

Nebraska Ethics Advisory Opinion for Lawyers  
No. 80-1

AN ATTORNEY WHO, IN THE COURSE OF REPRESENTING A DEFENDANT IN A CRIMINAL CASE, RECEIVES PHYSICAL EVIDENCE FROM A THIRD PARTY WHICH MAY BE MATERIAL TO THE CASE, HAS A DUTY TO DELIVER SUCH EVIDENCE TO THE COUNTY ATTORNEY. SUCH ATTORNEY, AFTER DELIVERING SUCH EVIDENCE TO THE COUNTY ATTORNEY, SHOULD WITHDRAW AS COUNSEL FOR THE DEFENDANT UPON PROPER APPLICATION MADE TO THE COURT.

FACTS AND QUESTIONS

A public defender was appointed to represent a person who was charged with a Class I felony. A relative of the accused brought to the office of and delivered to, the public defender an item that may be considered physical evidence against the accused z may have some bearing on the case.

1. Does the attorney who has possession of the evidence have a duty to deliver such evidence to the County Attorney?

2. In the event that the evidence must be delivered to the County Attorney, should the public defender withdraw as counsel for the accused?

DISCUSSION

Section 28-922 R.R.S., as amended, adopted by the 1977 Legislature, took effect on January 1, 1979. It provides in part as follows:

"(1) A person commits the offense of tampering with physical evidences if believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he: (a) Destroys, mutilates, conceals, removes, or

alters physical evidence with the intent to impair its verity or availability in the pending or prospective official proceeding; or . . .  
."(Emphasis added)

The statute further provides that tampering with physical evidence is a Class IV felony.

It is significant to note that the evidence was not acquired by the attorney from the accused himself but was delivered to the attorney by a third person; and, therefore, the provision of Section 7-105 of R.R.S., as amended, providing that, "It is the duty of an attorney and counselor . . . to maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his clients . . ." does not apply.

Ethical Consideration 7-27 of the Code of Professional Responsibility provides in part as follows:

"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."

Disciplinary Rule 1-102 of the Code of Professional Responsibility provides in part that a lawyer shall not engage in conduct that is prejudicial to the administration of justice. Disciplinary Rule 1-103 then provides in part that a lawyer possessing unprivileged knowledge of a violation of DR1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. These provisions set forth in DR1-102 and 1-103 are technically more applicable to a lawyer having knowledge of another lawyer violating rules or engaging in acts of misconduct as a lawyer; nevertheless, they do illustrate the seriousness of a lawyer violating Section 28-922 R.R.S., as amended, providing for tampering with physical evidence.

DR4-101 provides at Subparagraph 2 of C that a lawyer may reveal confidences or secrets when permitted under

Disciplinary Rules or required by law or Court order.

At 22 Criminal Law Reporter 2538, there is set forth under the caption of "Counsel did not violate attorney-client privilege in testifying about his acquisition of incriminating evidence from third party" a review of the case of Morrell v. State, Alaska Sup.Ct. 3/3/78. That case involved a lawyer defending a party charged with kidnapping. A kidnapping plan allegedly handwritten by defendant was turned over to defense counsel by a friend of the defendant. After receiving an opinion from the State Bar Association's Ethics Committee, counsel returned the evidence to the friend, assisted him in turning it over to the police, and withdrew from the case. He then subsequently testified at trial about these events.

The article summarized the case by stating as follows: "It would be unethical for an attorney to fail to reveal relevant evidence in a criminal case, the court notes. Thus the attorney here would have had to turn the evidence over himself even if his client had given it to him. The fact that a third party brought him the evidence makes this case even clearer and also undercuts the defendant's argument that the lawyer violated the attorney client privilege by testifying about his acquisition of the evidence."

#### CONCLUSION

1. The attorney who has possession of the evidence obtained from the third party and not his client, has a duty to deliver such evidence to the County Attorney.
2. Since the attorney who has possession of the physical evidence might be called upon to testify with reference to such evidence, he should withdraw from representing such defendant upon making proper application to the Court.

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