

ANCHORAGE POLICE DEPARTMENT



BUREAU BULLETIN



LEGAL BULLETIN NO. 14

August 8, 1978

DUTY OF DEFENSE ATTORNEY

TO DISCLOSE

EVIDENCE TO PROSECTUOR

Reference: Clayton J. MORRELL
v.
State of Alaska

Alaska Supreme Court
File No. 2790
575 P.2d 1200
Opinion No. 1521
March 3, 1978
575 P.2d 1200

FACTS:

MORRELL was arrested for the crimes of kidnapping and rape. He was appointed counsel to represent him. While in custody, a friend of the defendant cleaned out MORRELL's vehicle and found a yellow writing tablet on which appeared to be a kidnapping plan. The friend furnished the tablet to MORRELL's attorney who contacted MORRELL and asked him about it. MORRELL told his attorney that he had sketched the plan in response to a television report of an earlier kidnapping in Fairbanks. The attorney did not know what to do with "the plan", so he contacted the Ethics Committee of the Alaska Bar Association. The lawyer was urged to return the tablet to the friend of MORRELL, advise him as the law (AS.11.30.315) regarding concealment of evidence, and suggest that the friend turn the tablet over to the police.

As it turned out, the lawyer assisted the friend in giving the tablet to the police; then the lawyer withdrew from the case. The tablet was used at the trial of MORRELL, who was convicted. MORRELL raised several issues on appeal regarding the tablet and his "attorney client" privilege.

ISSUE:

Did the attorney have an affirmative duty to come forward with the evidence?

HELD: Yes.

REASONING:

1. The criminal defense attorney has an obligation to turn over to the prosecution any physical evidence which comes into his possession, especially where the evidence comes into the attorney's possession through acts of a third party who is neither a client of the attorney nor an agent of the client.
2. The attorney-client privilege does not give an attorney the right to withhold evidence.
3. If the evidence is obtained from a non-client third party who is not acting for the client, the privilege to refuse to testify concerning the manner in which the evidence was obtained is inapplicable.
4. Even if the attorney had received the tablet from MORRELL himself, the attorney would have been obligated to see that the evidence reached the prosecutor.

NOTES:

You must distinguish between an attorneys ethical duty (under the code of professional conduct) and his legal duty. Breach of ethical duty is not necessarily a crime. Misprision (concealment of a felony) generally requires an affirmative act of concealment.

Do not expect to get a statement from a defense attorney regarding what his client told him. This case involves "non-testimonial" evidence. Handwriting experts were able to establish that "the plan" was written by MORRELL and the friend testified that the plan came from MORRELL's vehicle. Remember--- the friend has no attorney-client privilege and has a duty to bring forth the evidence.

In another recent case (Duncan Campbell WEBB v. State of Alaska; File No. 2632; Opinion No. 1638; June 2, 1978), the Alaska Supreme Court upheld a search warrant for an attorney's office. The attorney, WEBB, was subsequently convicted of accessory after the fact to first degree murder. The court said there was no privilege and ".....the documents are evidence in a scheme of criminal conduct".

If information is developed to suggest that an attorney is concealing evidence, the District Attorney should be contacted immediately for instructions.