

**21-0001 [re Criminal Defense Attorney Disclosure Obligations]**

Preliminary Issue Outline for Opinion Regarding Guidance for Criminal Defense Attorneys under  
*People v. Meredith*

I. Issues/Questions

- a. What must a criminal defense attorney do when evidence that affects a criminal matter is made known to them by means of a confidential communication?
- b. What must a criminal defense attorney do when evidence that affects a criminal matter is provided to them by their client during a confidential communication?
- c. What must a criminal defense attorney do when evidence affecting a criminal matter is provided to them by a third party?
- d. What must a criminal defense attorney do when evidence affecting a criminal matter is provided to them by a third party acting as an agent of their client

II. Background and Authorities

- a. Rule 1.0(a): The purpose of the rules of professional conduct are, among other things, to promote confidence in the legal profession
- b. Business and Professions Code section 6068 (e): It is the duty of an attorney to do all of the following: [...] To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, or his or her client [...] [except that] 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 the death of, or substantial bodily harm to, an individual. (B&P 6068), unless the client gives informed consent.
- c. Penal Code 135: A person who, knowing that any book, paper, record, instrument in writing, digital image, video recording owned by another, or other matter or thing, is about to be produced in evidence upon a trial, inquiry, or investigation, authorized by law, willfully destroys, erases, or conceals the same, with the intent to prevent it or its content from being produced, is guilty of a misdemeanor.
- d. Rule 3.4(a): A lawyer shall not “(a) unlawfully obstruct another party’s access to evidence, including a witness, or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; [shall not] suppress any evidence that the lawyer or the lawyer’s client has a legal obligation to reveal or to produce
- e. “[T]he attorney-client privilege does not permit attorneys to disturb evidence without disclosing its original location and condition, nor may they turn over physical evidence to their clients rather than to the police or prosecution.  
(*People v. Superior Court (Fairbank)* ) (1987) 192 Cal.App.3d 32, 39–40, 237

Cal.Rptr. 158 ["If counsel or an agent of counsel chooses to remove, possess, or alter physical evidence pertaining to the crime, counsel must immediately inform the court of the action"]; *People v. Lee* (1970) 3 Cal.App.3d 514, 526, 83 Cal.Rptr. 715 [defense counsel has no right to withhold evidence from the state by asserting attorney-client privilege]; *Clutchette v. Rushen* (9th Cir.1985) 770 F.2d 1469, 1472 ["California law requires that a defense attorney must, after a reasonable time, turn evidence taken from its original resting place over to the prosecution"]; *People v. Meredith* (1981) 29 Cal.3d 682, 695, 175 Cal.Rptr. 612, 631 P.2d 46 [attorney-client privilege does not protect defense counsel who removes or alters evidence from divulging its original location and condition]; see *People v. Fairbank* (1997) 16 Cal.4th 1223, 1240, 69 Cal.Rptr.2d 784, 947 P.2d 1321.)" (Alhambra Police Officers Assn. v. City of Alhambra Police Dept. (2003) 113 Cal.App.4th 1413, 1423-24.)

- f. "Neither the public defender nor substituted counsel for defendant had the right to withhold the evidence from the State by asserting an attorney-client privilege. It has been held 'an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the instrumentalities of a crime.' (In re Ryder, 4 Cir., 381 F.2d 713, 714.) A defendant in a criminal case may not permanently sequester physical evidence such as a weapon or other article used in the perpetration of a crime by delivering it to his attorney." (People v. Lee (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715, 722].)
- g. "[T]he attorney-client privilege is not strictly limited to communications, but extends to protect observations made as a consequence of protected communications." People v. Meredith (1981) 29 Cal.3d 682, 693 [175 Cal.Rptr. 612, 618, 631 P.2d 46, 52]
- h. "[W]henever defense counsel removes or alters evidence, the statutory privilege does not bar revelation of the original location or condition of the evidence in question. We thus view the defense decision to remove evidence as a tactical choice. If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation. If, however, counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege." People v. Meredith (1981) 29 Cal.3d 682, 695 [175 Cal.Rptr. 612, 620, 631 P.2d 46, 54]
- i. Footnote 5 in *Meredith* suggests that when third party discovers evidence, attorney must not only turn it over, but also testify about its source, privilege is inapplicable because third party not acting as agent of client. Ergo - "at best, the footnote stands for the proposition that the attorney-client privilege may apply to a situation where a third party, acting as the agent of the defendant, delivers evidence to the defendant's attorney. However, *Meredith, supra*, 29 Cal.3d 682, 175 Cal.Rptr. 612, 631 P.2d 46 provides no further guidance than this general

proposition. It does not tell us under what conditions a court should find agency in this criminal context or what evidence the defendant would have to offer to prove the existence and scope of agency.” Zimmerman v. Superior Court (2013) 220 Cal.App.4th 389, 398 [163 Cal.Rptr.3d 135, 141]

### III. Discussion and Potential Hypotheticals

- a. *People v. Meredith* still lays out the primary paradigm for approaching evidentiary issues: if a confidential communication leads to discovery of evidence, the attorney is left with a tactical decision: 1) observe the evidence in a way that does not alter, destroy, or make the evidence harder to find; or 2) retrieve the evidence, and then provide it to the prosecution and protect only the confidential communication that lead to its discovery, making sure not to alter or destroy the evidence (or its evidentiary value)
  - i. This answers the first question above.
  - ii. If the evidence is provided, it cannot be withheld. This merely takes away the attorney’s tactical choice, forcing them into the second category of forced disclosure of evidence without disclosing the confidential communication
  - iii. Third, and relatively clear from the authorities, a third party providing the evidence would simply fall outside the confidential communication, and therefore providing the evidence to the prosecution would be required, along with testimony about the source
- b. Less clear is what happens when an agent of the criminal defense attorney’s client – not being counseled to do so by the attorney – provides the evidence to the attorney accompanied by a confidential communication. This introduces the concept of a third party, but also places it under the protection of confidential communications. The *Zimmerman* case’s treatment of this issue seems to suggest that it would likely be handled the same way as if a criminal defendant provided it: turn it over without testimony about the source
- c. Proposed hypotheticals would follow the four questions presented, the first three being basic iterations well-known ethical guidelines taught in any Professional Responsibility class. The last would have little to no guidance outside *Meredith* and *Zimmerman*, and would likely conclude with “provide the evidence, claim privilege about its source.”