STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 10
June 3, 1988

QUESTION - What are the ethical and professional responsibilities of an attorney whose client informs the attorney that the client has embezzled funds from his employer and the client induces the attorney to take possession of the embezzled funds?

ANSWER - An attorney cannot assert the attorney-client privilege as a justification for taking possession of and retaining the fruits of a crime. The funds should be surrendered to an appropriate law enforcement official having jurisdiction, with identification of the right owner, if known. The attorney should not disclose the client's communications surrounding the attorney's receipt of the funds.

AUTHORITIES RELIED ON
Nevada Rules of Professional Conduct (Supreme Court Rules) 152 and 156.

DISCUSSION
An individual in the course of seeking advice from an attorney discloses the fact that he has embezzled monies from his place of employment. He informs the attorney he desires to admit his wrong, make partial restitution by returning the remaining balance of the monies, and appeal to the court for leniency.

Later the individual asks to place the remaining embezzled funds isn the attorney's trust account for safekeeping to evidence his early intent to make partial restitution, while he counsels with his family and seeks counseling. The attorney accepts the money.

Subsequently, the individual in writing informs the attorney he has changed his mind, does not want to make disclosure of the facts, and asks for the return of the monies deposited in trust.

SCR 156 addresses confidentiality of information. The rule reads:
1. A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections 2 and 3.

2. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.
3. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(a) to prevent or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action; or
(b) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

The effect of SCR 156 is modified by SCR 152, subsection 4, which reads as follows:
4. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

While SCR 156 is to be considered in deciding the question presented, the Committee is of the opinion that the confidentiality gained in the attorney-client relationship is not absolute. The common law prohibits an attorney from taking possession of the fruits of a crime, except for the limited purpose of turning them over to proper authority.

Though arising under variant fact patterns and under differing statements of the rule supporting the attorney-client privilege, all opinions addressing the subject hold that if counsel possesses the proceeds of a crime, counsel must disclose such to the appropriate authority. In re January, 534 F.2d 719 (7th Cir. 1976); In re Ryder, 263 F.Supp. 360 (E.D. Va. 1967) aff'd, 381 F.2d 713 (4th Cir. 1967); People v. Superior Court, 192 Cal. App. 3d 32, 237 Cal.Rptr. 158 Ct. App. 1987); People v. Meredith, 175 Cal.Rptr. 612, 613 P.2d 46 (1981); Morrell v. State, 575 P.2d 1200 (Alaska 1978); Anderson v. State, 297 So. 2d 871 (Fla. Dist. Ct. App. 1974) State v. Olwell, 394 P.2d 681 (Wash. 1984); California State Bar comm. on Professional Responsibility and Conduct, Op. 1986-1989.

The policy compelling this result is best stated in In re January, 534 F.2d at 727:
The recognition that an attorney need not produce stolen monies . . . would provide a mechanism by which a member of a learned profession could become the privileged repository of the fruits of a . . . crime. There is no reason for thinking that the policy of respecting the private enclave of individual citizens reaches that far.

While apparently unanimous in respect to compelling surrender of the fruits of a crime, the authorities are in disagreement as to whether or not the communications surrounding the possession of the property must or should be compelled. The Committee adopts the holding in State v. Olwell and Andersons v. State, supra, that though it is proper to turn over the property the attorney cannot be compelled to testify when, how and from whom the property was received.

CONCLUSION
A lawyer who takes possession of the proceeds of a crime from his client must surrender them to the appropriate law enforcement official and identify the rightful owner if known. The attorney should not divulge the communications of the client surrounding the receipt of the proceeds.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.