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Ethics and the Law: Too Hot to Handle - By Robert Pelton

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There have been several calls to the hotline from lawyers faced with a dilemma when they find themselves with evidence or knowledge of evidence in a criminal case. For instance, a client may bring in a bloody knife and tell you they just stabbed someone. A client could bring in a gun and tell you they just shot someone in a robbery. A client may tell you their cell phone contains pornography or other bad information. What do you do?

Joseph Connors, a longtime lawyer friend and original member of our Ethics Committee, has told me many times the following: SOME THINGS ARE TOO HOT TO HANDLE.

If a client brings in something that could be evidence, you can tell them several times anything law enforcement can use against you will be used. Tell them that several times and then adjourn your meeting and have client come back later and never mention it again.

Never, *never* tell a client to throw the evidence in the river or somewhere else. You are then subjecting yourself to criminal prosecution.

If your client brings you incriminating evidence (not contraband or child porn), you can give it back to them with a copy of the tampering with evidence statute. If you think they will destroy it, you can keep it, but you should secure it safely in your law office so as to protect yourself against a charge of tampering with evidence. If your client brings you contraband, you must get that into the hands of law enforcement; how you do that without incriminating yourself or hurting your client will depend on the facts of the case. If you stumble upon child porn on your client's cell phone or computer, treat it as contraband and turn it over to law enforcement. The logistics of doing that are obviously far more complicated. You will want to remind yourself that you have a Fifth Amendment privilege and a work-product privilege, and you don't want to waive those protections in any way. You also should recognize that your personal and professional interests are in conflict with your client's interests. Accordingly, you should consider retaining a lawyer for yourself.

If the client brings you incriminating evidence and insists that you take it, you must turn it into the authorities. The last thing you want to do is to get hit with a tampering or obstruction charge. If the client tells you about specific incriminating evidence that exists somewhere (including a phone) that is NOT in your possession, no authority obligates you to report it (unless a statute says otherwise?like Texas Family Code 261.101?or the crime-fraud exception applies, or a person's life may be imminently threatened). In fact, absent an exception, reporting such a communication or information from a client would be a breach of the attorney-client privilege. However, you cannot tell a client to destroy evidence or make it ?disappear.?

There is nothing wrong telling a client "I don't want to know about any client criminality you are involved in." Our job as defense lawyers is to clean up messes after the "bomb" has already been detonated, not to be "business partners" with our clients so that we are obligated to rat them out.

The Bottom Line on Evidence Too Hot to Handle

Never receive it physically from the client. If client's own first attorney receives it, the first attorney should hire another attorney to turn that evidence/information (i.e., child pornography images and/or videos) into the District Attorney or proper law enforcement agency with the stipulation that the second attorney will not disclose identifying information of the first attorney or the first attorney's client. The first attorney must call the CPS 800 phone number hotline and report information of the abused child's name, address, etc., so CPS can begin an investigation. However, the question lingers: Does the attorney have to name his or her source of that information, which just might be the accused who is the client of the first attorney?

Remember in life some things are TOO HOT TO HANDLE.

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