



Ethical Considerations in Criminal Law Practice

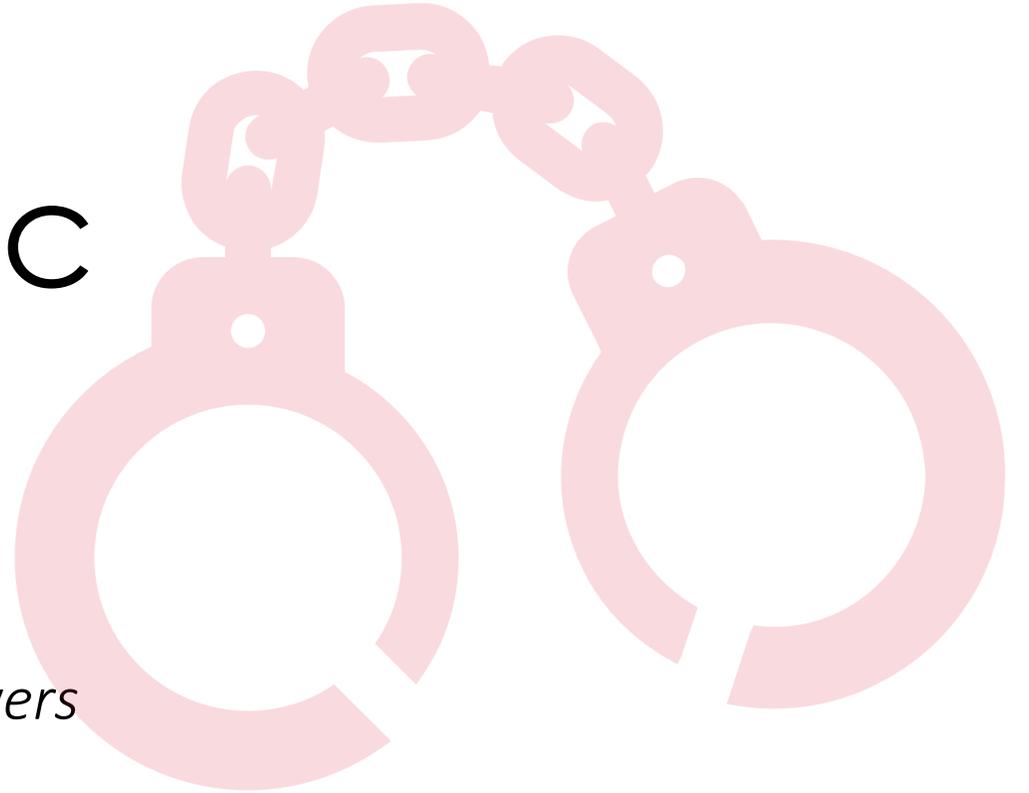
By Criminal Defense Lawyer
Stefano L. Molea, Esq.



Issues Specific To Criminal Law

*“Criminal lawyers are civil, civil lawyers
are criminal”*

-Unknown



General Basic Rules

Applicable to all lawyers in California

My stuff and your stuff
Rule 1.15: "Safekeeping Funds and
Property of Clients and Other
Persons"

"To maintain inviolate the confidence,
and at every peril to himself or herself
to preserve the secrets, of his or her
client."
B&P 6068(e); Rule 1.6



Rule 4.1: Truthfulness in
statements to others;
Rule 8.4(c): Misconduct to engage
in conduct involving dishonesty;
Rule 3.3: Candor towards the
tribunal

Rule 1.4; A lawyer must "respond
promptly to reasonable status
inquiries of clients and to keep
clients reasonably informed of
significant developments in
matters" (*Fracasse v. Brent* (1972)
6 Cal.3d 784, 790; State Bar Formal
Opinion 1994-134.)

Candor

Let's explore various contexts.

Example of deceit



jonny sun 
@jonnysun



LAWYER: [whispers] i did the murder
[loudly] read that back?

STENOGRAPHER: "I Did The Murder."

JUDGE: omg the stenographer just
confessed

11:40 AM · 2015-09-22 · [Twitter for iPhone](#)

*Is this
ok?*

Me as a lawyer: my client is innocent
Them: your client is on video dragging a lifeless
body into the woods
Me:





A client tells
you they
committed
the crime

- **Trial:** Lawyer knows client is going to take the stand and perjure him/herself. Can only inquire in the narrative.
- **Effect on Lawyer:** Cannot make representation to court or opposing counsel which suggests otherwise.
 - Quiz Time...

Do you ask the client if
she was guilty?



*Remember, there is a difference between being factually innocent
and not guilty.*

Let's explore this a bit further...

Just Because You Did It
Doesn't Mean You're Guilty.



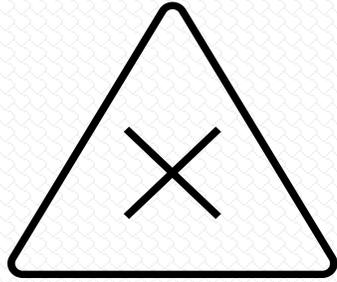
The Law Office Of
LARRY L. ARCHIE
ATTORNEY AT LAW

101 S. Elm St. Suite 35
336.285.7202

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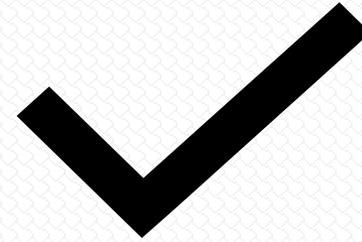
Underlying Principles

- Innocent is not the same as Not Guilty
- Guilty, in our criminal justice system, means the prosecution has provided evidence that establishes every element of the charged crime beyond a reasonable doubt
- Someone could have actually done an act, but be found Not Guilty because the evidence is not sufficient
 - Jury: “We think she did it, but the prosecution couldn’t prove it, so we voted not guilty”
- More in depth discussion:
<https://millennialmagazine.com/2017/08/15/a-legal-perspective-just-because-you-did-it-doesnt-mean-youre-guilty/>



Not ok!

Me as a lawyer: my client is innocent
Them: your client is on video dragging a lifeless
body into the woods
Me:



Hey, it's their burden!

When opposing counsel whips out
video surveillance of ur client and u try
to act like u can't tell who it is



Client does not want to concede a charge

- In *McCoy* (138 S.Ct. 1500), the US Supreme Court held that if the client objects, you can't concede guilt in a death penalty trial in order to try to obtain a life verdict in the penalty phase.
- In *People v. Eddy*, defense counsel conceded that the defendant committed manslaughter, to try to save him from a murder conviction. At sentencing on the murder, client stated that he had directed counsel to argue that he was factually innocent. Counsel admitted this.
- Court of Appeal reverses the conviction and rules that the failure of the defendant to object during final argument didn't matter, since it was clear that the client opposed counsel's strategy.

People v. Eddy; C085091; 3/26/19; C/A 3rd

Client uses
lawyer to
aid in the
commission
of a crime



Crime/Fraud Exception to Privilege



Evidence Code 956: (a) There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

Representing CO- defendants

Rule 1.7: You cannot, unless there is informed written consent from each client.

Actual conflict: Co-defendants are passengers in a vehicle. Illegal gun found in the center console. Each co-defendant points the finger at the other.

Potential Conflict: Husband and wife participate in filing a false insurance claim.

Continued...

- Rule 1.7 (d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:
 - the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - the representation is not prohibited by law; and
 - the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.
- *Above rules also apply in situations where a new client's co-defendant is lawyer's former client...*

*I represent John, and his co-defendant is Mary.
Mary is a former client of mine.*

Rule 1.9- Duty to former clients

- Will anything I know about Mary be used against her in my representation of John?

E.g. I need to cross examine Mary and I know, from my former representation, that she has a substance abuse problem which causes her memory to be affected.

After termination of a lawyer-client relationship, the...lawyer may not ...at any time use against the former client knowledge or information acquired by virtue of the previous relationship. (*See Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256]; *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505].)

What if a former client becomes the co-defendant in a new case and you represent someone new?



Coming across evidence of a crime

- Hypo: During the investigation of a bank robbery case, defense counsel's investigator goes to defendant's home at defendant's request to bring some of his clothes to the jail for future court appearances. While rummaging through a closet, the investigator discovers a ski mask, sawed-off shotgun, and a large sack filled with money. He calls defense counsel and asks what to do with the items (which counsel, who has seen the bank surveillance photos, believes were part of the bank robbery).

What do you do?

Answer

- Tell the investigator to leave the items alone! An attorney has no right to hide or possess evidence of a crime once that evidence comes into his or her possession. The leading California case, *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612], holds that evidence over which the attorney takes possession is not protected by the attorney-client privilege and states that it must be turned over to the prosecution. However, if not possessed by counsel or the investigator, there is no duty to inform the authorities of its whereabouts.
- Cal. State Bar. Committee on Prof. Resp., Formal Opinion 1984-76 (1984) ("**Thus, in the situation wherein the client informs the attorney of the location of the physical evidence of the crime, or the attorney merely observes it without taking possession, the attorney need not disclose to the prosecution either its location or his or his agent's physical observations of the same.**")

Credit: Chuck Sevilla, San Diego.



Client says he is about to commit a crime

Business and Professions Code 6068(e)

An attorney has a duty: “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client;” (2) “Notwithstanding paragraph (1), an attorney may, **but is not required to**, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”

Continued...

Rule 1.6 also says: Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable* under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and **(2)** inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).

- Reveal must be narrowly tailored.

Special responsibilities of prosecutors



Rule 3.8: Special responsibilities of prosecutors (a)-(g)



(a) not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;



(d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;



(f) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction...

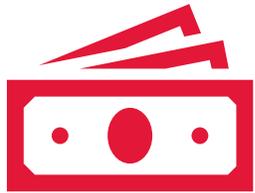


(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

Technically cannot reveal because BPC 6068 says:
“an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a **criminal act...**”

Client tells
you he/she
is suicidal

Payment of fees by third party



Rule 1.8.6 Compensation
from One Other than Client



A lawyer shall not enter into
an agreement for, charge,
or accept compensation for
representing a client from
one other than the client
unless:



(c) ...client must provide
written consent regarding
third party payor as soon as
practically possible (e.g.
family pays for incarcerated
client)



Releasing discovery to clients

- General Rule: "[d]uring a representation, defense counsel should provide the client with the client's file upon request, even if fees or costs are disputed or unpaid in whole or in part." See *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 621-622.

But not so fast...

PROTECTIVE ORDERS

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
Defendant.

Case No. _____
PROTECTIVE ORDER

IT IS HEREBY ORDERED, as follows:
The following Protective Order shall govern the use and disclosure of the Law Enforcement Generated Video ("Video"), including CHP MVARs and/or Body Worn Camera, produced in accordance with discovery disclosure under the laws of California in the case of People v _____
Except by further order of this Court:
1. The Video shall not be used in any proceeding other than the instant case.
2. The Video shall not be downloaded or inputted into any computer program or internet website subsequent to the issuance of this order. This does not apply to any computer program maintained and used specifically for this criminal action.
3. This Protective Order shall not prevent authorized individuals from having access to a Video to which they would have had access in the normal course of their duties.
4. No copy can ever be provided to the defendant or a witness. A copy may be provided to investigators, experts, or consultants retained by any party to work on this case. Any such copies shall be destroyed by the investigator, expert or consultant upon the final termination of this case. Confirmation of the destruction will be provided to the defense counsel.

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PROTECTIVE ORDER

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5. Disclosure of the Video recording shall be limited to the following persons: Counsel, party, defendant, or witness in this case; Investigators, experts or consultants retained by any party to work on this case.
6. Counsel for any party to this action shall advise those individuals to whom disclosure of the Video is made of the terms of the Protective Order, and obtain the consent of any such individual that he/she will be bound by the Protective Order. In the event such individual does not consent to be bound by the Protective Order, no disclosure of the recording or its contents will be made.
7. Defense counsel shall not provide to the Defendant or a witness, either orally or in writing, any personal identifying information as defined in California Penal Code section 530.55(b) and/or pursuant to Penal Code section 1054.2, except names, of any person identified within the Video.
8. A signature below by the Deputy Public Defender at arraignment is binding on the Public Defenders Office, the Alternate Public Defenders Office and the Multiple Conflict Defenders Office.
9. This Protective Order and the obligations of all persons subject to it, shall survive the final termination of this case, whether such termination is by settlement, judgment, dismissal, appeal, or otherwise. The Court retains jurisdiction to modify this order and to make further orders regarding the custody, control, and use of the Video.

IT IS SO STIPULATED.

Dated: _____
Summer Stephan, District Attorney

Attorney for the People

Dated: _____

Attorney for the Defendant

IT IS SO ORDERED.
Dated: _____

Judge of the Superior Court

2
PROTECTIVE ORDER

Personal Information of Alleged Victim or Witnesses

- PC 1054.2.: (a) (1) Except as provided in paragraph (2), no attorney may disclose or permit to be disclosed to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1, unless specifically permitted to do so by the court after a hearing and a showing of good cause.



Other issues

- Sometimes, providing discovery to a client can be detrimental to the client's case and even jeopardize his safety.
- For instance, if a jail-mate reads the discovery and finds out that the type of charge is a sex crime or involves children, the client will be at risk of physical attack.
- Also, people will try to learn things about a case and then pretend that they can offer helpful information to the prosecution in order to cut a deal for themselves.

Questions?
Comments?

LET'S STAY IN TOUCH!

- Email: Stefano@DPShapiro.com
- Call: 619-295-3555
- Instagram: [@SanDiegoCriminalDefense](https://www.instagram.com/SanDiegoCriminalDefense)
- Twitter: [@MoleaLaw](https://twitter.com/MoleaLaw)
- LinkedIn: [Stefano Molea](#) - only one of me



The image features a background of a complex network of black lines and nodes on a light gray background. A large, semi-transparent red rectangle is centered horizontally and vertically, covering most of the image. Two dark blue squares are positioned at the top and bottom center, partially overlapping the red rectangle and the network background. The text "THANK YOU" is centered within the red rectangle in a white, bold, sans-serif font.

THANK YOU