Duquesne Law Review

Volume 3 | Number 2 Article 6

1965

Fruits of the Attorney-Client Privilege: Incriminating Evidence and Conflicting Duties

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COMMENTS

FRUITS OF THE ATTORNEY-CLIENT PRIVILEGE: INCRIMINATING EVIDENCE AND CONFLICTING DUTIES

I Do Solemnly Swear:
I will maintain the confidence and preserve inviolate the secrets of my client. . . .[1]

One of the most fundamental ethical duties of an attorney is that of maintaining secrecy concerning the confidences of his client. This duty of non-disclosure has been embodied in two of the Canons of Professional Ethics[2] and has been recommended by the American Bar Association as one of the specifically ennumerated duties to be incorporated into the Oath of Admission to practice in all states and territories.[3] In theory, the highly personal relationship between a lawyer and his client is, in many respects, like that of a confessor and his penitent, bound by the bond of silence. In practice, it is an undefined duty which causes many members of the legal profession untold mental anguish by reason of conflicting and overlapping duties. If the lawyer is faced with a close ethical question and resolves it in favor of his client, he quite often still feels that somehow he has violated a duty owed to the court or profession. This most often occurs where the lawyer feels bound to non-disclosure by reason of the attorney-client privilege but bothered by disclosure as possibly demanded in the duty of candor and fairness owed to the court and profession.

The problem posed by this comment has not been passed upon by any court or ethics group.[4] It is impossible to believe that it has not

1. Oath of Admission to the Bar, American Bar Association.

2. Canon 6 provides in part: "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences. . ." Canon 37 provides in part: "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees. . . ."

3. *Supra* note 1.

4. In Clark v. State, 159 Tex. Cr. R. 187, 261 S.W.2d 339 (1953), *cert. denied* 346 U.S. 855 (1953), *rehearing denied* 346 U.S. 905 (1953), the Texas court by way of unsolicited dicta referred to the problem. That case will be discussed in length at a later point of this comment.

arisen many times. The author does not solve it but does make suggestions and points up the problem which many will find self answering. The ramifications of the problem demand serious reflection and, more idealistically, some definitive statement by those responsible for the formulation and exposition of legal ethics.

THE PROBLEM POSED

A lawyer undertakes the defense of one accused of a crime such as murder or income tax evasion. In strictest confidence his client, the accused, admits his guilt and produces incriminating evidence such as the murder weapon or the double set of books kept in the tax cheating scheme. Leaving aside all considerations of advising the client to plead guilty or innocent, the question asked is where does the lawyer's duty lie with respect to the incriminating evidence? Is his duty to his client who has revealed all on the basis of the bond of secrecy or to the court of which the lawyer is an officer? In short, does the lawyer act unethically by either keeping possession or recommending the disposal of the incriminating evidence?

At the outset, it should be clearly understood that the problem posed is deliberately restricted to the criminal law area. This has a profound and far reaching influence on the duties of the lawyer in defense of his client. So important is this distinction that it is well to note the fundamental right of an accused to counsel[5] and the strict interpretation accorded this right as witnessed by recent Supreme Court decisions.[6]

Needless to say, the problem under consideration deals only with confidences of past crimes and not the announced intention to commit a crime in the future. Such a future act is clearly outside the privilege afforded the attorney-client relationship.[7]

THE CANNONS AND CONFLICTING DUTIES

The starting point is the simple proposition that a lawyer may defend one accused of crime[8] and, indeed, must do so under some circum-

5. U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

6. Gideon v. Wainwright, 372 U.S. 335 (1963); Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. State of Illinois, 84 Sup. Ct. 1758 (1964).

7. Canon 37 provides in part: "The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened." See also Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege,* 47 A.B.A.J. 708 (1961).

8. Canon 5 provides in part: "It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused. . . ."

stances.[9] This is so irrespective of his personal beliefs in the innocence or guilt of the accused.[10] And while the canons are silent on the problem, it is a fundamental principle of legal ethics that the lawyer may plead his client innocent even though he knows the client to be guilty. A plea of not guilty is nothing more than asserting the presumption of innocence until proven guilty beyond a reasonable doubt. Were these propositions not so, the constitutional guarantee of right to counsel and the basic presumption of innocence until proven guilty in criminal cases would be meaningless. If all attorneys could turn their backs on those accused of crime, the rights of the accused would be shallow for without the services of the counsellor, the right is, for all intent and purposes, nonexistent. In point of fact, Canons 4 and 5 place the duty on lawyers to see that the rights of the accused are effectively afforded him. Even without the Canons, the Oath of Admission to practice demands this in terms of a sacred obligation.[11] Moreover, the deeply thought out concern for the right to counsel in recent Supreme Court decisions[12] should apply with equal force not only to the holder of the right but also to his lawyer who stands in his place before the courts in enforcement of those rights.

Confidences of a client are specifically provided for in Canons 6 and 37.[13] Basically, it is a privilege against disclosure and is necessary, for a client must have absolute confidence in his lawyer—his alter ego for advocacy. The client must be free to tell not only the favorable but also the unfavorable aspects of his legal problem. If the confidence is to work and be meaningful, the lawyer must be bound to act in his client's best interest. If, for example, the attorney could disclose confidential communications of his client to law enforcement officials, the right to counsel woud be of no value and the profession would soon fall into disrepute losing that faith and trust clients generally repose in their counsel. "He cannot be like the judge, solicitous only to do justice. The things which are said must be covered with a veil of

9. Canon 4 provides: "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."

10. Opinion 280, Opinions of Committee on Professional Ethics and Grievances, American Bar Association.

11. I DO Solemly Swear: I will support the Constitution of the United States . . . I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. So Help Me God." Oath of Admission to the bar, American Bar Association.

12. *Supra* note 6.

13. *Supra* note 2.

absolute secrecy never to be removed, save for the interest of the client."[14]

Neither Canon 6 nor Canon 37 specifically limit the duty to respect confidences or secrets to oral communications. It must be assumed that the duty encompasses more than mere spoken words, for in and of themselves words are meaningless without reference to some person, place, thing or event. Like a photograph used in court to pictorially convey a witness' testimony, incriminating evidence produced by a client is the real, actual, or demonstrative communication of a secret or confidence. It is the visual communication of a secret or confidence. In a sense, it is the corroborative proof of what the client tells in the strictest of confidence. As such, it must be encompassed by the privilege against disclosure. This much can be said, that the lawyer may not reveal it to the detriment of his client.

In addition to his duties to the client, the lawyer is also bound by obligations to the court and to his profession. Canon 15 purports to set the limits to which a lawyer may go in supporting his client's cause. The first paragraph of that Canon is couched in terms suggestive of a duty owed in civil matters for the Canon refers to "false claims" and "questionable transactions." The second paragraph does refer to conduct of a lawyer in criminal proceedings but only insofar as it admonishes him against asserting his personal beliefs in his client's innocence when arguing to a jury. The last paragraph addresses itself to the general proposition that the office of the lawyer does not permit violation of law, fraud or chicane in his client's behalf. Canon 16 deals with improprities of the client and places a duty on the lawyer to prevent such conduct or withdraw his appearance. It nowhere mentions criminal defenses but hints at civil practice as the scope of its operation. The duty of candor and fairness is espoused in Canon 22. This Canon speaks in language conotative of the personal behavior of the lawyer regarding the procedural conduct of his cause. He may not misquote cases or cite as authority cases or statutes no longer controlling. It is submitted that this Canon does not really touch upon the problem of incriminating evidence coming into the lawyer's possession.

The professional duties of honor and dignity are contained in Canon 29.[15] While the conflict of duties may be more apparent here, the overriding policies for the privilege of Canons 6 and 37 must prevail

14. Kent, *Legal Ethics*, 6 MICH. L. REV. 468 (1908).

15. Canon 29 provides in part: "The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. . . ."

despite the express language of Canon 29.[16] Canon 32[17] speaks of the lawyer's duty in the last analysis. Here, a real conflict is presented for it is clearly spelled out that as ministers of the law, the lawyer may not be disloyal to the law nor may his client expect it of him. It is interesting to note that this Canon does not specifically refer to criminal matters while it does specifically refer to causes civil or political. Again, the general tone sounds of the civil practice as opposed to the criminal practice of law. Canon 41 entitled "Discovery of Imposition and Deception" deals with the duty of a lawyer to remedy unfair advantages obtained by his client through fraud or deception. Here also the language is strikingly toned to the civil side of law.[18]

There exists not only an apparent but also a real conflict of duties with regard to incriminating evidence coming to the lawyer's attention by reason of his office as counsel for the accused. One recommendation is certainly suggested in that the language of the Canons applicable is toned in terms suggestive of civil practice. Possibly a separate set of Canons for the criminal lawyer is essential. The present Canons do touch upon conflicting duties but here also the Canon refers to civil practice. If the language of Canon 6[19] is strained, it might be argued to include the dilemma of the criminal lawyer as advocate of his client on the one hand and as officer of the court on the other. The Canon would then demand "undivided loyalty" to the client in spite of the overlapping duties to the court. It calls to mind the proverb that no man can serve two masters with undivided loyalty.

ANALOGUS SITUATIONS

The American Bar Association's Opinions of the Committee on Professional Ethics and Grievances provides some analogus situations worthy of consideration. In Opinion 23, the Committee advised that

16. The duty of Canon 29 is greatly modified by Opinion 287 discussed *infra*.

17. Canon 32 provides in part: "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 the public. . . ."

18. See Opinion 287, Opinions of Committee on Professional Ethics and Grievances, American Bar Association, in which the Committee says at page 602-603: "We do not believe that Canon 41 was directed at a case such as here presented but rather at one in which, in a civil suit, the lawyer's client has secured an improper advantage over the other through fraud or deception."

19. Canon 6 provides in part: "The obligation [is] to represent the client with undivided loyalty. . . ."

an attorney knowing the whereabouts of his fugitive client was bound not to disclose this fact by reason of such information coming from the confidential relationship. It could hardly be argued that in such a case the lawyer was harbouring a criminal or aiding one to avoid lawful arrest since the lawyer was merely following the dictates of his profession. By analogy, since the attorney-client privilege attaches to incriminating evidence that comes to the lawyer's knowledge, is it any more logical to argue that if he fails to disclose this to the proper authorities that he is suppressing evidence or aiding one to avoid arrest and prosecution? In both cases, the lawyer is following a higher dictate of his profession in respecting the confidential nature of so personal a relationship.

In Opinion 155, the Committee advised that a client jumping bond was committing a continuing wrong for which the privilege does not exist. In such a case, the lawyer was advised to disclose the whereabouts of his client. The Committee specifically held that this Opinion in no way conflicts with Opinion 23.[20] The rationalization was based on the continuing wrong which is in effect the announced intention to commit a future wrong and outside the privilege. In the problem posed by this comment, the wrong of murder or income tax evasion has been finalized so that there is no continuing wrong. It might be argued that suppression of evidence is a subsequent and continuing wrong. This, however, must give way to the proposition that it is in fact a subsequent wrong and not the one in issue and further, the accused may not be forced to testify and convict himself. By suppressing the evidence, he is merely refusing to allow incriminating evidence to do his testifying for him.[21] Of even more significance, however, is the fact that there is no duty on the accused to assist the prosecutor on whom exists the fundamental and all pervasive burden of proof. T o say that the accused is suppressing evidence is to place a duty on him to assist in prosecuting the very case he stands accused of. This would be an anomalous situation for the defendant would be on both sides of the table.

In Opinion 156, the Committee advised an attorney to disclose to the proper authorities his former client's violation of probation. The Committee found as a matter of fact that the attorney-client relationship had ceased as to the criminal matter before the lawyer learned of the violation of probation. In addition, the information came to

20. Opinion 155, Opinions of Committee on Professional Ethics and Grievances, American Bar Association, at p. 323.

21. U.S. Const. amend. V provides in part: ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

the attorney in another capacity other than as counsel for the defendant. This in no way reflects upon the duty under discussion for here the incriminating evidence comes from and during the course of the attorney-client relationship. The Committee, in Opinion 268, held that a lawyer, consulted by a nonresident as to a divorce, who learned that the client had an insufficient bona fide residence could not properly disclose this to the court or another lawyer later procured to obtain the divorce. The Committee specifically held that "While ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court, this duty does not transcend that to preserve the client's confidences."[22] The point of special note here is that the duty to the client is not subordinated to that owed to the court. Is there any reason to assume that the same reasoning would not apply to incriminating evidence? Certainly it can be argued that this is a fraud on the court but that overlooks the reasoning in criminal jurisprudence that to plead not guilty is to assert innocence until proven guilty beyond a reasonable doubt. The lawyer is not committing any fraud for he has no duty to present evidence, that falling within the domain of the prosecutor.

In a more expanded and better reasoned Opinion[23], the Committee dealt with the problem of conflicting duties. On one side of the controversial issue were attorney-client privileges espoused in Canons 6 and 37, and on the other side, the attorney-court-profession duties ennumerated in Canons 15, 22, 29, 32 and 41. The actual question under consideration was the duty of a lawyer where the client subsequently disclosed that he had perjured himself in a divorce proceeding. In this conspiciously longer than usual Opinion, the Committee struggled with the conflicting duties finally resolving the dilemma in favor of the sanctity of the attorney-client privilege. The Committee held that Canon 41 was directed at a civil suit in which the client had secured an unfair advantage through fraud or deceit. The Committee found that no such problem was here presented since the other spouse had been represented by counsel and further since the Committee could not consider the state as an "injured party" within the purview of the Canon. Canon 29 which provides in part that "The Counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities"[24] was

22. Opinion 268, Opinions of Committee on Professional Ethics and Grievances, American Bar Association, at p. 558.

23. Opinion 287, Opinions of Committee on Professional Ethics and Grievances, American Bar Association.

24. Canon 29, Canons of Professional Ethics, American Bar Association.

found to be in direct conflict with Canon 37. To follow the mandate of Canon 29 would involve a direct breach of the attorney-client privilege of Canon 37. The Committee summed up their position as follows:

> Neither Canon 41 nor Canon 29 specifically requires the lawyer to advise the court of his client's perjury, even where this was committed in a case in which the lawyer was acting as counsel and an officer of the court. We do not consider that either the duty of candor and fairness to the court, as stated in Canon 22, or the provisions of Canon 29 and 41 above quoted are sufficient to override the purpose, policy and express obligations under Canon 37.[25]

In a subsequent part of Opinion 287 dealing with a different but related problem, the Committee commented:

> . . . We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidence communicated by his clients to the lawyer in his professional capacity.[26]

It is submitted that the Opinion last discussed is a strong indicator for the problem under consideration. The Committee had before it clearly conflicting duties and went to great lengths to distinguish the duties and rationalize the solution in favor of upholding the attorney-client privilege. They also found that the state was not an "injured party" within the meaning of Canon 41. The mere length of the Opinion indicates that it was a more important and baffling problem. In favoring the privilege over the duty to disclose perjured testimony demanded by Canon 29, the Committee has indicated the almost inescapable conclusion that when conflicting duties face the lawyer, those owed to the client must take preference. This same reasoning well might be applied with equal force to the lawyer confronted with incriminating evidence. The lawyer who learned of perjured testimony and who respected the confidences of his client certainly could not be held to have subordinated perjury when in fact he followed the dictates of his profession. In the problem posed, is there any more persuasive reasons for holding that the lawyer who respects his

25. *Supra* note 23 at p. 613.

26. *Supra* note 23 at p. 614.

client's confidence concerning incriminating evidence would be held to have suppressed evidence in violation of his ethical duties?

The case of *Clark v. State*[27] is particularly interesting to note in this context. In that case, a telephone operator overheard the conversation between the defendant and his attorney in which the defendant admitted shooting his ex-wife. The lawyer advised him to say nothing and to dispose of the murder weapon. The Texas court allowed the testimony of the eavesdropping operator into evidence and concluded that it was not within the protection afforded the attorney-client privilege. This much of the opinion is undoubtedly correct since as a matter of fact the operator was a stranger standing in no relation of confidence to either the defendant or his attorney. By way of unsolicited dicta[28], the court announced that the attorney-client privilege does not extend to a defendant seeking advice regarding the destruction of the murder weapon. It is submitted that this dictum fails to resolve the problem or, for that matter, to fully realize the plight of the lawyer caught between conflicting duties. The noteworthy point of the *Clark* case is that the only argument before the court was the admissibility of the phone conversation by way of the telephone company operator. Its holding is thus limited to the stranger rule that where one not in privity overhears a privileged communication, he may testify to what he heard and is not bound by any bond of silence. The court's remarks are hard to accept with so little real insight into the problem and a complete lack of authoritative basis either ethically or legally for the unsolicited dicta.

This author addressed a letter to the New York County Lawyers Association, Committee on Professional Ethics. The problem posed in this comment was posed to that Committee with an inquiry as to whether they knew of any authority in point on the problem. The Committee speaking through its Chairman advised that they knew of no authority in point. The Committee was further asked if they had an opinion on the propriety of a lawyer advising his client to dis-

27. Clark v. State, 159 Tex. Cr. R. 187, 261 S.W.2d 339 (1953), *cert. denied* 346 U.S. 855 (1953), *rehearing denied* 346 U.S. 905 (1953).

28. "But 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 person who takes counsel on how he can safely commit a crime.

"We think this latter rule must extend to one who, having committed a crime, seeks or takes counsel as to how he shall escape arrest and punishment, such as advice regarding the destruction or disposition of the murder weapon or of the body following a murder. One who knowing that an offense has been committed conceals the offender or aids him to evade arrest or trial becomes an accesory. The fact that the aider may be a member of the bar and the attorney for the offender will not prevent his becoming an accessory." *Supra*, note 27 at 347.

pose of incriminating evidence. The Chairman commented "I would suspect that such action on the part of a lawyer would be so clearly improper that no lawyer would think of seeking a ruling on the matter from an Ethics Committee."[29] This author was dismayed and disappointed with the response and finds himself constrained to say that he cannot agree that "such action would be so clearly improper" in view of the previous discussion on the real conflict of duties and the analogous Opinions of the Committee on Ethics dealing with the appropriate Canons.

OTHER CONSIDERATIONS: FRUITS OF THE FORBIDDEN TREE

With the growing concern of the Supreme Court with individual liberties, constitutional rights and coerced confessions, it is well to reflect upon the analogy which can be drawn between the attorney-client privilege and the "fruits of the forbidden tree" doctrine announced by that Court. There is no doubt that evidence obtained by illegal search and seizure is clearly inadmissible in the prosecution of an accused.[30] So too with what courts have referred to as "fruits of the forbidden tree."[31] Thus, the exclusionary rule has been extended to include both the physical or real as well as verbal evidence obtained by reason of an illegal search and seizure.[32]

It is not open to doubt that a lawyer representing a defendant confronted with incriminating evidence would do his client a great disservice by allowing into evidence that incriminating matter obtained by methods denounced as improper. The lawyer certainly could not be accused of suppression of the evidence in such a case any more than he should be for advising his client of the dangerous character of incriminating evidence. This would be so irrespective of guilt or innocence for when the great machinery of government with its vast resources are pitted against the individual accused of a crime, our notions of fairness demands that the government, state or federal, prove its case properly and beyond a reasonable doubt.

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29. Letter of November 27, 1964, from Ames P. Murtagh, Chairman, Committee on Professional Ethics, New York County Lawyers Association.

30. Mapp v. Ohio, 367 U.S. 643 (1961).

31. Wong Sun v. United States, 371 U.S. 471 (1963).

32. "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of, an unlawful invasion . . . Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruits' of official illegality than the more common tangible fruits of the unwarranted intrusion . . . Nor do the policies underlying the exclusionary rule invite any logical distinction between the physical and verbal evidence. . . ." *Id.* at 485.

If the lawyer is bound to all communications made to him by his client in the privileged confidence, he must accept the consequences of this relationship which includes acting in the client's best interests. This applies to oral as well as real or demonstrative disclosures of an incriminating nature. To hold otherwise is to subvert and emasculate the very nature and meaning of right to counsel. In a very real sense, the incriminating evidence is a "fruit of the forbidden tree", the forbidden tree being the bond of silence arising from the privilege. There are two avenues open to the lawyer. Either he respects his client's trust and acts in his best interests or he jeopardizes his client's chances by remaining faithful to some as yet undefined and nebulous duty to aid in the prosecution, a duty imposed by reason of his status as an officer of the court. If the lawyer performs his true role as counselor, he must advise the client of the damaging nature of the evidence. The lawyer might advise his client not to take any action with respect to the incriminating evidence or to turn it over to the proper authorities. If he does so, the far reaching effects may be such that a conviction is all but assured. The lawyer might suggest that he retain the matter and secret it so that the prosecutor would not be able to reach it. He might even suggest that the client dispose of it. In either of these last two alternatives, the end result is exactly the same. The authorities are held to prove their case without the benefit of the fruits of the forbidden tree. The lawyer conceiveably might explain to the client the predicament he finds himself in regarding conflicting duties. But such a discolsure would demand a disclosure of the damaging character of the evidence which indirectly is leaving the client no alternative but the disposal of the incriminating evidence. Ultimately, the problem is does the lawyer see that such incriminating matter is kept from the prosecutor or does he possibly breach the yet undefined duty as an officer of the court?

CONCLUSION

It is all well and good to say that the guilty should be punished and that conduct which skirts upon suppression of evidence aids the guilty avoid punishment. But this overlooks the all pervasive philosophy of our criminal jurisprudence—innocent until proven guilty beyond a reasonable doubt and proven by constitutionally proper means. Constitutionally proper means includes the right to counsel and the privilege accorded that right. When the vast resources of government with all its personnel, agencies and machinery are working against a defendant, if his own advocate must also assist the prosecution, then what is the sense of having a right to counsel? In

such a case, it is merely paying lip service to the right. It is not a far cry from the exclusionary rule of evidence obtained by illegal search and seizure to the exclusion of a duty on the part of defense counsel to assist in any way the government in proving its case. This of necessity would include the correlative right and duty to advise the client of the adverse effect of incriminating evidence should it fall into the hands of the prosecuting authorities.

It is not the place of the lawyer to judge nor to make the prosecution's case for it. He most certainly can and will make recommendations to his client, but in the final analysis, when confronted with incriminating evidence, he must decide one way or the other. To withdraw is no answer and may even be unethical.[33] There will always be cases in which guilt or innocence will not be clear and in which incriminating evidence will be so potentially damaging that the lawyer dare not risk the chance. There will be cases in which the lawyer will recommend pleading guilty as charged or compromising for a lesser charge. In such cases, the problem of incriminating evidence will present no real ethical dilemmas but may be of significance for tactical reasons. Regardless of the situation, the monstorous conflict still looms overhead until some definitive statement or guidelines are promulgated. Until then, each lawyer must resolve the problem for himself always remembering his obligations as counsel for the defendant.

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33. See Opinion 90, Opinions of Committee on Professional Ethics and Grievances, American Bar Association, in which the Committee held that "A lawyer consenting to appear for a defendant accused of a crime has no right to receive the confidences of his client, invited by that relation, if the lawyer has formed an intention undisclosed to his client, to retire from the case, if he becomes convinced of his client's guilt. In this instance, the lawyer did not disclose to the client such intention, and it is plain enough as a matter of good morals and professional ethics, that the lawyer should continue to represent the defendant."