



The Law Society of
Upper Canada | Barreau
du Haut-Canada

Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence March 21, 2002*

Report to Convocation

Purpose of Report: Discussion

Prepared by the Policy Secretariat

* for discussion at April 25, 2002 Convocation (deferred to May 23, 2002 Convocation)

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INTRODUCTION

1. The Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence, in accordance with Convocation's mandate, has prepared a proposed rule and commentary.
2. The Committee is requesting that Convocation review the proposal and approve the rule and commentary in its present form or as amended by Convocation as an addition to the *Rules of Professional Conduct*.
3. The members of the Committee are benchers Gavin MacKenzie (chair), Stephen Bindman, Todd Ducharme, Niels Ortved, The Hon. Sydney Robins, Heather Ross and Clayton Ruby, as well as Alan Gold (president of the Criminal Lawyers Association), Paul Lindsay (Director, Crown Law Office - Criminal, Ministry of the Attorney General) and Tony Loparco (president of the Ontario Crown Attorneys' Association). The Committee is grateful to Paul Perell of Weir & Foulds in Toronto, for his assistance in drafting the proposed rule and commentary.
4. This report includes
 - an explanation of the process followed by the Committee
 - discussion of the central issues the Committee identified
 - discussion of the input received from lawyers and the public on the draft of the proposed rule and commentary, released for comment in March 2001
 - comment on the scope of the rule and commentary and the language of certain provisions

THE COMMITTEE'S PROCESS

First Steps

5. The Committee was appointed on November 29, 2000 following the withdrawal of a professional misconduct complaint against lawyer Kenneth Murray of Aurora. The Committee was charged with examining lawyers' ethical duties in connection with property relevant to a crime and devising a rule to address the relevant professional conduct issues.

6. The Committee has met on twelve occasions. Prior to its first meeting, the Committee reviewed extensive material that included existing rules and standards in other jurisdictions and academic writing and case law on the subject. The Committee thanks Austin Cooper Q. C. and Ian Scott, the defence counsel and Crown counsel respectively in *R. v. Murray* (in which a charge of attempting to obstruct justice was dismissed), for making information from their files available for this review.
7. The Committee was fortunate to receive permission from Justice Michel Proulx and David Layton (a criminal lawyer now practising in Vancouver) to review a chapter on lawyers' duties with respect to incriminating physical evidence from their then unpublished book, *Ethics and Canadian Criminal Law*, which has since been published by Irwin Law. This material provided a very useful discussion of the subject.
8. Alberta is the only jurisdiction in Canada thus far to adopt a rule on lawyers' duties with respect to property having potential evidentiary value. The Committee also reviewed the rules of several United States state bar associations and the standards for defence counsel adopted by the American Bar Association.
9. Using this information as a starting point, the Committee began to "scope out" the rule and was assisted in this respect by a detailed list of issues prepared by Alan Gold, which was of great help to the Committee in its efforts to address those issues in a clear and enforceable rule and explanatory commentary.

The Issues

10. The issues that the Committee identified and attempted to address included the following:
 - the role of the lawyer as advocate and the lawyer's duties to the client and the administration of justice;
 - the fundamental importance of solicitor-client confidentiality and privilege in the relationship between a lawyer and client in situations in which the lawyer learns of or is asked to receive property relevant to a crime or offence;
 - the distinction between the lawyer acquiring information about property and the lawyer acquiring possession of such property;
 - the possibility that the lawyer's duty may vary depending on whether the evidence is inculpatory, exculpatory, or partially inculpatory and partially exculpatory;

- the possibility that the lawyer's duty may vary depending on the nature of the property (for example, whether the rule should apply only to the instrumentalities or proceeds of crime, as suggested in some American authorities, or whether it should apply to all property (including documents, electronic communications, and computerized information) relevant to a crime);
- the possibility that the lawyer's duty may vary depending on whether the crime or offence to which the property is relevant is the subject of an existing charge, or investigation, or is undetected;
- the circumstances requiring, and the timing and method of, disclosure of property to law enforcement authorities;
- the necessity and scope of, and the lawyer's method of seeking, advice from senior counsel or the Law Society on issues respecting possession and disclosure of property.

The March 22, 2001 Draft

11. On March 22, 2001, the Committee presented a report to Convocation with a proposed rule and commentary recommended by the majority of the Committee. The report also quoted a proposed rule recommended by two dissenting members of the Committee who represent the Ministry of the Attorney General and the Ontario Crown Attorneys' Association, whose submission to the Committee is attached as **Appendix A**. As recommended by the Committee, Convocation directed the Committee to make its report including the proposed rule and commentary widely available to the public and the profession for written comments.
12. The Committee was attempting to accomplish two purposes with the March 22, 2001 proposed rule and commentary. First, the Committee proposed a mandatory rule that could be enforced through discipline proceedings if breached. Second, the Committee proposed an extensive commentary to provide guidance to lawyers in the multitude of circumstances in which issues may arise. The proposed commentary was designed to draw to the lawyer's attention the many distinctions and factors that should be taken into account, and provide advice on the approach the lawyer should adopt, when confronted with issues relating to property relevant to a crime.
13. This model would be consistent with the Law Society's current *Rules of Professional Conduct*, which came into force on November 1, 2000.

Call For Input And The Response

14. The proposed rule and commentary (including the explanatory report provided to Convocation on March 22, 2001) were made available to the public and the profession through the Society's web site and a notice in the *Ontario Reports*. A press release was also issued to the media commenting on the mandate of the Committee and the availability of the proposed rule and commentary for public comment. Selected legal organizations and the Attorney General of Ontario, David S. Young, received a written request for comment on the proposed rule and commentary.
15. A number of organizations and individuals both within and outside the profession responded to the call for input. The Committee received over 25 letters or e-mail communications. Most contained thoughtful comments on the proposed rule and commentary.¹ The Committee publicly thanks all those who responded to the call for input.
16. Many of those responding (including the Attorney General and various chiefs of police) expressed concerns about certain sections of the proposed commentary that would permit the lawyer to maintain temporary possession of property relevant to a crime or offence in certain defined circumstances. These respondents preferred the approach taken by the Law Society of Alberta in its rules of conduct, which is reflected in the position of the two members of the Committee who represent the Ministry of the Attorney General of Ontario and the Ontario Crown Attorneys' Association. The Attorney General's submission is attached as **Appendix B**. Other respondents (including the Advocates' Society) preferred the approach recommended by the Committee, though they also made constructive suggestions for ways in which the proposed rule and commentary might be improved.
17. The Committee assessed the input against the Committee's proposal and the key issues originally identified by the Committee. This led to revisions to the March 22 proposals, which are discussed in the next section of the report.

¹ A list of the organizations and individuals responding to the call for input and their responses is available through the Law Society's Policy Secretariat upon request.

SCOPE OF THE PROPOSED RULE

Revisions Following Review of Submissions

18. Revisions to the March 22, 2001 proposals recommended by the Committee were both substantive and structural, and include the following:
- (i) expanding the rule with text from the commentary, thereby converting elements of guidance and advice to mandatory obligations,
 - (ii) reorganizing the concepts in the rule so that they are set out in a more logical sequence,
 - (iii) clarifying the circumstances in which a lawyer may take or keep temporary possession of property relevant to a crime or offence for use at trial, by specifying that the lawyer may do so only where the lawyer determines that to do so may prevent a wrongful conviction and that this use of the property would be significantly diminished if the property were disclosed to law enforcement authorities, and
 - (iv) adding a requirement that a lawyer who proposes to take or keep temporary possession of property either for testing or for use at trial may do so only if the lawyer promptly seeks and receives authorization from a committee of the Law Society that the lawyer should be permitted to do so.

These revisions respond to concerns expressed in submissions received by the Committee, including the submission of the Attorney General. The third and fourth revisions, in particular, respond to submissions that a lawyer should be permitted to take or keep temporary possession of property relevant to a crime or offence for use at trial, if at all, only in narrowly defined circumstances, and that the decision should not be made exclusively on the basis of the subjective judgment of the particular lawyer involved in the case.

19. The authors of a number of submissions (including the Ontario Association of Chiefs of Police and several other police services), argued that a lawyer should never be permitted to retain possession of property relevant to a crime for purposes of testing or for use at trial, but rather should be required to turn the property over to law enforcement authorities in every case.

20. The majority of the committee concluded that such an approach would fail to recognize the extensive range of circumstances in which issues can arise in this area, the fundamental importance of the independence of the bar, and the important role of defence counsel in preventing wrongful convictions. Although it was the *Murray* case that gave rise to the creation of the Committee, the Committee was mindful of the fact that any rule and commentary adopted by Convocation would apply to a vast array of other situations. It is not difficult to conceive of circumstances, for example, in which a lawyer may be given a document that exposes the falsity of a Crown witness's evidence but which, if turned over to law enforcement authorities, would enable the Crown witness to tailor his or her testimony in such a way as to make the lawyer's client vulnerable to a wrongful conviction. In such cases (which the Committee expects would be rare) to permit the lawyer to retain the document for use at trial would, in the Committee's view, advance rather than obstruct the cause of justice.
21. Again, if the Committee's proposal is accepted, the lawyer would be permitted to retain the document temporarily for use at trial only if a committee of the Law Society established for the purpose were to authorize the lawyer to do so.

Rules of Other Jurisdictions

22. In addition to responding to the issues raised in the submissions, the Committee examined more closely the rules of other jurisdictions.
23. Most codes of professional conduct are silent on the subject of lawyers' duties with respect to property relevant to a crime. As mentioned above, Alberta is the only Canadian jurisdiction that has thus far adopted a rule on the subject. Rule 20 of Chapter 10 of the Law Society of Alberta's *Code of Professional Conduct* reads as follows:

A lawyer must not counsel or participate in:

- (a) the obtaining of evidence or information by illegal means;
- (b) the falsification of evidence;
- (c) the destruction of property having potential evidentiary value or the alteration of property so as to affect its evidentiary value; or
- (d) the concealment of property having potential evidentiary value in a criminal proceeding.

Commentary

Lawyers must uphold the law and refrain from conduct that might weaken respect for the law or interfere with its fair administration. See Chapter 1, *Relationship of the Lawyer to Society and the Justice System*. A lawyer must therefore seek to maintain the integrity of evidence and its availability through appropriate procedures to opposing parties. The word “**property**” in paragraphs (c) and (d) includes computerized information.

....

Paragraph (d) applies to criminal matters due to the danger of obstruction of justice if evidence in a criminal matter is withheld. While a lawyer has no obligation to disclose the mere existence of such evidence, it would be unethical to accept possession of it and then conceal or destroy it. The lawyer must therefore advise someone wishing to deliver potential evidence that, if possession is accepted by the lawyer, it will be necessary to turn the evidence over to appropriate authorities (unless it consists of communications or documents that are privileged). When surrendering criminal evidence, however, a lawyer must protect confidentiality attaching to the circumstances in which the material was acquired, which may require that the lawyer act anonymously or through a third party.

There is no equivalent obligation of disclosure with respect to evidence in a civil proceeding in light of the extensive discovery process provided by the Rules of Court. However, it is improper to block disclosure of documents or other evidence duly requested pursuant to rules of production or practice.

24. The approach adopted in the Alberta rules differs markedly from the approach adopted in the American Bar Association Criminal Justice Section Standards. Standard 4-4.6 on Physical Evidence reads as follows:

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

(b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

(c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (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 defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

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

25. The Committee considered both the Alberta rule and the ABA Defence Standards to be helpful in formulating its own rule. The majority of the Committee concluded, however, that both the Alberta approach and the ABA Defence Standards' approach could be improved upon.
26. The concerns of the majority about the Alberta rule and commentary may be illustrated by an example. If a client wishes to obtain a lawyer's advice about the effect of a document and forwards it to the lawyer as an e-mail attachment, and the document "has potential evidentiary value in a criminal proceeding", the lawyer would appear to have a duty under the Alberta rule to turn over the document to the authorities; the rule does not seem to allow lawyers to return property to its source. The lawyer's duty would seem to be to turn over such a document to the authorities whether the document is exculpatory or inculpatory.

27. Such a rule, in the view of the majority, would discourage persons from seeking legal advice and representation and would tend to undermine the independence of the bar by transforming lawyers into agents of the state.
28. At the same time, the Committee had concerns about certain features of the ABA Defence Standard. Specifically, paragraph (c) (4) of the Standard, which would allow defence counsel to receive and retain property whenever they intend to “use the item in any way as part of defense counsel’s representation of the client”, could in some circumstances permit defence counsel to retain property for an extended time – as in the *Murray* case itself – without any independent review of the effect of doing so on the administration of justice.

Discussion of Particular Provisions

The Rule

29. The following is the revised proposed rule on property relevant to a crime or offence, as recommended by the Committee. The proposed rule and commentary in their entirety are set out in **Appendix C**.

Rule 4 – Relationship to the Administration of Justice

4.01 THE LAWYER AS ADVOCATE

Property Relevant to a Crime or Offence

- 4.01 (10) A lawyer shall not take or keep possession of property relevant to a crime or offence, except in accordance with this rule.
- (11) A lawyer may take or keep temporary possession of property relevant to a crime or offence only where:
 - (a) it is necessary to do so to prevent the alteration, loss or destruction of the evidence,
 - (b) it is necessary to do so to prevent physical harm to any person,
 - (c) the client or the person possessing the property instructs the lawyer to promptly arrange for the property to be disclosed or delivered to the Crown or law enforcement authorities,
 - (d) the lawyer reasonably believes it is in the interests of justice that the property be examined or tested before it is disclosed or delivered to the Crown or law enforcement authorities, and the property may be examined or tested without altering or destroying its essential characteristics, or

- (e) the lawyer reasonably believes that a wrongful conviction may be prevented if the property is first disclosed at trial, and this use of the property would be significantly diminished if it were disclosed to the Crown or law enforcement authorities before the trial.
- (12) A lawyer may take or keep temporary possession under subrule (11) (d) or (e) only if the lawyer has been authorized to do so by a committee of the Law Society established by the Treasurer to decide whether the lawyer may take or keep temporary possession. The lawyer must seek such authorization promptly.
 - (13) A lawyer who takes or keeps possession of property relevant to a crime or offence shall not
 - (a) counsel any alteration, concealment, loss or destruction of the property,
 - (b) alter, conceal, lose, or destroy the property, or
 - (c) deal with the property in a manner that there are reasonable grounds to believe would
 - (i) obstruct justice, or
 - (ii) risk physical harm to any person.
 - (14) A lawyer who takes or keeps property relevant to a crime or offence shall give up possession of the evidence as soon as practical and only in accordance with subrules (11)(d) or (e), (15) or (16).
 - (15) A lawyer in possession of property relevant to a crime or offence may return the evidence to its source only if the lawyer is satisfied on reasonable grounds that the evidence will not be
 - (a) altered, concealed, lost or destroyed or
 - (b) used to cause physical harm to any person.
 - (16) Subject to subrules (10) – (15), a lawyer in possession of property relevant to a crime or offence shall disclose or deliver it to the Crown or law enforcement authorities as soon as practicable in all the circumstances.
30. The rule deals with the lawyer's actual possession of property. The lawyer's knowledge of the existence of property relevant to a crime or offence does not usually raise the difficult issues associated with physical possession of the property, such as whether the property must be turned over to law enforcement authorities. As the commentary makes clear, information communicated to the lawyer by the client about property is generally protected by solicitor-client privilege and the lawyer's duty of confidentiality and must not be disclosed.

31. The rule's underlying theme is avoidance of conduct that may amount to an obstruction of justice. In a broader sense, the rule enshrines lawyers' obligations as key players in the proper administration of justice. The commentary, discussed below, recognizes the possible tension between these duties and the lawyer's duties of confidentiality and loyalty to the client.
32. The thrust of the rule and commentary is that lawyers generally should not accept or retain property relevant to a crime or offence. The rule recognizes that in some circumstances, the lawyer does not have a choice, for example where the client simply leaves the property at the lawyer's office. The rule provides that lawyers may take or keep property relevant to a crime or offence only in very limited circumstances and even then temporarily.
33. The purposes for which such property may be retained temporarily are as follows:
 - To prevent the destruction of the property
 - To prevent physical harm to any person
 - To make arrangements to transfer the property to authorities pursuant to instructions
 - To examine or test the property
 - To prevent a wrongful conviction by making use of the property at trial
34. The Committee's discussions focussed on the merits of the fourth and fifth of these purposes.
35. The main concern expressed by the Crown counsel on the Committee and by a number of law enforcement agencies who made submissions, is that the lawyer's possession of the property, either for testing or for use at trial, and the timing of the lawyer's disclosure of the property, could impinge on the effectiveness of the investigation by the authorities and on the ability of the Crown to prosecute any charges laid that might arise out of the investigation. The circumstances may be aggravated, for example, if the property exculpates another accused, but is held by the lawyer until the trial of his or her client.
36. The Crown counsel on the Committee expressed concern that the lawyer's possession of the property may inappropriately affect a whole series of investigatory and prosecutorial decisions that are made at various stages of the proceedings up to and at trial, and that

public confidence in the administration of justice would not be enhanced by allowing defence counsel to retain possession of property relevant to a crime or offence for testing or for use in the defence even temporarily, and even in the narrow circumstances referred to in the proposed commentary.

37. The Crown counsel also suggested that lawyers who receive property relevant to a crime or offence should never be allowed to return the property to its original source or location, but should rather be required to turn over the property to law enforcement authorities in every case.
38. The rule and commentary proposed by the Crown counsel (which are based in part on the applicable rule and commentary in the Law Society of Alberta's *Code of Professional Conduct*, and which in the Crown's counsels' view are consistent with the law as articulated in *R. v Murray* (2000), 48 O.R. (3d) 544 (S.C.J.)) are set out in **Appendix A**.
39. The majority of the Committee preferred to include in the proposed rule provisions that would allow a lawyer in certain defined circumstances to take or retain temporary possession of property relevant to a crime or offence for the purpose of non-destructive testing or for use in the client's defence. In all such cases the rule would require the lawyer promptly to obtain authorization from a committee of the Law Society that the lawyer should be permitted to retain temporary possession for such a purpose. The Committee's view was informed by the following considerations:
 - (a) The retention of the property in some circumstances may be necessary to establish the client's innocence or to raise a reasonable doubt about the client's guilt, for example, by exposing the falsity of evidence on which the Crown relies;
 - (b) In some cases the disclosure of the property by defence counsel may enable a witness who has falsely implicated the accused person to tailor his or her testimony with a view to securing a wrongful conviction;
 - (c) The proposed rule and commentary make it clear that the circumstances in which a lawyer may retain temporary possession of property for use in the client's defence will be rare, and will be limited to circumstances in which the lawyer reasonably believes that a wrongful conviction may be prevented and that this use of the property would be significantly diminished if it were disclosed to law enforcement authorities;

- (d) The permissibility of defence counsel retaining temporary possession for non-destructive testing or for use in the defence is recognized by the American Bar Association Standards for Criminal Justice, which expressly allow counsel to retain property for a reasonable time where defence counsel “intends to test, examine, inspect or use the item in any way as part of defence counsel’s representation of the client.”;
 - (e) As for whether lawyers should be required in every case to turn over to the authorities property relevant to a crime or offence, the Committee observed that such a requirement may discourage clients from seeking legal advice. Allowing lawyers to return the property to the client where they harbour no reasonable fear that the property will be altered, destroyed or used to cause physical harm to any person makes it no less likely that the evidence will see the light of day and has the advantage of ensuring that the client receives proper legal advice;
 - (f) The requirement that the lawyer promptly seek authorization from a committee of the Law Society recognizes, in a way the Crown proposal does not, the wide range of circumstances in which problems in this area may arise. There is a significant difference, for example, between a situation in which a murder suspect leaves a bloody knife on a lawyer’s desk, on the one hand, and a situation in which a client provides a document to a lawyer that may expose the client to a prosecution for a provincial offence if it were provided to law enforcement authorities.
40. The Crown counsel on the Committee also expressed concern that the proposed rule and commentary recommended by the majority could potentially permit a recurrence of what occurred in the *Murray* case. In the view of the majority, this concern is without substance.
41. It is important to keep in mind what actually occurred in the *Murray* case. Defence counsel, Mr. Murray, on the instructions of his client, took possession of videotapes that were relevant to crimes of which his client was accused. He did not disclose the existence of the videotapes for approximately 17 months. On the advice of senior counsel, Mr. Murray then sought the advice of a committee of Law Society benchers established for the purpose. The accused’s trial was imminent. The Law Society committee advised Mr. Murray to turn over the videotapes to the trial judge, Associate Chief Justice (now Chief Justice) LeSage. Justice LeSage declined to receive the videotapes, which were turned over to the counsel for the accused’s new counsel (not to

the Crown). The accused's new counsel in turn disclosed the videotapes to the Crown, and they were introduced into evidence at trial. The central problem in the case was that the videotapes were not disclosed in a timely way. As a result of the advice of the Law Society, direction of the trial judge, and the decision of new counsel, the videotapes were eventually disclosed.

42. Under the rule and commentary recommended by the majority Mr. Murray would not be allowed to retain possession of the videotapes for such an extended time. If he were to claim a reasonable belief that a wrongful conviction would be prevented if the videotapes were first disclosed at trial – a requirement of the proposed rule - he would be required under the proposed rule promptly to seek authorization from a Law Society committee.

The Commentary

43. The commentary to the proposed rule is organized into the following sections:
- A. Introduction
 - B. Information Distinct from Possession
 - C. Types of Property
 - D. The Lawyer's Duties With Respect To Property Relevant to a Crime or Offence
 - E. Where Disclosure to Authorities is Required
 - F. Advising the Client
 - G. Seeking Advice and Authorization

A. Introduction

44. The Introduction describes the factors the lawyer must take into consideration before deciding to take or keep possession of such property, including the need to fulfill duties of loyalty and confidentiality to the client and to observe duties to the administration of justice. Particular mention is made of the general obligation not to obstruct the course of justice. The Introduction also makes it clear that a lawyer is never *required* to take or keep possession of property relevant to a crime or offence from a client or any other person.

B. Information Distinct from Possession

45. The commentary distinguishes between the lawyer's possession of property and knowledge of it. The commentary focusses on circumstances in which the lawyer is asked to take possession, and the obligations flowing from the lawyer's decisions.

C. Types of Property

46. This section confirms that the rule applies to all property, including original documents and documents that are electronically stored or formatted.

D. The Lawyer's Duties With Respect To Property Relevant to a Crime or Offence

E. Where Disclosure to Authorities is Required

47. Section D complements the portion of the rule that discusses how lawyers should deal with property relevant to a crime or offence. Section E is devoted to the circumstances in which lawyers have duties to disclose such property to law enforcement authorities.
48. According to the rule, lawyers are not to accept or retain such property except in very limited circumstances and even then only temporarily. The commentary, in discussing circumstances in which the lawyer has a duty to disclose the property to law enforcement authorities, advises lawyers to retain independent counsel to make the disclosure anonymously to protect the confidentiality of information about the source of the evidence.
49. The commentary elaborates on matters relating to the purposes for which such property may be retained temporarily and the lawyer's obligations in handling the property, including the point at which the lawyer gives up possession.

F. Advising the Client

G. Seeking Advice and Authorization

50. These two sections relate to the advice that a lawyer should provide to a client when asked to take or keep property relevant to a crime or offence. The Commentary advises lawyers to seek the advice of experienced counsel or the Law Society with respect to the

handling of the property or any other issues connected with it, but reiterates that a committee of the Law Society established for the purposes described in the rule *must* be approached by the lawyer for authorization before the lawyer takes or keeps property relevant to a crime or offence for testing or for use at trial.

51. The Commentary emphasizes that lawyers should keep a written record of the advice.

SUMMARY

52. The drafting of rules of professional conduct by its nature is an intricate exercise that calls for a delicate balancing of duties that sometimes conflict. The Committee's mandate not only illustrated the difficulty of that task, but also presented unique challenges as a result of the context in which the need for guidance in this problematic area arose. The extraordinary circumstances were set against the background of significant public interest in the events leading up to the formation of the Committee and decisions in both the courts and at the Society which called out for clear guidance. The themes appearing in the rule and commentary were, as noted above, the subject of significant debate among Committee members. This was not unexpected, given that the issues involved the need to ensure the integrity of the administration of justice, the fundamental nature of the solicitor and client relationship and the right of all persons to independent counsel.
53. The Committee as a whole recognizes the impossibility of anticipating all situations in which the rule and commentary may apply in future. The Committee expects that the efficacy of the rule will be tested only when issues falling within its ambit are dealt with on a case by case basis.
54. The primary objective of the proposed rule and commentary is to provide substantive guidance to lawyers in keeping with the Society's role to govern the profession in the public interest. The Committee urges Convocation to adopt the proposals as amendments to the Society's *Rules of Professional Conduct*.

DECISION FOR CONVOCATION

55. **Convocation is asked to approve the proposed rule and commentary, and amend the Law Society's *Rules of Professional Conduct* to add the rule and commentary appearing at Appendix C as rule 4.01(10) through (16) and related commentary.**

APPENDIX A

SUBMISSION OF THE ONTARIO CROWN ATTORNEYS' ASSOCIATION

CROWN DRAFT -- TONY LOPARCO, PAUL LINDSAY *March 2, 2001*

The Lawyer's Duties With Respect to Physical Evidence of Crime

Proposed Rule

1. A lawyer shall not counsel or participate in:
 - (a) the obtaining of evidence or information by illegal means;
 - (b) the falsification of evidence;
 - (c) the destruction of physical evidence relevant to an offence, the alteration of such evidence so as to affect its evidentiary value, or the removal of such evidence from a crime scene;
 - (d) the concealment of physical evidence relevant to an offence;
 - (e) the possession or concealment of property obtained or derived directly or indirectly from the commission of an offence.

2. A lawyer shall:
 - (a) advise the client that it is the lawyer's duty to turn over to the authorities any property within the ambit of Rule 1 that comes into the lawyer's possession;
 - (b) immediately turn over to the authorities any property within the ambit of Rule 1 that comes into the lawyer's possession.

NOTES

- This rule is not intended to affect communications or documents which otherwise come within the ambit of solicitor-client privilege.
- This rule is intended to cover all forms of property, including documents, which may have evidentiary value in a criminal or *quasi*-criminal investigation or proceeding, whether commenced or not.
- Paragraph 1 (c) is not intended to interfere with the testing of evidence or the release of court exhibits as authorized by the *Criminal Code* or other federal or provincial statutes.
- When turning over evidence coming within this rule to the authorities, the lawyer must nevertheless take appropriate steps to protect the client's confidences and preserve solicitor-client privilege, which may involve the lawyer acting through another lawyer.

Why is a new rule being formulated?

There is a need to formulate a crystal clear rule in response to concerns expressed by Mr. Justice Gravelly in *R. v. Murray* that the present rules of professional conduct are not clear, and in response to public concerns arising from the *Murray* case.

What are the purposes of new rule?

- To draft a "black letter" rule that can be enforced through discipline if breached.
- To give guidance to lawyers who need to address the dilemma of potentially conflicting duties, *i.e.* duty to client vs. duty to administration of justice.

How best to achieve this goal?

Formulate a rule as clear and simple as possible. This addresses the complaint that the Law Society gives no real guidance in situations of ethical conflicts.

This proposed formulation has the great advantage of being clear and simple, since it does not leave discretion in vaguely defined circumstances. It makes it clear that lawyers should not take possession of property that has potential evidentiary value. If such evidence nevertheless comes into the lawyer's possession it must be turned over to authorities in a manner that best protects the client's interests, without interfering with the due administration of justice.

Advantages of the proposed rule:

- The proposed rule is largely based upon Chapter 10, Rule 20, of the Alberta Code of Professional Conduct, and the Commentaries thereunder. There is no indication that the Alberta rule has unduly interfered with the relationship between lawyers and their clients. It is submitted that in the absence of compelling reasons justifying a different position, there is no good reason for Ontario to formulate a rule that justifies not turning evidence over to the authorities when the Alberta rule so requires. A rule which is based upon an American model is not one which is likely to instill public confidence in the administration of justice, given the very different legal and social environments in which our two systems operate.
- Easy to understand and comply with.
- No ethical dilemma, as rule is mandatory rather than discretionary.
- Client is fully aware of implications of turning items over to the lawyer.
- Administration of justice is enhanced by virtue of the fact that evidence of crime used for investigative or prosecutorial decision-making is not secreted by lawyers or is not otherwise placed out of the reach of the authorities by lawyers.
- Sophisticated criminals could never use lawyers as a repository of “contraband”.
- Counsel can never be accused of obstructing justice or contravening s.354 of the Code.
- Counsel does not risk becoming a potential witness if continuity of evidence becomes an issue.
- Investigative and prosecutorial decisions will be made with more comprehensive information, resulting in lesser likelihood of miscarriages of justice and enhanced public confidence in the due administration of justice.
- If rule were to permit withholding of evidence until after trial commences, trials could be delayed or mistrials declared to permit Crown testing or recall of witnesses to address new evidence or to conduct further investigation.
- Does not offend duty of loyalty and confidentiality to client.

Problems with the Previously Formulated Draft Rule:

- Previously drafted rule might have effect of not preventing obstruction of justice. The previous draft gives inadequate consideration to the effect that the withholding of evidence, *even temporarily*, might have on the course of justice.

As Justice Gravely indicated at paras. 106-108 of the *Murray* decision, the failure to disclose the tapes in that case not only tended to obstruct the police in their duty to investigate the crimes, but also impacted throughout on the series of prosecutorial decisions being made as the case was proceeding to trial. In this connection, Justice Gravely commented as follows:

On the face of the evidence Murray's action in secreting the critical tapes had the tendency to obstruct the course of justice at several stages of the proceedings.

The tapes were put beyond the reach of the police who had unsuccessfully attempted to locate them. Secreting them had the tendency to obstruct the police in their duty to investigate the crimes of Bernardo and Homolka.

*The impact of the absence of the tapes flowed through into the ability of the Crown to conduct its case throughout. Quite apart from, and in addition to, the possible impact of the tapes on the outcome of the Homolka proceedings, as Blacklock J. pointed out in his reasons for committal at the Preliminary Inquiry, "A whole series of prosecutorial decisions are being made as a case proceeds along to trial". **One of those prosecutorial decisions** occurred when, without knowledge of the tapes, Crown counsel approached Murray with a resolution offer which Murray recommended to his client. [Emphasis added.]*

Justice Blacklock's comments at page 17 of his Reasons for Judgment on the preliminary inquiry are also most instructive:

I agree that the notion that incriminating physical evidence may be held to the point of trial is troubling for reasons other than those set out in Fairbank. A whole series of prosecutorial decisions are being made as a case proceeds along to trial that the strength of the case relates to. Decisions are made about judicial interim release, the form of the indictment upon which the Crown and the Court will proceed is determined, whether or not to enter into plea negotiations, what position to take in those negotiations. If counsel are entitled to hold incriminating physical evidence to the point of trial, on the basis that to do so furthers in any measure a defence tactic counsel could presumably permit all these key decisions to be made knowing that it had taken out of any potential zone of discovery, significant incriminating physical evidence which would impact on those decisions.

- The previous draft rule does not achieve objective of being a clear rule that can be enforced through discipline proceedings if breached. That proposal continues to put counsel at risk of criminal prosecution because the judgment call on the part of counsel might result in an assessment that counsel's action had in fact tended to obstruct, pervert or defeat the course of justice, contrary to section 139 of the *Criminal Code*.

- If evidence is immediately handed over the authorities, examination or testing of evidence will normally be performed by the Crown and all results of testing will be disclosed to the defence; if the Crown declines to conduct testing or otherwise does not agree to reasonable defence testing, defence has ability to request the Court to order production of the evidence and, pursuant to s. 605 of the *Criminal Code*, the defence may seek a court order for the release of the evidence for scientific testing.
- With respect to the suggestion that it would be appropriate to withhold disclosure of evidence in order to test the credibility of witnesses at trial by surprising them with evidence relating to the crime, we offer the following observations:

If evidence is wholly inculpatory, then the only purpose of keeping it would be to prevent the Crown from using it. This is not a valid reason for defence to be able to keep evidence for any period of time. If evidence is exculpatory, the administration of justice is not impaired by turning it over to the Crown ahead of time. If evidence might be both inculpatory and exculpatory and this is the basis for withholding evidence until the close of the Crown's case, the issue arises as to what degree of exculpatory use is required in order to justify the retention of the evidence; and who makes the decision. It is submitted that a belief that there is some peripheral or collateral use that can be made of the evidence to test a witness's credibility or ability to perceive is insufficient to justify conduct which otherwise has the effect of obstructing justice. If this were not so, then Mr. Murray's justification for suppressing the tapes would be appropriate in the future. Clearly, this is not what Justice Gravelly found.

- With respect to taking temporary possession of evidence to avoid future harm; to prevent the destruction of the evidence; or to make arrangements to transfer the evidence the authorities, obviously these purposes do not obstruct justice and could be included in a proposed rule if it is felt that these situations are not adequately covered.

APPENDIX B

SUBMISSION OF THE ATTORNEY GENERAL OF ONTARIO

Attorney General
Minister Responsible for Native Affairs

The Hon. David S. Young

Procureur général
ministre délégué aux Affaires autochtones

L'hon. David S. Young

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May 28, 2001

Secretary, Special Committee on Physical Evidence

Policy Secretariat
Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
Toronto, Ontario M5H 2N6

Dear Sir/Madame:

I would like to thank you for the opportunity to comment on proposed rule 4.01(10) relating to lawyers' duties with respect to physical evidence of crime. I have grave concerns about the rule proposed by the majority of the Special Committee which I believe is inconsistent with the criminal law relating to obstruction of justice, is incompatible with the due and proper administration of justice, and will only serve to undermine the public's confidence in the legal profession.

The proposed rule purports to permit lawyers to participate in the concealment of evidence for lengthy periods of time, in some instances forever. There are three major aspects of the proposed rule which cause greatest concern.

First, the proposed rule would allow a lawyer to secrete evidence from the appropriate authorities until after the trial had commenced and the Crown had closed its case, solely for the purpose of permitting the defence to maximize the tactical effectiveness of the evidence at trial. This use of evidence is not consistent with Justice Gravelly's decision in *R. v. Ken Murray* (2000), 48 O.R. (3d) 544. Justice Gravelly stated at p. 570:

Once he had discovered the overwhelming significance of the critical tapes, Murray, in my opinion, was left with but three legally justifiable options:

- a. Immediately turn over the tapes to the prosecution, either directly or anonymously;
- b. Deposit them with the trial judge; or,
- c. Disclose their existence to the prosecution and prepare to do battle to retain them

I am satisfied that Murray’s concealment of the critical tapes was an act that had a tendency to pervert or obstruct the course of justice. [Emphasis added.]

Justice Gravelly’s judgement on this point should come as no surprise, since by holding on to the evidence until trial a lawyer is effectively concealing that evidence for that period of time. **What the proposed rule fails to take into account is that even temporary concealment of evidence of crime can have the effect of obstructing the course of justice.** That a rule of professional conduct of the Law Society of Upper Canada would purport to sanction such conduct is nothing short of scandalous. For example, the proposed rule would allow a lawyer to conceal physical evidence from the authorities even though the lawyer knows that the Crown is conducting plea discussions with a co-accused and that the physical evidence of crime would affect the outcome of those discussions. In short, it might allow a repeat of the *Bernardo* situation, in which the Crown was obliged to conduct plea discussions without knowledge of the existence of the most important physical evidence implicating the accused. As Justice Gravelly indicated at pages 566 and 567 of his judgment, the failure to disclose the tapes in that case not only tended to obstruct the police in their duty to investigate the crimes, but also impacted throughout on the series of prosecutorial decisions being made as the case was proceeding to trial. In this connection, Justice Gravelly commented as follows:

On the face of the evidence Murray’s action in secreting the critical tapes had the tendency to obstruct the course of justice at several stages of the proceedings.

The tapes were put beyond the reach of the police who had unsuccessfully attempted to locate them. Secreting them had the tendency to obstruct the police in their duty to investigate the crimes of Bernardo and Homolka.

The impact of the absence of the tapes flowed through into the ability of the Crown to conduct its case throughout. Quite apart from, and in addition to, the possible impact of the tapes on the outcome of the Homolka proceedings, as Blacklock J. pointed out in his reasons for committal at the Preliminary Inquiry, “A whole series of prosecutorial decisions are being made as a case proceeds along to trial. **One of those prosecutorial decisions occurred when, without knowledge of the tapes, Crown counsel approached Murray with a resolution offer which Murray recommended to his client.** [Emphasis added.]

Justice Blacklock's comments at page 17 of his Reasons for Judgment on the preliminary inquiry in *R. v. Murray* are also apposite:

I agree that the notion that incriminating physical evidence may be held to the point of trial is troubling for reasons other than those set out in Fairbank. A whole series of prosecutorial decisions are being made as a case proceeds along to trial that the strength of the case relates to. Decisions are made about judicial interim release, the form of the indictment upon which the Crown and the Court will proceed is determined, whether or not to enter into plea negotiations, what position to take in those negotiations. If counsel are entitled to hold incriminating physical evidence to the point of trial, on the basis that to do so furthers in any measure a defence tactic counsel could presumably permit all these key decisions to be made knowing that it had taken out of any potential zone of discovery, significant incriminating physical evidence which would impact on those decisions.

Given the clear pronouncements by Justice Gravely and Justice Blacklock on this point and the inherent logic of their position, the proposed rule is most problematic, as it purports to permit a lawyer to do that which the courts have said cannot be done. The implementation of this rule permitting defence counsel to hold on to incriminating evidence, for tactical reasons, until after the Crown's case is closed would not instill public confidence in the administration of justice. To the contrary, I am forced to observe that such a rule would bring the administration of justice into disrepute.

My second major concern is that the proposed rule would purport to allow a lawyer to retain physical evidence of crime in order to conduct scientific testing. The difficulty with this is that the proposed rule, once again, fails to consider the adverse effects that even temporary concealment of the physical evidence of crime could have on the administration of justice. The proposed rule also fails to recognize that the defence is not prejudiced by immediately handing over the evidence to the authorities. Any examination or testing of evidence that the Crown performs will be disclosed to the defence. If the Crown declines to conduct testing, or otherwise does not agree to reasonable defence testing, the defence has the ability to request the Court to order production of the evidence and, pursuant to s. 605 of the *Criminal Code*, the defence may seek a court order for the release of the evidence for scientific testing.

My third major concern with the proposed rule is that it would allow a lawyer who took possession of evidence of crime to return the evidence to the original source. This would, in effect, allow the lawyer to participate in the permanent concealment of evidence of a criminal offence. For example, it appears that if the item was originally hidden or buried in some remote location, then the proposed rule would allow the lawyer to rebury the evidence. The spectre of an officer of the court participating in the concealment of evidence in this manner would certainly shock the sensibilities of the community and would only serve to lower public confidence in the legal profession and in the due administration of justice.

The proposed rule is surprising in that it is contrary to past opinions rendered by the Law Society's *ad hoc* "smoking gun" committee. One such opinion involved the famous "bloody

shirt” case. In that case a person was wanted for murder and entered a lawyer’s office with blood on his shirt. The lawyer instructed the client to remove the shirt, which he did, and then placed the shirt in the client’s file. The lawyer started to worry about his actions, retained another counsel who approached the Professional Conduct Committee. The advice received from the Committee was:

You should not have taken the shirt. It is a piece of physical evidence. Not only that, what you saw with your eyes as opposed to what you heard with your ears, is not privileged so that you may be a witness now in this case. Our advice to you is that you must withdraw from the case and **you must turn the shirt over forthwith to the Crown Attorney.**

The proposed rule is also contrary to the rule promulgated by the Law Society of Alberta. I am unaware of any suggestion that Alberta’s rule has hampered the role of defence counsel. It would appear that the proposed rule is based upon an American model that is not likely to instill public confidence in the administration of justice, given the very different legal and social environments in which our two systems of law operate.

The proposed rule would do a great disservice to the legal profession. The Courts have routinely held that it is a criminal offence for anyone to conceal evidence of crime: *R. v. Lajoie* (1989), 47 C.C.C. (3d) 380 (Que. C. A.); *R. v. Lavin* (1992), 76 C.C.C. (3d) 279 (Que. C.A.) and *R. v. Akrofi* (1997), 113 C.C.C. (3d) 201 (Ont. C.A.). In attempting to formulate a rule regarding the retention of physical evidence of crime, the Law Society must ensure that the rule it enacts is consistent with the law. Any rule that is inconsistent with the criminal law is of no force or effect and *ultra vires* the Law Society, since, as you know, the Law Society is a provincial body which cannot amend federal criminal law. A lawyer who follows the proposed rule and retains physical evidence of crime until trial, or who conducts scientific testing without the knowledge of the authorities, or who returns the physical evidence of crime to its source, may still run the risk of being charged with a criminal offence.

I support the rule proposed by the Crown members of the Special Committee which states that physical evidence of crime that comes into a lawyer’s possession must immediately be turned over to the authorities. This proposed rule has many advantages: it is consistent with the criminal law; it is easy to understand and comply with; it poses no ethical dilemma to the lawyer, as the rule is mandatory rather than discretionary; investigative and prosecutorial decisions will be made with more comprehensive information, resulting in a reduced possibility of a miscarriage of justice; and ultimately, and most importantly, it serves to instill public confidence in the legal profession and in the administration of justice.

By way of summary, I am absolutely opposed to the rule proposed by the majority of the Special Committee. In my role as the chief law officer of the Crown, I am very concerned that this proposed rule gives no weight to the legitimate demands of the administration of justice that lawyers not become secret repositories of evidence of crimes. All right thinking members of the public will be appalled to discover that this proposed rule totally ignores the significant damage that can be caused to the administration of justice by any delay in handing over physical

evidence of crime to the authorities. In many cases, defence counsel will have no information concerning what steps an investigation or a prosecution may be taking and is in no position to gauge what damage delayed disclosure or non-disclosure might have on the conduct of an investigation or prosecution. It is simply unacceptable that the Law Society of Upper Canada would purport to permit lawyers to arrogate to themselves the decision as to when, or even whether, it is in the best interests of the administration of justice to disclose to the appropriate authorities physical evidence of crime which is in the lawyer's possession. There can be no doubt that it is in the public interest that investigative and prosecutorial decisions are made with all available evidence and information. That the Law Society might promulgate a rule that permits lawyers to secrete evidence that would have an adverse impact on those decisions and which might result in miscarriages of justice is intolerable and would only serve to bring the administration of justice into disrepute.

Thank you again for this opportunity to comment on the proposed rule. I sincerely hope that the Special Committee and Convocation will reconsider the possible implementation of the rule proposed by the majority of the Special Committee and will find favour with the rule proposed by the Crown members of the committee.

Yours truly,

David Young,
Attorney General and
Minister Responsible for Native Affairs

c.c. Robert Armstrong, Q.C.
Treasurer, Law Society of Upper Canada

APPENDIX C

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.01(10) – (16) AND COMMENTARY

Rule 4 - Relationship to the Administration of Justice

4.01 THE LAWYER AS ADVOCATE

Property Relevant to a Crime or Offence

- 4.01 (10) A lawyer shall not take or keep possession of property relevant to a crime or offence, except in accordance with this rule.
- (11) A lawyer may take or keep temporary possession of property relevant to a crime or offence only where:
- (a) it is necessary to do so to prevent the alteration, loss or destruction of the evidence,
 - (b) it is necessary to do so to prevent physical harm to any person,
 - (c) the client or the person possessing the property instructs the lawyer to promptly arrange for the property to be disclosed or delivered to the Crown or law enforcement authorities,
 - (d) the lawyer reasonably believes it is in the interests of justice that the property be examined or tested before it is disclosed or delivered to the Crown or law enforcement authorities, and the property may be examined or tested without altering or destroying its essential characteristics, or
 - (e) the lawyer reasonably believes that a wrongful conviction may be prevented if the property is first disclosed at trial, and this use of the property would be significantly diminished if it were disclosed to the Crown or law enforcement authorities before the trial.
- (12) A lawyer may take or keep temporary possession under subrule (11) (d) or (e) only if the lawyer has been authorized to do so by a committee of the Law Society established by the Treasurer to decide whether the lawyer may take or keep temporary possession. The lawyer must seek such authorization promptly.
- (13) A lawyer who takes or keeps possession of property relevant to a crime or offence shall not
- (a) counsel any alteration, concealment, loss or destruction of the property,
 - (b) alter, conceal, lose, or destroy the property, or
 - (c) deal with the property in a manner that there are reasonable grounds to believe would

- (i) obstruct justice, or
 - (ii) risk physical harm to any person.
- (14) A lawyer who takes or keeps property relevant to a crime or offence shall give up possession of the evidence as soon as practical and only in accordance with subrules (11)(d) or (e), (15) or (16).
- (15) A lawyer in possession of property relevant to a crime or offence may return the evidence to its source only if the lawyer is satisfied on reasonable grounds that the evidence will not be
 - (a) altered, concealed, lost or destroyed or
 - (b) used to cause physical harm to any person.
- (16) Subject to subrules (10) – (15), a lawyer in possession of property relevant to a crime or offence shall disclose or deliver it to the Crown or law enforcement authorities as soon as practicable in all the circumstances.

COMMENTARY

A. Introduction

A lawyer who takes from a client or other person property relevant to a crime or offence confronts difficult ethical issues and choices – and competing professional duties. This commentary is intended to assist lawyers who, in making decisions in the best interests of their clients, must also address their duties to the administration of justice.

A lawyer owes duties of loyalty and confidentiality to his or her client and must act in the client's best interests by providing competent and dedicated representation. These duties, which are fundamental to the administration of justice, among other things, encourage the client to be completely candid with the lawyer, who then can provide the best possible legal advice and representation, which is particularly important in the criminal law context where the reputation and liberty of the client may be at risk. The duties of loyalty and confidentiality must be fulfilled in a way that reflects credit on the legal profession, and inspires the confidence, respect and trust of clients and the public.

The lawyer also owes duties to the administration of justice, which require, at a minimum, that the lawyer not violate the law, improperly impede a police investigation, or otherwise obstruct the course of justice. These duties must be observed in the context of our adversarial system of justice, in which the state bears the burden of proof and an accused's lawyer is not allowed, unless the client permits, to assist in the proof of the crime or offence.

It is in this context that a lawyer's responsibilities under subrules 4.01 (10) – (16) should be considered. Under these rules, a lawyer is never required to take or keep possession of property relevant to a crime or offence and generally should not take or keep such property. However, in certain limited circumstances, is it permissible for a lawyer to take or keep such property temporarily. These rules also address how a lawyer should give up possession of property relevant to a crime or offence that he or she temporarily possesses.

B. Information Distinct from Possession

This rule applies where the lawyer takes or keeps property relevant to a crime or offence. It does not apply where the lawyer is merely informed of property in the possession or control of the client or other person. In those circumstances, the lawyer will ordinarily have a duty to keep confidential the information disclosed by or on behalf of the client (see rule 2.03.) Even where the lawyer is asked by or on behalf of the client to take or keep property relevant to a crime or offence, such information communicated by or on behalf of the client (as contrasted with the property itself) will ordinarily be confidential. The duty of confidentiality will also ordinarily apply to information about property communicated orally or in writing by or on behalf of the client (such as the location of the property) as well as information communicated by the client's actions (such as the fact that the client has possession or control of property). The lawyer's actions in viewing the property, without more, will ordinarily be confidential, as will any advice the lawyer provides to the client with respect to the property, as long as the lawyer does not counsel or participate in any alteration, concealment, loss or destruction of it.

Where the lawyer refuses to take possession of the property, the lawyer should be careful not to counsel or participate in the alteration, concealment, loss, or destruction of the property. The lawyer may provide legal advice concerning obstruction of justice and about how the handling of incriminating evidence may show consciousness of guilt to allow the client to make an informed decision on what is in the client's best interests. Subject to the qualifications of this rule (for example, the qualification about preventing physical harm to others) what to do with the property is the client's decision, as the client will have to face the consequences of the decision.

If the client leaves with the property, the lawyer's observations of the property and the client's possession of it will usually be confidential under rule 2.03. Nevertheless, the lawyer's knowledge may affect his or her ability to act as defense counsel. For example, if the lawyer learns that the client intends to testify that he or she never had possession of the property that the lawyer observed in the client's possession, the lawyer could not lead the client's evidence and

would have a duty to withdraw from the representation in accordance with rule 2.09 (7)(b) if the client insists on giving this testimony.

C. Types of Property

This rule applies to all types of property relevant to a crime or offence including original documents and documents that are electronically stored or formatted.

D. The Lawyer's Duties With Respect to Property Relevant to a Crime or Offence

Where under rule 4.10 (11)(d), the lawyer takes or keeps the property to examine or test it, the examination or testing must be genuinely for the purpose of the client's representation and not devised to aid in a ruse or to avoid disclosure of the property to the Crown or law enforcement authorities.

The lawyer should be satisfied that the person performing any test is reputable, and the lawyer should keep a record of the test and its observations and results. Where the testing method could alter or destroy the essential characteristics of the property, temporary possession is not authorized under rule 4.01(11)(d) and the lawyer should either (a) notify the Crown or law enforcement authorities so that the lawyer and the Crown may agree on a suitable testing process or apply to the court for directions or (b) give up possession of the property in accordance with the rule. The lawyer should give up possession of property kept for examination or testing as soon as is practicable.

Where under rule 4.10 (11)(e), the lawyer takes or keeps the property to make use of it at trial, the evidence should be disclosed to the Crown at trial, generally before the close of the Crown's case. If the property is not disclosed until after the close of the Crown's case, the lawyer should not oppose the Crown's case being reopened.

Where the lawyer takes or keeps temporary possession in any of the permitted circumstances, the lawyer should safeguard the property to ensure that it is not altered (for example by deterioration) or destroyed.

Where the lawyer takes possession of property relevant to a crime or offence but is not permitted to keep temporary possession of it, the lawyer should make arrangements for the property to be returned to the client or other source or disclose or deliver it to the Crown or law enforcement authorities in accordance with the rule as soon as practicable.

E. Where Disclosure Should be made to Authorities

When a lawyer discloses or delivers property relevant to a crime or offence to the Crown or law enforcement authorities, the lawyer has a duty to protect the client's confidences, including the client's identity, and to preserve solicitor and client privilege. This may be accomplished by the lawyer retaining independent counsel (who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer), to disclose or deliver the property.

F. Advising the Client

Before taking or keeping possession of property relevant to a crime or offence, the lawyer should advise the client that

- (i) the lawyer cannot be used as a means of altering, concealing, losing, or destroying the property,
- (ii) communications made for the purpose of altering, concealing, losing or destroying the property are not protected by solicitor and client privilege,
- (iii) the lawyer may take or keep possession of the property only in exceptional circumstances, and only then temporarily, and may be required to disclose or deliver the property to the Crown or law enforcement authorities,
- (iv) law enforcement authorities may seize the property by means of a valid search warrant, regardless of whether the property is kept by the client or the lawyer, and
- (v) if the client chooses to keep the physical evidence,
 - (A) the client cannot alter, conceal, lose, or destroy the property without committing a criminal offence,
 - (B) the lawyer cannot lead the client's evidence if the client proposes to testify that he or she never had possession of the property,
 - (C) if the client persists in the instructions described in (B), the lawyer will be required to withdraw as the client's counsel subject to the rules about criminal proceedings and the direction of the tribunal (see subrules 2.09 (4) – (9)), and
 - (D) any evidence of alteration, concealment, loss, or destruction of the property that can be proved by the Crown may be incriminating evidence.

The lawyer should prepare a written record of all communications and actions taken by him or her respecting property relevant to a crime or offence. The record should be kept in the lawyer's

file. If the lawyer takes or keeps property in accordance with the rule, the lawyer should keep the property in the file or record in the file the location of the evidence.

G. Seeking Advice and Authorization

A lawyer who is asked to take or does take property relevant to a crime or offence should generally seek the advice of senior counsel or the Law Society. The lawyer is *required* by the rule promptly to obtain the authorization of a committee of the Law Society established by the Treasurer before taking or keeping temporary possession of the property for testing or for use at trial. The lawyer should document all communications and dealings with respect to the property for the purposes of obtaining authorization including making a record of any advice obtained from senior counsel or the Law Society.