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Incriminating Criminal Evidence: Practical Solutions

BARRY S. MARTIN*

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When a client or a third party tells defense counsel about the existence of physical evidence that may implicate his client in a crime,¹ counsel has several choices open to him. First, he may ignore the information. Second, counsel may take possession of the evidence and may then either retain it,

1. The subject of disclosure of incriminating evidence received from a client has been the subject of theoretical treatment in several legal periodicals. See generally Abramovsky, *Confidentiality: The Future Crime - Contraband Dilemmas*, 85 W. VA. L. REV. 929, 937-41 (1983); Note, *The Attorney-Client Privilege: Hear No Evil, See No Evil, Speak No Evil?*, 20 HOUS. L. REV. 921, 921-36 (1983); Bender, *Incriminating Evidence: What to do With a Hot Potato*, 11 COLO. LAWYER 881, 881-95 (1982); Comment, *Disclosure of Incriminating Physical Evidence Received from a Client: The Defense Attorney's Dilemma*, 52 U. COLO. L. REV. 419, 419-63 (1981); Comment, *Ethics, Law and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 STAN. L. REV. 977, 977-99 (1980) [hereinafter referred to as *Ethics, Law and Loyalty*]; Comment, *The Problem of an Attorney in Possession of Evidence Incriminating His Client: The Need for a Predictable Standard*, 47 U. CIN. L. REV. 431, 431-43 (1978); Comment, *The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from His Client*, 38 U. CHIC. L. REV. 211, 211-29 (1970); Comment, *Professional Responsibility and In re Ryder: Can an Attorney Serve Two Masters*, 54 VA. L. REV. 145, 145-93 (1968) [hereinafter cited as *Serving Two Masters*]; Comment, *An Attorney in Possession of Evidence Incriminating His Client*, 25 WASH. AND LEE L. REV. 133, 133-41 (1968); Comment, *Fruits of the Attorney-Client Privilege: Incriminating Physical Evidence and Conflicting Duties*, 3 DUQ. L. REV. 239, 239-50 (1965).

turn it over to law enforcement officials, or return the evidence to where it was found. Finally, defense counsel may have another person examine the evidence without removing or altering it. Depending on the choice that is made, defense counsel may commit malpractice and may also violate the client's constitutional rights, a criminal statute, or a Rule of Professional Conduct.

A defense attorney who ignores the existence of evidence risks a disciplinary action by the bar, a malpractice action by his client, and an ineffective assistance of counsel claim on appeal if his client is convicted. Defense counsel cannot fulfill his ethical duty to represent his client zealously and competently without a thorough investigation of the case. If the client is convicted because counsel failed to introduce available evidence or was unable to deal effectively with prosecution evidence at trial, counsel may be liable for malpractice and may be the subject of an ineffective assistance of counsel claim.

Should counsel take and retain possession of the evidence, he risks criminal prosecution and disciplinary action. He may be prosecuted for concealment of evidence, conspiracy to obstruct justice, being an accessory after the fact, withholding information, or practicing deceit on the court. If the evidence is the proceeds of a crime, an attorney may be prosecuted for receipt of stolen property. Furthermore, an attorney who, without just cause, fails to comply with a subpoena duces tecum or order for production of evidence may be prosecuted for contempt of court. Under any of these circumstances, counsel may be disciplined for failure to obey the law and for suppression of evidence.

An attorney who takes possession of the evidence, examines it or has it tested, and then turns it over to law enforcement officials, may violate the client's constitutional rights, commit malpractice, and be subject to a disciplinary action. If the attorney learns about the evidence from the client, and the client could assert his privilege against self-incrimination in response to a subpoena duces tecum for the evidence, the attorney violates his duty of confidentiality to the client and deprives his client of fifth amendment protection. If the attorney or his investigator is compelled to testify about the prior location or condition of the evidence, and the client is convicted because the evidence had been turned over to the prosecution, the attorney may violate the client's right to effective assistance of counsel and commit malpractice. The attorney also may violate his ethical duty of confidentiality to his client.

When a California attorney takes possession of the evidence, examines or tests it, and returns it to where it was found, he will subsequently be required either to stipulate to or testify about its original location and condi-

tion. Under the *People v. Meredith*² exception to the attorney-client privilege, California attorneys are required to turn over and provide information about the location or original condition of the evidence if they have deprived the prosecution of an opportunity to discover the evidence. If this evidence is a substantial factor resulting in the client's conviction, the attorney may have committed malpractice and provided ineffective assistance of counsel.

The purpose of this article is to provide California attorneys and judges with an analysis of the evidentiary, constitutional, criminal, and ethical law applicable to implicating evidence situations. Initially, this article will discuss the aspects of attorney-client privilege law pertaining to implicating evidence and the manner in which courts have balanced the interest in attorney-client confidentiality against the interest of the administration of justice in the production of evidence. The constitutional ramifications of an attorney's handling of implicating evidence will also be discussed, focusing on a defendant's right to effective assistance of counsel, his privilege against self-incrimination, and the protection that the attorney-client privilege affords these rights. Action taken by attorneys in dealing with implicating evidence will be analyzed to determine whether the attorney's conduct constitutes ineffective assistance of counsel or malpractice under present law. This article additionally will focus on crimes that an attorney may commit when dealing with implicating evidence, emphasizing the crimes of destruction or concealment of evidence. Finally, an attorney's conflicting ethical duties in dealing with implicating evidence and situations in which the attorney may be ethically required to withdraw from representing the client will be examined.

In dealing with incriminating evidence, this article will suggest that the attorney direct his investigator to examine the evidence without removing or altering it, and then report to the attorney. The attorney and the client should discuss the advantages and disadvantages of removing the evidence for testing. If it is likely the results of the testing will exculpate the client, the evidence should be removed, tested, and then delivered to the prosecution. If it is unlikely or unclear that testing the evidence will exculpate the client, then defense counsel should leave the evidence alone. If the prosecution subsequently discovers and takes possession of the evidence, the defense can obtain the item for examination or testing through criminal discovery procedures.³

2. 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981).

3. Criminal defendants in California have extensive discovery rights. A defendant has the right to inspect and have tested physical objects relevant to the case both in the possession of the prosecution or another governmental agency. *Engstrom v. Superior Court*, 20 Cal. App. 3d 240, 97 Cal. Rptr. 484 (1971); *Norton v. Superior Court*, 173 Cal. App. 2d 133, 343 P.2d 139 (1959) (photographs used for identification); *Ross v. Municipal Court*, 49 Cal.

By following this approach the attorney will not violate the client's constitutional rights, or commit ethical or criminal violations. He will not deprive the client of his privilege against self-incrimination because the client participates in the decision to remove the evidence and to turn it over to the prosecution. The client receives effective assistance of counsel, and the attorney fulfills his ethical duty to represent his client competently. The attorney does not commit malpractice and does not breach his ethical duty of confidentiality because the client consents to the delivery of the evidence to the prosecution. The attorney also does not violate his ethical duty not to suppress evidence, nor is the attorney guilty of crimes relating to the concealment of evidence.

In the conclusion, this article will make specific recommendations for advice to clients and third parties who inform attorneys about implicating evidence or who bring the evidence to an attorney's office. A procedure for dealing with implicating evidence by an attorney's receptionist or investigator is suggested. Finally, a course of action is proposed for the attorney who has taken possession of the evidence without realizing that case law requires him to turn the evidence over to the prosecution.

I. ATTORNEY-CLIENT PRIVILEGE

Most courts have analyzed the implicating evidence problem as a question of attorney-client privilege.⁴ When the client communicates to the attorney in the course of the attorney-client relationship with the intent that the communication be confidential, the client has a privilege to refuse to disclose the confidential communication.⁵ This privilege applies only

App. 3d 575, 122 Cal. Rptr. 807 (1975) (all information dealing with the identity of a controlled substance). When the state has conducted a test which the defense cannot duplicate, the defendant is entitled to a copy of the prosecution expert's report. *Walker v. Superior Court*, 155 Cal. App. 2d 134, 141, 317 P.2d 130, 135 (1957).

4. *State v. Olwell*, 394 P.2d 681, 684 (Wash. 1964); see *Meredith*, 29 Cal. 3d at 683-95, 631 P.2d at 48-54, 175 Cal. Rptr. at 614-21; *Morrell v. State*, 575 P.2d 1200, 1207-12 (Alaska 1978); *People v. Lee*, 3 Cal. App. 3d 514, 526-27, 83 Cal. Rptr. 715, 722-23 (1970); *State v. Douglass*, 220 W. Va. 770, 783 (1882). The fruits, instrumentalities, and other evidence of a crime are not protected under the work product doctrine. Material that is not derived from the preparation of the defense, such as objects which are admissible into evidence or the identity or location of evidence, are not considered work product. 2 B. JEFFERSON, CALIFORNIA EVIDENCE BENCH BOOK §41.1-2, 1475 (2d ed. 1982). Work product, which is any "writing that reflects an attorney's impressions, conclusions, opinions or legal research or theories" is absolutely protected. CAL. CIV. PROC. CODE §2016(b), (g). While the part of an investigator's report summarizing a witness' statement is not conditionally protected, other parts of the report assessing the usefulness of the witness and the issues about which the witness could testify, and the fact that the witness had been subpoenaed, are conditionally protected. The test of the privilege is the content and the policies underlying the work product doctrine, not the intent of the investigator or attorney. *People v. Colie*, 30 Cal. 3d 43, 58-61, 634 P.2d 534, 543-44, 177 Cal. Rptr. 458, 467-68 (1981).

5. *Gonzales v. Municipal Court*, 67 Cal. App. 3d 111, 118, 136 Cal. Rptr. 475, 479 (1977). For example, the transmission of information from the client to the attorney about physical evidence relating to a past crime, and the attorney's advice, if not illegal, about

when the client, attorney, or their agent is testifying in a judicial, legislative, or administrative proceeding.⁶ It applies to communications relating to past crimes.⁷ The privilege belongs to the client, but can be waived by the client or by the attorney with the client's authorization.⁸ When the applicability of the privilege is unclear, the attorney has a legal and ethical duty to assert the privilege and if necessary, to appeal an adverse ruling.⁹ An exception to the attorney-client privilege exists, however, for communications pertaining to the planning or execution of future crimes, such as the destruction or concealment of evidence.¹⁰ The "interests of public justice further require that no shield such as the protection afforded to communications between attorney and client shall be interposed to protect a

what to do with the physical evidence, are confidential communications. A confidential communication is defined as:

[I]nformation transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes . . . the advice given by the lawyer in the course of that relationship.

CAL. EVID. CODE §952. In the case *In re* January 1976 Grand Jury, 534 F.2d 719, 728 (7th Cir. 1976), the court stated that it was "not persuaded" that the transfer of bank robbery proceeds to an attorney was a "communication for which the clients could legitimately anticipate confidentiality." Although the confidential communication must be made in the course of an attorney-client relationship, the client is not required to employ the attorney with whom he consults in order for the privilege to exist. Any information acquired by the attorney during the interview and in the course of negotiations about employment is privileged. *Sullivan v. Superior Court*, 29 Cal. App. 3d 64, 69, 105 Cal. Rptr. 241, 244 (1972). See also, ABA Comm. on Professional Ethics and Grievances, Informal Op. 1057 (1968). There is a presumption that whenever the attorney-client privilege is claimed that the communication was made in confidence, and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential. CAL. EVID. CODE §917.

6. CAL. EVID. CODE §§901, 910, 914, 950-955. The California Victim's Bill of Rights provides that it does not affect the statutory attorney-client privilege. CAL. CONST. art. I, §28(d).

7. 394 P.2d at 684.

8. CAL. EVID. CODE §912. The attorney must be careful not to waive the privilege without client authorization. In *Dyas v. State*, 539 S.W.2d 251, 256 (Ark. 1976), the court found that it was defense counsel ". . . who opened the door to the examination of the witness about the source of the rings by his questions and disclosure during his cross examination."

9. The court in *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir. 1956), *cert. denied*, 352 U.S. 833 (1956) stated:

[But] the attorney has the duty, upon any attempt to require him to testify or produce documents within the confidence, to make assertion of the privilege, not merely for the benefit of the client, but also as a matter of professional responsibility in preventing the policy of the law from being violated.

An attorney "has a right to press legitimate arguments and to protest an erroneous ruling." *Gallagher v. Municipal Court of Los Angeles*, 31 Cal. 2d 784, 796, 192 P.2d 905, 913 (1948). See also N.Y. City Bar Ass'n. Comm. on Professional Ethics Op. No. 312 (1934) (attorney may not disclose confidential information until question of privilege has been resolved by court).

10. CAL. EVID. CODE §956. When an attorney inquired of the Customs Office on behalf of a client in order to ascertain what his obligation might be if an object he had purchased had been smuggled into the United States by the seller, the attorney properly refused to disclose his client's identity to the customs representative because he did not necessarily intend to commit a crime. Okla. Bar Ass'n. Legal Ethics Comm. Advisory Op. 136 (1937) (available from Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152).

person who takes counsel on how he can safely commit a crime.”¹¹

The attorney-client privilege is essential for the protection of an accused’s constitutional right to effective assistance of counsel and his privilege against self-incrimination. An attorney cannot provide effective assistance without a full disclosure of information by the client. The attorney-client privilege is necessary to encourage full and open communication between the client and the attorney. With the protection of the attorney-client privilege, a client can fully disclose information to an attorney without fear that the attorney will be forced to reveal the information. This assurance is also needed to preserve the accused’s privilege against self-incrimination. If damaging information cannot be obtained directly from the client because of his privilege against self-incrimination, but the information could still be obtained from his attorney, the client would be very reluctant to confide in his attorney.¹²

A. *Capacity of Attorney*

If the attorney is retained only to return evidence pertaining to a crime, but not to perform any legal services, the attorney-client privilege may not apply because the attorney is not performing in a professional capacity and is not providing a professional service. In *Hughes v Meade*,¹³ an attorney was telephoned at home on a Saturday morning and asked if he would return some stolen property to the police department. While the attorney was watching television, he claimed that an unseen person had left the property on his front porch. After receiving the telephone call, the attorney arranged for the police department to pick up the property. He was paid solely for this service and did not represent the defendant at trial. The attorney was held in contempt of court for failing to identify the person

11. *Clark v. State*, 159 Tex. Crim. 187, 199-200, 261 S.W.2d 339, 347 (Tex. 1953), *reh’g denied*, 346 U.S. 905 (1953).

12. *Meredith*, 29 Cal. 3d at 691, 631 P.2d at 51, 175 Cal. Rptr. at 617; *Fisher v. United States*, 425 U.S. 391, 403 (1975). “As a practical matter if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.” *Id.* *People v. Collier*, 30 Cal. 3d 43, 55, 634 P.2d 534, 540-41, 177 Cal. Rptr. 458, 464-65 (1981). The attorney-client privilege is “not of constitutional origin . . . [but may have] important constitutional implications. . . .” *Id.* *People v. Belge*, 372 N.Y.S.2d 798, 801 (1975), *aff’d mem.*, 376 N.Y.S.2d 771 (1975), *aff’d per curiam*, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976). “The effectiveness of counsel is only as great as the confidentiality of this attorney-client relationship. If the lawyer cannot get all the facts about the case, he can only give his client half of a defense. This, of necessity, involves the client telling his attorney everything remotely connected with the crime.” *Id.* *State v. Kociolek*, 129 A.2d 417, 424 (1957). “[T]he attorney-client privilege in this country . . . [i]s indispensable to the fulfillment of the constitutional security against self-incrimination. . . .” *Id.* See also Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978).

13. 453 S.W.2d 538 (Ky. 1970).

who had called him. The court stated:

[I]t is the opinion of the majority of the court that whether or not a bona fide attorney-client relationship existed between the petitioner and the undisclosed person, the principal transaction involved, i.e., the delivery of stolen property to the police department, was not an act in the professional capacity of petitioner nor was it the rendition of a legal service. He was acting as an agent or conduit for the delivery of property which was completely unrelated to legal representation. While repose of confidence in an attorney is something much to be desired, to use him as a shield to conceal transactions involving stolen property is beyond the scope of his professional duty and beyond the scope of the privilege.¹⁴

B. Identity of Client

If an attorney has been retained by a client who has not yet been charged with a crime and who has turned over to the attorney evidence that is not connectible to the client, the attorney may be in a position to turn over the evidence to law enforcement officials and still keep his client's identity confidential under the attorney-client privilege. The majority rule is that the identity of an attorney's client is not a confidential communication protected by the privilege.¹⁵ Under the California minority rule, however, a client's identity may be privileged if a strong probability exists that disclosure will implicate the client in the very criminal activity about which the legal advice is sought.¹⁶ In *Ex Parte McDonough*,¹⁷ the California Supreme Court held that an attorney could not be compelled to tell the grand jury the names of certain clients who had employed him to appear on behalf of three defendants and post cash bail for one of them. The court concluded that application of the majority rule in this situation would force the attorney to divulge a confidential communication tending to show an acknowledgment of guilt by the clients in connection with the matter about which they had retained the attorney. Similarly, in *Baird v. Koerner*,¹⁸ a tax attorney was retained by an account-

14. *Id.* at 542.

15. *Brunner v. Superior Court*, 51 Cal. 2d 616, 618, 335 P.2d 484, 486 (1959).

16. *U.S. v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977). Even under the minority rule, the privilege does not apply if the legal representation was secured in furtherance of a continuing or future crime. *Id.* at 1355. In *In re Grand Jury appearance of Alvin S. Michaelson*, 511 F.2d 882, 888 (9th Cir. 1975), *cert. den.*, 421 U.S. 978 (1975), the court stated that an "... exception is made for cases where the existence of the attorney-client relationship might be incriminating to a client (as ... where an attorney returns a murder weapon to the police...)." *Id.*

17. 170 Cal. 230, 149 P. 566 (1915).

18. 279 F.2d 623, 626-35 (9th Cir. 1960).

ant on behalf of taxpayers who had been advised that they had underpaid their taxes. The Internal Revenue Service was not investigating the taxpayers. The attorney delivered to the Service the amount determined to be owing without disclosing his clients' identities. The trial court held the attorney in civil contempt because of his refusal to disclose their names. However, the Ninth Circuit, following *McDonough*, reversed and held that the identities of the clients were privileged.

The confidentiality of client identity rule was also applied in *Anderson v. State*¹⁹, a Florida case in which the defendant was already charged with a crime at the time the implicating evidence was delivered to law enforcement personnel by the attorney. The accused had delivered stolen items to his attorney's receptionist. The attorney then delivered the items to the police. Both the attorney and receptionist were subpoenaed to testify at trial about when, how, and from whom they had received the property. The defendant's motions to quash the subpoena were denied and a petition for common-law certiorari was filed to the Florida District Court of Appeal raising the issue of attorney-client privilege. The court of appeal concluded that the delivery of the items by the client to the attorney's office constituted a communication protected by the attorney-client privilege. Although the court relied upon *McDonough* and *Baird*, which involved the identity of clients who had not been charged with criminal activity, the Florida court concluded that the facts of the case fit within the minority privileged identity rule. While recognizing the public interest in effective criminal prosecution and the likelihood that the attorney's testimony would conclusively show that the accused once possessed the stolen property, the court believed that requiring the attorney to testify would violate the basic concept of the attorney-client privilege. The court noted that the defendant would not have delivered the evidence to the attorney and would not have talked to the attorney except for the attorney-client relationship. Consequently, the court held that neither the attorney nor his receptionist could be required to divulge the source of the evidence, and the prosecution could not introduce evidence to show receipt of the evidence from the attorney's office.²⁰

C. *Delivery of the Evidence*

The attorney-client privilege does not protect the evidence itself, but it does protect the fact of the delivery of the evidence to the attorney. In the case of *In re Ryder*,²¹ attorney Ryder transferred money taken and a

19. *Anderson v. State*, 297 So. 2d 871 (Fla. 1974).

20. *Id.* at 875.

21. *In re Ryder*, 381 F.2d 713, 714 (4th Cir. 1967); *see also* *State v. Dillon*, 471 P.2d

weapon used in a bank robbery from his client's safe deposit box to his own safe deposit box. The court found that one of Ryder's purposes was to conceal the evidence and break the chain of possession to his client. Ryder erroneously believed that the evidence itself was protected by the attorney-client privilege. The court 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 client's confidential communication.²²

The delivery of stolen merchandise to an attorney's receptionist, however, has been held a communication protected by the attorney-client privilege.²³

D. Observation of the Evidence

If an attorney looks at evidence revealed to him by his client, the attorney's observations as a result of the confidential communication are protected by the attorney-client privilege. In *West Virginia v. Douglas*,²⁴ the West Virginia Supreme Court held that the trial court erred in admitting an attorney's testimony about the location of a pistol that he had discovered as the result of a privileged communication from his client. The court stated that excluding the actual communication from evidence while admitting observations that were made as a result of the privileged communication would have the same effect as requiring the attorney to testify about confidential communications with his client concerning the pistol. "It would be a slight safeguard, indeed, to confidential communications made to counsel, if he was thus compelled substantially, to give them to a jury, although he was required not to state them in the words of his client."²⁵ In other words, the attorney-client privilege cannot be circumvented by revealing facts discovered solely by reason of a confidential communication.²⁶

553, 565 (Idaho 1970); *Ethics, Law and Loyalty*, *supra* note 1, at 980-82; *cf.* *State v. Olwell*, 394 P.2d at 683 (which erroneously held that material objects acquired by an attorney may be protected as privileged communications).

22. *Ryder*, 381 F.2d at 714.

23. 297 So. 2d at 875. The attorney's delivery to her client of a police report was a communication protected by the attorney-client privilege. *In re Navarro*, 93 Cal. App. 3d 325, 330-31, 155 Cal. Rptr. 522, 525 (1979).

24. 20 W. Va. 770 (1882).

25. *Id.* at 783.

26. *State v. Sullivan*, 373 P.2d 474, 476 (Wash. 1962); *Meredith*, 89 Cal. 3d at 692 n.4, 631 P.2d at 52 n.4, 175 Cal. Rptr. at 618 n.4.

E. Role of non-agent third parties

When a third party, who is not an agent of the attorney or client, presents the evidence to the attorney or tells the attorney about it, the attorney-client privilege does not apply.²⁷ A confidential communication has not been made between the client and the attorney in the course of an attorney-client relationship. If an investigator employed by the attorney or client, however, is advised of the confidential attorney-client communication to accomplish the purpose for which the attorney was consulted, the attorney-client privilege is applicable.²⁸

Two courts have held that the attorney-client privilege does not apply in cases involving the delivery of evidence to defense counsel by a non-agent third party. In *Morrell v. State*,²⁹ the defendant, who was incarcerated on a kidnapping charge, asked a friend to clean out the defendant's vehicle. The friend found in the vehicle a writing tablet with a kidnap plan outlined on it, and then turned the tablet over to the defendant's attorney. The Alaska Supreme Court found that the friend was not acting as the defendant's agent because the friend decided to turn the evidence over to the deputy public defender without consulting the defendant. In a similar case, *People v. Lee*,³⁰ the defendant's neighbors found in their shrubbery the shoes that the defendant had been wearing when he kicked his victim. The neighbors heard that the defendant's wife had been looking for the shoes and gave them to her. Subsequently, the defendant telephoned his father, stated that he had hidden a pair of shoes in the neighbors' yard, and asked his father to look for them. According to the state's brief,³¹ the father refused the request. The father told the defendant's wife about the de-

27. *Meredith*, 89 Cal. 3d at 693 n.5, 631 P.2d at 52 n.5, 175 Cal. Rptr. at 618 n.5; see also *Owll*, 394 P.2d at 683-84.

28. CAL. EVID. CODE §912(d); see *Meredith*, 89 Cal. 3d at 690 n.3, 631 P.2d at 50-51 n.3, 175 Cal. Rptr. at 616-17 n.3.

29. 575 P.2d at 1211 n.17. In *Dyas*, the defense attorney asked a prosecution witness whether he had brought him two rings removed from the murder victim. On redirect examination, the officer testified that the defense attorney said he had obtained them from a safe deposit box. The court found that the attorney-client privilege was not applicable because the evidence was not received from the client. 539 S.W.2d at 256.

30. 3 Cal. App. 3d 514, 519-21, 83 Cal. Rptr. 715, 717-19 (1970). One of the issues in *Lee* was whether the shoes had been illegally seized by the District Attorney. The deputy public defender was relieved prior to the preliminary hearing. In order to avoid being prosecuted for suppression of evidence and to prevent seizure of the shoes by the prosecution without a court determination of their possible privileged character, the deputy public defender delivered the shoes to the Municipal Court judge, who was scheduled to preside over the preliminary hearing. The deputy public defender believed that he had an agreement with the deputy district attorney that the judge would retain the evidence as a "private citizen" until an appropriate judicial determination of its proper disposition. Subsequently, the prosecution obtained the shoes pursuant to a search warrant issued by a Superior Court judge. The appellate court decided that the prosecution did not obtain the evidence illegally. *Id.* at 524-26, 83 Cal. Rptr. at 721-23.

31. Brief of Respondent at 5; *People v. Lee*, 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (1970) (filed in California State Law Library, Sacramento).

defendant's telephone call. The defendant's wife then gave the shoes to an investigator from the public defender's office, who placed them in a drawer of the desk used by the deputy public defender representing the defendant. The California District Court of Appeal found no evidence that the defendant's estranged wife was acting as the defendant's agent or under his direction.³² Testimony was therefore admissible in *Lee* that the public defender received the shoes from the defendant's wife, just as testimony was admissible in *Morrell* that the public defender received the tablet from the defendant's friend.³³

F. Balancing the Interest in Confidentiality with the Interest in Production of Evidence

The first court to balance the interest in the attorney-client privilege with the interest in the production of evidence in the context of implicating evidence was the Washington Supreme Court in *State v. Olwell*. In dicta and without citing any authority, the court announced a rule that defense counsel should turn over evidence to the prosecution and the prosecution should not disclose the source. Subsequent appellate courts have uncritically approved this dicta.³⁴

The briefs in *State v. Olwell* reveal that during his personal investigation on behalf of a client suspected of murder, attorney Olwell obtained a knife belonging to his client, but not the one used in the fatal stabbing. According to the state's brief, Olwell wrote the prosecuting attorney that he had obtained the defendant's knife, and that if charges were filed, he would preserve it until the time of trial. Olwell stated that he had talked to several "respected counsel" and that he believed he had no duty or right to surrender possession of the knife because of the attorney-client relationship. Olwell further stated that he would surrender the knife if ordered to do so after a hearing before the Washington Supreme Court.³⁵

When the deputy prosecuting attorney received the letter, he assumed that Olwell possessed the murder weapon because otherwise the letter would have been pointless. The prosecutor believed that a search of Olwell's office pursuant to a warrant would undermine the attorney-client

32. *People v. Lee*, 3 Cal. App. 3d 514, 527, 83 Cal. Rptr. 715, 723 (1970).

33. *Id.* at 524-26, 83 Cal. Rptr. at 723; *Morrell*, 575 P.2d at 1211 n.17.

34. *State v. Olwell* 394 P.2d 681, 684-85 (Wash. 1964). *See infra* note 266.

35. Brief of Respondent at 5; *State ex rel. Sowers v. Olwell*, 394 P.2d 681 (1964). The appellant's and respondent's briefs are in Brief 64 (2d) Wash. Vol. 23, 787-841, available on interlibrary loan from Washington State Law Library, Temple of Justice, Olympia, Washington 98504. The Washington Supreme Court in its summary of facts in *Olwell* relied on the record and undisputed statements of facts in the briefs. When facts in this article are mentioned from a brief, these facts are undisputed, but not recited by the court in its opinion.

privilege, including the privileges of clients other than the accused, and would therefore be inappropriate.³⁶ The prosecutor decided that a broadly drawn subpoena duces tecum, which he believed would not require Olwell to authenticate the knife, would be less intrusive upon the attorney-client privilege.³⁷

Olwell was served with a subpoena duces tecum directing him to bring to a coroner's inquest all knives in his possession and under his control relating to his client, the victim, and his client's girlfriend. Olwell declined to comply with the subpoena as it pertained to his client on the grounds of the attorney-client privilege and his client's privilege against self-incrimination. The coroner, and subsequently the trial court, found Olwell in contempt, and he appealed.³⁸

After his client was convicted of murder, Olwell's contempt conviction was reversed by the Washington Supreme Court. The issues considered by the court were whether an attorney may refuse to produce material evidence of a crime by claiming the attorney-client privilege or his client's privilege against self-incrimination.³⁹ The court held that Olwell's refusal to testify at the coroner's inquest on the ground of the attorney-client priv-

36. A search warrant can be served on an attorney's office and does not require authenticating testimony. See CAL. PENAL CODE §§1523-28. In *Andresen v. Maryland*, 427 U.S. 463 (1975) an attorney was charged with the crime of false pretenses. Pursuant to a search warrant, a file pertaining to the real estate transaction in question was seized from the attorney's office and introduced into evidence. The records were clearly incriminating. However, each document had been prepared voluntarily. The United States Supreme Court pointed out that the attorney "... was not asked to say or to do anything. The records seized contained statements that [he] had voluntarily committed to writing. The search for and seizure of these records were conducted by law enforcement personnel. Finally, when these records were introduced at trial, they were authenticated by a handwriting expert. . . ." *Id.* at 473. There was no compulsion for the attorney to speak, other than the inherent psychological pressure to respond at trial to unfavorable evidence. *Id.*

37. Brief of Respondent at 9-11; *Olwell*, 394 P.2d at 681.

38. *Olwell*, 394 P.2d at 683. When an attorney questions a trial court's ruling on a matter of privilege, he should file a writ or a notice of appeal, whichever is the correct procedure in his jurisdiction, and have the matter decided by a higher court. N.Y. St. Bar Ass'n. Comm. on Prof. Ethics Op. No. 528 (1981). The appellant's brief argued that a Washington attorney is under a duty according to the Washington State Bar Act, R.C.W. 2.48.210, to preserve the confidences and secrets of a client, and that an attorney could be disbarred or suspended under R.C.W. 2.48.220(3) for violating this duty. Brief of Appellant at 14-15; 394 P.2d 681. The murder trial was completed before the Washington Supreme Court decided the contempt appeal. The court in the murder trial ruled that it would be improper to compel Olwell to provide testimony "... which might tend to incriminate his client or which might tend to hamper his representation of his client at the trial." Olwell was required to make the knife available to the prosecution outside the presence of the jury. At this time the prosecution first learned that Olwell did not possess the murder weapon, but rather possessed another of his client's knives that had been in the possession of his client's ex-wife. Brief of Respondent at 6; 394 P.2d 681.

39. *Olwell*, 394 P.2d at 682. Although it was not clear from the record whether Olwell obtained possession of the knife, which at the time of the coroner's inquest was considered as possibly the murder weapon, as a result of a confidential communication with the defendant or through his own independent investigation, the Washington Supreme Court for the purpose of the attorney-client privilege analysis assumed that the knife was obtained as a result of a confidential communication. *Id.* at 683. The court concluded that the privilege against self-incrimination is personal to the client and cannot be asserted by the attorney. *Id.* at 686.

ilege was not contemptuous. The court stated that the subpoena, which named the client and required the attorney to produce in an open hearing evidence allegedly received from the client, was defective on its face because the subpoena required the attorney to testify about privileged communications without the client's consent.⁴⁰

After resolving the contempt issues, the Washington Supreme Court then went much further, apparently to provide guidance in the future for Washington attorneys holding evidence received from clients charged with crimes. The court attempted to balance the attorney-client privilege and the privilege against self-incrimination with the public interest in the criminal investigation process. In dicta, the court stated:

[W]e are in agreement that the attorney-client privilege is applicable to the knife held by appellant, but do not agree that the privilege warrants the attorney, as an officer of the court, from withholding it after being properly requested to produce the same. 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 purpose of aiding counsel in the preparation 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. . . .

We think the attorney-client privilege should and can be preserved even though the attorney surrenders the evidence he has in his possession. The prosecution, upon receipt of such evidence from an attorney, where a charge against the attorney's client is contemplated (presently or in the future), should be well aware of the existence of the attorney-client privilege. Therefore, the state, when attempting to introduce such evidence at the trial, should take extreme precautions to make certain that the source of the evidence is not disclosed in the presence of the

40. *Id.* at 684.

On the basis of the attorney-client privilege, the subpoena duces tecum issued by the coroner is defective on its face because it requires the attorney to give testimony concerning information received by him from his client in the course of their conferences. The subpoena names the client and requires his attorney to produce, in an open hearing, physical evidence allegedly received from the client. This is tantamount to requiring the attorney to testify against the client without the latter's consent.

Id.

jury and prejudicial error is not committed. By thus allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client's privilege is preserved and a balance is reached between these conflicting interests. The burden of introducing such evidence at a trial would continue to be upon the prosecution.⁴¹

Prior to *Ollwell*, Washington attorneys had no duty to deliver evidence to law enforcement officials on their own motion under either statutory or case law. Their statutory duties included upholding the United States and Washington state constitutions and preserving their clients' confidences.⁴² The duties of Washington attorneys under case law included refraining from (1) concealing from the court any material fact such as the existence of another similar judicial proceeding,⁴³ (2) soliciting money to bribe referees,⁴⁴ (3) contacting jurors during a judicial proceeding,⁴⁵ and (4) advising a client to lie.⁴⁶

Although the American Bar Association Canons of Professional Ethics by statute was "the standard of ethics" for members of the Washington Bar at the time of the *Ollwell* decision,⁴⁷ the canons did not include an attorney's duty to turn over evidence on his own motion.⁴⁸ Subsequently, under the Model Code of Professional Responsibility, as promulgated by the American Bar Association in 1969 and adopted by the Washington Supreme Court, a mandatory ethical duty arguably exists for counsel to

41. *Id.* at 684-85. This language is quoted approvingly in *People v. Lee*, 3 Cal. App. 3d at 526, 83 Cal. Rptr. at 722. The court in *People v. Investigation Into a Certain Weapon*, 448 N.Y.S.2d 950 (Sup. Ct. 1982) also applied a balancing approach. The defendant in the presence of his common-law wife turned over to his attorney ammunition and an ammunition clip. A subpoena duces tecum was served on the attorney requiring production of these items before the Grand Jury. A motion to quash was denied and defense counsel was ordered to deliver the items to the District Attorney. The court held that the transfer of these items by the client to the attorney would have been protected by the attorney-client privilege except for the presence of his common-law wife. The court was particularly concerned about the client's constitutional rights: (1) the client could assert his privilege against self-incrimination if he was served with a subpoena duces tecum, but the attorney could not assert it on his behalf; (2) the effect on the client's right to counsel of the attorney's testimony against his own client; and (3) the client's right to a fair trial. On the other hand, the court was aware that the prosecution could obtain the items by means of a search warrant. The court concluded:

Therefore, a practical solution to the dilemma presented by this case mandates that defense counsel turn over the ammunition and clip to the District Attorney's Office without the necessity of the attorney personally appearing before the Grand Jury. . . . Thereby the public interest in criminal investigation is balanced fairly with the other public interest of affording the defendant a fair trial with counsel of his own choosing.

Id. at 955.

42. WASH. REV. CODE §2.48.210.

43. *In re Coons*, 250 P.2d 976, 980 (Wash. 1952).

44. *State ex rel. Hardin v. Grover*, 91 P. 564, 564 (Wash. 1907).

45. *In re Bruener*, 294 P. 254, 256-57 (Wash. 1930).

46. *In re Ballou*, 295 P.2d 316, 318 (Wash. 1956).

47. WASH. REV. CODE §2.48.230.

48. See ABA Canons of Professional Ethics 5, 15, 22, 29, 32, 37, 39 (1908).

disclose confidential information when served with a subpoena.⁴⁹ This argument is based on a reading of the provisions of Disciplinary Rules 4-101(C)(2) and 7-102(A)(3). DR 4-101(C)(2) provides that a lawyer "may reveal" confidences or secrets when "required by law or court order." DR 7-102(A)(3) provides that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal." Unlike DR 7-102(B)(1), which imposes an affirmative duty on an attorney to reveal a client's past fraud upon a tribunal, unless the attorney learned of the fraud through a confidential communication, DR 7-102(A)(3) contains no exception for privileged communications. The Washington Supreme Court, reading DR 4-101(C)(2) and DR 7-102(A)(3) together, has held that an attorney is required to disclose confidential client information contained in documents that are subpoenaed.⁵⁰ In contrast is a case involving defense attorneys who learned about the locations of the bodies of two victims through confidential client communications and who did not report that information to authorities. A New York court held that the attorneys' duty of confidentiality prevailed over two "psuedo-criminal" statutes, which required that a body be provided a decent burial and that the death

49. See American Bar Foundation, *Annotated Code of Professional Responsibility* 172-78 (1979). The Model Code of Professional Responsibility was adopted by the American Bar Association in 1969, and has been adopted entirely or in part by most states. The Model Code consists of three parts. The Canons are statements of axiomatic norms, which express in general terms standards of professional conduct expected of attorneys. The Disciplinary Rules (DR) state minimum levels of conduct. If an attorney violates a Disciplinary Rule, he is subject to discipline. The Ethical Considerations (EC) are aspirational in nature and represent objectives toward which attorneys should strive, but are not a basis for discipline. *Id.* at 2-4.

In August 1983, the American Bar Association adopted the Model Rules of Professional Conduct. These rules are the work product of the Committee on the Evaluation of Professional Standards, also known as the Kutak Commission. The Model Rules of Professional Conduct before becoming operative must be adopted by the various states. Model Rule of Professional Conduct 3.4(a) provides that a "lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act. . . ."

50. *In re Kerr*, 548 P.2d 297, 301 n.2 (Wash. 1976). The attorney was disbarred for attempting to suborn perjury. In the attorney's presence, his client M requested the burglary victims' attorney to persuade his clients to testify or sign affidavits different than their statements about the burglary to law enforcement officials. The request was refused. The attorney unsuccessfully moved for a continuance of the trial because he claimed that he possessed affidavits that convinced him there should be no trial. After the attorney's clients were convicted of the burglary, a special inquiry judge investigated M's activities. The attorney was served with a subpoena duces tecum for the affidavits. He testified that he allowed M to remove the affidavits from his file because he considered them to be protected by the attorney-client privilege. The Washington Supreme Court commented on the attorneys contention in a footnote as follows:

DR 7-102(A)(3). In his representation of his client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. DR 4-101(C)(2). A lawyer may reveal confidences or secrets of his client when required by court order. RCW 7.20.010(10). Disobedience of a subpoena duly served is contempt of court.

Id. at 301 n.2.

of any person without medical attendance must be reported.⁵¹

G. *People v. Meredith* exception for removal or alteration of evidence.

The California Supreme Court, in *People v. Meredith*, uncritically followed the *Olwell* dicta and also created an unprecedented exception to the attorney-client privilege when defense counsel removes or alters the evidence.⁵² In the *Meredith* case, Meredith's co-defendant, Scott, was charged with conspiracy to commit murder and robbery. After being urged by his court-appointed attorney to tell him everything so that the defense would not be "sandbagged" by the prosecution, Scott revealed what happened after Meredith shot the victim. Scott stated that he took the victim's wallet, returned to his residence with his roommate, Meredith, and divided the money in the wallet with him. Scott further revealed that he tried to burn the wallet, and threw it in a trash can behind his residence. After receiving this information, Scott's attorney then sent an investigator to find the wallet and bring it to him. The attorney verified that the wallet belonged to the victim and immediately turned it over to a police detective assigned to the case. The attorney did not tell the detective how he discovered the wallet, but the detective knew that the attorney was representing Scott. Subsequently, the attorney withdrew as Scott's counsel.⁵³

The crucial evidence showing that Scott conspired with Meredith to rob and kill the victim was the location behind Scott's residence where the victim's wallet was found. At trial, the prosecutor called the investigator for Scott's counsel as a witness, and asked him where he had found the wallet. The prosecutor did not ask the investigator any questions, which, if answered, would have linked the investigator to Scott or to Scott's first attorney. On cross-examination, Scott's trial attorney asked the investigator by whom he had been employed and under whose direction he had located the wallet. When called by defense counsel, Scott's first attorney testified about his directions to the investigator. Scott then testified about how he had gained possession of the wallet and what he had done with it.⁵⁴

In deciding that the investigator's observation of the wallet's location as a result of a confidential attorney-client communication was privileged

51. *People v. Belge*, 372 N.Y.S. 2d 798, *aff'd mem.*, 376 N.Y.S.2d 771 (1975), *aff'd per curiam*, 390 N.Y.S.2d 867, 359 N.E.2d 377 (1976).

52. *People v. Meredith*, 29 Cal. 3d 682, 694, 631 P.2d 46, 53, 175 Cal. Rptr. 612, 619, (1981).

53. *Id.* at 687-89, 631 P.2d at 49-50, 175 Cal. Rptr. at 615-16.

54. *Id.* at 689, 631 P.2d at 50, 175 Cal. Rptr. at 616. In one of its appellate briefs, the State argued that Scott's defense counsel was trying to show that Scott was innocent and that he had cooperated with law enforcement in bringing Meredith to justice. Opposition to Petition for Rehearing at 2 (filed Aug. 7, 1981 with California Supreme Court).

information, the California Supreme Court weighed competing policy considerations. On the one hand, the court recognized that denial of protection to this type of observation might inhibit attorney-client communication and undermine the attorney's investigation because the client might not tell the attorney everything he knew. On the other hand, the court was aware that extending protection to this type of observation would prevent the prosecution from locating and introducing evidence because the defense had seized it first.⁵⁵

As a solution to this dilemma, the California Supreme Court crafted an exception to the attorney-client privilege. The court held that the privilege is waived when defense counsel removes or alters the evidence. The court reasoned that the alteration or removal of physical evidence by defense counsel deprives the prosecution of an opportunity to observe that evidence in its original condition or location. If testimony about the original location and condition is inadmissible under the attorney-client privilege, the court further reasoned that the defense could, in effect, "destroy" critical information. If this were the case, the court believed that extending the attorney-client privilege to situations in which the defense removed evidence "might encourage defense counsel to race the police to seize critical evidence."⁵⁶ The court concluded that:

[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.⁵⁷

The California Supreme Court in *Meredith* rejected as "unworkably speculative" the contention by the defense that this exception to the attorney-client privilege should apply only if law enforcement officials would have "inevitably discovered" the evidence in its original location during the normal course of their investigation if defense counsel had not previ-

55. *Meredith*, 29 Cal.3d. at 694-95, 631 P.2d at 53-54, 175 Cal. Rptr. at 619-20.

56. *Id.* at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619. "Alter" means: "1. To make different without changing into something else; to vary; to modify." WEBSTER'S NEW COLLEGIATE DICTIONARY 34 (4th Ed. 1974). "Remove" means: "1. To change the location of, to transfer, especially in order to re-establish." *Id.* at 978.

57. 29 Cal. 3d at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620. The California Supreme Court held that the trial court did not err in admitting the investigator's testimony about the location of the wallet. *Id.* Scott's conviction of first degree murder and robbery was affirmed. *Id.* at 621.

ously removed it.⁵⁸ If the California Supreme Court had adopted this “inevitable discovery” approach, the *Meredith* exception to the attorney-client privilege probably would not have applied in the *Meredith* case because law enforcement officials, prior to removal of the wallet by the investigator, had conducted a search of the defendant’s residence pursuant to a search warrant without finding the implicating evidence and apparently conducted no subsequent search.⁵⁹ The *Meredith* court, however, reasoned that evidence can be discovered not only as a result of deliberate police searches, but also as a result of chance by police or lay persons. The court concluded that “to ask where, how long, and how carefully they would have looked is obviously to compel speculation as to theoretical future conduct of the police.”⁶⁰

In describing how this exception should be implemented, the California Supreme Court indicated that the prosecution should present the evidence without divulging the original source of the information or the content of any attorney-client communication.⁶¹ For example, in *Meredith*, the prosecuting attorney only asked the investigator where he found the wallet; the prosecutor did not have the witness identify himself as the defendant’s investigator. The court further suggested that when obtaining similar testimony is impossible without identifying the witness as the defendant’s attorney or investigator, the defendant might be willing to stip-

58. *Id.* at 695, 631 P.2d at 53, 175 Cal. Rptr. at 619. Some states, including California, follow an “inevitable discovery” exception to the exclusionary rule. Under this exception, if the prosecution can prove a high probability that evidence, which had been unconstitutionally obtained, would have been discovered through a proper investigation, the item of evidence is admissible. *People v. Superior Court (Tunch)*, 80 Cal. App. 3d 665, 671-83, 145 Cal. Rptr. 795, 798-805 (1978).

59. *People v. Meredith* (Crim. No. 8986 Third District Nov. 21, 1979).

60. 29 Cal. 3d at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620. In *People v. Clutchette* (Ct. of App. 3d Dist. 3 Crim. 11192, filed March 25, 1982), an unpublished opinion, the defendant was charged with first degree murder. He had the bloody seat covers and carpets of the car in which the victim was shot replaced and kept the receipt from the auto reconditioning shop. His wife, who formerly had worked as an investigator for his attorney and who was involved in a child custody dispute with him, voluntarily turned over the receipts to the police. A forensic serologist established the seat covers had blood stains of the same blood type as the victim. The defendant’s suggestion that attorneys be allowed to return evidence in its original state to the site of discovery was rejected. The evidence was conflicting whether counsel had instructed defendant’s wife after she obtained the receipts to destroy them or deliver them to him. The receipts had been obtained probably in July or August 1978 from the reconditioning shop, and were turned over to the police in April 1979 after the initial murder charges had been dismissed for insufficiency of evidence in December 1978. Petition for Hearing to California Supreme Court at 5 (available from California State Law Library, Sacramento California). The court did not discuss California Penal Code Section 135, which provides the destruction or concealment of evidence is a misdemeanor. The court stated:

The court in *People v. Meredith* . . . rejected as speculative a test based upon the probability of eventual discovery by police before disclosure of the place from which evidence was removed by defense counsel. The “return rule” is similarly objectionable. Temporary removal of evidence reduces the likelihood the evidence will be found, especially if the place where the evidence had been is searched by authorities during the time the evidence is in defense counsel’s possession.

People v. Clutchette at 6.

61. 29 Cal. 3d at 695 n.8, 631 P.2d at 54 n.8, 175 Cal. Rptr. at 620 n.8.

ulate to the relevant location or condition of the evidence. If such a stipulation was offered, the court indicated that the prosecution should not be permitted to reject the stipulation to compel the defendant's attorney to testify and consequently to allow the jury to infer that the attorney obtained the information from the accused.⁶²

The stipulation procedure described in *Meredith* is fraught with danger to unsuspecting defense counsel. It is conceivable that a trial judge might rule that a stipulation to the location and condition of the evidence alone would impair the prosecution's case and that the testimony of the attorney and the investigator is admissible. In suggesting the stipulation approach, the California Supreme Court referred to *People v. Hall*,⁶³ which held that in the prosecution of an ex-felon for possession of a concealable firearm, the element of a prior felony conviction may be not be stated to the jury if the accused stipulates to the prior conviction. An exception to this rule exists, however, if the state can clearly demonstrate that a stipulation will legitimately impair the prosecutor's case.⁶⁴ If the facts to which the defendant has offered to stipulate retain some probative value, then evidence of those facts may be introduced. The evidence retains some probative value and is admissible if the stipulation is limited in scope or if it deprives a party of the legitimate force and effect of material evidence.⁶⁵

II. PRIVILEGE AGAINST SELF-INCRIMINATION

When defense counsel deals with implicating evidence, he must be careful not to deprive the accused of his privilege against self-incrimination. If the accused is served with a subpoena duces tecum for the implicating evidence, usually he can successfully assert his privilege against self-incrimination. If evidence implicating the client is subpoenaed from defense counsel, however, defense counsel will not be allowed to assert the privilege against self-incrimination because no compulsion is exerted upon him to be a witness against himself.⁶⁶

62. *Id.*

63. 28 Cal. 3d 143, 616 P.2d 826, 167 Cal. Rptr. 844 (1980). Evidence offered to prove a fact that is not genuinely disputed is irrelevant. *Id.* at 152, 616 P.2d at 831, 167 Cal. Rptr. at 849.

64. *Id.* at 152-53, 616 P.2d at 831, 167 Cal. Rptr. at 849.

65. *Id.* at 153, 616 P.2d at 831, 167 Cal. Rptr. at 849.

66. *Fisher v. United States*, 425 U.S. 391, 397 (1975). The fifth amendment provides in relevant part that no "person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V; see also CAL. CONST. art. I, §15; CAL. EVID. CODE §§930, 940. The elements of the privilege against self-incrimination are: (1) compulsion (2) of testimony (3) resulting in self-incrimination. 425 U.S. at 399. The fifth amendment has been interpreted to prohibit testimonial disclosures that might be a "link in a chain" of evidence to the accused. *Maness v. Myers*, 419 U.S. 449, 461 (1975). The protection of the fifth amendment "adheres basically to the person, not to information that may incriminate him." *Couch v. United States*, 409 U.S. 322, 328 (1973). "A party is privileged from producing the evidence but not from its production." *Johnson v. United States*, 228

The leading United States Supreme Court decision on whether compliance with a subpoena duces tecum or summons violates an individual's privilege against self-incrimination is *Fisher v. United States*.⁶⁷ In *Fisher*, the taxpayer defendants were under investigation for possible civil or criminal federal income tax violations. The taxpayers delivered to their attorneys work papers prepared by their accountants. The Internal Revenue Service served summons on the attorneys to produce the accountants' workpapers, and the attorneys refused to comply.⁶⁸ Justice White defined the issue as "whether a summons directing an attorney to produce documents delivered to him by his client in connection with the attorney-client relationship is enforceable over claims that the documents were constitutionally immune from summons in the hands of the client and retained that immunity in the hands of the attorney."⁶⁹ The Supreme Court then held that compliance with a summons directing the taxpayer to produce the accountant's documents would involve no incriminating testimony that is within the protection of the fifth amendment and that the summons could be enforced against the attorneys.⁷⁰

In deciding that the taxpayers would not be testifying against themselves by producing their accountants' work papers, the Supreme Court stated that compliance with the summons by the clients would not rise "to

U.S. 457, 458 (1913). An order to an attorney to produce a client's system accounting prepared by the attorney was held not to be violative of the clients' fifth amendment rights because the clients were under no compulsion to authenticate. See *In re Fisher*, 575 F.2d 209, 213 (9th Cir. 1977).

Since the person upon whom a search warrant is served is not compelled to respond to the warrant, the testimonial element for a violation of the fifth amendment is lacking. See *Andresen v. Maryland*, 427 U.S. 463, 470-76 (1975). A search warrant may be issued in California for stolen or embezzled property, instrumentalities of a felony, items in possession of someone for the purpose of concealment or prevention of discovery, or any evidence which tends to show a felony has been committed or that a particular person has committed a felony. CAL. PENAL CODE §1524(a)(1)-(4). These items may be taken on the warrant from any person in possession of them or from any place. *Id.* §1524(b). A search warrant may be issued only upon probable cause, supported by an affidavit naming or describing the person and particularly describing the items and the place to be searched. *Id.* §1525. A specific procedure must be followed in California for the issuance and execution of a search warrant for documentary evidence in an attorney's office, if the attorney is not reasonably suspected of engaging in or having engaged in criminal activity related to the documentary evidence for which the warrant is requested. The application for the search warrant must specify that the place to be searched is in the possession or under the control of an attorney. *Id.* A special master must be appointed at the time of the issuance of the warrant to accompany whomever serves the warrant. When the warrant is served, the special master must inform the attorney about the specific items being sought. If the attorney, in the judgment of the special master, fails to provide these requested items, the special master must conduct a search for the items in the area indicated in the search warrant. If the attorney states that an item or items should not be disclosed, the item or items must be sealed by the special master and taken to the Superior Court for a hearing. *Id.* §1524(c)(1)-(3). If a claim of privilege is made and the court determines no other feasible means are available to rule on the validity of the claim, the court may hold an *in camera* inspection of the documents. CAL. EVID. CODE §915(a), (b). See FED. R. CRIM. P. 41(a), (c).

67. 425 U.S. 391 (1975); see also *United States v. Doe*, 104 S. Ct. 1237 (1984). °

68. 425 U.S. at 395.

69. *Id.* at 393.

70. *Id.* at 414.

the level of testimony within the protection of the Fifth Amendment” because compliance added “little or nothing to the sum total of the Government’s information . . .”; the Internal Revenue Service already knew about the existence and location of the workpapers.⁷¹ Moreover, the Court stated that responding to the summons would not authenticate the workpapers because the taxpayers were not competent to authenticate for admission into evidence at trial papers prepared by their accountants. Finally, the Court concluded that responding to the summons would not appear to represent a substantial threat of self-incrimination because the taxpayers only could express their belief that the papers were those described in the summons.⁷²

A. *Implicit Authentication*

The Supreme Court did not resolve the fifth amendment “implicit authentication” question in *Fisher* because the parties did not prepare the work papers and could not authenticate them. When a person complies with a subpoena duces tecum, he “implicitly testifies that the evidence he brings forth is in fact the evidence demanded.”⁷³ The Second Circuit Court of Appeals has stated that the effect of a subpoena duces tecum served on an individual and requiring production of the person’s records is the same as requiring the individual to testify and admit the genuineness of the records.⁷⁴ When an accused is forced to produce his records, the prosecutor can subsequently introduce them into evidence. If the accused wants to dispute or explain the records, he must then testify.⁷⁵ According to Wigmore on Evidence, a testimonial disclosure of constitutional dimension is implicit in the production of documents or chattels pursuant to a subpoena duces tecum:

It is the witness’ assurance, compelled as an incident of the process, that the articles produced are the ones demanded. No

71. *Id.* at 411; see also *United States v. Osborn*, 561 F.2d 1334, 1338-39 (9th Cir. 1977). Enforcement of IRS summons against attorney for production of business documents did not violate client’s fifth amendment rights because it involved no testimonial self-incrimination, and any tacit concessions as to existence, possession, and belief that documents were those described did not rise to the level of testimony protected by the fifth amendment. *United States v. Friedman*, 593 F.2d 109, 118 (9th Cir. 1979). Admission into evidence of defendant’s passport did not violate his fifth amendment rights even though production tacitly admitted the existence, possession, and belief that it was the document requested because it was of minimum significance in the case and did not rise to the level of testimony protected by the fifth amendment.

72. *Fisher*, 425 U.S. at 412-13; *In re Fred R. Witte Center Glass No. 3*, 544 F.2d 1026, 1027-28 (9th Cir. 1976) (accountant’s work papers in possession of accused not protected by fifth amendment from production merely because this action would be incriminating because no implied authentication).

73. *Couch v. United States*, 409 U.S. 322, 344, 346 (1973).

74. *U.S. v. Beattie*, 522 F.2d 267, 270 (2d Cir. 1975).

75. *Id.*

meaningful distinction can be drawn between a communication necessarily implied by legally compelled conduct and one authenticating the articles expressly made under compulsion in court. Testimonial acts of this sort—authenticating or vouching for pre-existing chattels—are not typical of the sort of disclosures which are caught in the main current of history and sentiments giving vitality to the privilege. Yet they are within the borders of its protection.⁷⁶

A Massachusetts court has held that an accused cannot be compelled to produce an instrumentality of the crime because his “implicit authentication” might be a “link in a chain” of evidence against him. In *Commonwealth v. Hughes*,⁷⁷ the charge against the defendant was assault with a dangerous weapon. An order compelling the defendant to produce a weapon for ballistics testing was reversed. The Supreme Judicial Court of Massachusetts, Berkshire Division, observed that the “converse inference” from *Fisher* was that “assertions implied from production of things (whether or not documents) are within the Fifth Amendment, and thus justify the refusal to produce, when they are nontrivial and incriminating.”⁷⁸ The prosecution possessed evidence that the defendant was the registered owner of the weapon prior to the crime. The existence, location, and control of the weapon at the time of the order were not a foregone conclusion. If the defendant produced the weapon, he would “implicitly” provide a statement about its existence, location, and control from which the prosecution would conclude he had possession and control at some time after the alleged crime. Production of the weapon would furnish a “link in the chain of evidence that could lead to prosecution” because a recovered bullet from the scene of the crime might be connected to the produced weapon through ballistics tests. Even if the prosecution did not indicate at trial that the defendant produced the gun, the court believed that the defendant’s privilege against self-incrimination would still be violated.⁷⁹

Several courts have held that an accused cannot be compelled to produce personal documents because implicit authentication would result in testimonial self-incrimination. The Second Circuit Court of Appeals in *United States v. Beattie*⁸⁰ interpreted *Fisher* as providing fifth amendment

76. 8 WIGMORE, EVIDENCE §2264 at 380. (McNaughton rev. 1961) (quoted approvingly in *Beattie*, 522 F.2d at 270 n.6, and *State v. Superior Court of Maricopa County*, 625 P.2d 316, 319-20 n.3 (Ariz. 1981)).

77. 404 N.E.2d 1239 (Mass. 1980), cert. denied, 449 U.S. 900 (1980); see also *Goldsmith v. Superior Ct.*, 152 Cal. App. 3d 76, 199 Cal. Rptr. 366 (1984).

78. *Id.* at 1243.

79. *Id.* at 1244-45.

80. 541 F.2d 329, 331 (2nd Cir. 1976). In addition to the implicit authentication question, the *Fisher* court left unanswered the question whether personal papers are pro-

protection against an Internal Revenue Service summons to the taxpayer for letters addressed to his accountant that were still in the taxpayer's possession. The court reasoned that the taxpayer's authentication would be testimonial self-incrimination. In *United States v. Plesons*,⁸¹ the Eighth Circuit Court of Appeals held that patient records of a doctor charged with unlawful distribution of drugs were protected. The Arizona Supreme Court has similarly held that a defendant who had been charged with sexual misconduct with his minor daughter could not be compelled to produce letters to her in which he allegedly discussed the criminal acts because compliance would authenticate the letters and be an incriminating communicative act.⁸²

The fifth amendment implicit authentication analysis has also been applied to prevent an accused's production of tape recordings. In *Matter of Vanderbilt (Rosner-Hickey)*,⁸³ the New York Court of Appeals, following *Fisher*, held that a tape of self-incriminating conversations in the possession of its maker would be privileged because "testimonial evidence" was involved. After learning that he was the target of an assault investigation,

ected from compelled production. The Supreme Court in *Fisher* did not expressly overrule *U.S. v. Boyd*, 116 U.S. 616 (1886), which held that an individual's private books and papers are protected by both the fourth and fifth amendments. In his concurring opinion in *Fisher*, Justice Brennan indicated that the majority implied that the fifth amendment would no longer afford protection to private papers. 425 U.S. at 415. Judge Kennedy in his concurring opinion in the case of *Matter of Fred R. Witte Center Glass No. 3*, 544 F.2d 1026 (9th Cir. 1979) attempted to shed some light on the meaning of the *Fisher* majority decision. He stated:

The *Fisher* case may not apply to other writings or materials, especially those of a private nature, even where the testimonial assertion does not amount to an implicit authentication. This is not a recognition that the contents of such writings necessarily are protected; rather, it follows from the high probability that an order to produce personal papers may compel assertions or communications that fall within the privilege.

Id. at 1029. However, later in the same United States Supreme Court term, Justice Blackmun for the majority in *Andresen v. Maryland*, 427 U.S. at 473-74, referring to *Fisher* stated that "[T]he Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information. . . ." When determining whether production of documents will violate the fifth amendment, the Fifth Circuit Court of Appeals applies a *Boyd* test in addition to a *Fisher* testimonial analysis. If an individual has in his actual or constructive possession incriminating papers, whether personal or business in nature, which he wrote or were written under his immediate supervision, these documents are absolutely protected from production pursuant to a subpoena or summons. *United States v. Miller*, 660 F.2d 563, 566-67 (5th Cir. 1981); *United States v. Davis*, 636 F.2d 1028, 1041-43 (5th Cir. 1981); *United States v. Authement*, 607 F.2d 1129, 1131-32 (5th Cir. 1981).

81. 560 F.2d 890, 892-93 (8th Cir. 1977).

82. *State v. Superior Court of Maricopa County*, 625 P.2d 316, 320 (Ariz. 1981). Since the letters were privileged in the possession of the client, the court held that the letters were privileged in possession of the defendant's counsel to whom the letters had been delivered for preparation of the defense and to whom the subpoena duces tecum was directed. *Id.*

83. 453 N.Y.S.2d 662 (N.Y. 1982); see also *Briggs v. Salcines*, 392 So. 2d 263 (Fla. 1980) (holding that attorney under *Fisher* can invoke attorney-client privilege against production pursuant to subpoena of illegal tape recordings of telephone conversations because client could assert privilege against self-incrimination and tapes were delivered to attorney for purpose of legal advice).

Doctor R made two tape recordings, and unsuccessfully attempted suicide. Doctor R's wife obtained the sealed tapes, temporarily left the tapes with an attorney friend, and then turned the still-sealed tapes over to the son of her husband's attorney. The tape recordings were subsequently subpoenaed from the attorney. The court defined testimonial evidence as "that which communicates the witness' ideas or thoughts, that exposes the witness' mental state or thought process,"⁸⁴ and concluded that the one tape, which was not protected by the marital privilege, and its production were testimonial in nature. By producing the tape, the accused "would not only express his belief that this is the tape sought by the Grand Jury, but would be vouching for the circumstances of its preparation, its accuracy, and the conclusions drawn from it."⁸⁵

When dealing with the "implicit authentication" issue, the Fifth Circuit Court of Appeals does not find self-incrimination when someone other than the accused authenticates the object at trial because the act of production then is not a testimonial communication by which the witness is compelled to affirm the truth of a statement that incriminates him. In *United States v. Authement*,⁸⁶ the Fifth Circuit allowed production by the accused's attorney of an instrumentality of the crime because the defendant was not required to authenticate it. The defendant, a former police officer, was charged with beating a suspect using brass knuckles. Because the court held that the defendant was not privileged from producing the brass knuckles, the attorney to whom the defendant had delivered them was required to comply with the subpoena duces tecum. The court stated:

[E]ven if production of the brass knuckles would involve a testimonial communication that the knuckles existed, that they were the ones Authement was carrying at the time of the assault, and that they were in his possession at the time of the subpoena, this testimonial communication was not incriminating because it was never used against Authement in any way.⁸⁷

84. 453 N.Y.S.2d at 669.

85. *Id.* at 670. In *State v. Alexander*, 281 N.W.2d 349 (Minn. 1979), the Supreme Court of Minnesota held that a court order requiring defendants charged with violation of an obscenity ordinance to produce an allegedly obscene film violated their privilege against self-incrimination. The court noted that the existence and control or possession of the film was not a foregone conclusion because the only evidence linking any of the defendants to the theater in which the film had been shown was an application by one of the defendants for a state sales tax permit. The court stated that if the state did not have to rely on the act of production to prove possession and control it should have granted immunity to the defendants from use of any evidence pertaining to production of the film, but not as to the issue of obscenity.

86. *United States v. Authement*, 607 F.2d 1129, 1132 (5th Cir. 1979); see Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683, 683-702 (1982) (for a discussion of the various approaches taken by the circuits to this problem); see also *United States v. Fisher*, 500 F.2d 683, 694 (3d Cir. 1974), *aff'd*, 425 U.S. 391 (1976).

87. 607 F.2d at 1132.

The court reached this conclusion because the brass knuckles were authenticated at trial by another officer. The jury was never told that the defendant had produced the brass knuckles. Most importantly, the production of the brass knuckles did not lead to any other evidence against the defendant.⁸⁸

Under another approach to the "implicit authentication" problem, the First Circuit Court of Appeals compels production by an accused of his personal records if the government grants immunity against use of the fact of compliance with legal process. In the case of *In re Grand Jury Proceedings United States*,⁸⁹ a hospital was under investigation for making illegal payments to labor union officials. The appointment logs of a doctor, who was chairman of the hospital board, were subpoenaed. The district court quashed the subpoena on the ground that the implied authentication by the doctor would be incriminating. Chief Justice Coffin pointed out that in many cases "the authentication of the documents, which may be proven by an official's testimony that he received them from the individual who prepared and possessed them, will provide a necessary link to incriminating evidence contained in the documents."⁹⁰ The matter was remanded to allow the government to immunize the use of the fact of the doctor's compliance with the subpoena. Under the federal statute, however, this immunization would not preclude subsequent use of the contents of the appointment books, which might provide a link to incriminating evidence in the form of reference to appointments with union officials.⁹¹

88. *Id.*

89. 626 F.2d 1051 (1st Cir. 1980).

90. *Id.* at 1055.

91. *Id.* at 1059. Use immunity protects a witness only against the actual use of his compelled testimony and evidence derived directly or indirectly from this compelled testimony. Transactional immunity protects a person against all later prosecutions relating to matters about which he testifies. *People v. Sutter*, 134 Cal. App. 3d, 806, 813, 184 Cal. Rptr. 829, 833 (1982).

The Federal statute grants only use immunity. 18 U.S.C. §6002. In *Kastigar v. United States*, 406 U.S. 441, 453 (1972), the United States Supreme Court held that this Federal statute was consonant with the fifth amendment:

We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts." Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Id. The California statute permits a transactional immunity only upon request of the District Attorney. CAL. PENAL CODE §1324. There is also a precedent in California for a limited judicially declared use immunity. See *People v. Sutter*, 134 Cal. App. 3d at 814-15, 184 Cal. Rptr. at 832.

B. Relationship to Attorney-Client Privilege

The United States Supreme Court in *Fisher* ruled that documents in the possession of an attorney are protected under the attorney-client privilege if they are protected under the privilege against self-incrimination when in the client's possession and are subsequently delivered to the attorney for the purpose of legal advice.⁹² Since legal process had been utilized, the Court did not deal with the question of what counsel should do with evidence delivered to him by his client in the course of the attorney-client relationship when no process has been served. The Court also did not decide what the attorney should do with evidence protected under the attorney-client privilege after he has examined it and advised the client. This article suggests that the attorney should return the evidence to the client, who could assert his privilege against self-incrimination in response to a subpoena. By returning the evidence to the client, the attorney avoids making his office a depository for evidence pertaining to a crime and himself a potential defendant in a concealment of evidence prosecution.

In *People v. Swearingen*,⁹³ the Colorado Supreme Court approved the delivery of implicating evidence by defense counsel to the prosecution because the attorney-client privilege did not apply. The accused was charged with forgery and offering a false instrument for recording. The accused allegedly had added a legal description of additional real property to a deed of trust after it had been signed by the trustor, and then recorded the deed of trust. During the investigatory phase, the accused delivered the deed of trust and related documents to his attorney, and his attorney handed the documents to the prosecutor. The prosecutor made copies of the documents, retained the originals, and gave the copies to defense counsel. A document examiner determined that the accused had altered the deed of trust. Without any analysis other than to state that production of the documents by the attorney did not compel the defendant to be a witness against himself, the court erroneously assumed that the documents were not privileged under the fifth amendment in the possession of the accused.

92. 425 U.S. at 404; see 8 WIGMORE, EVIDENCE §2307, at 592 (McNaughton rev. ed. 1961). The Supreme Court erroneously cited *State v. Olwell*, 394 P.2d 681 (Wash. 1964), along with other cases for the proposition that pre-existing documents which could have been obtained by court process from the client may be obtained by similar process from the attorney after transfer to him to obtain legal advice 425 U.S. at 403-04.

In *United States v. Goldenstein*, 456 F.2d 1006, 1011 (8th Cir. 1972), the attorney, after his client's arrest for bank robbery, went to his client's hotel room with hotel employees. The attorney suggested that the hotel manager look in a closet. A package of \$12,900 in currency was found. The manager handed it to the attorney, who delivered it to the police. The court stated that there was "... no evidence that the attorney acquired information as to the money by means of a confidential communication directed at aiding in defendant's defense. . . . Any communication made for the purpose of concealing stolen money would not be privileged." *Id.*

93. 649 P.2d 1102 (Colo. 1982).

The court also concluded that the documents were not protected under the attorney-client privilege because the accused had no expectation of privacy in the deed of trust, which had been recorded.⁹⁴

The Seventh Circuit Court of Appeals case of *In re January 1976 Grand Jury*⁹⁵ provides another interesting fact pattern for applying the *Fisher* dual privilege analysis to a situation in which the fruits of the crime are in the possession of an attorney. In that case, the court upheld a subpoena duces tecum directed to an attorney for the proceeds of a bank robbery allegedly committed by his clients, and affirmed the attorney's contempt conviction for noncompliance with the subpoena.⁹⁶ The three judge panel agreed that the fruits of the crime were not protected by the privilege against self-incrimination, but the judges were unable to agree on a rationale. In the opinion of Judges Tone and Bauer, the money was non-testimonial, and even compliance by the suspects with a subpoena would not be testimonial enough in character to invoke the privilege against self-incrimination.⁹⁷ Judge Pell, however, recognized the existence of an incriminatory "implied assertion" if the client were required to produce the money. This implied assertion was that production of the stolen money "would furnish a link in the chain of evidence" that could lead to prosecution, as well as to evidence that an individual could reasonably believe might be used against him in a criminal prosecution.⁹⁸ Judge Pell decided,

94. *Id.* at 1105-06.

95. 534 F.2d 719 (7th Cir. 1976); see Seidelson, *The Attorney-Client Privilege and Client's Constitutional Rights*, 6 HOFSTRA L. REV. 693, 704-05, 710-12 (1978) (criticizing Judge Pell for proceeding on the assumption that the defendants were guilty contrary to the presumption of innocence). *In re January 1976 Grand Jury* was decided less than one month prior to *Fisher*.

96. 534 F.2d at 720-21. During their investigation, FBI agents discovered that two suspects visited Attorney Genson's law office approximately one to three hours after the robbery, and that one suspect transferred cash to Genson's associate. Genson was served with a subpoena duces tecum requesting production of all the money paid or delivered to him by either of the two suspects subsequent to the time of the robbery. Genson's motion to quash on fifth amendment, attorney-client privilege, and other grounds was denied. When Genson refused to answer questions before the Grand Jury about his receipt of the money from the suspects or comply with the subpoena duces tecum, he was held in civil contempt. *Id.* Disobedience or resistance to lawful process is punishable as a criminal contempt under 18 U.S.C. §401(3). See also FED. R. CRIM. P. 17(g).

97. 534 F.2d at 731. Under Judge Tone's analysis in which Judge Bauer joined, the money was delivered to the attorney for his fee or for safe keeping with or without his knowledge that it was stolen. If the money was paid as a fee, the suspects had voluntarily released it and the money itself was nontestimonial in nature. If the money was delivered for safekeeping, it was "an act in furtherance of the crime" regardless of whether the attorney knew the money was stolen. The attorney was "simply a witness to a criminal act." *Id.* Judge Tone concluded: "There is no authority or reason, based on any constitutional provision or the attorney-client privilege, for shielding from judicial inquiry either the fruits of the robbery or the fact of the later criminal act of turning over the money to appellant." *Id.*

98. 534 F.2d at 723, 727 n.7. Judge Pell stated that the major issue was "[W]hether a subpoena duces tecum requiring an attorney to produce for a Grand Jury investigation monies turned over to him by his clients and believed to be proceeds of a bank robbery infringes his clients' Fifth Amendment privilege against compelled self-incrimination." *Id.* at 722. He found no discernible basis "... for thinking that the Fifth Amendment testimonial privilege was intended to allow an attorney to suppress or secrete the physical fruits of an armed robbery." *Id.* at 724. Furthermore, he pointed out that the fifth amendment explicitly pro-

however, that the attorney lacked standing to assert his client's privilege against self-incrimination.⁹⁹ In conclusion, the court reasoned that no attorney-client privilege existed in the case because matters involving receipt of fees are not privileged, and the attorney lacked standing to assert the fifth amendment. Consequently, the attorney was under a "legal obligation" to produce the money and to testify about its source, and the attorney's failure to do so constituted suppression of evidence.¹⁰⁰

Under the *Fisher* analysis, the accused in *In re January 1976 Grand Jury* would be protected by the privilege against self-incrimination from production pursuant to a subpoena of the bank robbery proceeds in his possession. He would not, however, be protected by the attorney-client privilege from his attorney's production of the robbery proceeds in the attorney's possession. If, pursuant to a subpoena, the accused produced all the money in his possession, and some of the money was identified by bank personnel as bait money, the accused certainly would have testimonially incriminated himself by producing a link in the chain of evidence against himself. Although compelled production of the money by the accused would be denied because of his privilege against self-incrimination, compelling the attorney to produce the money if it were in his possession probably would not be prevented by assertion of the attorney-client privilege. As courts have often stated, the office of an attorney should not be used as a repository for the fruits of a crime.¹⁰¹ Possession of bank robbery proceeds would not be necessary to the attorney's preparation of a legal defense. Furthermore, information about a fee and its payment, whether paid with legally or illegally obtained funds, is not normally protected by the attorney-client privilege because in most circumstances, it is not a communication for the purpose of seeking legal advice nor a communication about which a client can legitimately anticipate confidentiality.¹⁰²

hibits compelling an accused to bear witness against himself; but that it does not proscribe an incriminating statement elicited from another. *Id.* However, he concluded: "The recognition that an attorney need not produce stolen monies in response to a subpoena would provide a mechanism by which a member of a learned profession could become the privileged repository of the fruits of a violent crime Whatever implied testimony arises from the act of production is that of the lawyer. . . ." *Id.* at 727.

99. *Id.* at 727. The U.S. Supreme Court in *Fisher* expressly did not decide whether an attorney can assert his client's privilege against self-incrimination. 425 U.S. at 402 n.8. See *United States v. Judson*, 322 F.2d 460, 467-68 (9th Cir. 1963) (holding attorney can assert privilege against self-incrimination on behalf of client). But see *Owll*, 394 P.2d at 686 (holding the contrary).

100. 534 F.2d at 729.

101. *Owll*, 394 P.2d at 684. Assuming that the accused's home could be watched while an affidavit was prepared and a magistrate found, a search warrant would be the preferable device.

102. *Phaksuan v. United States*, 722 F.2d 591, 592 (9th Cir. 1983); 534 F.2d at 728; cf. *State v. Dawson*, 89 S.W. 827, 829 (Mo. 1886) (where the court held that the kind of money paid to the attorney by clients accused of stealing a certain amount of silver coin was confidential and the description of services performed in an attorney's bill may be pro-

C. State v. Olwell

In the *Olwell* decision, the Washington Supreme Court announced a duty of defense counsel to turn over to the prosecution, on his own motion, evidence obtained as a result of a confidential client communication, but the court failed to analyze thoroughly the fifth amendment implications of that duty. Under the analysis used in the *Fisher* decision,¹⁰³ if the client's knives in *Olwell* had been subpoenaed directly from him, he would have been able to assert his privilege against self-incrimination. Otherwise, if the client had been compelled to produce the knives pursuant to a subpoena duces tecum, he would have implicitly authenticated the knives. Furthermore, should a doctor testify that the victim's fatal wounds were caused by the defendant's knife, the client by the act of production would have forged a link in the chain of evidence against himself. Unlike in *Authement*,¹⁰⁴ however, no person other than the defendant could have authenticated the knife used in the *Olwell* fatal stabbing because there were no witnesses. If the prosecution had offered *Olwell's* client immunity in return for production of the knives, the evidence would have been of no probative value to the prosecution.

D. People v. Meredith

A privilege against self-incrimination problem lurks beneath the *Meredith* exception to the attorney-client privilege. In *People v. Meredith*, the California Supreme Court was not directly faced with a privilege against self-incrimination issue because defendant Scott elected to testify to explain his apparent possession of the victim's wallet. If the *Meredith* exception to the attorney-client privilege were to be applied in a similar fact situation in which the accused asserts his constitutional right to remain silent, the accused would in effect be denied his privilege against self-incrimination. The information about the location of the wallet was testimonial in nature because Scott told his attorney about it. The California Supreme Court, however, treated the location of the wallet as physical evidence; the court adopted the Attorney General's argument that the

tected as a confidential communication); see also, *United States v. Osborn*, 409 F. Supp. 406, 411 (D. Ore. 1975).

103. 425 U.S. 391 (1975). The *Fisher* rule should not be extended to allow defense counsel to keep a defendant's letters to his accountants or his knife from being introduced into evidence at trial. In preparing a defense, counsel only needs time to copy the letters or have a forensic expert examine the knife. If the letters or knives have not yet been subpoenaed, then defense counsel can return the items to the client. Defense counsel should not be a repository for evidence in order to secrete that evidence from the prosecution and the trier of fact.

104. 607 F.2d 1129 (5th Cir. 1979).

wallet “bore a tag bearing the words ‘located in the trashcan by Scott’s residence,’ and the defense by taking the wallet, destroyed this tag.”¹⁰⁵ The Fifth Circuit approach of authentication by a third party at trial would not eliminate the implicit authentication problem because only defendant Scott or his attorney’s investigator could authenticate the wallet’s location.

The apparent lack of sensitivity by the California Supreme Court toward an accused’s privilege against self-incrimination in formulating the removal or alteration exception to the attorney-client privilege is surprising because that court has claimed to show a “more solicitous attitude” toward the privilege against self-incrimination than the United States Supreme Court.¹⁰⁶ Certainly, in a case in which the defendant did not testify, providing the prosecution with information about the location or condition of implicating evidence would lighten the prosecution’s burden of proof. In *Prudhomme v. Superior Court*,¹⁰⁷ the California Supreme Court held that an order requiring the defendant in a criminal prosecution to divulge the names, addresses, and anticipated testimony of all witnesses she intended to call at trial violated her federal privilege against self-incrimination because this information possibly might incriminate her.¹⁰⁸ The court pointed out that disclosure “conceivably might lighten the prosecution’s burden of proving its case in chief.”¹⁰⁹ The court reasoned that the defense’s disclosure of a witness who would testify that the defendant acted in self-defense might lead the prosecution to the only witness to the crime and serve as a “link in a chain” of evidence tending to establish guilt of a criminal offense.¹¹⁰

105. 29 Cal. 3d at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619. The court partially distinguished the admissibility of expert’s observations in civil cases from the protection afforded to criminal defense attorneys observations as a result of confidential communications from clients on the basis of the client’s privilege against self-incrimination. *Id.* at 693 n.6, 631 P.2d at 52-53 n.6, 175 Cal. Rptr. at 618-19 n. 6.

106. *Allen v. Superior Court*, 18 Cal. 3d 520, 525, 557 P.2d 65, 67, 134 Cal. Rptr. 774, 776 (1976); CAL. CONST. art. I, §15.

107. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

108. *Id.* at 326-27, 466 P.2d at 677-78, 85 Cal. Rptr. at 133-34.

109. *Id.* at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.

110. *Id.* In ruling upon a claim of the privilege against self-incrimination, the trial court must find that it clearly appears from a consideration of all the circumstances in the case that an answer to the challenged question cannot possibly have a tendency to incriminate the witness. *Id.* Subsequent to the *Prudhomme* decision, the United States Supreme Court upheld a trial court order compelling a defendant to disclose portions of a defense investigator’s report pertaining to statements taken from prosecution witnesses. *United State v. Nobles*, 422 U.S. 225 (1975). Recognizing that the trend of the United States Supreme Court on questions of compelled defense disclosure to the prosecution was not “consistent with our interpretation of the privilege against self-incrimination,” the California Supreme Court interpreting the California Constitution next in *Allen v. Superior Court*, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976), held invalid a trial court order compelling disclosure of the names of prospective defense and prosecution witnesses for the purpose of jury *voir dire* even though the prosecution was enjoined from contacting any individuals named by the defense until their identity was otherwise revealed during the trial. The California Supreme Court pointed out that even this procedure would not pre-

III. EFFECTIVE ASSISTANCE OF COUNSEL

When an attorney does not act competently in dealing with implicating evidence and his conduct contributes to his client's conviction, the attorney will deprive his client of his constitutional right to effective assistance of counsel. Although deputy public defender Cline in *Morrell* was found not to have rendered ineffective assistance of counsel, and Scott's first attorney in *Meredith* did not render ineffective assistance of counsel under the state of the law at the time he acted, the result might be different today for defense counsel acting similarly. If an attorney fails to provide effective assistance of counsel, he probably also has committed malpractice, because the standards are much alike.

The sixth amendment provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."¹¹¹ The underlying premise of this constitutional right is that counsel will effectively assist the accused. If the assistance is not effective, the accused has been denied a constitutional right.¹¹² Effective assistance of counsel includes careful investigation of all defenses of fact and law that may be available to the defendant.¹¹³ Careful investigation involves conferring with the client without undue delay and as often as necessary about developing the defense, advising the client promptly of his rights and taking all actions necessary to preserve them, interviewing defense and prosecution witnesses when accessible, attempting to secure information in the possession of prosecution and law enforcement authorities, and researching adequately.¹¹⁴

The constitutional right to effective assistance of counsel does not automatically prevail over an attorney's ethical duties as an officer of the

clude investigation of other matters suggested by the names of the witnesses. As an example, the court pointed out that if the identified witnesses were friends or relatives of the accused an alibi defense might be anticipated and investigated. Noting that in *Prudhomme* it had been more solicitous of the privilege against self-incrimination than federal law then required, the California Supreme Court in *Allen* applied the *Prudhomme* test and decided that providing names of prospective defense witnesses without their addresses did not "secure the privilege against self-incrimination" as set forth in the California Constitution. *Id.* at 525-26, 557 P.2d at 66, 134 Cal. Rptr. at 777. Interestingly, the California Supreme Court in *Allen* noted that the *Prudhomme* standard "leaves no room for a balancing of interests" between a trial by an unbiased jury without disruption and the privilege against self-incrimination. *Id.* at 525, 557 P.2d at 67, 134 Cal. Rptr. at 776.

111. U.S. CONST. amend. VI; see also CAL. CONST. art. 1, §15.

112. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). Both the United States and California constitutional rights to adequate assistance of counsel are "in addition to the general due process protection of a fair trial; . . . (and) focus[es] 'on the quality of the representation provided the accused.'" *People v. Nation*, 26 Cal. 3d 169, 178, 604 P.2d 1051, 1056, 161 Cal. Rptr. 299, 304 (1980). *In re Williams*, 1 Cal. 3d 168, 174, 460 P.2d 984, 988, 81 Cal. Rptr. 784, 788 (1969); *Barber v. Municipal Court*, 24 Cal. 3d 742, 750, 598 P.2d 818, 822, 157 Cal. Rptr. 658, 662 (1979).

113. *People v. Farley*, 90 Cal. App. 3d 851, 859, 153 Cal. Rptr. 695, 698 (1979).

114. *People v. Pope*, 23 Cal. 3d 412, 424, 590 P.2d 859, 865-66, 152 Cal. Rptr. 732, 738-39 (1979).

court. Although defense attorneys have a duty to represent their clients zealously,¹¹⁵ one court has stated:

[T]hat duty must be met in conjunction with, rather than in opposition to, other professional obligations. Counsel does have an "obligation to defend with all his skill and energy, but he also has moral and ethical obligations to the court, embodied in the canons of ethics of the profession. . . ." The ethical strictures under which an attorney acts forbid him to tender evidence or make statements which he knows to be false as a matter of fact. . . His activities on behalf of his client are circumscribed by the principles and traditions of the profession¹¹⁶

A. *Morrell v. State*

In *Morrell*, an implicating evidence case in which ineffective assistance of counsel was an issue, the Alaska Supreme Court decided that assistance by the attorney to the client's friend in turning over to law enforcement officials the kidnap plan drawn by the client did not violate the client's constitutional right.¹¹⁷ Deputy public defender Cline represented Morrell, who was charged with kidnapping. While Morrell was incarcerated awaiting trial, his friend Wagner was staying at Morrell's residence. At Morrell's suggestion, Wagner cleaned out Morrell's vehicle. While performing that task, Wagner found a legal pad on which was written what appeared to be a kidnap plan. Upon being contacted by Wagner, Deputy Public Defender Cline went to Morrell's residence to examine the pad. At Wagner's request, Cline took possession of the pad, and subsequently showed it to his client. Morrell explained he had sketched the plan while watching a report on television of an earlier kidnapping.¹¹⁸

Unsure of his duty with respect to the implicating evidence, Cline contacted other attorneys, a local judge, the American Bar Association, and the Alaska Bar Association. The Alaska Bar Association Ethics Committee, in an advisory opinion, recommended that Cline return the evidence to Wagner, explain to Wagner the law on concealment of evidence, and withdraw as attorney of record if a later violation of ethical rules would occur.¹¹⁹

115. *People v. Cropper*, 89 Cal. App. 3d 716, 720-21, 152 Cal. Rptr. 555, 557 (1979).

116. *Thornton v. United States*, 357 A.2d 429, 437-38 (D.C. Cir. 1976).

117. *Morrell v. State*, 575 P.2d 1200, 1210-12 (Alaska 1978).

118. *Id.* at 1206-07. Morrell was also charged with forcible rape and assault with intent to commit rape.

119. *Id.* at 1206; Brief of Appellee at 7 (available through interlibrary loan on microfiche from Inter Library Department, Alaska Court Libraries, 303 "K" Street, Anchorage, Alaska 99501). D. LOUISELL, J. KAPLAN & J. WALTZ, *CASES & MATERIALS*

After withdrawing as attorney of record, Cline assisted Wagner in turning over the pad to law enforcement officials. Morrell's subsequent counsel moved to suppress the evidence, but the motion was denied. The pad was introduced into evidence at trial. Since the evidence was obtained from a non-agent third party, Cline was required to testify about how he had obtained the pad. A handwriting expert testified that Morrell had outlined the kidnap plan.¹²⁰

The Alaska Supreme Court decided that Cline's assistance to Wagner in delivering the tablet to law enforcement personnel did not violate his client's sixth amendment right because Cline acted competently. The Alaska two-prong ineffective assistance of counsel test was: (1) whether counsel's performance fell below what would be expected of a lawyer with ordinary training and skill in criminal law, and (2) whether that ineffective performance in some way contributed to the client's conviction.¹²¹ The court considered three issues in applying the first prong of the test. First, the court analyzed the implicating evidence decisions and concluded that the general rule was that "a criminal defense attorney must turn over to the prosecution real evidence that the attorney obtains from his client."¹²² Second, the court determined that Cline's testimony about the kidnap plan did not violate the attorney-client privilege because Wagner was not Morrell's agent. Third, the court decided that Cline "could have reasonably concluded" that the Alaska concealment of evidence statute required him to reveal the existence of the evidence.¹²³

Even if the Alaska Supreme Court had found that Cline did not act competently, the court probably would have concluded under the second prong of the test that Cline's action did not contribute to the conviction of Morrell and would have denied the ineffective assistance of counsel claim on that basis. The principal witnesses were the victim and the defendant. Ample independent evidence supported the victim's testimony. As the victim testified, both interior door handles in Morrell's pickup truck and the window crank on the passenger side were missing or inoperative, which prevented her escape. Upon her release, the victim had bruises circling both ankles which could have been caused by being tied with rope. When the accused's home was searched pursuant to a search warrant, several items were found that confirmed the victim's testimony, including magazines with address labels torn out, a disconnected telephone exten-

ON EVIDENCE 608-11 (3d ed. 1976) (correspondence between Deputy Public Defender Cline and the Alaska Bar Association Ethics Committee).

120. 575 P.2d at 1207.

121. *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974); *Green v. State*, 579 P.2d 14, 15-16 (Alaska 1978).

122. 575 P.2d at 1210.

123. *Id.* at 1211 n.17; *see infra* notes 172-74.

sion, clothes of the type the victim claimed she had been provided by the defendant, and pieces of rope.¹²⁴

If a case with facts similar to *Morrell* were to be decided today on the ineffective assistance of counsel issue, the court would probably find that the attorney did not act competently, but would not reverse on the ground of ineffective assistance of counsel because the defendant would still be convicted without the pad being admitted into evidence. After *Morrell*, a defense attorney taking possession of the pad would not act competently because he should be aware of the general rule about turning over evidence in counsel's possession. Instead of taking possession of the pad, defense counsel should have the pad examined by an investigator without removing or altering it, perhaps have the pad photographed, and then discuss with his client the importance of the pad to the defense. No tactical advantage is gained by taking possession of the pad for submission to a handwriting analyst before discussing with the client its significance. If defense counsel has the evidence examined without taking possession and discusses the evidence with his client, counsel will not be in the position of being required to assist in turning over to law enforcement officials evidence that might be harmful to his client's defense.

B. *People v. Meredith*

Scott's first attorney in *Meredith* did not render ineffective assistance of counsel because his actions in having the wallet retrieved and delivered to the police were reasonably competent under the law in 1976. When the attorney took this action, he reasonably could have thought that the prosecution under *Olwell* could not have ascertained the location of the evidence from the defense. The California two-prong test for ineffective assistance of counsel is (1) whether counsel failed to act in a manner expected of reasonably competent attorneys acting as diligent advocates, and (2) whether his conduct resulted in the withdrawal of a potentially meritorious defense.¹²⁵ Even though a defense has not been withdrawn,

124. 575 P.2d at 1202-04.

125. *People v. Pope*, 23 Cal. 3d 412, 424-25, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979). An example of not reasonably competent conduct in the investigatory phase of a criminal defense is the failure to locate witnesses other than defendant's immediate family to corroborate his statement that he could not speak Spanish when the robbery victim testified that the robbers were speaking Spanish. *People v. Rodriguez*, 73 Cal. App. 3d 1023, 1032, 141 Cal. Rptr. 118, 123-24 (1977). The United States Supreme Court in dictum has posited an objective standard for effective assistance of counsel as being "... within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The Ninth Circuit standard is "reasonably competent and effective representation," and if the claim of ineffective assistance is founded upon specific acts and omissions of defense counsel at trial, the accused must establish that counsel's errors prejudiced the defense. *Cooper v. Fitzharris*, 586 F.2d 1325, 1327, (9th Cir. 1978). "Defense counsel's errors or omissions must reflect a failure to exercise the skill, judgment, or

the second prong of the test is satisfied if a reasonable probability exists that the client would have received a more favorable determination but for counsel's incompetence.¹²⁶

Should a case with facts similar to *Meredith* be decided today by the California Supreme Court on the ineffective assistance of counsel issue, the client would probably prevail. After *Meredith*, a California attorney, by taking possession of the wallet in similar circumstances without consultation with his client, would fail to act with reasonable competence under the first prong of the test. Counsel should know that the incriminating evidence will have to be delivered to law enforcement authorities and information about its location or condition crucial to the defense will have to be disclosed. If defense counsel's purpose was to verify that the wallet belonged to the victim, competent counsel would direct the investigator to examine the identification items in the wallet without removing or altering them. If the wallet was subsequently discovered and secured by law enforcement, the defendant would have access to the wallet through criminal discovery procedures.¹²⁷

Assuming that an attorney taking possession of the *Meredith* wallet today would be acting incompetently, the second prong of the test would be satisfied because Scott probably would have been acquitted if the wallet had not been turned over to law enforcement officials, had not been admitted into evidence, and if the investigator had not testified about its location. The police probably would not have searched further for that evidence because Scott's residence already had been searched pursuant to a warrant, and the wallet had not been found. In his statement to the police prior to his arrest, Scott did not mention the wallet. Other evidence

diligence of a reasonably competent criminal defense attorney—they must be errors a reasonably competent attorney acting as a diligent conscientious advocate would not have made. . . ." *Id.* at 1330. Prejudice ". . . may result from the cumulative impact of multiple deficiencies. . . [and] the requirement that prejudice appear does not mean that relief is available only if the defendant would have been acquitted but for counsel's blunder." *Id.* at 1333.

126. *People v. Fosselman*, 33 Cal. 3d 572, 584, 659 P.2d 1144, 1151, 189 Cal. Rptr. 855, 862 (1983). Although *Pope* involved a failure to assert the defense of diminished capacity, subsequent appellate decisions found ineffective assistance of counsel even though the attorney's incompetence did not constitute withdrawal of an actual defense. In *Fosselman*, the prosecution committed misconduct, which the California Supreme Court concluded was not harmless, and defense counsel failed to object to this misconduct. Since the conviction "turned largely on the respective credibility" of the victim and defendant, the supreme court found that it "is reasonably probable that a result more favorable to defendant would have occurred had the prosecutor refrained from the offensive conduct." The judgment was reversed and remanded with directions to the trial court to reconsider defendant's motion for a new trial on the grounds of ineffective assistance of counsel. *Id.* at 580-81, 659 P.2d at 1148-49, 189 Cal. Rptr. at 859-60. "In cases in which a claim of ineffective assistance of counsel is based on acts or omissions not amounting to withdrawal of a defense, a defendant may prove such ineffectiveness if he establishes . . . that it is reasonably probable that a determination more favorable to the defendant would have resulted in the absence of counsel's failings." *Id.* at 584, 659 P.2d at 1151, 189 Cal. Rptr. at 862.

127. See *supra* note 3 and accompanying text.

against Scott was weak. Meredith did not implicate Scott in the crime because Meredith relied on an alibi defense. Jacqueline Otis, who originally was charged as a co-defendant on the conspiracy count but who testified for the prosecution in return for an eventual dismissal of charges, also did not implicate Scott. She testified that the victim suggested that she walk with him to his car. The only witness implicating Scott at trial was Laurie Sam, a pregnant thirteen year old girl of limited intelligence, and her trial testimony contradicted her preliminary hearing testimony, which had not implicated Scott.¹²⁸

Without the location of the wallet in evidence, Scott probably could have successfully defended the conspiracy count by asserting his privilege against self-incrimination and discrediting the testimony of Laurie Sam. As the California Supreme Court pointed out, to “support the theory of conspiracy the prosecution sought to show the place where the victim’s wallet was found, and, in the course of the case this piece of evidence became crucial.”¹²⁹ After the investigator testified that he had found the wallet behind Scott’s residence, Scott had to make a Hobson’s choice between waiving his privilege against self-incrimination and explaining his apparent possession of the wallet, or not testifying and risking that the jury would draw an unfavorable inference from his apparent possession of the wallet. Scott believed that he had to testify to overcome Laurie Sam’s testimony that she overheard him tell Otis to lead the victim to his car so Meredith could “knock him in the head.” Scott admitted on the stand that he had originally agreed to participate in the robbery, but claimed that he had “backed out” because his fingerprints were on the victim’s car and he was afraid the police would discover them. Scott also admitted that after the shooting and after Meredith left the crime scene he removed the victim’s wallet. Confronted with the wallet in evidence and the investigator’s testimony about its location, Scott’s defense was that he did not participate in the conspiracy to rob the victim, and that when he later took the wallet, he was only guilty of theft or as an accessory after the fact, but not of robbery.¹³⁰

128. Appellant’s Opening Brief, filed December 16, 1977, at 8 (on file at California Supreme Court 350 McAllister St., San Francisco, CA 94102); *People v. Meredith*, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981).

129. *Meredith*, 29 Cal. 3d at 685-86, 631 P.2d at 48, 175 Cal. Rptr. at 614.

130. Appellant’s Opening Brief, at p.26. *Meredith*, 29 Cal. 3d at 682, 631 P.2d at 646, 175 Cal. Rptr. at 612. “Hobson’s choice: This or nothing; a choice with no alternative; in allusion to the practice of Thomas Hobson, 1544-1631, English Liveryman, who required each customer to take the horse nearest the door.” FUNK AND WAGNALLS NEW COMPREHENSIVE INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1973).

C. In re January 1976 Grand Jury

The issue of whether ineffective assistance of counsel results when an attorney produces implicating evidence received from a client in response to a subpoena duces tecum has not been decided. In the case of *In re January 1976 Grand Jury*,¹³¹ the attorney was served with a subpoena duces tecum for any money he had received from two clients, both of whom were suspected of a bank robbery. The attorney argued that the prosecution's attempt to subpoena him and make him the source of evidence against his clients impermissibly infringed upon their right to counsel. The prosecution argued that the defendants had no right to particular counsel and that the attorney could be replaced by equally competent counsel. Judge Pell recognized that compliance by the attorney with a subpoena duces tecum might "place him in the position of being a source of evidence against either or both of his clients."¹³² The judge expressed no opinion on the issue of whether the defendants, after having made the attorney a witness to their crime, could properly invoke the sixth amendment to bar the attorney's eyewitness testimony at trial. Judge Tone indicated, however, that "to ask that question is almost to answer it."¹³³

D. Malpractice

When an accused has a valid ineffective assistance of counsel claim, he may also have a valid malpractice cause of action. The District of Columbia Circuit has stated that "the legal standards for ineffective assistance of counsel in . . . criminal proceedings and for legal malpractice . . . are equivalent."¹³⁴ The competence prong of the California ineffective assistance of counsel test is very similar to the duty of care element in an action for attorney malpractice. A California attorney has the duty to apply ordinary

131. 534 F.2d 719 (1976).

132. *Id.* at 729. Judge Pell found that the right to counsel issue was too premature for consideration at the time of the hearing on the motion to quash the subpoena and prior to any other hearing. *Id.* at 730. In *State v. Sullivan*, 373 P.2d 474 (Wash. 1962), defense counsel and approximately twenty law enforcement personnel were present when the murder victim's body and the murder weapon were discovered and photographed. The prosecuting attorney sought to cross-examine defense counsel about this phase of the criminal investigation. The court concluded that defense counsel's testimony was "repetitious and not necessary to the state's case in the interest of justice and the protection of the public" which tilted the balance in the defendant's favor. The court concluded that defense counsel, as an unwilling witness for the state, "rendered his services less effective and invaded the accused's right to unhampered representation at the trial." *Id.* at 478. One potential limitation on counsel testifying about implicating evidence is that defense counsel should not be called to testify if there are numerous other witnesses so that his testimony would be repetitive, and the probative value of his testimony is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. CAL. EVID. CODE §352.

133. 534 F.2d at 731.

134. *McCord v. Bailey*, 636 F.2d 606, 609 (D.C. Cir. 1980).

care and skill, reasonable diligence, and his best judgment in his professional employment. When an attorney fails to fulfill this duty, he is negligent.¹³⁵ An attorney, however, is not liable for an error of judgment as long as the error is not attributable to negligence.¹³⁶ The other elements of legal malpractice are that in the absence of the attorney's negligence a more favorable result would have been obtained, and that as a result, the client has been damaged.¹³⁷

In *Meredith*, when Scott's first attorney sent the investigator to pick up the victim's wallet, that attorney did not commit malpractice. Scott's first attorney could not be held responsible for failing to foresee an unexpected development in the law.¹³⁸ In 1976, applicable case law indicated that a defense attorney could take possession of physical evidence for a reasonable period of time and then should deliver the evidence to law enforcement officials. The cases indicated, however, that the prosecution should not disclose the source of that evidence.¹³⁹ A clever defense counsel at that time might have thought that by turning over the evidence he might remove a link in the chain of evidence to his client because he could not be identified as the source of the evidence that had been produced. In 1976, it was unforeseeable that the California Supreme Court in the 1981 case of *Meredith* would extend the *Olwell* rule and judicially create an exception to the statutory attorney-client privilege, thereby formulating a unique and unprecedented rule.

After *Meredith*, when a California criminal defense attorney removes evidence without a good tactical reason and delivers it to law enforcement

135. BAJI 6.37; see *Lakoff v. Lionel Corporation*, 137 N.Y.S.2d 806, 808-09 (1955). The court held that a client stated a cause of action against his patent attorney for disclosing allegedly confidential information from the client to another client. *Id.*

136. *Smith v. Lewis*, 13 Cal. 3d 349, 358-59, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 627 (1975).

137. Apparently in California the client does not have to establish that he was innocent of the crime for which he was prosecuted in order to prevail in a legal malpractice action. In *Martin v. Hall*, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971), the defendant pleaded guilty to misdemeanors of disturbing the peace and carrying a concealed weapon in a vehicle. He commenced serving a 30 day jail sentence. Then in connection with the same incident he was charged with the felonies of assault with a deadly weapon and discharging a firearm into an inhabited dwelling. His attorney arranged with the trial court for psychiatric care, rather than incarceration, but he failed to appear at the sentencing hearing and was convicted and imprisoned for about four years. His attorney failed to raise the defenses of multiple prosecution and multiple punishment under California Penal Code section 654. The client won a \$20,000 malpractice judgment, but it was reversed because the trial court erroneously did not rule as a matter of law which defenses were legally available at the time of the criminal trial. *Id.* at 417-19, 427-28, 97 Cal. Rptr. at 731-33, 739.

138. *Ruchti v. Goldfein*, 113 Cal. App. 3d 928, 934, 170 Cal. Rptr. 375, 378 (1980) (Hrg. denied Feb. 18, 1981). The court stated: "We do not believe any attorney should be held to have foreseen the 180 degree shift in the law in this area." *Id.* at 934, 170 Cal. Rptr. at 378.

139. Scott's first attorney hired independent counsel to prepare and argue a motion to suppress introduction of the wallet or testimony by Scott's first attorney or the investigator about the location of the wallet. The principal authority relied on was *State v. Olwell*, 394 P.2d 681 (Wash. 1964). *People v. Scott*, Sacramento Municipal Court file no. 31738F (on file at Sacramento County Courthouse, 720-9th Street, Sacramento, CA 95814).

officials, the attorney may have committed malpractice. If the location of the evidence is crucial to the conviction of his client and the attorney must disclose that location, he will have acted negligently by removing the evidence. In a factual situation similar to *Meredith*, the client might be able to prove that but for the turning over of the evidence and the disclosure of its location, he would have been acquitted.¹⁴⁰

IV. IMPERMISSIBLE CONSTITUTIONAL TENSION ANALYSIS

One commentator has argued that the *Olwell* turnover rule and the *Meredith* exception to the attorney-client privilege create a constitutionally impermissible tension between the defendant's privilege against self-incrimination and his right to effective assistance of counsel. This commentator believes that requiring defense counsel to turn over the evidence and divulge its location compels the accused to choose between telling or not telling his attorney about the existence and location of the evidence. If the accused tells the attorney, who then removes or alters the evidence, turns the evidence over to law enforcement officials, and divulges its location or condition, the accused in effect, is denied his privilege against self-incrimination. If the accused does not tell his attorney and the attorney therefore cannot fully investigate the defense, the accused is denied effective assistance of counsel.¹⁴¹ This commentator's argument, however, is currently of doubtful legal validity and ignores some of the practicalities of criminal defense representation.

A. *Simmons v. United States*

The constitutionally impermissible tension analysis derives from the United States Supreme Court decision in *Simmons v. United States*.¹⁴² In

140. Three principal defenses are available in a legal malpractice action. First, if the defendant unsuccessfully raised the same error in a petition for a writ of *habeas corpus* or a motion for a writ of error *coram nobis*, he would be collaterally estopped. *McCord*, 636 F.2d at 610. Collateral estoppel "prohibits parties who have litigated one cause of action from re-litigating in a second and different cause of action matters of fact which were, or necessarily must have been, determined in the first litigation." *Id.* at 608. Scott filed a writ of error *coram nobis* with the California Supreme Court (copy on file at California State Archives, 1020 - "0" Street, Sacramento, CA. 95814). Secondly, if the client inaccurately or incompletely disclosed information upon which the attorney decided to take possession of the evidence, the defense of contributory negligence would be available. *Martin*, 20 Cal. App. 3d at 428, 97 Cal. Rptr. at 739. Thirdly, if the client due to his own misconduct, was denied parole or placed under more severe restrictions in his place of incarceration, he would have failed to mitigate damages. *Id.*

141. Note, *People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights*, 70 CAL. L. REV. 1048, 1051-64 (1982); see also Comment, *Extending the Attorney-Client Privilege: A Constitutional Mandate*, 13 PAC. L.J. 437, 437-57 (1982).

142. 390 U.S. 377 (1968).

Simmons, the defendant was indicted for bank robbery. Without a warrant, evidence was seized from a suitcase found in the basement of a house belonging to the mother of the defendant's friend. In support of a motion to suppress this evidence on fourth amendment grounds, the defendant testified that the suitcase belonged to him. The motion to suppress was denied. At trial, the defendant's testimony about his ownership of the suitcase was introduced by the prosecution. After his conviction, the defendant contended on appeal that admission of his suppression motion testimony at trial on the issue of guilt forced him to waive his privilege against self-incrimination for the opportunity to raise a fourth amendment claim. Justice Harlan, the author of the majority opinion, wrote:

[The defendant] was obliged either to give up what he believed . . . to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.¹⁴³

Several courts have followed *Simmons*, and consequently, have also found a constitutionally impermissible tension in forcing a defendant to choose between his constitutional rights.¹⁴⁴

The *Simmons* impermissible tension analysis, however, has been limited by a subsequent United States Supreme Court decision. In *McGautha v. California*,¹⁴⁵ the Court held that a unitary murder trial does not create an impermissible tension between the defendant's fourteenth amendment due process right to be heard on the issue of punishment and his fifth amendment privilege against self-incrimination on the issue of guilt. The defendant argued that the unitary trial deprived him of his right to be heard on the extent of his punishment without having his testimony on that issue used against him in the guilt phase of the trial. In the majority opinion in *McGautha*, Justice Harlan, who also wrote the majority opinion in *Simmons*, stated "[t]o the extent that its [*Simmons*] rationale was based on a 'tension' between constitutional rights . . . , the validity of that reasoning must now be regarded as open to question."¹⁴⁶ In another case

143. *Id.* at 394.

144. See *United States v. Anderson*, 567 F.2d 839, 840-41 (8th Cir. 1977); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087 (5th Cir. 1979).

145. 402 U.S. 183 (1971).

146. *Id.* at 212. One commentator has distinguished *McGautha* from *Simmons* on three grounds: (1) *Simmons* involved a conflict between two provisions of the Bill of

in which the Court found the choice between constitutional rights acceptable, the United States Supreme Court stated that the Constitution [does not] forbid “. . . every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.”¹⁴⁷

B. Criticism

Even if the impermissible constitutional tension doctrine is still legally viable, it is of limited practical applicability in the implicating evidence context. First, most criminal defendants are probably unaware of tensions between their constitutional rights, and will not be influenced by the possibility of such a tension in communicating with their attorneys. Second, competent defense counsel will not automatically take possession of, remove, or alter the implicating evidence and turn it over to law enforcement officials, nor disclose its location or condition. As previously discussed, a competent attorney would have the evidence examined by an investigator without removing or altering it, discuss with the client the advantages and disadvantages of removing the evidence and testing it, and decide with the client what action to take. Whether to remove evidence that must then be turned over to the prosecution and its location and condition divulged is a tactical decision.¹⁴⁸ The impermissible constitutional tension doctrine is of limited applicability for a third reason. In *Meredith*, the California Supreme Court suggested a stipulation procedure that in most cases avoids an impermissible tension between the defendant's exercise of his fifth and sixth amendment rights. The court stated that the prosecution and defense should stipulate to the presentation of the evidence and testimony about its location in a manner that would not forge an incriminating link in the chain of evidence to the defendant through the attorney or investigator.¹⁴⁹ Fourth, the defendant, if convicted because of incompetence by his counsel in removing or altering, and disclosing the location or condition of evidence, can assert on appeal a violation of his right to effective assistance of counsel.¹⁵⁰

Rights; (2) the court in *McGautha* decided in substance that the unitary trial did not violate either the fifth or fourteenth amendment; (3) if a tension existed in *McGautha*, it involved a mid-trial choice between constitutional rights that is caused by the strength of the prosecution case, while *Simmons* involved a pretrial choice between constitutional rights that is caused by rules or procedures. Note, *supra* note 141, at 1056 n.47. See Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 741-75 (1981).

147. *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973).

148. *Meredith*, 29 Cal. 3d at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620.

149. *Id.* at 695 n.8, 631 P.2d at 54 n.8, 175 Cal. Rptr. at 620 n.8.

150. See *Morrell*, 575 P.2d at 1206.

V. CRIMES

In dealing with implicating evidence, California defense counsel may commit one or more of several crimes. Defense counsel must be careful not to conceal evidence, or conspire with the client to conceal evidence. Depending on his advice or conduct, the attorney may also become an accessory to the crime. Although the attorney does not take possession of evidence from a third party, he may be guilty of conspiring to withhold information, depending on the advice he gives to the third party. When his client is charged with theft, burglary, or a similar crime, the attorney can be convicted of receipt of stolen property if he takes possession of the pilfered items. Moreover, when examining evidence, the attorney and his investigator must be careful not to alter it so as to commit the crime of tampering with evidence.

A. *Destruction or Concealment of Evidence*

California Penal Code section 135 provides that any person who wilfully destroys or conceals a specified type of writing or "other matter or thing," knowing it is about to be produced as evidence in any investigation, inquiry, or trial, and intending to prevent its production, is guilty of a misdemeanor.¹⁵¹ The language "other matter or thing" in the statute has been interpreted to include contraband,¹⁵² narcotics,¹⁵³ weapons,¹⁵⁴ photographs, and other physical evidence.¹⁵⁵

151.

Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, wilfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

CAL. PENAL CODE §135.

152. *People v. Fields*, 105 Cal. App. 3d 341, 343, 164 Cal. Rptr. 336, 337 (1980). Although the heading of Penal Code section 135 refers to "destroying or concealing documentary evidence," section headings in the Penal Code are not "deemed to govern, limit, modify or in any manner affect the scope, meaning or intent of the . . . section." CAL. PENAL CODE §10004. California penal statutes are to be construed ". . . according to the fair import of their terms, with a view to effect (their) objects and to promote justice." CAL. PENAL CODE §4.

A statute is to be given a reasonable and common sense construction in accordance with its apparent purpose and the intent of the Legislature—one that is practical rather than technical and that will lead to a wise policy rather than to mischief or an absurdity. . . . The legislative intent should be gathered from the whole statute rather than from isolated parts or words. All of the parts should be construed together if possible without doing violence to the language or spirit of the statute.

105 Cal. App. 3d 341, 343-49, 164 Cal. Rptr. 336, 337-38 (1980).

153. *People v. Mijares*, 6 Cal. 3d 415, 491 P.2d 1115, 99 Cal. Rptr. 139 (1971).

154. *People v. Santos*, 26 Cal. App. 3d 397, 403, 102 Cal. Rptr. 678, 679-81 (1972) (gun); *People v. Lee*, 3 Cal. App. 3d 514, 83 Cal. Rptr. 715, 722 (1970) (shoes worn by defendant in kicking victim).

155. *People v. Superior Court (Reilly)*, 53 Cal. App. 3d 40, 125 Cal. Rptr. 504, 511 (1975) (photographic material, wallet and check container).

The knowledge and wilfulness required for a violation of Penal Code section 135 do not include knowledge of the statute or a specific intent to violate the statute. "Knowingly" connotes only knowledge that facts exist which bring the act within the statute; knowledge of the unlawfulness of the act is not required.¹⁵⁶ "Wilfully" implies an intent or willingness to commit the act of destruction or concealment, not any intent to violate the statute.¹⁵⁷

Whether an item is "about to be produced in evidence" so that its destruction or concealment will violate California Penal Code section 135 requires "an immediacy or temporal closeness."¹⁵⁸ The statute applies to evidence that is to be produced in any "investigation whatever," even though formal legal proceedings have not been commenced. For example, the seizure and examination of marijuana by an officer in a jail is a sufficient investigation because it must be presumed the evidence would be used in a future prosecution.¹⁵⁹ The statute also applies when a counterfeiter in fear of imminent disclosure or arrest tries to hide his work product from approaching officers,¹⁶⁰ when officers are enroute with a search warrant;¹⁶¹ and when a defendant, already charged with a crime, tells someone to dispose of the evidence.¹⁶² In contrast, one court has stated that the statute should not apply to the disposal of drugs prior to the commencement of any police investigation.¹⁶³ Another court has held the statute does not apply to defendants who, shortly after the crime, burned clothes worn by them during commission of the crime.¹⁶⁴

The term "destroy" has not been defined by a California court in construing Penal Code section 135. Generally, "to destroy" means to "tear

156. CAL. PENAL CODE §7(5); *In re Smith*, 7 Cal. 3d 362, 497 P.2d 807, 102 Cal. Rptr. 335 (1972).

157. CAL. PENAL CODE §7(1).

158. *People v. Prysock*, 127 Cal. App. 3d 972, 1000, 180 Cal. Rptr. 15, 31 (1982).

The statute requires that the actor know that the object is *about to be* produced in evidence. We conclude that whatever the statute's exact meaning, the evidence herein falls short because the prosecution failed to show that any law enforcement investigation in fact had started and/or that law enforcement was or would be looking for the particular item. Unless this or a similar limiting interpretation is given, the statute would appear virtually open ended, at least in all but 'victimless' crimes.

Id. at 1001, 180 Cal. Rptr. at 31.

159. *People v. Fields*, 105 Cal. App. 3d 341, 345-46, 164 Cal. Rptr. 336, 339 (1980).

160. *People v. Superior Court (Reilly)*, 53 Cal. App. 3d 40, 48-49, 125 Cal. Rptr. 504, 508-11 (1975) (police officer looking through a motel window saw defendant's confederate working with a camera and drivers license and after officers announced their presence, defendant was seen hiding a wallet and what appeared to be a travelers check container).

161. *Prysock*, 127 Cal. App. 3d at 1000, 180 Cal. Rptr. at 31.

162. *People v. Santos*, 26 Cal. App. 3d 397, 402-03, 102 Cal. Rptr. 678, 680-82 (1972).

163. *People v. Fields*, 105 Cal. App. 3d 341, 346 n.4, 491 P.2d 1115, 1119-20 n.4, 164 Cal. Rptr. 336, 339-40 n.4. In *People v. Mijares*, 6 Cal. 3d 415, 422, 491 P.2d 1115, 99 Cal. Rptr. 139 (1971), the defendant leaned inside a parked car, removed an object, and threw it into a nearby field, while being watched by a witness.

164. *Prysock*, 127 Cal. App. 3d at 1001, 180 Cal. Rptr. at 31.

down, wrench apart, knock or pull to pieces.”¹⁶⁵ However, a New York court, construing a statute similar to Penal Code section 135, held that disassembling a murder weapon and burying it constituted concealment, not destruction.¹⁶⁶ The California Supreme Court in *Meredith* did not discuss Penal Code section 135, but gave the meaning of destruction of evidence a unique twist in the context of the attorney-client privilege. The court stated that barring admission of testimony concerning the original condition and location of evidence altered or removed by an accused’s attorney would in effect permit the defense “to ‘destroy’ critical information because the prosecution would be deprived of the opportunity to observe the evidence in its original condition or location.”¹⁶⁷

California courts have construed the word “conceal” to require affirmative conduct. The word “conceal” pertains to affirmative action likely to prevent or intended to prevent knowledge of fact; the act of concealment results in some advantage to the concealing party or disadvantage to an interested party from whom the fact is withheld.¹⁶⁸ If a person requests the opportunity to consult an attorney for advice about whether or not to produce evidence, however, he has not concealed evidence.¹⁶⁹

Apparently, delivery of evidence to an attorney and his possession of it for a reasonable period of time in preparing a defense does not constitute concealment of evidence under California Penal Code section 135. In

165. *George v. McManus*, 27 Cal. App. 414, 416, 150 P. 73, 76-77 (1915). Flushing the evidence down a toilet constitutes destruction of evidence. *People v. Fields*, 105 Cal. App. 3d at 347, 164 Cal. Rptr. at 340.

166. *People v. DeFelice*, 282 App. Div. 514, 125 N.Y.S.2d 80, 82 (1953).

167. *Meredith*, 29 Cal. 3d at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

168. *Mitchell v. Locutro*, 79 Cal. App. 2d 507, 514, 179 P.2d 848, 851 (1947). The common definition of conceal is to “. . . hide or withdraw from observation; to cover or keep from sight.” It does not necessarily mean that the object may not be located or found by reasonable means of discovery. *People v. One 1940 Oldsmobile Coupe*, 80 Cal. App. 2d 372, 376-77, 181 P.2d 950, 952 (1947) (placing a case of liquor on a small back seat of a locked coupe effectively withdrew it from observation and constituted a concealment under the Alcoholic Beverage Control Act); *People v. Nicholas*, 403 N.Y.S.2d 683, 684 (1978) (moving a murder victim’s body in order to prevent the murderer’s detection by law enforcement authorities held to be concealment under the New York suppression of evidence statute); see also *People v. Eddington*, 201 Cal. App. 2d 574, 576-77, 20 Cal. Rptr. 122, 124 (1962).

169. *People v. Edgar*, 60 Cal. 2d 171, 383 P.2d 449, 32 Cal. Rptr. 41 (1963). A jailer overheard a prisoner tell his mother to hide pictures which might be important to his defense. When the mother arrived home, she was met by two police officers. They asked her for the pictures. The mother said that she did not know what she should do and that she thought she should contact an attorney. After being told several times that if she did not turn over the pictures she would be booked for withholding evidence, the mother found the pictures and gave them to the officers. In discussing the contention that the pictures were obtained illegally, Justice Traynor concluded that the mother neither violated nor attempted to violate Penal Code section 135. The “mother did no more than return home from the jail. At most the officers had reasonable cause to believe that she intended to violate section 135 in the future. She obviously did not intend to hide or attempt to hide the pictures in their presence. It is equally clear that she did not conceal the pictures within the meaning of the statute by her initial refusal to give them to the officers.” *Id.* at 174, 383 P.2d at 451, 32 Cal. Rptr. at 43.

People v. Lee,¹⁷⁰ the accused's wife turned over the instrumentality of the crime to the public defender's office. Upon being relieved as attorney of record, the deputy public defender with the agreement of the deputy district attorney delivered the evidence to a municipal court judge. The appellate court noted that an accused may not "permanently sequester physical evidence" by delivering it to his attorney. The court quoted Penal Code section 135, but did not indicate that the deputy public defender's actions violated that statute. The court also approvingly quoted the dicta in *Olwell* that the attorney may retain evidence for a reasonable period of time in preparation of a defense, but then on his own motion must turn the evidence over to the prosecution.¹⁷¹

While a California court has not thoroughly analyzed Penal Code section 135 in connection with an attorney's possession or knowledge of implicating evidence, the Alaska Supreme Court in *Morrell* specifically, but incorrectly, analyzed a similar statute in this context. The Alaska statute provided criminal penalties for a person who wilfully destroyed, concealed, or altered evidence relating to the commission of a crime or evidence being sought for production during an investigation, inquiry, or trial with the intent to prevent its discovery or production.¹⁷² The Alaska Supreme Court found that the deputy public defender "could have reasonably concluded" that this statute "required him to reveal the existence" of the kidnap plan.¹⁷³ The court stated:

While statutes which address the concealing of evidence are generally construed to require an affirmative act of concealment in addition to the failure to disclose information to the authorities, taking possession of evidence from a non-client third party and holding the evidence in a place not accessible to investigating authorities would seem to fall within the statute's ambit.¹⁷⁴

170. 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (1970).

171. *Id.* at 526, 83 Cal. Rptr. at 722.

172. ALASKA STAT. §11.30.315 (repealed effective January 1, 1978). "A person who wilfully destroys, alters or conceals evidence concerning the commission of a crime or evidence which is being sought for production during an investigation, inquiry or trial, with the intent to prevent the evidence from being discovered or produced, is guilty of a misdemeanor. . . ." Cf. ALASKA STAT. §11.56.610(a)(1) (Supp. 1978) (which prohibits destruction of evidence regardless of the time of the act).

173. 575 P.2d at 1211-12.

174. *Id.* at 1212. The court did not cite cases from any jurisdiction construing statutes similar to the Alaska concealment of evidence statute, such as California Penal Code section 135, to require an affirmative act of concealment. The court cited federal cases construing the federal misprision statute to require an affirmative act of concealment in addition to a failure to disclose a crime to the proper authorities. "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States. . ." is guilty of a misprision. 18 U.S.C. §4. The elements of misprision are: (1) one or more of the principals had committed and completed the described crime; (2) defendant had full knowledge of that fact; (3) defendant failed to notify the authorities; and (4) defendant took an affirmative step to conceal the crime.

No evidence existed of any intent by deputy public defender Cline to prevent discovery of the pad on which the kidnapping plan had been printed. Actually, Cline kept the pad only a short period of time before returning it to his client's friend, Wagner. Cline returned the pad to Wagner while at the defendant's residence, and after law enforcement officials had failed to find the pad when conducting a search pursuant to a warrant. Although Wagner wanted to leave the Fairbanks area to work on the Alaska pipeline, no evidence was produced to indicate he intended to destroy or conceal the pad.¹⁷⁵

B. Conspiracy to Obstruct Justice

Even though obstruction of justice is not a crime in California, conspiracy to obstruct justice is a statutory crime.¹⁷⁶ Specifically, it is a crime for two or more persons to conspire ". . . to pervert or obstruct justice, or the due administration of the laws."¹⁷⁷ Conspiracies that fit within this statute include conspiracies to destroy or conceal evidence, bribe witnesses, commit perjury, falsify evidence, and compound or conceal a crime.¹⁷⁸

C. Accessory

If a California attorney assists a client in concealing evidence of a felony, he may be convicted as an accessory to the felony. Every person who

United States v. King, 402 F.2d 694, 695 (9th Cir. 1968). Common law misprison of felony is "the concealment of a felony which a man knows, but never assented to; for, if he assented, this makes him either principal or accessory." 4 W. BLACKSTONE, COMMENTARIES 121 (1st Ed. 1903). Misprison of felony is not a crime in California.

175. *Morrell*, 575 P.2d at 1203-04, 1207.

176. See *Agnew v. Parks*, 172 Cal. App. 2d 756, 766, 343 P.2d 118, 124 (1959) (concealing or withholding documentary evidence was a common law crime of obstruction of justice).

177. CAL. PENAL CODE §182(5). Usually, "conduct which constitutes an offense against public justice, or the administration of law includes . . . anything done by a person in hindering or obstructing an officer in the performance of his official obligations. . . ." *Lorenson v. Superior Court*, 35 Cal. 2d 49, 59, 216 P.2d 859, 865 (1950). Unlike under the federal obstruction of justice statute, an "evil or corrupt motive" is not required in California. *People v. Saugstad*, 203 Cal. App. 2d 536, 542, 21 Cal. Rptr. 740 (1962). The federal obstruction of justice statute encompasses anyone who ". . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice. . . ." 18 U.S.C. §1503. Anyone who intentionally withholds or destroys tangible evidence, which he knows to be the target of a grand jury investigation can reasonably be said to be one "who corruptly . . . obstructs, or impedes or endeavors to influence, obstruct, or impede the due administration of justice." *United States v. Walasek*, 527 F.2d 676, 679 (3d Cir. 1975).

178. *Lorenson v. Superior Court*, 35 Cal. 2d 49, 216 P.2d 859 (1950); *Davis v. Superior Court*, 175 Cal. App. 2d 8, 16, 345 P.2d 513 (1959); *People v. Martin*, 135 Cal. App. 3d 710, 721, 185 Cal. Rptr. 556, 562 (1982). See CAL. PENAL CODE §§134, 135, 137, 138, 153. *People v. Horn*, 12 Cal. 3d 290, 524 P.2d 1300, 115 Cal. Rptr. 516 (1974); *Feagles v. Superior Court*, 11 Cal. App. 3d 735, 90 Cal. Rptr. 197 (1970). Conviction of obstruction of justice is a crime involving moral turpitude which results in disbarment. See, e.g., *In re Craig*, 12 Cal. 2d 93, 82 P.2d 442 (1938).

knowingly aids the perpetrator of a felony with intent that the criminal avoid or escape arrest, trial, conviction or punishment, is an accessory to the felony.¹⁷⁹

Attorneys in Virginia and Texas have been found to be accessories to crimes because of their actions with respect to implicating evidence. The Fourth Circuit Court of Appeals in the case of *In re Ryder*¹⁸⁰ stated that attorney Ryder became an accessory after the fact when he transferred a weapon and bank robbery proceeds from his client's safe deposit box to an adjacent box in his own name. If the authorities located his box, Ryder planned to assert the attorney-client privilege and break the chain of evidence to his client.¹⁸¹ The court stated: "Ryder 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."¹⁸²

In the Texas case, *Clarke v. State*,¹⁸³ an attorney advised his client to dispose of the murder weapon. The Texas statute provided that one who knows that an offense has been committed and conceals the offender or aids him in avoiding arrest or trial becomes an accessory. An exception provided that a person who aids an offender in making or preparing his defense is not an accessory. The court found that advising the client to dispose of the weapon could not constitute aid in making or preparing a defense, but that it did constitute conduct that enabled the perpetrator of the crime to avoid arrest or trial.¹⁸⁴

D. Receiving Stolen Property

When the client has committed robbery, burglary, theft, extortion, or a similar crime, defense counsel must be careful not to commit the crime of receiving stolen property when dealing with the fruits of the crime. Any

179. CAL. PENAL CODE §32 provides:

Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

Id. See also *Ex parte Goldman*, 88 P. 819 (Cal. 1906) (defendant indicted for being an accessory to the concealment of stolen property).

180. 381 F.2d 713 (4th Cir. 1967); see *Serving Two Masters*, *supra* note 1, at 145 (for a detailed discussion of the facts of this case based on the trial transcript). In *State Ex. Rel Oklahoma Bar Ass'n. v. Harlton*, 669 P.2d 774, 777 (Okla. 1983) the Oklahoma Supreme Court stated that the attorney who had concealed a weapon used by his client in the commission of a crime, "embraced the role of an accessory to a crime. . . ." Under Federal law, "whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact." 18 U.S.C. §3.

181. 381 F.2d at 714.

182. *Id.*

183. 261 S.W.2d 339 (Tex. 1953).

184. *Id.* at 347.

person who receives property that has been stolen or obtained in any manner constituting theft or extortion with the knowledge that the property was stolen, or anyone who conceals, withholds, or aids in concealing or withholding the property from the owner knowing that it has been stolen or obtained by extortion, is guilty of the crime of receiving stolen property.¹⁸⁵ Possession of stolen property is not established by mere access or proximity to the stolen goods; dominion and control must be shown.¹⁸⁶ To establish concealment, all that need be shown is that the whereabouts of the property was concealed from the rightful owner.¹⁸⁷

E. Tampering

When an attorney or investigator examines and leaves evidence where it was found, he must be careful not to commit the crime of tampering with evidence. The California Supreme Court in *Meredith* inferred that an attorney or his investigator may examine the evidence.¹⁸⁸ Penal Code sec-

185. CAL. PENAL CODE §496(1) provides in part:

Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison, or in a county jail for not more than one year. . . .

Id. The elements of receiving stolen property are: (1) property was received, concealed or withheld by the accused; (2) the property had been obtained by theft or extortion; and (3) the accused knew that the property had been so obtained. *People v. Kunkin*, 9 Cal. 3d 245, 249 507 P.2d 1392, 1395, 107 Cal. Rptr. 184, 187 (1960). In *In re Ryder*, 263 F. Supp. at 369, the Federal District Court concluded that Ryder by taking possession of the bank robbery proceeds had violated the Virginia larceny statute, which was very similar to the California receipt of stolen property statute. Virginia Code Section 18.1-107 (1950) (repealed by Acts 1960, c. 358) provided:

If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted.

It is also a federal crime to receive, possess, conceal, store, barter, sell, or dispose of any property or money or thing of value knowing to have been taken from a bank or a savings and loan association. 18 U.S.C. §2113(c). In *People v. Wurbs*, 347 N.E.2d 879 (Ill. 1976) the attorney was convicted of conspiracy to commit theft for arranging return of stolen property for a percentage of the reward collected. The court stated: "Defendant's status as an attorney cannot give him the right to do acts which would be criminal if performed by a layman." *Id.* at 883.

186. *People v. Myles*, 50 Cal. App. 3d 423, 429, 123 Cal. Rptr. 348, 351 (1975).

187. *Williams v. Superior Court*, 81 Cal. App. 3d 330, 346, 146 Cal. Rptr. 311, 320 (1978).

188. "We must recognize, however, that in some cases an examination of evidence may reveal information critical to the defense. . . ." *Meredith*, 29 Cal. 3d at 693 n.7, 631 P.2d at 53 n.7, 175 Cal. Rptr. at 619 n.7. Examine means: "1. To inspect closely; to test the condition of; to inquire carefully." WEBSTER'S NEW COLLEGIATE DICTIONARY 397 (4th ed. 1974). One source states:

Exercise care in picking up objects at a crime scene. Do not pick up objects with a handkerchief, since prints or microscopic particles adhering to it can inadvertently be removed. Rather, use the thumb and middle finger to pick up the object by a portion least likely to retain prints. For example, the grips of a revolver with a corrugated surface from which no prints can be obtained. Otherwise, a pencil can be inserted through the trigger guard.

tion 135 does not specify altering or tampering with evidence as criminal conduct.¹⁸⁹ Under the Model Penal Code, however, a person is guilty of tampering with evidence when "... believing that an official proceeding or investigation is pending or about to be instituted, [the person] . . . alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation"¹⁹⁰

F. Miscellaneous Crimes

While most California attorneys probably are aware of the crimes of destruction or concealment of evidence, conspiracy to obstruct justice, accessory to the felony, and receipt of stolen property, they may not be aware of lesser known crimes.¹⁹¹

1. Compounding

If a California attorney as part of his fee arrangement agreed to withhold any evidence of the crime in his possession that under *Meredith* should be turned over to law enforcement officials, the attorney might be

F.L. BAILEY AND H.B. ROTHBLATT, INVESTIGATION AND PREPARATION OF CRIMINAL CASES: FEDERAL AND STATE §392, at 336 (1970). Another authority states: "Evidence must be packaged so as to avoid breakage, loss, or contamination in transit. Tweezers, forceps, and similar tools are used to collect and place traces and small items in their containers. Rubber gloves are suggested for handling some physical evidence." P. WESTON AND K. WELLS, CRIMINAL INVESTIGATION BASIC PERSPECTIVE 90 (2nd ed. 1974) (also discussing how to handle particular types of evidence).

189. CAL. PENAL CODE §135. With respect to the term "tamper" in California Vehicle Code section 10852, which makes it a crime to break or remove vehicle parts, the California Supreme Court stated that an accepted definition of tamper is "to interfere with." *People v. Anderson*, 15 Cal. 3d 806, 810, 543 P.2d 603, 606, 126 Cal. Rptr. 235, 238 (1975).

190. MODEL PENAL CODE §241.7(1) (Proposed Official Draft 1962); see *State v. Fisher*, 103 N.W.2d 325, 328 (Neb. 1960) (defense attorney suspended for one year for obstructing justice because during trial recess he forced wooden dowel through bullet hole in murder victim's belt in order to enlarge it; whether .22 caliber bullet passed through the hole was crucial to the prosecution's case); see *People v. Nicholas*, 417 N.Y.S.2d 495, 496 (Sup. Ct., 1979) (holding that helping to remove the victim's body from the scene of the murder and driving away with the body propped up between two individuals constitutes tampering with physical evidence).

191. There are numerous other crimes that apply to implicating evidence situations. Possession of a sawed-off shotgun is a violation of the Federal illegal possession of sawed-off shotgun statute. 26 U.S.C. §5861. California has a similar statute, which provides that any person who possesses any instrument or weapon such as a sawed-off shotgun is guilty of a felony. CAL. PENAL CODE §12020. When the two upstate New York attorneys failed to report the existence of two human bodies, one of them was prosecuted for violation of two obscure New York public health statutes dealing with reporting a death without medical attendance and burial of human remains. *People v. Belge*, 372 N.Y.S. 2d 798, 865 (1976); N.Y. PUB. HEALTH LAW §§4200(1), 4143. California has a statute, which provides that with the exception of cremated remains "every person who deposits or disposes of any human remains, in any place within the corporate limits of any city, or city and county, except in a cemetery, is guilty of a misdemeanor." CAL. HEALTH & SAFETY CODE §7054. It is also illegal in California to possess certain controlled substances. CAL. HEALTH & SAFETY CODE §11377.

guilty of compounding. When a person accepts something of value under an unlawful agreement to conceal or withhold evidence of the crime, he is guilty in California of compounding the original crime. The elements of compounding are: (1) knowledge of the commission of the original crime; (2) an agreement not to report or prosecute that crime or to withhold any evidence of it; and (3) the receipt of consideration.¹⁹² Compounding depends on an agreement not to act or give evidence. In contrast, being an accessory to a crime requires concealment, destruction, or tampering with evidence, which is affirmative conduct.¹⁹³

2. *Withholding Information*

If a California attorney persuades a third party to withhold information about a crime from the police, he commits a crime. It is a misdemeanor to knowingly induce another person "to withhold true material information pertaining to a crime from . . . a law enforcement official."¹⁹⁴ The statute apparently does not apply to physical evidence or "other things," which fall within the ambit of Penal Code section 135. Generally, information is defined as: "something told; news; intelligence; word; knowledge acquired in any manner; facts; data; learning; lore . . ."¹⁹⁵ Furthermore, this statute by its own terms is expressly not applicable "to any attorney

192. CAL. PENAL CODE §153 provides:

Every person who, having knowledge of the actual commission of a crime, takes money or property of another, or any gratuity or reward, or any engagement, or promise thereof, upon any agreement or understanding to compound or conceal such crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof, except in the cases provided for by law, in which crimes may be compromised by leave of court, is punishable. . . .

Id. In *People v. Pic'l*, 31 Cal. 3d 731, 743-45, 646 P.2d 847, 853-55, 183 Cal. Rptr. 685, 692-93 (1982), the California Supreme Court held that an attorney who prepared a nonprosecution agreement for execution by a crime victim was guilty of compounding because the attorney received the promise of a fee and also cash from the victim. The court reasoned that the attorney fitted within the statutory language of "every person" who takes money or other "reward . . . or promise thereof . . . upon any agreement or understanding to compound" a crime. *Id.* In *In re Friedland*, 280 A.2d 183 (1971), attorneys under threat of a malicious prosecution suit negotiated a settlement of their client's loanshark agreement in return for the dropping of criminal charges. The court held that the lawyers acted unethically in thwarting the criminal process.

Compounding can be distinguished from common law misprision in that an agreement is required in compounding, but not in misprision. Also misprision, unlike compounding, does not require a consideration as an element. Lipson, *Compounding Crimes: Time for Enforcement*, 27 HASTINGS L.J. 175, 181-82 (1975).

193. Lipson, *supra* note 192, at 179.

194. CAL. PENAL CODE §137(c) provides:

Every person who knowingly induces another person to give false testimony or withhold true testimony not privileged by law or to give false material information pertaining to a crime to, or to withhold true material information pertaining to a crime from, a law enforcement official is guilty of a misdemeanor.

Id. Law enforcement officials include deputy sheriffs, policemen, California highway patrolmen, parole, probation, and other officers designated in Chapter 4.5 of Title 3 of Part 2 of the Penal Code commencing with Section 830. CAL. PENAL CODE §137(e).

195. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1160 (1971).

advising a client.”¹⁹⁶ An attorney, however, should advise third parties to answer questions about evidence asked by law enforcement officials as long as they can do so without incriminating themselves.

3. *Deceit or Collusion*

If a California attorney commits “any deceit or collusion, or consents to any deceit or collusion with intent to deceive the court or any party,” he is guilty of a misdemeanor.¹⁹⁷ Deceit can be “negative as well as affirmative; it may consist in suppression of that which it is one’s duty to declare, as in the declaration of that which is false.”¹⁹⁸ Collusion has been defined as a “secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose.”¹⁹⁹

VI. ETHICAL DUTIES

While walking the professional tightrope between avoiding personal criminal conduct and protecting the accused’s constitutional rights, defense counsel has conflicting ethical duties in dealing with implicating evidence. On the one hand, the attorney has ethical duties to obey the law, to employ only measures consistent with truth, and to avoid suppressing evidence. On the other hand, the attorney has the ethical duties of preserving his client’s confidences and secrets, and representing his client zealously and competently. When the client persists in conduct such as concealing evidence, which may involve the attorney in unethical behavior, the attorney may have an ethical duty to withdraw from representation of the cli-

196. CAL. PENAL CODE §137(f).

197. CAL. BUS. & PROF. CODE §6128(a). The California Supreme Court has found violations of this statute in several disciplinary cases: (1) *Sullins v. State Bar*, 15 Cal. 3d 609, 622, 542 P.2d 531, 639, 125 Cal. Rptr. 471, 479 (1975) (failure to disclose in petition for approval of contingency fee in will contest that beneficiary of will had wanted property to go to will contestant); (2) *Snyder v. State Bar*, 18 Cal. 3d 289, 555 P.2d 1104, 133 Cal. Rptr. 864, 867 (1976) (filing involuntary bankruptcy petitions containing false allegations and obtaining an *ex parte* order while knowingly failing to disclose its intended use); (3) *Jackson v. State Bar*, 23 Cal. 3d 509, 591 P.2d 47, 153 Cal. Rptr. 24, 26 (1979) (filing false accountings with probate court with intent to deceive). In *Price v. State Bar*, 30 Cal. 3d 537, 543-48, 638 P.2d 1311, 1314-17, 179 Cal. Rptr. 914, 917-19 (1982), a murder prosecution, defense counsel made at least two pretrial requests for discovery of all pertinent evidence from the prosecution. Deputy District Attorney Price assured defense counsel that all the requested information had been furnished. During cross-examination of a cab driver, who was a prosecution witness, defense counsel discovered that the witness had prepared a “trip ticket” for his fares around the time of the murder. This ticket had not been produced pursuant to the request for discovery. The deputy district attorney altered his copy of the ticket and provided defense counsel with a copy of the altered copy. His motive was to mislead defense counsel, and prevent use of the original ticket or an unaltered original to impeach the cab driver. The supreme court held that the Deputy District Attorney had violated California Business and Professions Code section 6128(a).

198. *MacDonald v. DeFrenery*, 168 Cal. 189, 203, 142 P. 73, 79 (1914).

199. *Hone v. Climatrol Industries, Inc.*, 59 Cal. App. 3d 513, 522 n.4, 130 Cal. Rptr. 770, 774 n.4 (1976).

ent.

A. *Obedience of Law*

First and foremost, an attorney must obey the law. A philosophy exists that “lawyers must operate within the bounds of the law and not without it, and therefore, if there are statutes pertaining to the suppression of evidence, the lawyer must comply with these statutes. . . .”²⁰⁰ In the case of *In re Ryder*,²⁰¹ the federal district court found that Attorney Ryder took possession of a sawed-off shotgun knowing the gun had been used in a robbery and took possession of money knowing that it had been stolen. The court further found that Ryder intended to break the chain of evidence that linked the contraband to his client and that he intended to prevent the use of the contraband in prosecuting his client. The court emphasized that the attorney, not the client, took the initiative in transferring possession of the contraband. By illegally possessing the shotgun and committing larceny, the court concluded that Ryder violated former American Bar Association Canon 15, which required a lawyer to perform within the boundaries of the law and not violate any law,²⁰² and Canon 32, which prohibited deception and disloyalty to the law.²⁰³ Ryder, consequently,

200. ABA Comm. on Professional Ethics and Grievances Informal Op. 1057 (1968). California Business and Professions Code section 6068(a) provides that it is the duty of a California attorney to support the Constitution and laws of the United States and of California. The State Bar Act in Business and Professions Code Sections 6000 et. seq. governs the conduct of California attorneys.

201. 263 F. Supp. 360, 361-62, 367 (E.D. Va. 1967), *aff'd*, 381 F.2d 713, 715 (4th Cir. 1968); see *Serving Two Masters*, *supra* note 1, at 147-49.

202. ABA Canons of Professional Ethics Canon 15 provided:

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause. . . .

The lawyer owes “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,” to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client.

Id.

203. ABA Canons of Professional Ethics Canon 32 provided:

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of

was suspended for eighteen months.²⁰⁴

B. Suppression of Evidence

As part of this duty of obedience to the law, a California attorney must not "... [s]uppress any evidence that he or his client has a legal obligation to reveal or produce."²⁰⁵ The American Bar Association Code of Professional Responsibility has a similar provision.²⁰⁶ Arguably, this legal obligation to reveal or produce evidence arises when a subpoena duces tecum or formal court order to produce evidence has been issued and served.²⁰⁷ Only one court, apparently, has cited the American Bar Association disciplinary rule in connection with suppression of evidence. In *State v. Stapleton*,²⁰⁸ two deputy public defenders took possession of a board that their client claimed he had used to defend himself. Initially, the attorneys refused both the prosecutor's demand to turn over the evidence and his offer for joint laboratory testing of the board. Finally, the attorneys turned the board over to the police after an alleged threat of forcible entry into their office and a criminal prosecution of them. The Missouri Court of Appeal

the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

Id.

204. 263 F. Supp. at 369-70. Mitigating factors which resulted in an eighteen-month suspension, rather than disbarment, were Ryder's consultations with attorneys and a judge about his course of conduct and his intent to return the money to the bank after the trial. The Fourth Circuit Court of Appeals adopted the opinion of the district court. 381 F.2d at 715.

205. Cal. R. Prof. Conduct 7-107(a). The Rules of Professional Conduct became effective January 1, 1975. The rules, as amended, are adopted by the Board of Governors of the State Bar pursuant to the provisions of the State Bar Act, and become effective on approval by the California Supreme Court. Upon supreme court approval, the rules are binding on all members of the California State Bar. Any wilful breach of the rules is punishable as provided by law. "Nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof. The prohibition of certain conduct in these rules is not to be interpreted as an approval of conduct not specifically mentioned." *Id.* 1-100.

206. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(A) provides: "A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-27 provides: "Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. . . ." See also MODEL RULES OF PROFESSIONAL CONDUCT 3.4(a)(c).

207. AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 371-72 (1979); *In re* January 1976 Grand Jury, 534 F.2d at 729.

208. 539 S.W.2d 655 (Mo. 1976).

stated:

The restraints on a Missouri lawyer are ethical only. The Code of Professional Responsibility, DR 7-109 requires without further definition that: "A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce."²⁰⁹

C. Confidentiality

Under the California attorney's oath, an attorney swears to "... maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client."²¹⁰ The term "confidence" refers to information that is privileged under the attorney-client privilege. The term "secret" refers "to 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."²¹¹ Unlike the attorney-client privilege, the ethical duty "exists without regard to the nature or source of information or the fact that others share the knowledge."²¹² Unlike the attorney-client privilege, which is asserted only when the attorney or client is asked in a judicial, administrative, or legislative proceeding about a confidential communication, the attorney at all times owes an ethical duty of confidentiality to his client.²¹³ This duty continues even after the termination of the employment relationship.²¹⁴

Although the California Business & Professions Code and the Rules of Professional Conduct do not contain any specific exceptions to the ethical duty of confidentiality, the American Bar Association Model Code of Professional Responsibility exceptions are instructive. These exceptions are permissive, rather than mandatory.²¹⁵ First, the confidential information may be revealed with the consent of the client after the attorney has

209. *Id.* at 658 n.1.

210. CAL. BUS. & PROF. CODE §6068(e); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(2) which provides that a lawyer shall not use "a confidence or secret of his client to the disadvantage of the client." *See also* MODEL RULES OF PROFESSIONAL CONDUCT 1.6.

211. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A). The Alaska Supreme Court in *Morrell v. State*, 575 P.2d at 1211 n.19, stated that the deputy public defender followed the advice of the Alaska Bar Association as it affected his obligation to preserve his client's secrets. Apparently, the court believed that the deputy public defender could ethically deliver the kidnap plan to the prosecutor because he could reasonably conclude that he was required to do so by the Alaska destruction and concealment of evidence statute.

212. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1979).

213. *Id.*

214. *Id.* EC 4-6.

215. *Id.* DR 4-101(C).

fully explained the implications of disclosure.²¹⁶ For example, an attorney must obtain the client's consent before consulting other attorneys about an ethical problem, if the consultation will involve disclosure of confidential information.²¹⁷ Second, an attorney may reveal the client's confidences or secrets when permitted under a disciplinary rule or when disclosure is required by law or court order.²¹⁸ As previously discussed, one court and one commentator believe that this rule, when read in conjunction with Disciplinary Rule 7-102(A)(3), which prohibits a lawyer from concealing or knowingly failing "to disclose that which he is required by law to reveal," requires an attorney to turn over implicating evidence to the court.²¹⁹ Third, the attorney may reveal the intention of his client to commit a crime, such as the destruction of evidence, and may also reveal any information necessary to prevent the crime.²²⁰ Fourth, the attorney may reveal a client's confidences or secrets to defend himself against an accusation of wrongful conduct such as a malpractice action brought by the client or a post-conviction habeas corpus proceeding based on ineffective assistance of counsel.²²¹

Observation of evidence as a result of a confidential communication from a client to an attorney is also protected by the attorney's ethical duty

216. *Id.* DR 4-101(C)(1); *see also* MODEL RULES OF PROFESSIONAL CONDUCT 1.6 which provides:

(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 that the lawyer believes is likely to result in imminent death or substantial bodily harm; 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 the client.

Id.

217. Thus, attorneys with implicating evidence and other ethical problems have submitted hypothetical questions to judges, other attorneys, research services, and ethics committees. *See In re Ryder*, 263 F. Supp. at 362-64. In *Morrell*, 575 P.2d at 1206, deputy public defender Cline submitted a hypothetical question to the ethics committee of the Alaska Bar Association. He posited a bank robbery in which the safe was blown open with plastic explosives, and the subsequent discovery by his client's friend in the client's vehicle of a detailed plan of the bank, a list of "things to take with me," and a receipt for purchase of plastic explosives. The attorney also noted that the vehicle might be repossessed soon. D. LOUISELL, J. KAPLAN & J. WALTZ, *CASES & MATERIALS ON EVIDENCE* 608-09 (4th Ed. 1981).

218. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2).

219. AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 173-78 (1979). *See supra* notes 47-51 and accompanying text.

220. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3); *see* Sevilla, *Between Scylla and Charybdis: The Ethical Perils of the Criminal Defense Lawyer*, 2 J. CRIM. DEF. 237, 263-65 (1976); *cf.* MODEL RULES OF PROFESSIONAL CONDUCT 1.6(b)(1).

221. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4); *see also* MODEL RULES OF PROFESSIONAL CONDUCT 1.6(b)(2).

of confidentiality. In *People v. Belge*,²²² two upstate New York attorneys observed the locations of two bodies described to them by their client. The New York court and the Committee on Professional Ethics of the New York State Bar Association found that the lawyers acted properly in not disclosing the locations to the authorities.²²³

The location of stolen property may also be protected when confidentially disclosed by a client to his attorney. When the defendant in a larceny prosecution told counsel the whereabouts of the stolen property, the New York State Bar Association Committee on Professional Ethics, interpreting Disciplinary Rule 4-101(C)(2),²²⁴ concluded that the lawyer should not reveal the location of the stolen property to law enforcement officials. The Committee reasoned that an attorney “has no affirmative obligation to reveal to the authorities the location of stolen property” because the ethical rule pertaining to disclosure of confidences and secrets when required by law or court order is permissive, rather than mandatory. The Committee further concluded that revealing the location of the stolen property to law enforcement authorities would be improper without the consent of the client because this action would risk exposing the client as the possessor of the property. The Committee noted that concealment by a thief is “normally incident” to commission of larceny and “this reality” permits the inference that the possessor stole the property. If the attorney revealed the location of the stolen property, the Committee reasoned that:

“... he would, in effect, be assuming a role adverse to the interests of his client and repugnant to the confidential relationship between lawyer and client. In essence, he would be disclosing confidential information as to the crime of larceny that is charged against his client. In other words, he would be doing indirectly what he could not do directly as a matter of law, as well as ethical obligation.”²²⁵

222. 372 N.Y.S.2d 798 (Onondaga, County Ct.), *aff'd mem.*, 376 N.Y.S.2d 771 (1975), *aff'd per curiam*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

223. *Id.* N.Y. St. Bar Ass'n. Comm. on Professional Ethics Op. 479 (1978), 50 N.Y. St. B.J. 259 (1978).

224. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) provides: “A lawyer may reveal: ... [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order.” *Id.*

225. N.Y. St. Bar Ass'n. Comm. on Prof. Ethics Op. 405 (1975); 47 N.Y. St. B.J. 526 (1975); *cf.* N.Y. St. Bar Ass'n. Comm. on Prof. Ethics Op. 530 (1981) (holding that a lawyer may not retain a piece of documentary evidence that his client's friend surreptitiously removed from a police station); *see also* N.Y. St. Bar Ass'n. Comm. on Prof. Ethics Op. 466 (1977), 49 N.Y. St. B.J. 351 (1977) (holding that a lawyer may not accept proceeds of a crime from client for safekeeping, but should not reveal the client's proposal). Okla. Bar Ass'n. Legal Ethics Comm. Advisory Op. 110 (1936) holds that a member of the bar who induces his client to reveal the hiding place of stolen jewels under the pretense of applying them on his fee but in reality to enable their recovery by law enforcement officials in order to return them to the rightful owner is guilty of unprofessional conduct (available from the Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Okla. 73152).

D. Competence

A California attorney also has an ethical duty of competence. He must apply sufficient learning, skill, and diligence necessary to fulfill his duties arising from his representation of the client.²²⁶ The attorney must perform whatever research lawyers representing clients in similar matters would perform to make informed and intelligent judgments.²²⁷ Competently representing a criminal defendant includes careful investigation of all the factual and legal bases for defenses that may be available to the client.²²⁸

E. Withdrawal

Defense counsel may be required to withdraw from representation of the accused because of difficulties connected with implicating evidence. If a California attorney in a contemplated or pending criminal prosecution "learns or it is obvious" that he may be called to testify other than on behalf of his client, for example, about the location or condition of evidence that has been removed or altered, the attorney may continue the representation only "until it is apparent that his testimony is or may be prejudicial to his client."²²⁹

Depending on the client's conduct, counsel may have to withdraw to avoid prosecution for a criminal or disciplinary violation. When an attorney considers moving to withdraw because he discovers that evidence has been destroyed, tampered with, or concealed, the attorney will confront several difficult problems. The attorney may not be certain who suppressed the evidence; he may have difficulty in finding a legal basis for withdrawal; or he may be faced with the problems of revealing confidential information and violating the client's constitutional rights.

When the evidence has been destroyed, tampered with, or concealed, determining the culpable individual or individuals may be difficult. The client may deny responsibility. A friend or relative of the client may have suppressed the evidence. The attorney must not move to withdraw based only on a belief that his client or client's friend or relative has destroyed, concealed, or tampered with the evidence. Unless the client or witness ad-

226. Cal. R. of Prof. Conduct 6-101(A)(1); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A) (which defines incompetence to include handling a legal matter without adequate preparation) and MODEL RULES OF PROFESSIONAL CONDUCT 1.1, 1.3).

227. *Smith v. Lewis*, 13 Cal. 3d 349, 359, 530 P.2d 589, 595, 118 Cal. Rptr. 621, 627 (1980).

228. *People v. Pope*, 23 Cal. 3d 422, 425, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979).

229. Cal. R. of Prof. Conduct 2-111(A)(5); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR5-102(B).

mits the act, the attorney must confirm his belief with an independent investigation.²³⁰

None of the mandatory grounds for withdrawal under California Rule of Professional Conduct 2-111(B) seem applicable to destruction, concealment, or tampering with evidence by a client. Although one mandatory ground is the attorney's knowledge that his continued employment by the client will result in a violation of the State Bar Act or the Rules of Professional Conduct,²³¹ the attorney would not violate Rule of Professional Conduct 7-107(a), which prohibits a California attorney from suppressing "any evidence that he or his client has a legal obligation to reveal or produce," even if he continued the representation after the suppression of evidence occurred. The act of destruction or concealment would already have been committed by the client, not the attorney, and therefore the attorney's continued employment would not result in a disciplinary violation. Furthermore, this rule arguably applies only to evidence that is subject to a subpoena duces tecum or an order to produce. The attorney's continued employment also would not violate the provisions of the State Bar Act dealing with support of the law, respect to the courts, and employment of means consistent with truth because the attorney would be faced with a *fait accompli*.²³²

Although the mandatory grounds for an attorney's withdrawal do not seem applicable to destruction or concealment of evidence by a client, various permissive withdrawal grounds may apply. When the client conceals evidence in violation of Penal Code section 135, a ground for withdrawal is that the client "[p]ersonally seeks to pursue an illegal course of conduct."²³³ If the attorney discovers that the client has destroyed or tampered with evidence, the ground that the client's conduct "renders it unreasonably difficult" for the attorney to provide effective representation might apply because the client might lie in response to prosecution ques-

230. *People v. Schultheis*, 638 P.2d 8, 11 (Colo. 1981).

231. Cal. R. of Prof. Conduct 2-111(B)(2); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR2-110(B)(2) and MODEL RULES OF PROFESSIONAL CONDUCT 1.16(a)(1). An attorney may not be permitted to withdraw unless he can avoid prejudicing the client's rights. The attorney must provide "due notice" to the client of his intent to withdraw, allow the client enough time to employ other counsel, and deliver to the client the case file and any other items to which he is entitled. Also, the attorney must comply with substantive and procedural law and court rules, including obtaining court permission for withdrawal from the case if he is the attorney of record. Cal. R. of Prof. Conduct 2-111(A)(2). Finally, he must "refund promptly any part of a fee paid in advance that has not been earned." *Id.* 2-111(A)(3); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR2-110(A)(1)(2)(3); MODEL RULES OF PROFESSIONAL CONDUCT 1.16(d).

232. CAL. BUS. & PROF. CODE §6068(a), (b), (d).

233. Cal. R. of Prof. Conduct 2-111(C)(1)(b); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR2-110(C)(1)(b); MODEL RULES OF PROFESSIONAL CONDUCT 1.16(b)(1)(2).

tions about what happened to the evidence.²³⁴ When an accused has destroyed, tampered with, or concealed evidence, other "good cause" for withdrawal might exist because the client refuses to cooperate or follow the attorney's advice concerning implicating evidence.²³⁵

When the attorney of record for the accused has determined that his client has destroyed, concealed, or tampered with evidence and that a legal basis for withdrawal exists, he is confronted with the duty to preserve his client's confidences and secrets. An attorney of record must obtain court approval before he can withdraw, and the court may want to know the factual as well as the legal basis for his motion. When the attorney discovers that his client has destroyed or tampered with evidence, the crime has been committed and cannot be undone. The general rule is that information about a past crime divulged to an attorney by the client to obtain legal advice is protected by the attorney's ethical duty of confidentiality and the attorney-client privilege.²³⁶ If the attorney obtained the information about the destruction or concealment of the evidence during the professional relationship, such as from a third party, and disclosure of this information would be detrimental to the client, the information is protected as a secret.²³⁷ The client's destruction of, or tampering with, evidence does not fit into the future crime exception to the attorney-client privilege or the duty of confidentiality if the client did not consult the attorney about committing the criminal act.²³⁸

When the client is concealing evidence, he is committing a continuing crime; the criminal conduct can be terminated by returning the evidence to the place where it was found or where it is normally kept. If the attorney persuaded the client to return the evidence to its last or normal keeping place, the attorney no longer could allege grounds for withdrawal based on the client's pursuit of an illegal course of conduct, the presence of un-

234. Cal. R. of Prof. Conduct 2-111(C)(1)(d); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1)(d). Wisc. Bar Ass'n. Ethics Op. 11/77 states: An attorney who is aware that an object of her/his client's was found at the scene of alleged criminal misconduct is not under an ethical obligation to disclose the existence of the object or where it was found to the authorities. S/he should discuss the matter with her/his client and it is the client's decision whether to disclose the information. The attorney must, however, tell the client s/he cannot lie about the item and s/he must tell the truth about it if questioned concerning it. Supplement to the June 1979 issue of Wisc. Bar Bul. 94.

235. Cal. R. of Prof. Conduct 2-111(C)(6); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-111(C)(6); MODEL RULES OF PROFESSIONAL CONDUCT 1.16(b)(6).

236. *See* ABA Comm. Professional Ethics, Formal Op. 287 (1953); *Olwell*, 394 P.2d at 684. If the attorney is not of record, the attorney can withdraw without court approval and without revealing any confidential information, as long as he avoids any prejudice to the client.

237. CAL. BUS. & PROF. CODE §6068(e); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A).

238. CAL. EVID. CODE §956; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3).

reasonably difficult circumstances under which to carry out the representation, or "other good cause" for withdrawal. Should the attorney be unsuccessful in persuading the client to return the evidence, the Rules of Professional Conduct, ethics opinions, and cases unfortunately provide little guidance for attorneys representing clients who are committing continuing crimes.²³⁹

The Colorado Supreme Court has taken the position that courts should not require criminal defense counsel to divulge a confidential communication in support of a motion to withdraw.²⁴⁰ In a case in which counsel sought to withdraw because his client wanted him to present witnesses who would perjure themselves, the court expressly held that defense counsel should not tell the judge the specific reasons for the motion to withdraw.²⁴¹ Instead, the court recommended counsel advise the court that he and his client have an "irreconcilable conflict." This might mean a conflict of interest, a personality conflict, or a conflict as to trial strategy or presentation of false evidence. The court recommended that counsel make a private record of the circumstances, his advice and reasons for that advice, and his conclusion, because a disagreement between counsel and client about trial tactics might be the subject of a post conviction proceeding on the issue of effectiveness of counsel.²⁴²

The Colorado Supreme Court was less clear about whether the trial

239. Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 362-65 (1976); see also N.Y. St. Bar Ass'n. Comm. on Prof. Ethics Op. No. 405 (1975); *LA County Bar Association Comm. on Legal Ethics Op. No. 267* (1960) in 38 L.A. BAR BULL. 103 (1963). Mere knowledge that a crime is being committed and the failure to prevent it does not constitute aiding and abetting. *Pinell v. Superior Court*, 232 Cal. App. 2d 284, 287-88, 42 Cal. Rptr. 676, 678-79. (1965)

240. *People v. Schultheis*, 638 P.2d 8, 13 (Colo. 1981). "The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient." MODEL RULES OF PROFESSIONAL CONDUCT 1.16, Comment at 17. The Commission on Professional Responsibility in the American Lawyer's Code of Conduct (Public Discussion Draft 1980), 605 in illustrative case 6(a) states:

A lawyer representing the accused in a criminal case learns from the client he intends to present a false alibi. The lawyer knows that he will be required to give an explanation to the judge if he makes a motion for leave to withdraw as counsel; he also knows that the judge will take an equivocal explanation as an indication that the client intends to commit perjury. The lawyer nevertheless asks leave to withdraw, telling the judge only, 'I have an ethical problem, my client and I do not see eye to eye.' The lawyer has committed a disciplinary violation.

Id. In *Chaleff v. Superior Court*, 69 Cal. App. 3d 721, 722-24, 138 Cal. Rptr. 735, 736-37 (1977), a public defender declined to accept a court appointment as an advisory counsel because he would be placed in an "untenable ethical position." He stated that he was "handcuffed" in explaining his position to the court because of the attorney-client privilege. The Appellate Court reversed a contempt conviction. In *Butler v. United States*, 414 A.2d 844, (1980), the District of Columbia Court of Appeals stated: "The protection of a client's confidence is so basic a tenet of professional responsibility that it yields only in the rarest of real ethical dilemmas. Thus in such a dilemma, advice, disassociation, and even passive representation, may be resorted to in lieu of exposure." *Id.* at 849.

241. 638 P.2d at 14.

242. *Id.*

court should allow withdrawal based on counsel's conclusory statement of "irreconcilable conflict." The court stated that the decision was within judicial discretion. The court indicated, however, that the trial judge would be justified in denying the motion unless a reasonable basis existed for believing the attorney-client relationship had deteriorated so badly that the attorney could not render effective assistance of counsel.²⁴³ The court was particularly concerned about not allowing defendants to postpone their trials indefinitely by telling each of their successor counsel that they intended to lie, thereby causing "a perpetual cycle of eleventh-hour motions to withdraw."²⁴⁴

Allowing withdrawal by an attorney after his client destroys, conceals, or tampers with evidence may often be unjustified in terms of the cost to the administration of justice. The damage to the truth-seeking function of the judicial system is completed if the client has destroyed or tampered with the evidence and also if a change of attorneys will not convince an accused to stop concealing evidence. Although the attorney may want to withdraw to avoid being disciplined or prosecuted, the administration of justice is not advanced by having successor counsel appointed for the sole reason that the destruction or tampering occurred during representation by another attorney. When successor counsel is appointed for an accused entitled to a public defender, an additional public expense may be incurred for successor counsel to repeat some of the trial preparation accomplished by the predecessor counsel. If the attorney moves to withdraw without specifying the basis for his action, and the motion is denied, he should satisfy his ethical duty and avoid criminal complicity.

An ethics opinion of the Los Angeles County Bar Association is instructive for California attorneys who must decide whether client confidences should be revealed in support of a motion to withdraw. The client of the attorney requesting the opinion had been convicted of hit and run driving after lying that he was the driver to protect a youthful family member who was the actual driver. The Committee concluded that representation of the client at the time of sentencing after having learned of his perjury would be improper. If the client would not voluntarily disclose his perjury, the Committee stated that the attorney should move to withdraw without disclosing his client's confidences or secrets.²⁴⁵

Counsel not only discloses client confidences if he reveals the factual basis for his motion to withdraw, but he also may deprive the client of a

243. *Id.* at 15.

244. *Id.* at 14.

245. L.A. Bar Comm. on Legal Ethics, Op. 305 (1968); 45 L.A. BAR BULL. 254-57 (1970).

constitutional right.²⁴⁶ Revealing that the client destroyed or concealed evidence after the client advised counsel of his action would constitute a link in the chain of evidence to the client for a Penal Code section 135 prosecution and consequently, would deprive the client of his fifth amendment privilege against self-incrimination. A Texas Court of Criminal Appeals, however, held that a defendant is not denied effective assistance of counsel when the attorney tells the judge his reasons in support of a motion to withdraw, if the jury is the fact finder and assesses the punishment.²⁴⁷ The District of Columbia Circuit has held that the judge must be advised of facts underlying the motion to withdraw because the basic constitutional right of effective assistance of counsel is involved.²⁴⁸ The same Circuit, however, concluded that a defendant was denied due process in violation of the fifth amendment when counsel advised the motions judge of his client's intent to commit perjury and then permitted his client to go to a bench trial before the same judge.²⁴⁹

F. *A.B.A. Proposed Standard*

The American Bar Association Committee on Ethical Considerations in Criminal Cases, Criminal Justice Section, in June 1981 proposed an Ethical Standard to Guide Lawyer Who Receives Physical Evidence Implicating His Client in Criminal Conduct.²⁵⁰ The proposed standard ap-

246. In the case of *Lowery v. Cardwell*, 575 F.2d 727, (9th Cir. 1978), defense counsel made a motion to withdraw without stating the reason. After denial of the motion, the attorney ceased direct examination of the client and did not mention the client's perjurious testimony in closing argument. This omission alerted the judge, who was the trier of fact, that the client had committed perjury. The court consequently held that the attorney had deprived the client of his due process right to a fair trial under the fourteenth amendment. *Id.* at 730. In Justice Hufstedler's concurring opinion, she stated that defense counsel's "actions were so adverse to petitioner's interests as to deprive her of effective assistance of counsel." *Id.* at 732.

247. *Maddox v. State*, 613 S.W.2d 275, 284 (Tex. Crim. App. (1981)).

248. *Thornton v. United States* 357 A.2d 429, 435-36 (D.C. Ct. of App. 1976).

249. *Butler v. United States*, 414 A.2d 844, 853 (D.C. Ct. of App. 1980).

250. 29 CRIM. L. REP. (BNA) 2465-67 [hereinafter cited as "Standard"].

(a) A lawyer who receives a physical item under circumstances implicating a client in criminal conduct shall disclose the location of or shall deliver that item to law enforcement authorities only: (1) if such is required by law or court order, or (2) as provided in paragraph (d).

(b) Unless required to disclose, the lawyer shall return the item to the source from whom the lawyer receives it, except as provided in paragraphs (c) and (d). In returning the item to the source, the lawyer shall advise the source of the legal consequences pertaining to possession or destruction of the item.

(c) A lawyer may receive or retain the item for a period of time during which the lawyer: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect or use the item in any way as part of the lawyer's representation of the client; or (5) cannot return it to the source. If the lawyer retains the item, the lawyer shall do so in a manner that does not impede the lawful ability of law enforcement to obtain the item.

(d) If the item received is contraband, or if in the lawyer's judgment the lawyer can-

plies at any stage of the prosecutorial process to contraband and the instrumentalities, fruits, and other evidence of a crime. In attempting to accommodate the criminal defense attorney's conflicting duties of loyalty to his client and obedience to the law, the Committee considered both the restitutionary interests of crime victims and the societal interests in a criminal justice system that within constitutional limits finds the truth and provides speedy justice.²⁵¹ The proposed standard provides guidelines to assist criminal defense attorneys in deciding when to accept, return to the source, or disclose or deliver the evidence to law enforcement officials.

Unless the attorney is required by law to disclose or turn over to law enforcement officials the implicating evidence, the American Bar Association Committee concluded that the attorney must refuse to accept it and return the evidence to the source.²⁵² The Committee recognized that the offices of attorneys should not become depositories for physical evidence that criminally implicates their clients unless a legitimate reason exists for the attorney to receive and retain the evidence.²⁵³ When the attorney returns the evidence to the client or the third party, the Committee stated that the attorney must advise the person about the law pertaining to possession or destruction of evidence.²⁵⁴

Under the American Bar Association proposed standard, in certain cir-

not retain the item in a way that does not pose an unreasonable risk of physical harm to anyone, the lawyer shall disclose the location of or shall deliver the item to law enforcement authorities.

(e) If the lawyer discloses the location of or delivers the items to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c) (1), the lawyer shall do so in the way best designed to protect the client's interests.

Id. The proposed "Standard" is still under consideration by the ABA Comm. on Ethical Considerations in Criminal cases for eventual recommendation to the ABA Standing Committee on Association Standards for Criminal Justice for inclusion in the ABA Standards for Criminal Justice: The Defense Function. The Committee did not have the benefit of the California Supreme Court decision in *Meredith*, which was filed July 20, 1981, and consequently its standard does not take into consideration the *Meredith* "removal rule."

251. Standard, *supra* note 250, commentary at 1. The commentary is available from the ABA Criminal Justice Section, 1800 M. Street N.W., Washington, D.C. 20036.

252. *Id.* subdivision (b). The American Lawyers Code of Conduct illustrative case applicable to this situation is as follows:

A lawyer represents a client in a murder case. The client leaves the murder weapon with the lawyer. The lawyer fails to advise the client that the weapon might be more accessible to the prosecution in the lawyer's possession than the client's, and that, if the lawyer retains the weapon, he will produce it, if ordered to do so by a valid subpoena. The lawyer has committed a disciplinary violation by failing to fully advise the client . . . The lawyer would not commit a disciplinary violation by returning the weapon to the client, unless the lawyer also encouraged the client to make it unavailable as evidence.

Public Discussion Draft: The American Lawyer's Code of Conduct, published by the Roscoe Pound American Trial Lawyers Foundation (June, 1980), illustrative case 3(b)(c), at 305, reprinted in 16 TRIAL no. 8 at 54 (Aug. 1980).

253. Standard, *supra* note 250, commentary at 3.

254. *Id.* subdivision (b). This admonition is required by the attorney's duty to advise his client, if his client is the source, and also by society's interest in prevention of the unlawful destruction or concealment of evidence. *Id.* commentary at 3.

cumstances an attorney is ethically permitted, but not required, to receive or retain the evidence for a legitimate purpose and for a reasonable period of time.²⁵⁵ The attorney, however, must not impede the use of subpoena or search warrants by law enforcement authorities to obtain the evidence.²⁵⁶ An attorney may receive and retain the implicating evidence, if he reasonably believes the evidence will be destroyed should he return the evidence to the source, or if the attorney reasonably fears that return of the evidence will result in physical harm to someone.²⁵⁷ The attorney may also receive and retain stolen property to return it to the rightful owner.²⁵⁸ Furthermore, he may receive and retain the evidence for a reasonable period of time to test, examine, inspect, or use the items as part of his preparation of the defense.²⁵⁹ After the reasonable period of time expires, the attorney may have an obligation to turn the evidence over to law enforcement authorities.²⁶⁰ Otherwise, the evidence must be returned to the source with advice about the legal consequences of its destruction or concealment.²⁶¹ Finally, the attorney may retain the evidence if he cannot return it to the source.²⁶²

According to the American Bar Association Committee proposal, an attorney is required to disclose the location of the evidence or deliver it to law enforcement when: (1) required to do so by law or court order; (2) the evidence received is contraband; or (3) retention of the evidence would "impose an unreasonable risk of physical harm" upon someone.²⁶³ Whenever the attorney discloses the location of the evidence, or delivers it to law enforcement authorities, or returns the evidence to the source, the Committee stated that he must do so in a manner that protects the client's interests.²⁶⁴ The attorney should consider methods of return or disclosure

255. *Id.* subdivision (c).

256. *Id.* commentary at 4.

257. *Id.* subdivisions (c)(2), (3). This recognizes society's interest in the preservation of evidence and prevents implication of the lawyer in criminal conduct. *Id.* commentary at 4.

258. *Id.* subdivision (c)(1). This fulfills society's interests in restitution of the victim. *Id.* commentary at 4.

259. *Id.* subdivision (c)(4).

260. *Id.* commentary at 5; see *State v. Olwell*, 394 P.2d 681 (Wash. 1964).

261. Standard, *supra* note 250, subdivision (b).

262. *Id.* subdivision (c)(5).

263. *Id.* subdivisions (a), (d). A lawyer has a duty to follow the law of the jurisdiction in so far as in the lawyer's judgment this law provides clear instruction. The laws which are most likely to be applicable include obstruction of justice and concealment or destruction of evidence statutes, and court decisions "which in the lawyer's judgement provide clear instruction regarding an attorney's duties under various circumstances," such as *Ryder*, *In re January 1976 Grand Jury*, *Morrell*, and *Olwell*. *Id.* commentary at 2. "Since mere possession of contraband is thought to be a crime and is always evidence that a crime has been committed, the lawyer is ethically bound to have contraband returned to appropriate law enforcement authorities." *Id.* commentary at 5.

264. *Id.* subdivision (e).

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

that best protect the client's identity, privileged communications, and confidences and secrets, as well as the client's privilege against self-incrimination. Suggested methods include a return or disclosure that is anonymous, that reveals only the attorney and not the client, or that reveals the client but not the relevancy of the item.²⁶⁵

VII. CONCLUSION

The cardinal rule for criminal defense attorneys who must make a decision about implicating evidence is to avoid taking possession unless testing or analysis of the evidence will most likely result in a decision by the prosecution either not to file charges or to dismiss the charges, or unless taking possession will otherwise assist in the defense. If the attorney takes possession of the evidence, the appellate decisions uniformly state that he must turn the evidence over to law enforcement officials.²⁶⁶ Although most appellate courts also state that the prosecution must not reveal 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, . . . consistent with the lawyer's duty to reveal only such confidences and secrets of the client as are necessary in the circumstances, . . . the lawyer should turn over the evidence in a manner least prejudicial to the client.

Where the lawyer, after accepting custody of incriminating evidence, becomes convinced that it must be surrendered, . . . 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. . . .

N.Y. State Bar Ass'n. Comm. on Professional Ethics Op. 530 (1981).

265. Standard, *supra* note 250, commentary at 6. Methods of anonymous return include registered mail with no return address or a cooperative police officer.

266. *Olwell*, 394 P.2d at 684-85; *Lee*, 3 Cal. App. 3d at 525-26, 83 Cal. Rptr. at 722; *Morrell*, 575 P.2d at 1210. "From the foregoing cases emerges the rule that a criminal defense attorney must turn over to the prosecution real evidence that the attorney obtains from his client." *Id.* *In Re Navarro*, 93 Cal. App. 3d 325, 330, 155 Cal. Rptr. 522, 525 (1979). "The Lee court applied the long-standing rule that an attorney must relinquish incriminating physical evidence to the police." *Id.*

In People v. Nash, 313 N.W. 2d 307 (Mich. App. 1980), defense counsel informed the police by letter that he had in his possession a revolver and other evidence. The items were seized pursuant to a search warrant. The Michigan Supreme Court stated: "We adopt the reasoning of the Court in *Olwell* and hold that defendant's attorney had a duty to relinquish the evidence to the authorities and that he did not violate the defendant's attorney-client privilege by doing so." *Id.* at 314.

In Gipson v. State, 609 P.2d 1038, 1043 n.2 (Alaska 1980), the defendant's attorney turned over the murder weapon to the state troopers. The attorney's investigator had located the weapon using information from the defendant. The Alaska Supreme Court stated that relinquishment of the gun by the attorney to law enforcement was required under its holding in *Morrell*.

In State v. Carlin, 640 P.2d 324 (Kan. 1982), after discussing *Olwell*, *Morrell*, *Ryder*, *Lee*, and *Meredith*, the Kansas Supreme Court stated: "Since the appellant's attorney had a duty to turn over the evidence under the line of cases mentioned above, there was no error in the court ordering him to do so." *Id.* at 328.

source of the evidence to the trier of fact, under *Meredith*²⁶⁷ a danger exists that the source may be revealed if a stipulation about the location or condition of the evidence cannot be arranged. Possession of the evidence is usually of little value to the defense other than to secrete it from law enforcement authorities, which is criminal and unethical conduct for an attorney. Possession by defense counsel of the defendant's knife in *Olwell*, the defendant's bloody shoes in *Lee*, the kidnap plan in *Morrell*, and the victim's wallet in *Meredith*, for example, were all unnecessary for the preparation of an effective legal defense. If the prosecution discovers the evidence, the defense can examine it through criminal discovery procedures. If necessary, a court order can be obtained to permit testing. By refraining from taking possession of evidence, the attorney avoids being a repository of criminal material, and by not turning over the evidence to law enforcement officials, the attorney avoids contributing to the conviction of his client, as well as a potential ineffective assistance of counsel or malpractice claim.

A competent attorney can avoid many potential constitutional, criminal, and ethical problems involving implicating evidence by discussing the evidence in the case with his client, staff, and third parties before evidence is presented to him. After the attorney has established rapport with the client or when the client reveals the existence of evidence, the attorney should advise the client that: (1) It is a crime to destroy, conceal, alter or tamper with evidence;²⁶⁸ (2) Their conversations about the past crime are confidential, but any conversation about a future crime, such as destruction or concealment of, or tampering with, evidence is not confidential;²⁶⁹ (3) The client must tell the attorney everything he knows about the alleged crime, whether helpful or harmful, so that the attorney can develop the best possible defense and avoid being surprised by the prosecution; (4) If the client tells the attorney about the location of evidence, and the attorney, his investigator, or authorized agent examines the evidence but does not destroy, conceal, remove, alter, or tamper with it, the existence and the location of the evidence are confidential. If the attorney, his investigator, or agent, however, removes or alters the evidence, the attorney is required by the California Supreme Court decision in *Meredith* to turn the evidence over to law enforcement officials and to disclose by stipulation its location or previous condition. If the evidence cannot be presented in a way that will not reveal its source, the attorney or investigator may be required to testify about its location or condition.²⁷⁰ In that situation, the attorney

267. 29 Cal. 3d at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620.

268. See *supra* notes 151-69 and accompanying text.

269. See *supra* notes 7-11 and accompanying text.

270. See *supra* notes 56, 57, 61-65 and accompanying text.

will move to withdraw, and if the motion is granted, a successor counsel will be appointed; (5) To avoid the difficulty just discussed, the attorney or his investigator will initially only examine the evidence and perhaps photograph and take notes about it, but will not remove, alter, or take possession of the evidence. The attorney will then discuss with the client the results of the on-scene examination of the evidence, and tactical advantages and disadvantages of removing the evidence. The evidence will not be removed for any purpose other than to prevent a possible destruction of it or possible harm to someone, unless the attorney and his client agree that it should be removed for testing or for some other proper purpose in furtherance of the client's defense. If they disagree on whether the evidence should be removed, the attorney will move to withdraw from the case. Should law enforcement officials obtain the evidence, defense counsel can also obtain it for examination through criminal discovery procedures;²⁷¹ (6) The instrumentality, fruits, or other evidence of a crime are subject to seizure under a search warrant when they are in the possession of the attorney, defendant, or any third party,²⁷² and they are subject to production pursuant to a subpoena duces tecum when in the possession of the attorney or a third party;²⁷³ (7) If the attorney subsequently discovers that any evidence has been destroyed, concealed, altered, or tampered with, he will move to withdraw from the case. When he moves to withdraw, the attorney will advise the court that his continued representation of the client will result in a violation of a Rule of Professional Conduct without identifying the rule or the factual basis for the motion. A risk exists, however, that the judge may require the attorney to state the legal or factual basis that the attorney believes necessitates his withdrawal.

To avoid assisting the prosecution in convicting his client, the defense attorney should instruct his staff, and especially his investigator and receptionist, that the attorney will be obligated to turn over to the prosecution any evidence which they take into their possession. Therefore, the staff should not accept evidence from a client or third party unless at the direction of the attorney. A California attorney should also advise his staff that he will have to disclose to law enforcement officials the location or condition of any evidence that is removed or altered by the defense team. If the investigator discovers evidence, he should make a written record and if appropriate, take pictures and then contact the attorney for instructions. If an examination of the evidence is necessary, the examination should be done without destroying any fingerprints or otherwise damaging the evidence. The staff should know that the attorney may

271. See *supra* note 3 and accompanying text.

272. See *supra* notes 36 and 66 and accompanying text.

273. See *supra* note 66-72 and accompanying text.

be sued for malpractice, disciplined, or accused of ineffective assistance of counsel if they or the attorney bungle the handling of implicating evidence. In addition, the attorney should advise his staff about the law of concealment and destruction of evidence, search warrants, and attorney-client confidentiality.

If a third party, who is not an agent of the client or the attorney, tells the attorney or his investigator about the existence or location of evidence, the attorney should inform the third party that the attorney will have his investigator examine the evidence and report to him, so that the attorney can decide with the client whether to remove the evidence for testing and subsequently turn over the evidence to the prosecution, or whether to leave the evidence in its present location. In addition, the third party should be advised about the law of destruction and concealment of evidence, the availability to the prosecution of search warrants and subpoenas duces tecum, and the attorney's ethical duty to withdraw.²⁷⁴

If the client brings evidence to the attorney, the attorney should not accept the evidence unless the attorney and the client decide that the likelihood that test results will be beneficial to the defense outweighs the disadvantages of turning the evidence over to the prosecution. Since the *Meredith* exception to the attorney-client privilege refers only to counsel and not to the defendant,²⁷⁵ the client should be advised that the evidence should be returned to its last keeping place or to its normal keeping place. The client also should be told that the fruits, instrumentalities, or other evidence of a crime cannot be subpoenaed from the client because of the privilege against self-incrimination, but can be subpoenaed from the attorney or a third party. In addition, the client should be informed about the crime of destruction or concealment of evidence, search warrants, the availability of criminal discovery procedures, and the attorney's ethical duty to withdraw.

If a third party, who is not an agent of the client or the attorney, brings the implicating evidence to the attorney, the attorney should not accept the evidence unless he believes that it might be destroyed or that the evidence might be harmful to others if not taken into his custody. If these two provisos do not apply, the attorney should advise the third party that he should return the evidence to where it was found, and that the attorney will decide with the client whether to take possession of it. In addition, the

274. The Alaska Bar Association Ethics Committee advised Cline to return the evidence to the third party from whom he had received it, inform him of the applicable Alaska statute that was very similar to California Penal Code section 135, and withdraw. 575 P.2d at 1211. In an informal letter opinion, the chairman of the committee stated that this advice was given "... to re-create, as nearly as possible, the status quo ante." D. LOUISELL, J. KAPLAN & WALTZ, *CASES & MATERIALS MATERIALS ON EVIDENCE* 610 (4th Ed. 1981).

275. 29 Cal. 3d at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620.

attorney should inform the third party about the law pertaining to destruction or concealment of evidence, the availability of search warrants and subpoena duces tecums, and the attorney's ethical duty to withdraw.

After the attorney advises the client or the third party to return the evidence to its last or normal keeping place, a risk exists that the client or a third party will destroy or conceal the evidence, and that the client may retain another attorney and never mention the evidence to the new attorney. If the client or third party has not already destroyed or concealed the evidence, however, the client or third party may be willing to follow the attorney's advice. The attorney might advise the client that an inference will be created by a missing item of evidence, which most likely was last in the client's possession, that the evidence had been destroyed or concealed by him, and that this inference might contribute to his conviction.²⁷⁶ The client should also be advised that the jury will be instructed that attempts to suppress evidence, such as destroying or concealing the evidence, may be considered as circumstances tending to show a consciousness of guilt.²⁷⁷ The attorney might also point out to the client that some types of evidence may be of such an unexpected nature, so difficult to locate, or so nonessential to the prosecution's case that law enforcement officials either may not bother to look for them, or may not find them if they do look.²⁷⁸ In addition, the client might not want to risk the judge's inquiry at a hearing on a motion to withdraw about the grounds for that motion.

When the attorney advises the client or third party that the physical evidence be returned to the normal or last keeping place, the attorney does not commit a criminal act. The attorney would not be concealing the evidence; he would not be acting with the knowledge or intent to prevent evidence from being produced in a criminal proceeding. On the contrary, the attorney would be recommending that the evidence be placed where it otherwise would be found through law enforcement investigation or pursuant to a search warrant.²⁷⁹ Similarly, the necessary intent is lacking either to agree or to conspire to destroy or conceal the evidence.²⁸⁰ The attorney would not be an accessory after the fact because he would not be aiding the accused in a nonprofessional manner with the intent that he avoid conviction.²⁸¹ The attorney would not be inducing the third party to withhold information; he would be advising the client or third party to re-

276. CAL. EVID. CODE §413.

277. CAL JIC 2.06.

278. For example, the *Morrell* kidnap plan, the *Clutchette* upholstery receipt, or the *Meredith* victim's wallet.

279. See *supra* notes 151-71 and accompanying text.

280. See *supra* notes 177-78 and accompanying text.

281. See *supra* notes 179-84 and accompanying text.

place the evidence so that information would not be missing.²⁸² He would not be suppressing any information that he had a duty to reveal, nor would he be conspiring with the client to defeat the presentation of the evidence to the trier of fact.²⁸³

When the attorney has the evidence in his possession, he can keep it for a reasonable period of time to have tests performed for the preparation of the defense and then must turn the evidence over to law enforcement officials.²⁸⁴ If the client has not been charged with a crime, the attorney might turn the evidence over to law enforcement officials without identifying the client and assert the minority and California attorney-client privilege rule that the client's identity is privileged.²⁸⁵ If the client has been charged with a crime, the attorney could turn the evidence over to a judge and seek a stipulation from the prosecution under *Meredith* that would prevent the evidence from being linked to the defendant through the testimony of either the attorney or his investigator.²⁸⁶ After the attorney turns the evidence over to law enforcement officials or a judge, the prosecution refers to stipulate that the evidence will be introduced without the testimony of the attorney or the investigator, then the attorney should move to withdraw from the case.²⁸⁷

282. See *supra* notes 194-96 and accompanying text.

283. See *supra* notes 197-99 and accompanying text.

284. See *supra* note 266 and accompanying text.

285. See *supra* notes 15-20 and accompanying text.

286. Such a stipulation would be appropriate in the fact situations in three of the leading cases, and would protect the attorney-client privilege and assure effective assistance of counsel without detriment to the prosecution's burden of proof. For example, in *Lee*, the defendant's neighbor could have testified about where the shoes were found, any percipient witness could have testified that the shoes belonged to the defendant, and the defendant could have been compelled to try on the shoes to prove a proper fit; in *Morrell*, the friend could have testified about the pad being found in Morrell's vehicle at his residence; and in *Meredith*, the investigator testified on direct examination where the victim's wallet was found without being identified as an investigator for the defendant's attorney.

287. Cal. R. of Prof. Conduct 2-111 (A)(5).

