

LOS ANGELES COUNTY BAR ASSOCIATION  
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 466

November 18, 1991

**ATTORNEY AND CLIENT - DISCLOSURE OF EVIDENCE OF CRIME RECEIVED FROM CLIENT.** An attorney who believes with reasonable certainty that specific cash received as a fee from a client is the actual bills used in a crime must turn that cash over to law enforcement or the prosecution without request and within a reasonable time after learning with reasonable certainty that the cash received was used in commission of the crime.

Authorities Cited:

California Business and Professions Code section 6068 subdivision (e)  
California Rule of Professional Conduct 5-220  
State Bar Formal Opinions 1981-58, 1984-76  
LACBA Formal Opinions 389, 436, 456  
*Caplin & Drysdale, Chartered v. United States* 491 U.S. 617, 109 S.Ct. 2646, 105 L. Ed.2d 528 (1989)  
*People v. Meredith* 29 Cal.3d 682, 175 Cal.Rptr. 612, 631 P.2d 46 (1981)  
*People v. Lee* 3 Cal.App.3d 514, 83 Cal.Rptr. 715 (1970)  
*People v. Superior Court (Fairbank)* 193 Cal.App.3d 32, 237 Cal.Rptr. 158 (1987)  
*Baird v. Koerner* 279 F.2d 623 (9th Cir. 1960)  
*In re Osterhoudt* 722 F.2d 591 (9th Cir. 1983)  
*Tornay v. United States* 840 F.2d 1424 (9th Cir. 1988)

ISSUE PRESENTED

Client is arrested and charged with sale of illegal drugs. Client pays Attorney the fee in cash. Attorney suspects the cash received from the Client is cash used in an illegal

narcotics sale and is fearful that if the cash is placed in the Attorney's checking account the Attorney might be accused of money laundering. Attorney therefore puts the cash in a safe. Subsequently, Attorney learns with reasonable certainty that the cash received is the actual money used in an illegal narcotics transaction. Client has made statements to the police which confirm that the cash received by the Attorney has been received from illegal drug sales. Client admits to Attorney that the statements to the police are accurate.<sup>1</sup> At issue is whether Attorney must turn the cash over to the police.

### DISCUSSION

An attorney may not reveal client confidence and secrets (Business and Professions Code section 6068 subdivision (e))<sup>2</sup>. Unless the disclosure is compelled by law, a lawyer cannot disclose client confidences or secrets to a third party without the client's informed consent (LACBA Opinions 389, 456). In previous opinions this Committee has adopted

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<sup>1</sup>This Committee assumes that based on the facts of this inquiry the Attorney believes with reasonable certainty that the cash was used in an illegal narcotics transaction. Where there is a factual dispute as to the accuracy of the information provided by the Client to the police, then the attorney may not be in a position to determine the source of the cash with reasonable certainty. This opinion only addresses the duty of an attorney who is reasonably certain that the cash received is the same bills used in the illegal narcotics transaction. This Committee is of the opinion that until such time as the attorney is reasonably certain that the cash received was used in the illegal narcotics transaction, there is no duty to turn the cash in question over to the police or prosecution. However, the attorney may be well advised to keep the funds segregated until the matter of the source of the money is resolved.

<sup>2</sup>California Business and Professions Code section 6068 subdivision (e) provides that it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

the definition of 'confidence' and 'secret' of the American Bar Association Code of Professional Responsibility DR 4-101 (A) which states:

'Confidence' refers to information protected by the attorney-client privilege under applicable law, and '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 likely to be detrimental to the client. (Opinions 386, 436, 456).

The information that the source of fees is cash derived from narcotics transactions is a client 'secret'. (Cf. Opinion 386). However, the government may be able obtain information concerning attorney fees where there is reason to believe that the source of fees is illegal activity. *Caplin & Drysdale, Chartered v. U.S.* 491 U.S. 617, 109 S.Ct. 2646, 2651-2657, 105 L.Ed.2d 528 (1989) (government may recover attorneys fees which are forfeitable assets resulting from drug-law violations.). At least in federal prosecutions, information regarding the fee arrangement may not be part of the subject matter of the professional consultation and therefore is not a privileged communication under the attorney-client privilege. *In re Osterhoudt* 722, F.2d 591, 593 (9th Cir. 1983), (allegations that appellant was a major marijuana distributor); *Tormay v. U.S.* 840 F.2d 1424, 1426 (9th Cir. 1988), (IRS investigation to establish tax liability with subpoenas to attorneys for information regarding fees paid). (But see also *Baird v. Koerner*, 279 F.2d 623, 632 (9th

Cir.1960) where clients' identity in payment of delinquent tax payments is protected by the attorney-client privilege). Moreover, Business and Professions Code section 6068 subdivision (e) provides broader protection than the attorney-client evidentiary privilege. (State Bar Formal Opinion 1981-58).

An attorney also has the duty not to suppress evidence. California Rule of Professional Conduct 5-220 states "A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or produce." The issue of the duty to turn over to the police or prosecution evidence and instrumentalities of a crime which is received by the attorney is discussed in an opinion by the California Supreme Court, two opinions of the California Courts of Appeal, and State Bar Committee on Professional Responsibility and Conduct Formal Opinion 1984-76.

In *People v. Meredith, supra*, 29 Cal.3d 682, 175 Cal.Rptr. 612, 631 P.2d 46 (1981) the prosecution had called as its witness a defense investigator who testified that he had seen the victim's partially burnt wallet in a burn barrel behind a defendant's residence. Although not disclosed to the jury, defendant had told his counsel of the location of the wallet and counsel had instructed the investigator to retrieve the wallet. Counsel examined the wallet and then turned it over to the police. It was conceded that the wallet itself was properly admitted into evidence and that the attorney-client privilege protected conversations between defendant, his counsel and the counsel's investigator. The California Supreme Court held that the defense investigator's observation of the location of the wallet, which was the product of a privileged communication between defendant and his counsel, was

not protected. Since defense had altered the location of the evidence which precluded the prosecution from making the same observation, the investigator's testimony was admissible. (*Id.* 29 Cal.3d at 695).<sup>3</sup>

In *People v. Lee* 3 Cal.App.3d 514, 83 Cal.Rptr. 715 (1970) a deputy public defender who had been assigned to represent the defendant received a pair of defendant's shoes from defendant's wife, who in turn had received them from another couple. When the public defender was relieved, in order to avoid a charge of suppressing evidence or having the shoes seized by the district attorney without prior determination of a possible claim of privilege, the deputy public defender delivered the shoes to a municipal court judge. The district attorney obtained a search warrant from a second judge and obtained the shoes from the municipal court judge. The appellate court opinion held that neither the public defender nor defendant's substituted counsel had the right to withhold from the prosecution the shoes which had bloodstains subsequently determined to be of the same type as the victim. Rather, the attorney, after a reasonable period, should on his own motion turn the evidence over to the prosecution (*Id.* 3 Cal.App.3d at 526).

At issue in *People v. Superior Court (Faribank)* 192 Cal.App.3d 32, 237 Cal.Rptr. 158 (1987) was whether, if defense counsel comes into possession of physical evidence related to charges against the client, must that evidence be turned over to the police or

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<sup>3</sup>This opinion does not address the prosecutor's ethical responsibilities except to point out that *People v. Meredith* 29 Cal.3d 682, 695, 175 Cal.Rptr. 612, 631 P.2d 46 (1981) states at note 8: "In offering the evidence, the prosecution should present the information in a manner which avoids revealing the content of attorney-client communications or the original source of the information."

prosecution. The appellate court opinion responds in the affirmative and goes on to state that "[i]t has been held an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the instrumentalities of a crime." (*Id.* 192 Cal.App.3d at 34, citations omitted).

Formal Opinion 1984-76 of the State Bar Committee on Professional Responsibility and Conduct states that "it is settled law in this state that the criminal defense attorney, after holding for a reasonable time for the purpose of preparing his client's defense, the instrumentality, fruits, or other physical evidence of the crime placed upon his desk by the client, is thereafter both legally and ethically obligated on his own motion to turn such evidence over to the prosecution." The Opinion offers the following advice: "prior to taking possession of such evidence, the defense attorney should inform the client of the attorney's obligation to turn over the evidence once possession is made and the attorney should seriously question the consequences of his taking possession of the evidence at all."

Unfortunately, the inquirer was not in a position to determine with reasonable certainty, at the time the cash fee is received, that the cash was used in the illegal drug transaction. However, once an attorney learns with reasonable certainty that the cash received was the actual money used in the illegal narcotics transaction, the attorney has a duty to turn that cash over, in a reasonable period of time, to the police or prosecution. Therefore, the best advice may be the suggestion of State Bar Formal Opinion 1984-76 that when in doubt as to the legality of the source of cash offered in payment of a fee, an attorney should consider the possible consequences of accepting cash which later may

be determined to be evidence or instrumentality of a crime.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts as are set forth in the questions submitted.