

FORMAL OPINION NO 2005-105

Information Relating to the Representation of a Client: Receipt of Property Stolen by Client or Other “Fruits” of Crime

Facts:

Defendant *A* is charged with theft. Defendant *A* hires Lawyer *A* and asks Lawyer *A* to take possession of the stolen property and return it to the victim of the crime.

Defendant *B* is charged with obtaining money under false pretenses. Defendant *B* hires Lawyer *B* and would like to pay Lawyer *B* a large advance retainer.

Defendant *C* is accused of murder. Defendant *C* hires Lawyer *C* and asks Lawyer *C* to take possession of the murder weapon.

Questions:

1. May Lawyer *A* accept the stolen property for the reason noted?
2. May Lawyer *B* accept the retainer?
3. May Lawyer *C* accept the murder weapon?

Conclusions:

1. Yes.
2. Yes, qualified.
3. No, qualified.

Discussion:

1. *Return of Stolen Property to a Crime Victim.*

Absent a separate unlawful purpose, Lawyer *A* may assist in the return of stolen property to its lawful owner. Cf. Oregon RPC 1.2(a), which provides, in pertinent part:

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

2. *Acceptance of the Retainer.*

On facts as provided, it is not clear whether the funds to be received by Lawyer *B* from Client *B* are the "fruits" of a crime. If Lawyer *B* knows¹ that the funds to be paid to Lawyer *B* were the fruits of a crime, Lawyer *B* cannot accept the funds. ORS 164.095 (prohibiting the receipt or retention of stolen property); Oregon RPC 8.4(a)(2) (prohibiting the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"); Oregon RPC 1.2(c) (a lawyer shall not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent"). See also *In re Albrecht*, 333 Or 520, 42 P3d 887 (2002); *In re Hendricks*, 306 Or 574, 761 P2d 519 (1988); *In re Griffith*, 304 Or 575, 748 P2d 86 (1987), *reinstatement granted sub nom Application of Griffith*, 323 Or 99, 913 P2d 695 (1996); *In re Anson*, 302 Or 446, 730 P2d 1229 (1986). If Lawyer *B* does not know that the funds are the fruits of a crime, however, Lawyer *B* may ethically accept and retain the funds. *But cf. F.T.C. v. Assail, Inc.*, 410 F3d 256 (5th Cir 2005) (requiring disgorgement of fees knowingly received from frozen funds).

3. *Acceptance of the Murder Weapon.*

A lawyer who comes into possession of information linking a client to a crime ordinarily is barred by the lawyer's duty of confidentiality from voluntarily disclosing that information to others. See, for example, ORS 9.460(3) and Oregon RPC 1.6, discussed in OSB Formal Ethics Op No 2005-34. A lawyer may not, however, accept evidence of a crime, such as the murder weapon at issue here, unless the lawyer makes it available to the prosecutor. *Cf. People v. Belge*, 50 AD2d 1088, 376 NYS2d 771 (App Div 1975), *aff'd*, 41 NY2d 60, 359 NE2d 377 (1976); *In re Ryder*, 381 F2d 713 (4th Cir 1967); *In re*

¹ *Knows* denotes "actual knowledge of the facts in question." Knowledge can be "inferred from the circumstances." Oregon RPC 1.0(h).

January 1976 Grand Jury, 534 F2d 719 (7th Cir 1976). See also ORS 162.295 (tampering with evidence); Oregon RPC 8.4(a)(4) (prohibiting “conduct that is prejudicial to the administration of justice”). A lawyer may, however, deliver the weapon to the prosecutor anonymously or through an intermediary to avoid implicating the lawyer’s client.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 7.5-2 (assisting in illegal or fraudulent conduct), § 12.4-1 (notification, handling, and distribution of client property) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 44–45 (2000) (supplemented periodically); ABA Model RPC 1.2; ABA Model RPC 1.6; ABA Model RPC 1.15; and ABA Model RPC 8.4.

