

NEW HAMPSHIRE BAR ASSOCIATION

Disposition of Stolen Property

Ethics Committee Formal Opinion

10/23/81

An opinion has been asked of the Ethics Committee concerning a series of questions dealing with an attorney's responsibility upon learning/^{that}the property which the attorney has received is stolen property and/or the fruits of a crime of which the client is charged with.

It is unnecessary for the Committee to address the issue of the attorney's further representation, as a withdrawal has already been entered by the attorney and new counsel has been obtained.

Having considered the alternative proposals available to the attorney, the Committee concludes that the attorney is under an ethical duty to return the stolen property to the authorities, while at the same time, maintaining the confidences of his client. "It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime." Such acts by an attorney "bear no reasonable relation to the privilege and duty to refuse to divulge a client's confidential communication." In Re: Ryder, 263 F. Supp. 360 (E.D. Va.), aff'd 381 F.2d 713 at 714 (4th Cir. 1967); In Re: January 1976 Grand Jury, 534 F.2d 719 at 728-729 (1976).

The majority of reported cases hold that the conduct of an attorney in retaining property of this type constitutes unethical conduct as an officer of the Court. Morrell v. State, 575 P.2d 1200 (Alaska 1980). Reference should also be made to New Hampshire R.S.A. 642:3, I, (d).

Turning over the property to the authorities is the prescribed course of action. However, it must be done so with regard to the ethical duties owed to the client as well as in light of the evidentiary features of the attorney-client privilege. Clearly, the attorney has a duty to protect the confidences of his client. (Canon IV of Code of Professional Responsibility; ABA Opinion 155 (1936)). In addition, the communications of the client are privileged and confidential. McGranahan v. Dahar, 119 N.H. 758 (1979). Furthermore, confidential communications are permanently protected from disclosure absent a waiver by the client. Shelley v. Landry, 97 N.H. 27 (1951). Although a return of the property to the police is mandated as being the proper course of conduct, it may lead to the discovery of damaging evidence against the client or may circumstantially incriminate the client. Accordingly, and having due regard for these problems and the ethical considerations involved, the attorney should turn over the money to the authorities as an Officer of the Court and should remain silent as to the circumstances under which he obtained such evidence and the identity of his client. Liew v. Breen, 640 F.2d 1046 (9th CCA 1981). Furthermore, the duty to protect the confidences and communications of the client continues to exist

absent an express waiver by the client or a contrary judicial decree.

The questions raised in this inquiry concern more than an ethical dilemma, but also encompass some unresolved evidentiary questions in the State of New Hampshire. It is with that frank caveat that this opinion is rendered. The attorney's attention is called to the cases and authorities contained herein for a broader and more indepth discussion of the issues.