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# Obstructing The Bernardo Investigation: Kenneth Murray and the Defence Counsel's Conflicting Obligations to Clients and the Court

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ARTICLE

OBSTRUCTING THE *BERNARDO* INVESTIGATION: KENNETH MURRAY  
AND THE DEFENCE COUNSEL'S CONFLICTING OBLIGATIONS TO  
CLIENTS AND THE COURT<sup>♦</sup>

Christopher D. Clemmer<sup>\*</sup>

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*This article focuses on how the investigation and prosecution of Paul Bernardo not only exposed one of Ontario's most notorious killers but led to significant discussion about the legal and ethical obligations faced by criminal defence lawyers. Using the example of the prosecution of Kenneth Murray, Bernardo's lawyer, for obstruction of justice, this paper examines the tension that is created between the conflicting duties owed by defence lawyers to candor and confidentiality. The limits of confidentiality are explored, as is the importance of the solicitor-client relationship to the legal system and whether (or when) there is a duty to disclose the possession of physical evidence. This paper will ultimately demonstrate that the ethical obligations faced by criminal defence counsel are often highly contextual and can only be decided on a case-by-case basis. As such, it is important that lawyers are provided with adequate guidance on difficult ethical and legal situations. However, despite Murray's prosecution (and acquittal), defence lawyers could still benefit from greater guidance in these difficult and legally-significant situations.*

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## I

### INTRODUCTION

On June 29, 1991, the dismembered body of 14-year-old Leslie Mahaffy was found encased in concrete in a lake near St. Catharines, Ontario. Abducted two weeks earlier, she had been raped before being murdered.<sup>1</sup> Less than one year later, the naked body of 15-year-old Kristen French was found in a ditch in Burlington, Ontario, having suffered the same fate.<sup>2</sup> The investigations that followed not only exposed one of Canada's most notorious killer couples, but eventually thrust Ontario's legal community into a divisive argument about the ethical and legal obligations of criminal defence lawyers. Kenneth Murray, defence counsel for accused killer Paul Bernardo, was eventually charged with obstruction of justice for his handling of

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<sup>1</sup> *Report to the Attorney General of Ontario on Certain Matters Relating to Karla Homolka* by Patrick T. Galligan (Toronto: ADR Chambers, 1996) at 230 [Galligan Report].

<sup>2</sup> *Ibid.*

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inculpatory physical evidence while representing his client.<sup>3</sup> This paper will examine Murray's conduct during his representation of Bernardo and will discuss the balance that must be struck by a criminal defence lawyer when she is faced with the prospect of accepting physical evidence from her client. It will then be demonstrated that the ethical obligations faced by criminal defence counsel are often highly contextual and can only be decided on a case-by-case basis.

To understand Murray's actions, it is important to have a general understanding of the crimes with which Bernardo had been charged, as well as timeline of the case. Accordingly, this paper will begin with an account of the crimes of Bernardo and his former wife and accomplice Karla Homolka. Essential to this chronology are the dates on which Murray viewed the contents of six videotapes depicting the rapes and tortures of the eventual murder victims ("the tapes"), the date on which Homolka struck her plea bargain with the Crown, and the length of time that the tapes were held in Murray's possession. This timeline will assist in an examination of Murray's conduct, his subsequent prosecution, and the Law Society of Upper Canada ("LSUC") investigation.

Following a summary of the pertinent facts, the obstruction of justice charge will be evaluated. The charge will be defined and it will be demonstrated that Murray's actions satisfy the *actus reus* of the offense. The importance of the videotapes will then be examined and their tactical value outlined. It will become clear that Murray did, in fact, have legitimate justification for withholding the tapes. Mr. Justice Gravelly's reasons for Murray's acquittal on the charge of obstruction of justice will be outlined, as will the LSUC's decision to drop its investigation of the professional misconduct allegations. Finally, the rationale behind Murray's decision to remove himself from the Bernardo case will be outlined. It will ultimately be demonstrated that Murray's possession of the tapes put him in an extremely difficult ethical and legal position.

Subsequent to an examination of the obstruction of justice allegations, this paper will evaluate the obligations that a criminal defence lawyer has to her client. Once a lawyer has been retained

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<sup>3</sup> *R. v. Murray* (2000), 48 O.R. (3d) 544 (Sup. Ct.), 186 D.L.R. (4th) 125 [*Murray* cited to O.R.].

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there is a duty upon that lawyer to represent her client with undivided loyalty, within the constraints of the law. This paper will also demonstrate that this duty includes an inherent obligation to avoid judging a client's guilt. The duty to observe the instructions of the client will then be examined. Ultimately, it will be demonstrated that once retained, the criminal defence lawyer must zealously represent the interests of her client, subject to few qualifications.

Furthermore, this analysis will demonstrate that a criminal defence lawyer is bound by an obligation to further the course of justice as she defends her client, which prohibits the use of tactics that have the effect of misleading the court, explicitly or implicitly. This duty to the administration of justice can also restrict solicitor-client privilege. The lawyer's duty to the administration of justice creates an obligation that defines the limits of her duty to her client, but that often seems to conflict with that duty.

Subsequently, the most fundamental elements of the relationship between a criminal defence lawyer and her client – solicitor-client privilege and the duty to confidentiality – will be examined. The privilege that attaches to most lawyer-client discussions results in an obligation on the part of the lawyer to keep in the strictest of confidences almost anything that has been said between her and her client. This obligation prohibits criminal defence lawyers from assisting the Crown's case against her client.<sup>4</sup> Privilege does, however, have limits. For example, the lawyer's obligation to strict confidentiality does not oblige her to commit or be a party to a criminal offense (such as obstructing justice). Moreover, it will be shown that some communications have been found to be outside of the scope of solicitor-client privilege and the duty to confidentiality. Finally, this paper will examine the question of whether privilege can extend to physical evidence or whether there is a duty to disclose such evidence.

Maintaining the integrity of Canada's legal system requires a delicate balance between the rights of the accused and the rights of society. Using this as a foundation for analysis, this paper will examine the importance of respecting the basic rights of the accused in a criminal proceeding. It is essential that the accused be fully-informed

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<sup>4</sup> The Crown, however, must fully disclose its case. See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1.

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of his rights to defence, which requires largely uninhibited discussion with their lawyer. Without absolute trust in confidentiality, it is likely that the client will not disclose information that is essential to his defence. Additionally, this initial disclosure by the client may require the lawyer to take possession of inculpatory evidence. Therefore, a lack of trust between the lawyer and client will serve to deny the accused of his right to a full defence. Ultimately, it is difficult to maintain the integrity of the criminal system if a defence lawyer is compelled to break client confidentiality by disclosing physical evidence to the authorities even if that is the state of the law at present.

Much of the controversy surrounding a criminal defence lawyer's possession of physical evidence relates to whether (or when) there is a duty of disclosure. This analysis will discuss when this duty exists and will argue that in virtually all situations, a defence lawyer does not have an obligation to assist an investigation against her client. There is disagreement about a lawyer's obligations when she comes into possession of inculpatory physical evidence. There seems to be a right to withhold physical evidence for a reasonable period of time but there is little guidance on this issue, at least from the LSUC. As a result, the expectations of criminal defence lawyers in possession of inculpatory physical evidence are unclear, although the existing jurisprudence can be of assistance in that respect.

Having examined a lawyer's obligations both to her client and the administration of justice, this paper will then examine the tension created by these conflicting duties. The fact that a criminal defence lawyer is pulled in opposite directions by these duties can make her job very difficult. As such, under incredible pressure and with little guidance relating to the expectations of defence lawyers, Murray had to find a balance. This paper will argue his decision to retain the tapes was not entirely unreasonable.

As a criminal defence lawyer tries to satisfy her competing obligations, guidance from the LSUC is essential. This analysis will discuss the importance of guidance on the part of the LSUC in maintaining public confidence in the legal profession. Murray's dilemma was largely the result of the lack of guidance on difficult ethical issues from the LSUC, although, admittedly, this problem could have been mitigated through a review of the existing

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jurisprudence relating to the retention of physical evidence.<sup>5</sup> Nevertheless, the rules of the LSUC themselves provided little guidance. In the absence of specific professional guidelines, it is important for individual lawyers to develop personal ethical codes of conduct and review the existing jurisprudence relating to the matter at issue. Guiding principles from the LSUC, complemented by personal codes, will help to establish a baseline from which defence lawyers may work. Lawyers need guidance as they face the conflict between duties to the client and to the administration of justice.

As a result of the *Murray* case, the options left to defence lawyers in possession of inculpatory physical evidence have been significantly limited. This analysis will outline the options provided to lawyers in possession of inculpatory physical evidence by Mr. Justice Gravelly in the *Murray* decision, which have established a duty to disclose and a duty to inform the client of mandated disclosure. The LSUC's reaction to the *Murray* decision will then be outlined. The need for a revised rule will be established and the LSUC's proposed rule will be discussed.<sup>6</sup>

This paper will conclude with an examination of the present day LSUC *Rules of Professional Conduct* (the "*Rules*") relevant to the issues Murray faced. Despite several revisions, the *Rules* remain ambiguous and provide little guidance for criminal defence lawyers facing those same issues. Despite the good intentions behind the LSUC's proposed rule, criminal defence lawyers are offered little help.

There is an obvious need to prevent obstruction of justice by lawyers. If everything placed in a lawyer's hands was protected, lawyers' offices would become evidence safe houses. Conversely, by compelling some types of evidence to be disclosed, the fear that it will be disclosed to the Crown is likely to result in the accused being denied the opportunity to present to his lawyer evidence that is potentially relevant to his defence. This would force an accused person to decide what is important to show his lawyer and, as a result, would deny him a full, competent legal opinion. In this respect, laws compelling the defence to produce physical evidence arguably do so at the expense of the accused. *Murray* highlighted this tension. At the

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<sup>5</sup> See *Murray*, *supra* note 3 at paras. 80, 149.

<sup>6</sup> As will be seen, due to widespread opposition, the proposed rule was never adopted. As a result, defence lawyers are again left with very little guidance from the LSUC.

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time, the only realistic guidance was from case law relating to the production of physical evidence and not from the *Rules*. Without adequate guidance and facing competing duties, lawyers are left on their own to make difficult and significant ethical decisions.

## II

### THE CHRONOLOGICAL CONTEXT

To fully appreciate Murray's dilemma, it is essential to understand the crimes perpetrated by Paul Bernardo. This section of the paper will survey the relevant elements of Bernardo's crimes in an attempt to demonstrate the incredibly difficult circumstances in which Murray found himself.

On December 24, 1990, an unconscious Tammy Homolka choked to death on her own vomit.<sup>7</sup> Tammy had been drugged with animal tranquilizers by Paul Bernardo and Karla Homolka, her older sister, so that she could be raped while unconscious.<sup>8</sup> Although her death was ruled accidental, the string of deaths attributable to Bernardo had begun. Six months later, on June 15, 1991, 14-year-old Leslie Mahaffy went missing from outside of her Burlington, Ontario home. Mahaffy's dismembered body was found set in concrete on June 29, 1991.<sup>9</sup> She had been kidnapped, raped, tortured, and murdered by Bernardo and Homolka. On April 16, 1992, 15-year-old Kristen French went missing from a church parking lot in St. Catharines, Ontario.<sup>10</sup> Two weeks later, her naked body was found in a ditch in Burlington. French had suffered the same fate as Mahaffy: she was abducted, raped, tortured, and murdered by Bernardo and Homolka. The rapes and tortures of Tammy Homolka, Kristen French, Leslie Mahaffy, and at least two other young women were captured

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<sup>7</sup> *R. v. Bernardo* (20 June 1995), Toronto Region (Ont. Ct. J. (Gen. Div.)) (Evidence, testimony of Karla Homolka Vol. 1 at 165-166).

<sup>8</sup> *Ibid.* at 175-180.

<sup>9</sup> Galligan Report, *supra* note 1 at 230.

<sup>10</sup> *Ibid.* See also Canadian Broadcasting Corporation, "In-Depth: Bernardo, Bernardo/Homolka Timeline" *CBC News In-Depth* (21 February 2006), online: CBC News <<http://www.cbc.ca/news/background/bernardo/>> [CBC].

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on six home videotapes. However, the murders of Mahaffy and French do not seem to have been filmed.<sup>11</sup>

In mid-February 1993, after a three year investigation, Bernardo was arrested in relation to a string of violent rapes that took place in Scarborough, east of Toronto.<sup>12</sup> Kenneth Murray, a criminal defence lawyer from Newmarket, was retained by Bernardo to defend these charges.<sup>13</sup> On February 19, police executed a search warrant of Bernardo and Homolka's St. Catharines home which, despite lasting for 71-days, failed to produce the tapes.<sup>14</sup> On May 6, after the expiration of the warrant, Murray, Carolyn MacDonald (co-counsel), and Kim Doyle (office manager and law clerk) were given unsupervised access to the home by Bernardo's landlord to retrieve his personal belongings.<sup>15</sup> While in the home, Bernardo gave Murray specific instructions (over a cellular telephone) as to the location of the tapes, which were above a ceiling light fixture in an upstairs bathroom.<sup>16</sup> Bernardo instructed that although they would view the tapes in the future, Murray was not to view them. Murray would keep the tapes for 17 months.<sup>17</sup>

On May 14, Homolka, a suspect in the murders of French and Mahaffy, agreed to a plea bargain in exchange for her testimony against Bernardo.<sup>18</sup> The Crown had very little evidence to use in Bernardo's murder prosecution; Homolka's testimony was essential.<sup>19</sup>

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<sup>11</sup> Galligan Report, *supra* note 1 at 230; *French Estate v. Ontario (Attorney General)* [1996] O.J. No. 1300 (Ct. J. (Gen. Div.), 134 D.L.R. (4th) 587 at para. 2 (cited to O.J.)

<sup>12</sup> CBC, *supra* note 10; Galligan Report, *supra* note 1 at 233.

<sup>13</sup> *Murray*, *supra* note 3 at paras. 1, 4-5.

<sup>14</sup> *Ibid.* at para. 6.

<sup>15</sup> *Murray*, *supra* note 3 at para. 6.

<sup>16</sup> *Ibid.* at para. 10.

<sup>17</sup> *Ibid.* at para. 85a.

<sup>18</sup> The negotiations leading up to the agreement began on February 12, 1993 and lasted for three months. See Galligan Report, *supra* note 1 at 52. For a copy of the plea arrangement between Crown Attorney Murray Segal and Defence Lawyer George Walker, see Galligan Report, *supra* note 1 at 240-246.

<sup>19</sup> In his Report on Homolka's plea agreement, Justice Galligan claimed that "by the end of April [1993], the case against Paul Bernardo had not advanced at all. None of [the DNA] evidence was by then available. The videotapes had not been found. The search warrants expired on April 30, 1993 and all of the inquiries and investigations had not led the police a step closer to Paul Bernardo. *The only way to him was through Karla Homolka...* The authorities were faced with the unpleasant fact that

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As a result, she was offered an extremely attractive plea bargain: instead of two counts of first-degree murder, she would plead guilty to two counts of manslaughter, resulting in a 12-year sentence.<sup>20</sup> Sometime during May 14-17, Murray learned about Homolka's completed plea bargain (although no details about the terms). On May 18, the day that Bernardo was charged with the first-degree murders of French and Homolka, Bernardo authorized Murray to watch the tapes.<sup>21</sup> Sometime later in the month, he rented copying equipment and duplicated the tapes, but did not bill the Ontario Legal Aid Plan, concerned that this would alert the prosecution to the existence of the tapes.<sup>22</sup> On July 6, with the tapes still safely in Murray's possession, Homolka pled guilty to two counts of manslaughter, and was sentenced to a 12-year prison term. The details of her plea arrangement and her statement of facts were restricted by a court-ordered publication ban.<sup>23</sup> The plea bargain was completed and the tapes remained a secret.

In August 1994, Murray, for various reasons, asked defence lawyer John Rosen to take over the Bernardo case, to which Rosen hesitantly agreed.<sup>24</sup> On September 2, through lawyer Austin Cooper, Murray wrote to the LSUC to ask for advice on what to do with the tapes.<sup>25</sup> The LSUC's September 8 response, signed by the *ad hoc* committee of Earl Levy Q.C., Paul Copeland, and Colin Campbell Q.C., instructed that the tapes be turned over to the trial judge, Murray be removed from the case, and Bernardo be immediately notified.<sup>26</sup> Although the tapes were passed over to Rosen on September 12, he was uncomfortable with the prospect of surrendering the tapes before being able to evaluate them and ascertain their significance. That day, Murray was removed as counsel and LeSage A.C.J.O.C. ruled that Rosen was allowed to retain the tapes until October 7, with the understanding that he would "deal

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if Paul Bernardo was to be prosecuted for those offenses, it was essential that they have Karla Homolka's evidence and co-operation." [emphasis added]. *Ibid.* at 76.

<sup>20</sup> *Murray, supra* note 3 at para. 15.

<sup>21</sup> *Ibid.* at para. 16.

<sup>22</sup> *Ibid.* at para. 29.

<sup>23</sup> *R. v. Bernardo* [1994] O.J. No. 4119 (Ct. J. (Gen. Div)) at paras. 7, 9, 12; Galligan Report, *supra* note 1 at 101.

<sup>24</sup> *Murray, supra* note 3 at paras. 50-54.

<sup>25</sup> *Ibid.* at para. 2.

<sup>26</sup> *Ibid.* at para. 70.

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ethically, legally and professionally with [them] and would preserve [their] integrity.”<sup>27</sup> Although in Rosen’s subsequent meetings with the Crown he maintained that he had no ethical or legal obligation to surrender the tapes, Bernardo instructed that the tapes be turned over to the Crown.<sup>28</sup> On September 22, the tapes were delivered to representatives of the Metropolitan Toronto Police and the Niagara Regional Police.<sup>29</sup>

Bernardo was found guilty of all charges against him and was sentenced to 25-years in prison on 1 September 1995.<sup>30</sup> In January 1997, Kenneth Murray was charged with obstructing justice, conspiracy to obstruct justice, possessing child pornography and making obscene materials for withholding and copying the tapes.<sup>31</sup> The latter two charges were later dropped by the Crown.<sup>32</sup> Murray’s co-counsel, Carolyn MacDonald, was also charged with obstructing justice and possession of child pornography, although the charges against MacDonald were dropped in May 1997.<sup>33</sup> In March 2000, Murray unsuccessfully sought a stay of proceedings by claiming that his “to a trial within a reasonable time as guaranteed by s. 11(b) of the *Charter* has been infringed by both pre and post-charge delay”, the latter delay lasted for 38-months.<sup>34</sup>

In February, the LSUC served Murray with professional misconduct complaints, the hearing for which was delayed until after his criminal trial.<sup>35</sup> No complaint of professional misconduct was made against MacDonald.<sup>36</sup> On June 13, 2000, Murray was acquitted of the criminal charges against him. Gravely J held that “Murray’s

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<sup>27</sup> *Ibid.* at para. 74.

<sup>28</sup> *Ibid.* at para. 82, 84.

<sup>29</sup> *Ibid.* at para. 85.

<sup>30</sup> Galligan Report, *supra* note 1 at 239; *R. v. Bernardo* (1995) Toronto (Ont. Ct. J. (Gen. Div)).

<sup>31</sup> *R. v. Murray*, [2000] O.J. No. 1365, 185 D.L.R. (4th) 746 (Ct. J. (Gen. Div.)) at para. 3 [cited to O.J.]

<sup>32</sup> *Ibid.* at Appendix A.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* at paras. 1, 8.

<sup>35</sup> The Law Society of Upper Canada (Professional Regulation Committee), Press Release, “Charges of professional misconduct against Kenneth Murray withdrawn” (29 November 2000), online: LSUC <http://www.lsuc.on.ca/media/nov2900Kennethmurray.pdf> [LSUC Committee].

<sup>36</sup> Beth Gorham, “Bernardo lawyer faces censure over graphic videotapes” *The Calgary Herald* (22 February 1997) A15 [Gorham].

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testimony...raises a reasonable doubt as to his intention to obstruct justice.”<sup>37</sup> Similarly, on November 29, 2000, the LSUC withdrew the charges of professional misconduct and Robert P. Armstrong Q.C., then the Treasurer of the LSUC, promised the appointment of a special committee to “devise a proposed rule of professional conduct to provide guidance to lawyers who may be faced with similar issues in the future.”<sup>38</sup> The proposed rule, which will subsequently be examined, was not adopted by the LSUC. In December 2001, the tapes depicting the torture and rape of Bernardo and Homolka’s victims were finally destroyed.<sup>39</sup> Murray had escaped from the *Bernardo* ordeal without any sanction.

Murray’s conduct during the Bernardo case raised questions of fundamental importance for criminal defence lawyers who take possession of incriminating physical evidence. The history of the Murray ordeal demonstrates that Ontario’s professional guidelines relating to this issue were, and continue to be, woefully inadequate. Unfortunately, despite the controversy brought on by the Murray case, little has changed.

### III

#### OBSTRUCTION OF JUSTICE

Obstruction of justice is an extremely serious offense. Canada’s *Criminal Code* outlines that “everyone who wilfully attempts...to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.”<sup>40</sup> This is the offense with which Kenneth Murray was charged for his role in secreting away the inculpatory tapes in the *Bernardo* case.<sup>41</sup> As is clear from the jurisprudence relating to the offence of obstructing justice<sup>42</sup>, to be convicted of obstruction of justice, the accused must have done some act which

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<sup>37</sup> *Murray*, *supra* note 3 at para. 154.

<sup>38</sup> LSUC Committee, *supra* note 35.

<sup>39</sup> CBC, *supra* note 10.

<sup>40</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s.139(2).

<sup>41</sup> *Murray*, *supra* note 3 at para. 85a.

<sup>42</sup> See e.g. *R. v. May* (1984), 13 C.C.C.(3d) 257 (Ont. C.A.) at 260, *R. v. Kirkham* (1998), 126 C.C.C.(3d) 397 at 411 (Sask. Q.B.).

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tends to pervert the course of justice, with the specific intention of perverting the course of justice.<sup>43</sup>

Although it may be necessary for a criminal defence lawyer to take possession of physical evidence to defend her client, according to University of Victoria Law Professor David Layton and defence lawyer Michel Proulx, it would be an offense for a defence lawyer “even temporarily to remove evidence of a crime for the purposes of preventing seizure by the police.”<sup>44</sup> Similarly, Layton and Proulx add that the defence cannot “actively impede a police investigation.”<sup>45</sup> Neither ethical considerations nor solicitor-client privilege could ever permit a lawyer to break the law or be a party to the law being broken in this manner.<sup>46</sup> Clearly, criminal defence lawyers must carefully consider conduct that runs the risk of obstructing the course of justice.

Murray’s conduct obstructed the course of justice as it related to Homolka.<sup>47</sup> Shortly after Murray came into possession of the tapes, Homolka entered into a plea bargain with the Crown which, until then, had very little evidence against Bernardo.<sup>48</sup> The consensus amongst those who thought that Murray had done wrong was that had the prosecution been in possession of the tapes, the need for Homolka’s testimony against Bernardo would have been greatly diminished. As a result, Homolka’s extremely lenient plea bargain would never have been offered.<sup>49</sup> According to the Honourable Patrick Galligan, who conducted the official inquiry into Homolka’s plea bargain, “if the videotapes had been in the hands of the authorities on or before May 14, 1993, the Crown would never have

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<sup>43</sup> Lucinda Vandervort, “Mistake of Law and Obstruction of Justice: A ‘Bad Excuse’...Even For a Lawyer” (2001) 50 U.N.B.L.J. 171 at 174 [Vandervort].

<sup>44</sup> David Layton and Michel Proulx, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 495 [Layton].

<sup>45</sup> *Ibid.* at 490.

<sup>46</sup> Earl A. Cherniak, “Ethics of Advocacy” (1985) 19 L. Soc’y Gaz. 147 at 147 [Cherniak].

<sup>47</sup> In his trial, it was found that Murray’s conduct had satisfied the *actus reus* of the offense of obstructing justice. *Murray, supra* note 3 at para. 100.

<sup>48</sup> Anothony DePalma, “Murderer’s Sex Tapes Put Canadian Lawyer at Risk” *The New York Times* (27 February 1997) A4 [DePalma].

<sup>49</sup> Peter M. Brauti & Gena Argitis, “Possession of Evidence by Counsel: Ontario’s Proposed Solution” (2003) 47 Crim. L.Q. 211 at 219 [Brauti].

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entered into the [plea] agreement with Karla Homolka.”<sup>50</sup> He added that after conducting extensive interviews, “all of the persons who were involved told me that if the videotapes had been available at the time, Karla Homolka would have found herself in the prisoner’s box beside Paul Bernardo.”<sup>51</sup> Similarly, according to Dan Mahaffy, Leslie’s father, “had the tapes been turned over to the police, Karla wouldn’t have been able to plea bargain and she’d be serving a first-degree murder term with Bernardo.”<sup>52</sup> Bernardo’s lead prosecutor Ray Houlahan echoed this opinion.<sup>53</sup> Interestingly, despite his apparent centrality to Homolka’s plea arrangement, Kenneth Murray was not interviewed during the nearly four-month inquiry conducted by the Honourable Patrick Galligan.<sup>54</sup>

In Murray’s trial, Gravely J held that “the tapes were the products and instrumentalities of crime and were far more potent ‘hard evidence’ than the often-mentioned ‘smoking gun’ and ‘bloody shirt.’” Their concealment, he added, “had the potential to infect all aspects of the criminal justice system.”<sup>55</sup> Had Murray not secreted the tapes, Homolka would have been charged with two counts of first-degree murder, not the two counts of manslaughter to which she pled guilty. The implication, according to Assistant Crown Attorney

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<sup>50</sup> *Ibid.*

<sup>51</sup> Galligan Report, *supra* note 1 at 89. Galligan claimed that “in addition to providing extensive detail about the matters under investigation, Karla Homolka gave the police a vital piece of information. Until that time, the police had no evidence other than Karla Homolka directly connecting Paul Bernardo to either Leslie Mahaffy or Kristen French. During the course of the induced interview, Karla Homolka provided the police with some information which enabled the police to make a direct link between Paul Bernardo and the dead body of Leslie Mahaffy.” Moreover, he adds: “It is my firm conclusion that, distasteful as it always is to negotiate with an accomplice, the Crown had no alternative but to do so in this case...It is, as Dan Mahaffy put it, the ‘lesser of two evils’ to deal with an accomplice rather than to be left in a situation where a violent and dangerous offender cannot be prosecuted...The public interest demanded that Paul Bernardo be prosecuted for murder. I do not see how it could have been responsible to delay the institution of that prosecution to some uncertain time in the future on the hope that some evidence might turn up which would make Karla Homolka’s testimony unnecessary.” *Ibid.* at 94, 111.

<sup>52</sup> Gorham, *supra* note 36.

<sup>53</sup> Alan Cairns & Scott Burnside, “Ken Murray’s tale of the tapes” *Law Times* (23 October 1995) 1 [Cairns].

<sup>54</sup> See Galligan Report, *supra* note 1 at Appendix A.

<sup>55</sup> *Murray*, *supra* note 3 at paras. 109, 111.

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Matthew Humphreys, is that when you discover the evidence and you are blind to its contents, you have an obligation to make the evidence known.<sup>56</sup> Murray, having failed in this obligation, had obstructed the course of justice.

Criminally charging a defence lawyer with obstruction of justice for withholding evidence is an uncommon reaction. According to Austin Cooper, Murray's counsel, there has never been a successful criminal prosecution of a defence lawyer for holding onto physical evidence.<sup>57</sup> University of Ottawa Law Professor David Paciocco had also never heard of such a prosecution, adding that "it's extremely unusual for the *Criminal Code* to be used against the [defence] counsel for attempting to defend their clients."<sup>58</sup> However, despite its unconventionality, obstruction of justice charges proceeded against Murray.

#### A. THE STRATEGIC VALUE OF THE TAPES

According to Murray's testimony, the tapes formed an essential part of Bernardo's defence and his strategy required their concealment.<sup>59</sup> When the tapes were discovered, it was thought that they were a "bonanza" or "gold mine" for the defence.<sup>60</sup> Murray immediately made a pact with Doyle and MacDonald, swearing them to secrecy.<sup>61</sup> According to Murray, the tapes had tremendous tactical value, who claimed that the Crown was going to portray Homolka as "a shrinking, abused wife under the control of Bernardo" – merely a "manipulated victim."<sup>62</sup> The benefit of the tapes to the defence, however, "was not just that Homolka could be shown as a liar, but also as a person capable of committing murder."<sup>63</sup> One tape shows

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<sup>56</sup> Interview of Matthew Humphreys, Assistant Crown Attorney, Ministry of the Attorney General, County of Ottawa-Carleton (1 November 2007) ["Humphreys Interview"].

<sup>57</sup> Kirk Makin & Theresa Ebdon, "Bernardo lawyer a scapegoat: counsel" *The Globe and Mail* (10 May 2000) A7 [Makin, "Bernardo Lawyer"].

<sup>58</sup> Stephen Bindman, "Charging defence counsel unusual, legal experts say" *The Vancouver Sun* (24 January 1997) A18.

<sup>59</sup> *Murray, supra* note 3 at para. 127.

<sup>60</sup> *Ibid.* at para. 11.

<sup>61</sup> *Ibid.* at paras. 11, 34.

<sup>62</sup> *Ibid.* at para. 26.

<sup>63</sup> *Ibid.* at para. 138.

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Homolka administering tranquilizers to her sister and another girl, then participating in the sexual assaults on both of them, while others show her involvement in the rape and torture of Mahaffy and French. The tapes did not show a cowering, fearful Homolka, but an enthusiastic participant in the sexual assaults.<sup>64</sup> At Murray's trial, Cooper said the tapes gave Bernardo a slim chance. Although making Bernardo look bad, the tapes also made Homolka look equally bad.<sup>65</sup> Bernardo had admitted to the sex-related crimes but had denied killing Mahaffy or French and the tapes supported such a theory as a possibility. Ultimately, as Gravelly J held in the trial, "Murray's alleged plan to use the tapes... is not unfeasible."<sup>66</sup>

The tactical value of the tapes, however, would have been greatly diminished if the Crown were to have been given the opportunity to prepare Homolka for cross-examination.<sup>67</sup> Murray claimed that the tapes would be used either after the preliminary trial, in an attempt to negotiate a plea bargain for Bernardo, or at trial to undermine the credibility of the Crown's star witness (Homolka) and introduce doubt as to who had murdered Mahaffy and French.<sup>68</sup> Both uses required that the prosecution be surprised with the tapes at trial. If the tapes could be used to undermine Homolka, it is reasonable to believe that Murray could and should have used them in Bernardo's defence.

Despite the potential benefit the tapes had for Bernardo's defence, there is a real argument that Bernardo would have been better served had the tapes never come out. Murray's admitted strategy for employing the tapes was to introduce them to show how *bad* they made Homolka look. Thus, it follows that the tapes would serve to make Bernardo look equally bad – likely to his detriment during a jury trial for a crime that had already seen one of the perpetrators agree to a lenient plea bargain. As Gravelly J identified during Murray's trial, the tapes were "damning evidence" and quoted

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.* at para. 140.

<sup>67</sup> It is important to note that although Homolka had looked for the tapes in Bernardo's house, she did not know where they were located. See Gallagan Report, *supra* note 1 at 60-61.

<sup>68</sup> Austin M. Cooper, "The Ken Murray Case: Defence Council's Dilemma" (2003) 47 *Crim. L.Q.* 141 at 145 [Cooper].

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Rosen in holding that the any jury that viewed the tapes “would have convicted him of sinking the Titanic.” Bernardo’s case, Gravelly J added, “would have been in a substantially better position if the tapes had never surfaced.”<sup>69</sup>

Kitchener, Ontario-based criminal defence lawyer Randall Martin also had trouble understanding Murray’s decision to introduce the tapes in Bernardo’s defence. “Why would he introduce those tapes at all?” Martin asked, adding that “showing those films wouldn’t strengthen his case,” but rather “the tapes were certainly going to hurt Bernardo’s case.”<sup>70</sup> Similarly, Gravelly J held that the tapes “provide strong circumstantial evidence to prove Bernardo guilty of the murders.”<sup>71</sup> University of British Columbia Associate Law Professor Janine Benedet agrees, claiming that the tapes were “an evidentiary record of the accused committing at least part of what he has been charged with.”<sup>72</sup> Introducing the tapes in Bernardo’s defence, therefore, was a risky proposition.

In a subsequent civil case by the estate of Kristen French against the Ontario government, Moldaver J.A. claimed that in “the Bernardo criminal trial, the videotapes played a central, if not crucial role, in bringing Bernardo to justice. The tapes formed some of the most cogent and damning evidence against Bernardo and their value in his successful prosecution cannot be overstated.”<sup>73</sup> Ultimately, despite the fact that the use of the tapes was questionable, Murray’s belief that they could introduce reasonable doubt to the charges of first degree murder helped establish his defence to the obstruction of justice charge.

#### B. MURRAY’S CASE FOR WITHHOLDING THE TAPES

At the time of his decision, it was possible that Murray had a justifiable reason for withholding the tapes. Prior to and following the

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<sup>69</sup> *Murray, supra* note 3 at para. 134.

<sup>70</sup> Interview of Randall Martin, Criminal Defence Attorney (5 October 2007) [“Martin Interview”].

<sup>71</sup> *Murray, supra* note 3 para. 24.

<sup>72</sup> Interview of Janine Benedet, Associate Professor, Faculty of Law, University of British Columbia (2 November 2007) [“Benedet Interview”].

<sup>73</sup> *French Estate v. Ontario (Attorney General)*, [1998] O.J. No. 752, 38 O.R. (3d) 347 at para. 90 [cited to O.J.].

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plea agreement, repeated requests for notes from Crown deal-maker Murray Segal and Homolka's lawyer, George Walker, were ignored. It was not until six months after the deal had been struck that Murray was provided with some of the details of the plea arrangement.<sup>74</sup> The full details of the plea arrangement were not provided until disclosure was ordered by the Ontario Court of Justice on May 10, 1994.<sup>75</sup> At the time of the plea negotiations, Murray had not watched the content of the tapes.<sup>76</sup> Had Murray been provided with the details of the plea arrangement before the deal was completed, he would have been in a better position to avoid the possibility of obstructing justice, perhaps by requesting Bernardo's permission to view the tapes and then turning them over if he deemed it necessary. Moreover, when the deal was being negotiated, Murray believed that the Crown knew about some of the tapes' contents. During their investigation, the police had seized portions of the video from Bernardo's briefcase, which showed Homolka willingly involved in sexual acts.<sup>77</sup> As will be subsequently discussed, Murray had a genuine belief that there was no duty to turn the tapes over to the Crown.

As was stated by Cooper at the time of Murray's trial, "anybody who thinks [defence] lawyers are supposed to further the hunt for the truth in a criminal case is misled."<sup>78</sup> He added that "lawyers may quite justifiably tear apart Crown witnesses, decline to turn over material that harms their clients and force the Crown to prove its case" and that defence lawyers are often required "to do certain things that obstruct the course of justice and obstruct a prosecution."<sup>79</sup> In a vernacular sense, Cooper seems to have been indicating that defense lawyers often do things that do not assist the Crown and that may impede fact-finding in an effort to build a full defense for her client.

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<sup>74</sup> Cairns, *supra* note 53.

<sup>75</sup> *R. v. Bernardo*, [1994] O.J. No. 1718 at para. 22.

<sup>76</sup> *Murray*, *supra* note 3 at para. 30.

<sup>77</sup> Bernardo was apparently going to use the video segments to show infidelity in an upcoming divorce proceeding; Kirk Makin, "Video shows Homolka as 'evil,' trial told" *The Globe and Mail* (19 April 2000) A5.

<sup>78</sup> Makin, "Bernardo Lawyer", *supra* note 57.

<sup>79</sup> *Ibid.*

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### C. ACQUITTAL AND PROFESSIONAL SANCTION

With little doubt that Murray's actions tended towards the obstruction of justice, his fate with respect to the criminal trial hinged on one word: wilfully. This word, held Gravely J, denotes a specific intent offense and thus, the onus was on the Crown to show beyond a reasonable doubt that Murray, in suppressing the tapes, intended to obstruct justice.<sup>80</sup> Gravely J did not find that the Crown had proven its case. "The context of the whole of the evidence," Gravely J held, "raises a reasonable doubt as to his intention to obstruct justice."<sup>81</sup> Murray did not have the requisite *mens rea* for the offense and therefore, had to be found not guilty of obstruction of justice. This conclusion, however, was not well-received by some in the academic community. Associate Professor Benedet, for example, commented during an interview for this paper that Gravely J "fiddles with the *mens rea* of the charge...and [he] kind of slides mistake of law and mistake of fact together in a way that I don't find convincing."<sup>82</sup> Benedet, who thinks that Murray intended to suppress the tapes permanently, felt that Gravely J did not want Murray to be the "fall guy" for a systemic problem that was "bigger than Murray."<sup>83</sup> Despite the dissent, Murray's belief that he was acting within the confines of the law won out.

Murray's acquittal, however, did not signal the end of his troubles. Murray still faced the threat of sanction by the LSUC, which had served him with a professional misconduct complaint in February 1997.<sup>84</sup> It was asserted that contrary to Rule 2.02(5), Murray has become "the tool or dupe of his unscrupulous client"<sup>85</sup> and that he failed to look at the contents of the tapes to decide whether they should have been disclosed to the police.<sup>86</sup> Defence lawyer Randall Martin explains that this was because he "allowed himself to be...used

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<sup>80</sup> *Murray*, *supra* note 3 at para. 100.

<sup>81</sup> *Ibid.* at paras. 154-155.

<sup>82</sup> Benedet Interview, *supra* note 72; For a discussion regarding the difference between 'mistake of law' and 'mistake of fact', see *Nepean (Township) Hydro Electric Commission v. Ontario Hydro* [1982] S.C.J. No. 15 (Ont.)

<sup>83</sup> *Ibid.*

<sup>84</sup> LSUC Committee, *supra* note 35.

<sup>85</sup> DePalma, *supra* note 48.

<sup>86</sup> Gorham, *supra* note 36.

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by his client.”<sup>87</sup> The hearing for the claims was deferred until the conclusion of Murray’s criminal trial.<sup>88</sup> In November 2000, six months after Murray’s criminal acquittal, the LSUC dropped the professional misconduct charges.<sup>89</sup> According to the LSUC Press Release, the Proceedings Authorization Committee gave Gravely J’s decision significant deference, concluding that “the public interest would be better served by the clarification of lawyers’ professional responsibilities when confronted with such a dilemma than by the continuation of disciplinary proceedings against Mr. Murray.”<sup>90</sup> Robert P. Armstrong, Q.C., then the head of the LSUC, announced the appointment of a committee to consider the issues arising from the Murray case and to draft a proposal for a new rule to guide lawyers who face similar dilemmas in the future.<sup>91</sup> Murray had emerged from the *Bernardo* affair having escaped from both criminal and professional sanction.

#### D. MURRAY’S REMOVAL FROM *BERNARDO*

Murray’s suppression of the tapes ultimately led to his decision to remove himself from the *Bernardo* case. As explained by Associate Professor Benedet, a lawyer who takes possession of physical evidence risks becoming a witness in her client’s case.<sup>92</sup> Murray would have likely been removed from the case from the very beginning, when he first took possession of the tapes from Bernardo’s house. When a lawyer comes into possession of physical evidence, Assistant Crown Attorney Humphreys explains, the source of the evidence becomes important, making the lawyer a witness who is subject to cross-examination by the Crown. “You need to find out where the evidence came from,” says Humphreys, adding that “if the accused walks in and hands the defence a bloody shirt, that is pretty strong evidence.”<sup>93</sup> Defence lawyer Randall Martin agrees, claiming that “often where the evidence came from is very important.”<sup>94</sup>

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<sup>87</sup> Martin Interview, *supra* note 70.

<sup>88</sup> LSUC Committee, *supra* note 35.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> E-mail from Janine Benedet (1 November 2007) RE: Criminal Question.

<sup>93</sup> “Humphreys Interview” *supra* note 56.

<sup>94</sup> “Martin Interview” *supra* note 70.

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Benedet, Humphreys, and Martin all agree that because of his possession of evidence, Murray should have removed himself from the case.

Murray became uncomfortable when he visited Bernardo on July 11-12, 1994, when Bernardo told him was going to deny ever having met Mahaffy or French and that Murray was not to contradict this position.<sup>95</sup> The implication was obvious: Murray was to permanently suppress the tapes. As a result, Murray asked John Rosen to take over the Bernardo case in August 1994.<sup>96</sup> On September 1, Murray contacted the office of Austin Cooper for help in removing himself from the case.<sup>97</sup> Cooper wrote to the Professional Conduct Committee of the LSUC and was sent the following instructions by Earl Levy Q.C., Paul Copeland, and Colin Campbell Q.C.:

- (1) Mr. Murray should remove himself as counsel of record for Mr. Bernardo as soon as practicable.
- (2) Certain material in possession of Mr. Murray should be delivered to His Honour Judge P. LeSage in a sealed packet and to be subject to court determination.
- (3) We are of the view that Mr. Bernardo should be advised of the steps you intend to take as soon as possible.<sup>98</sup>

Murray and Rosen followed the instructions. On September 12, Rosen took possession of the tapes, and LeSage A.C.J.O.C. ruled that Rosen could retain the tapes until October 7.<sup>99</sup> Murray was also removed from the Bernardo case on September 12.

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<sup>95</sup> *Murray, supra* note 3 at para. 47.

<sup>96</sup> *Ibid.* at paras. 50-54.

<sup>97</sup> *Ibid.* at para. 68.

<sup>98</sup> *Ibid.* at para. 70.

<sup>99</sup> *Ibid.* at para. 74.

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## IV

### THE DUTY TO CLIENTS

Once retained, a defence lawyer assumes several fundamental duties to that client, which form the basis of the lawyer-client relationship. The most obvious duty that a lawyer owes to her client is the obligation to represent the client resolutely. In cases like *Bernardo*, representing clients who have been accused of horrible acts can cause a considerable ethical dilemma. However, once retained, a lawyer must suspend such reservations in order to fully defend her client.

The belief in a lawyer's duty to represent her client fully and loyally is significant. "No matter how notorious [Mr. Bernardo] was and how egregious his crimes were," Cooper explains, "under our system he is entitled to good counsel that will defend him to the best of their ability."<sup>100</sup> Similarly, Toronto-area lawyers Stephen Grant and Linda Rothstein identify that a lawyer-client relationship is fiduciary and thus, the lawyer must represent the client "with undivided loyalty."<sup>101</sup> Admittedly, a fiduciary obligation can only license legal behavior and cannot render legally-permissible what is not otherwise allowed. In a criminal trial, Gavin Mackenzie adds, this includes a "duty is to protect the client as far as possible from being convicted except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged."<sup>102</sup> Mackenzie continues by saying that "it is the professional responsibility of the [defence] counsel in many cases to prevent the whole truth from coming out by all lawful means," allowing for reliance on legal techniques that are not known to be fraudulent or false.<sup>103</sup> This forms an essential part of the criminal adversarial process and, according to Justice Finlayson in *R. v. Lomage*, the role of the "[defence] counsel is every bit as important as

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<sup>100</sup> Kirk Makin, "Doubts cast on use of tapes to Bernardo team" *The Globe and Mail* (5 May 2000) A6 [Makin, "Doubts cast"].

<sup>101</sup> Stephen M. Grant & Linda R. Rothstein, *Lawyers' Professional Liability* (Toronto: Butterworths, 1989) at 32 [Grant].

<sup>102</sup> Gavin Mackenzie, *Lawyers and Ethics* 4<sup>th</sup> ed. (Toronto: Thomson Carswell, 2006) at 7-2 [Mackenzie].

<sup>103</sup> *Ibid.* at 7-2, 7-4.

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that of any other party to the proceedings.”<sup>104</sup> Murray seems to have embraced this duty, later explaining that “my responsibility was to my client...and to present the best defence available to him.”<sup>105</sup> Such a defence, he contended, necessitated suppression of the tapes until they could be used in cross-examination against Homolka.<sup>106</sup> Assistant Crown Attorney Humphreys suggests that although the tapes do depict the murders, they show that Bernardo was guilty of a “whole host of things” and invite strong inferences that Bernardo may have committed the murders.<sup>107</sup> As a result, Bernardo needed a strong defence for the charges of first-degree murder. Murray’s strategy was an attempt to honour his duties to his client.

#### A. THE DUTY NOT TO JUDGE

In a criminal context, it is essential that a lawyer defend her client without passing judgment on his guilt or innocence. Thus, it is important that the defence lawyer reconciles her ethics with the oft-asked question: “how can you defend someone who you know to be guilty?”<sup>108</sup> This question is often asked with disgust, many people feeling that defence lawyers are “worse than the criminals [they] represent” because “[they] know better.”<sup>109</sup> According to Professor Barbara Babcock of the Stanford Law Society, however, most defence lawyers are indifferent to the question.<sup>110</sup> Martin Erdmann, former head of the Supreme Court branch of New York City’s Legal Aid Society, clarifies, adding that defence lawyers “have nothing to do with justice. Justice is not even a part of the equation.”<sup>111</sup> He adds that justice is for the courts, not the defence counsel, to determine. Echoing this statement, defence lawyer Randall Martin adds that

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<sup>104</sup> *R. v. Lomage*, [1991] O.J. No. 362 (C.A.) at para. 17, 2 O.R. (3d) 621 [cited to O.J.].

<sup>105</sup> Cairns, *supra* note 53 at 5.

<sup>106</sup> *Ibid.*

<sup>107</sup> “Humphreys Interview” *supra* note 56; E-mail from Matthew Humphreys (27 November 2007) [matthew.humphreys@ontario.ca], RE: Murray Paper [Humphreys, “E-mail”].

<sup>108</sup> Mackenzie, *supra* note 102 at 7-2.

<sup>109</sup> Gerry Spence, *With Justice for None* (New York: Random House, 1989) at 31 [Spence].

<sup>110</sup> Mackenzie, *supra* note 102 at 7-2.

<sup>111</sup> *Ibid.*

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“whether the accused is lying to me or not is not my judgment to make.”<sup>112</sup>

Criminal defence lawyers, it would seem, neither “believe nor disbelieve their clients, but are in the neutral state of non-belief.”<sup>113</sup> By representing clients who they know or believe to be guilty, Mackenzie feels that defence lawyers are upholding, not offending, their professional duties.<sup>114</sup> In criminal trials, the duty of a lawyer not to judge her client is essential – and the same has been true for centuries. Dr. Samuel Johnson, an 18<sup>th</sup> century English writer claimed that “in Western democracies...it is no part of defense [*sic*] lawyers’ function to determine whether their clients are guilty.”<sup>115</sup> The understanding of defence counsel’s function has transcended the centuries and forms an important part of the lawyer-client relationship, without which defendants would be denied the opportunity to secure a full legal defence.

#### B. OBSERVING THE CLIENT’S INSTRUCTIONS

The final important obligation on the part of a lawyer to her client is a duty to observe his instructions, if they are legal, ethical, and pertain to the defence. Such a duty, many would suggest, is where Murray’s strategy became problematic. As the client’s advocate, defence lawyers are subject to the instructions of a client, within certain limits. According to Austin Cooper, if a defence lawyer gets instructions that something should be used to benefit the defence, “he neglects those instructions at his own risk.”<sup>116</sup> Cooper added that had Murray ignored Bernardo’s instructions and the tapes were destroyed with the house, “Murray would have to be concerned about allegations of incompetence. He didn’t have any choice.”<sup>117</sup>

Murray’s instructions from Bernardo in relation to the tapes were very clear. Through a note, Bernardo instructed that “we will have to go through them in the future. At this time I instruct you not

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<sup>112</sup> “Martin Interview”, *supra* note 70.

<sup>113</sup> Robert Megarry, “Convocation Address” (March, 1983) 17 Soc’y Gaz., no. 1, 41 at 42-43.

<sup>114</sup> Mackenzie, *supra* note 102 at 7-2.

<sup>115</sup> James Boswell, *Life of Johnson*, vol. 5 (London: Murray, 1876) at 28-29.

<sup>116</sup> Makin, “Doubts Cast”, *supra* note 100.

<sup>117</sup> *Ibid.*

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to view them.”<sup>118</sup> Once Murray had decided to retrieve the tapes, he was not at liberty to disobey Bernardo’s instructions. According to some, this is where Murray made his fundamental mistake. Randall Martin suggests that Murray could have “refused the instructions from the accused” and Bernardo could have discharged his lawyer. Martin feels that Murray allowed himself to be taken advantage of by Bernardo, as lawyers cannot “take blind instructions from a client.”<sup>119</sup> Associate Professor Benedet agrees, claiming that “if Bernardo tells Murray that there were tapes in the house, he does not have an obligation to call the police. Nor does he have an obligation to go and get the tapes. He should have left them alone.”<sup>120</sup> Loyally adhering to the instructions of his client may have been the root of Murray’s troubles.

## V

### THE DUTY TO THE ADMINISTRATION OF JUSTICE

Although having no “generalized duty to justice,”<sup>121</sup> as “officers of the court”<sup>122</sup> there are certain elements of the administration of justice to which defence lawyers are bound. According to University of Alberta Law Professor Wayne Renke, lawyers have a duty to “promote the course of justice.”<sup>123</sup> Lawyers are not required to disclose every detail in an all-out search for the truth, but must respect the administration of justice. As will be discussed, this expectation likely means that lawyers cannot deceive the court by lying or offering evidence that they know to be false. Similarly, as the *Murray* ordeal confirmed, lawyers may not obstruct the course of justice nor have involvement in any other illegal activities.

The *Rules* set out the expectations relating to the duty to justice but provide little guidance; individual lawyers must determine

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<sup>118</sup> *Murray*, *supra* note 3 at para. 13.

<sup>119</sup> “Martin Interview”, *supra* note 70.

<sup>120</sup> Benedet Interview, *supra* note 72.

<sup>121</sup> Mackenzie, *supra* note 102 at 7-1.

<sup>122</sup> Wayne N. Renke, “Real Evidence, Disclosure and the Plight of Counsel” (2003) 47 *Crim. L.Q.* 191 at 204 [Renke].

<sup>123</sup> *Ibid.*

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how to act in the furtherance of justice. Assistant Crown Attorney Humphreys explains that for defence lawyers, there are two levels at which a lawyer has to operate: “everyone has a duty to society at one level. At another level, there is a duty to the client and the Law Society.”<sup>124</sup> The challenge, he asserts, is for a defence lawyer to “decide how this meshes with [her] personal ethics.”<sup>125</sup> He notes that in an ideal world, the duty to the administration of justice would force defence lawyers to disclose all relevant evidence to the Crown. He concludes, however, that complete disclosure could only be mandated “if the sole purpose of the criminal process is to get to what the truth is.”<sup>126</sup> The challenge for a defence lawyer is to determine how she will satisfy her duty to the administration of justice without jeopardizing her client’s interests.

Although many of the LSUC’s contemporary expectations relating to the administration of justice were unclear, lawyers must not deceive the court. It is obvious that a lawyer cannot lie to a court<sup>127</sup> nor can she introduce evidence that she knows to be false because of his client’s admissions.<sup>128</sup> Similarly, the *Rules* prohibit a lawyer from knowingly assisting or permitting her clients to do anything that she sees as being dishonourable or dishonest.<sup>129</sup> The alternative for a lawyer is to put her client on the stand and argue the case based on his testimony. Before doing this, the lawyer should discourage the client from lying by advising that false testimony can result in prosecution for perjury and, if discovered, will act to the detriment of the client’s case.<sup>130</sup> Randall Martin suggests that although you cannot put the client on the stand knowing that they are going to lie, “you can sure put him on the stand thinking that he is going to lie” because “every once in a while you are wrong about what you

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<sup>124</sup> “Humphreys Interview”, *supra* note 56.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> Monroe Freedman, “Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions” (1966) 64 Mich. L. R. 1469 at 1475-1478. [Freedman, “Professional Responsibility”].

<sup>128</sup> Mackenzie, *supra* note 102 at 7-14.

<sup>129</sup> *Ibid.*

<sup>130</sup> Freedman, “Professional Responsibility”, *supra* note 127 at 1478; Monroe Freedman, *Lawyers’ Ethics in an Adversary System* (New York: Bobb-Merrill, 1975), 40-41 [Freedman, “Ethics”].

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think.”<sup>131</sup> Thus, the defence lawyer must help the client “polish their story” but must not “change the gist of it.”<sup>132</sup> Therefore, it is to the lawyer’s advantage to know as little as possible about the client’s guilt. “[When] you know that he did whatever he was charged with, you can no longer make certain representations,” Humphreys explains, adding that once a defence lawyer “knows [her client] did it, [the lawyer] cannot go into the courtroom and say that [he] didn’t do it.”<sup>133</sup> Ultimately, the overarching point being made by the example of client testimony is that lawyers have an unqualified duty to be candid with the court.

As officers of the court, lawyers have a duty to the administration of justice. Although the current ethical and legal guidelines are vague, they frame the outer limits as to what is considered to be acceptable conduct on the part of lawyers. Defence lawyers have no ethical or legal commitment to the search for the truth. They are, however, bound by rules that demand honesty and respect for the court, specifically prohibiting lawyers from engaging in dishonest tactics before the court. A failure to obey these duties places a lawyer in danger of professional sanction or criminal conviction. Therefore, in representing Bernardo, Murray was prohibited from falsely representing his client. This created a problem when, in mid-July 1994, Murray was instructed to deny that Bernardo had ever been in contact with Mahaffy or French.<sup>134</sup> The tapes, Bernardo dictated, were not to contradict this position.<sup>135</sup> Situations like this leave defence lawyers in an extremely difficult position. The ambiguity of the rules relating to the duty to justice has resulted in varying interpretations of what is expected of lawyers, as was highlighted by the *Murray* case. Ultimately, the duty to the administration of justice forms one of the two tensions pulling defence lawyers in opposing directions.

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<sup>131</sup> Martin, *supra* note 70.

<sup>132</sup> *Ibid.*

<sup>133</sup> “Humphreys Interview”, *supra* note 56

<sup>134</sup> *Murray*, *supra* note 3 at para. 47.

<sup>135</sup> *Ibid.*

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VI

THE DUTY OF CONFIDENTIALITY AND ITS LIMITS

Perhaps the single most difficult issue facing Murray in the *Bernardo* case related to Murray's duty of confidentiality not to disclose privileged communications between himself and his client. In *R. v. Solosky*, the Supreme Court of Canada (SCC) held that "the concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice."<sup>136</sup> This privilege, the Court held, "protects communications between solicitor and client."<sup>137</sup> Similarly, lawyers Stephen Grant and Linda Rothstein claim that as a part of a lawyer's fiduciary relationship with her client, a lawyer must preserve her client's confidences, requiring rigorous protection of the client's secrets.<sup>138</sup> They add that "it is not only information furnished to a lawyer by a client that is confidential: all information received on behalf of a client in a professional capacity is confidential."<sup>139</sup> Lawyer Rachel Fogl feels that "privilege attaches to all communications made within the ambit of the solicitor-client relationship," beginning from when the client first approaches the lawyer.<sup>140</sup> As will be argued below, a client's confidence in his lawyer's commitment to confidentiality is essential to his right to defend against criminal allegations.

Murray defended his dealings with Bernardo by claiming that "lawyers are required to keep absolutely confidential all communications with their clients and are under no obligation to turn over incriminating evidence."<sup>141</sup> Professor Renke agrees, claiming that "Bernardo had the right to expect that his communications with his lawyer would not be disclosed, and Murray was entitled not to disclose his communications with Bernardo to anyone."<sup>142</sup> Therefore, Murray's belief in his duty to maintain confidentiality is of central

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<sup>136</sup> *R. v. Solosky*, [1980] 1 S.C.R. 821 at 829, 50 C.C.C. (2d) 495 [cited to S.C.R.].

<sup>137</sup> *Ibid.*

<sup>138</sup> Grant, *supra* note 101 at 32 & 40.

<sup>139</sup> *Ibid.* at 41.

<sup>140</sup> Rachel Fogl, "Sex, Laws and Videotape: The Ambit of Solicitor-Client Privilege in Canadian Criminal Law as Illuminated in *R. v. Murray*" (2001) 50 U.N.B.L.J. 188 at 201 [Fogl].

<sup>141</sup> DePalma, *supra* note 48.

<sup>142</sup> Renke, *supra* note 122 at 197.

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importance to his ordeal. However, this also seems to be the source of much of the controversy regarding Murray's decision to withhold the physical evidence.

Implicit in the duty to maintain confidentiality is a duty to avoid doing anything that would help the case against a lawyer's client. In *Szarfer v. Chodos*, Callaghan A.C.J.O. held that "the fiduciary relationship between a lawyer and his client forbids a lawyer from using any confidential information obtained by him for the benefit of himself...or to the disadvantage of his client" (emphasis in original).<sup>143</sup> Thus, as is suggested by Associate Professor Benedet, the duty to confidentiality prohibits the provision of any aid to the Crown, unless compelled by the law.<sup>144</sup> The duty of confidentiality forces a lawyer to protect communications with her client and removes any duty to help the prosecution of her client. The protections afforded to solicitor-client privilege and by extension to the duty of confidentiality are not, however, absolute.

#### A. LIMITS OF SOLICITOR-CLIENT PRIVILEGE AND THE DUTY OF CONFIDENTIALITY

Confidentiality arising out of solicitor-client privilege can be limited in several ways. Perhaps the most obvious limitation is that such confidentiality cannot extend to a situation from which a crime would result. For example, privilege does not attach to an instruction to handle evidence in a manner that itself would constitute a criminal offense.<sup>145</sup> In Murray's case, privilege would not attach if Bernardo asked Murray to retrieve and destroy the tapes to prevent their seizure by investigators. Similarly, privilege does not attach to the client's announced intention to commit a crime.<sup>146</sup> In the evidence destruction example, privilege would not attach if Bernardo had indicated his plans to have the tapes destroyed. Ultimately, according to lawyer Norman Lefstein, privilege cannot be applied if the lawyer

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<sup>143</sup> *Szarfer v. Chodos*, [1986] O.J. No. 256 (C.A.) at para. 29, 54 O.R. (2d) 663 [cited to O.J.].

<sup>144</sup> "Benedet Interview", *supra* note 72.

<sup>145</sup> Layton, *supra* note 44 at 503.

<sup>146</sup> H. S. Drinker, *Legal Ethics* (New York: Columbia University Press, 1953) at 132.

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would be a party to a crime.<sup>147</sup> In *Murray*, Gravelly J held that the tapes were not protected by confidentiality or privilege.<sup>148</sup> Therefore, he concluded, withholding them was itself a criminal act.<sup>149</sup>

Solicitor-client privilege may be breached in cases where disclosure is necessary for the lawyer to defend herself against criminal accusations. Despite the contemporary LSUC rule that “the lawyer owes the duty of secrecy to every client without exception...[which] survives the professional relationship after the lawyer has ceased to act for the client,” solicitor-client privilege may be limited where a lawyer’s liberty is threatened by a criminal prosecution.<sup>150</sup> In a pre-trial hearing to determine whether Murray could break his solicitor-client privilege with Bernardo to defend himself, Gravelly J, after weighing both Bernardo and Murray’s interests, held that “there is no doubt that Mr. Bernardo's privilege must give way to the overwhelming importance of Mr. Murray's right to full answer and defence.”<sup>151</sup> Gravelly J held that Bernardo’s rights did not disappear, but would yield “to full answer and defence as necessary.”<sup>152</sup> In *Murray*, since both the defence and Crown positions related almost exclusively to communications between Murray and Bernardo, it would have been impossible to try to limit what could be introduced and thus, “the invasion of Mr. Bernardo's solicitor-client privilege must be extensive.”<sup>153</sup> Despite Bernardo’s objection that the violation of privilege would prejudice his pending appeal to the SCC, it was held that Bernardo’s chances of a successful application were slim and the threat of a 10-year jail sentence if Murray were convicted justified the intrusion.<sup>154</sup>

A lawyer’s right to defend herself can also extend to the public forum. In September 1995, Cooper disclosed publicly that Murray had

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<sup>147</sup> Norman Lefstein, “Client Perjury in Criminal Cases: Still in Search of An Answer (1987-1988) 1 *Geo. J. Legal Ethics* 521 at 524-525.

<sup>148</sup> For a discussion on the differences between evidence and communications as they relate to privilege, see *Murray*, *supra* note 3 at paras. 115-116.

<sup>149</sup> *Ibid.* at paras. 115, 125.

<sup>150</sup> Daryl-Lynn Carlson, “Bernardo complains about his first lawyer,” *Law Times* (30 October 1995) 1 [Carlson].

<sup>151</sup> *R. v. Murray*, [2000] 48 O.R. (3d) 437 (Sup. Ct.) at para. 15, O.J. No. 1367 [*Murray*, Full Answer, cited to O.R.].

<sup>152</sup> *Ibid.* at para. 16.

<sup>153</sup> *Ibid.* at paras. 15, 16.

<sup>154</sup> *Ibid.* at para. 13.

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not viewed the tapes because of Bernardo's instructions. Bernardo's then lawyer, Tony Bryant, claimed that this was a breach of privilege and vowed to register a complaint with the LSUC.<sup>155</sup> Speaking publicly seems to be included in the allowance for full answer and defence. So long as the balance of the full defence outweighs the need to maintain the privilege, the privilege can be vitiated. Otherwise, the privilege remains intact. As a result, there were no further law society proceedings relating to this potential breach of confidence.<sup>156</sup> Under today's *Rules*, this would be an acceptable breach of confidentiality under Rule 2.03(4)(a).<sup>157</sup> During Murray's ordeal, solicitor-client privilege may have been broken only to the extent necessary to allow for full answer and defence.<sup>158</sup>

Another limit on the expectation of confidentiality between a solicitor and client is engaged when the subject matter of the conversation falls outside of the "umbrella of solicitor-client privilege."<sup>159</sup> The tapes, suggests Professor Renke, did not fall within the protected sphere of communications for the purpose of obtaining legal advice but rather, were "pre-existing non-communications."<sup>160</sup> He added that the denial of privilege to objects such as the tapes that were "created for their own purposes, without any reference to obtaining legal assistance" is constitutionally sound.<sup>161</sup> Renke concludes that so long as Bernardo's rights against illegal search and seizure were protected, the tapes were subject to lawful apprehension by the prosecution.<sup>162</sup> Gravelly J agreed, finding that "videotapes are not communications" and that "Murray's discussions with his client about the tapes are covered by the privilege; the physical objects, the tapes, are not."<sup>163</sup> Similarly, W.B. Williston and R. J. Rolls claim that "documents existing before litigation was conceived and not brought into existence for the purpose of obtaining legal advice are not free

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<sup>155</sup> Carlson, *supra* note 150.

<sup>156</sup> E-mail from Discipline Department, Law Society of Upper Canada (22 November 2007) RE: Discipline History, forwarded by Dale Carlisle, Administrative Assistant.

<sup>157</sup> See *infra* note 221 at 21.

<sup>158</sup> *Murray*, Full Answer, *supra* note 151 at para. 12.

<sup>159</sup> *Murray*, *supra* note 3 at para. 115.

<sup>160</sup> Renke, *supra* note 122 at 198.

<sup>161</sup> *Ibid.* at 197-198.

<sup>162</sup> *Ibid.* at 197.

<sup>163</sup> *Murray*, *supra* note 3 at para. 115.

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from the duty to produce.”<sup>164</sup> In order to qualify for solicitor-client privilege, “the communication must be made in order to elicit professional advice from the lawyer based upon his or her expertise in the law.”<sup>165</sup> Ultimately, because they predated the solicitor-client relationship and were non-communications, the tapes were not covered by solicitor-client privilege.

Although privilege is essential to the solicitor-client relationship, it is not absolute. It requires that a lawyer not disclose any of the communications that have taken place as a direct result of the accused seeking legal advice. This privilege does not extend to communications that would constitute a criminal offense or an intention to commit a criminal offense and may be broken when a lawyer must defend herself against criminal charges. Finally, privilege does not attach to communications that predate the solicitor-client relationship or to non-communications, such as the tapes.

## VII

### THE SOLICITOR-CLIENT RELATIONSHIP AND THE INTEGRITY OF THE LEGAL SYSTEM

Allowing the solicitor-client relationship to function relatively freely is essential to preserving the integrity of the legal system. If criminal sanctions against the accused are to be seen as being legitimate, they must only be assessed after a full and impartial trial, during which the accused is given the opportunity to defend himself. As defendants are only rarely themselves lawyers, they often need to rely on the expertise of legal experts. Therefore, the protection of the solicitor-client relationship forms a crucial part of the criminal system. This analysis will now examine the importance of the solicitor-client relationship in the criminal sphere, demonstrating that interference with the trust between a lawyer and client has the potential to undermine the legitimacy of Canada’s criminal justice system.

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<sup>164</sup> W.B. Williston & R. J. Rolls, *Law of Civil Procedure*, vol. 2 (Toronto: Butterworths, 1970) at 917.

<sup>165</sup> John Sopinka et al., *The Law of Evidence in Canada* 2d ed. (Toronto: Butterworths, 1999) at 735.

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In *The Symbols of Government*, Yale Law Professor Thurman Arnold argues that the criminal trial is “the center [*sic*] of ideals of every Western government” in that it embodies the “greater principles which give dignity to the individual.”<sup>166</sup> As such, “the notion that every man however lowly is entitled to a trial and an impartial hearing is regarded as the cornerstone of civilized government.”<sup>167</sup>

In *R v. Seaboyer*, the SCC added to this idea, when Justice McLachlin (as she then was) held that “the right of the innocent not to be convicted is dependent on the right to present full answer and defence,” which “depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution.”<sup>168</sup> McLachlin J (as she then was) added that this right includes an “opportunity adequately to state [one’s] case.”<sup>169</sup> In *R. v. Mills*, the SCC affirmed this holding, calling the right to full answer and defence a “principle of fundamental justice” which is protected by the *Charter of Rights and Freedoms*.<sup>170</sup> McLachlin J (as she then was) held in *Mills* that *Seaboyer* established that:

both s. 7 [of the *Charter*] and the guarantee of a right to a fair trial enshrined in s. 11(d) are ‘inextricably intertwined’ and protect a right to full answer and defence” and that this right is also connected to “other principles of fundamental justice ‘such as the presumption of innocence, the right to a fair trial, and the principle against self-incrimination.’”<sup>171</sup>

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<sup>166</sup> Thurman Arnold, *The Symbols of Government* (New Haven: Connecticut: Yale University Press, 1935) at 128.

<sup>167</sup> *Ibid.* at 134-135.

<sup>168</sup> *R. v. Seaboyer* overturned the so-called ‘rape shield’ law, which protected the victim from being cross-examined about their sexual history. The Court ruled that this protection could exclude relevant information and therefore, infringe upon the accused’s right to make a full answer and defence, *R v. Seaboyer* (1991), S.C.J. No. 62 at para. 34, 2 S.C.R. 577 [*Seaboyer* cited to S.C.J.].

<sup>169</sup> *Ibid.* at para. 32.

<sup>170</sup> *R. v. Mills* (1999), S.C.J. No. 68 at para. 69, 3 S.C.R. 668 [cited to S.C.J.]. It was held that the right to make full answer and defence was crucial to guarantee that the innocent are not convicted, *Ibid.* at para. 76.

<sup>171</sup> *Ibid.* at para. 69.

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A denial of the right to full answer and defence would surely be an infringement of constitutionally-protected principles. *Seaboyer* suggests that if the “evidentiary bricks needed to build a defence” are denied, then “for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.”<sup>172</sup> Thus, if part of the full answer and defence is premised on physical evidence, the following issues arise.

#### A. TRUST IN THE LAWYER-CLIENT RELATIONSHIP

The integrity of the Canadian criminal system requires that the lawyer representing the accused be fully-informed about the facts of the case.<sup>173</sup> A criminal defendant is only rarely an expert in criminal law, and thus is not likely to know what information should be revealed to his lawyer to aid in his full answer and defence.<sup>174</sup> It follows logically that the accused should be free to disclose all relevant facts to his lawyer without worrying about self-incrimination. As was held in by the SCC in *Smith v. Jones*, “clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent.”<sup>175</sup> This requires that the solicitor-client relationship be carefully protected by strict standards of privilege. Ultimately, “the right to counsel would be meaningless if accused persons were not free to communicate fully with their lawyers.”<sup>176</sup>

Within a solicitor-client relationship, if trust in confidentiality is lacking, a client would likely not share important information with his lawyer, for fear that the Crown would discover this information. Without being fully-informed, a lawyer’s ability to effectively defend the accused would be inhibited. Therefore, it is essential to the protection of the right to full answer and defence that lawyer-client communications be protected completely within the bounds of solicitor-client privilege. To allow lawyers to disclose information to anyone, either directly or indirectly, “would destroy

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<sup>172</sup> *Seaboyer*, *supra* note 168 at para. 34.

<sup>173</sup> Mackenzie, *supra* note 102 at 7-6.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Smith v. Jones*, [1999] S.C.J. No. 15, 1 S.C.R. 455 at para. 46 (cited to S.C.J.).

<sup>176</sup> Mackenzie, *supra* note 102 at 7-7; For jurisprudence on this idea, see *R. v. Jones* (1994), 89 C.C.C. (3d) 353 (S.C.C.) at 367 and *Smith v. Jones*, [1999] S.C.J. No. 15.

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the benefits to be derived by accused persons from professional assistance.”<sup>177</sup> The law of privilege, Professor Renke explains, is extended to the accused’s right not to incriminate himself and thus, must also extend to lawyer-client communications. The decision to talk with a lawyer is not a decision to talk with prosecuting authorities.<sup>178</sup> According to lawyer Rachel Fogl, “members of the legal community acknowledge that, without guaranteed security, an effective relationship between the lawyer and his client would be impossible, and without this relationship, the system would lie in shambles.”<sup>179</sup> Any interference with privilege encourages distrust of lawyers by their clients, lowers the efficacy of representation, and damages the administration of justice. In Murray’s case, forcing the disclosure of the tapes arguably undermined his role as an advocate. In fact, if lawyers must promote the administration of justice, they must also work to *avoid* distrust between themselves and their client.<sup>180</sup> Compelling the disclosure of evidence is at obvious odds with this idea, even if it is required, at present, by law. If clients cannot trust that the communications with their lawyers are absolutely secure, no such disclosure will occur.

If a lawyer is to effectively represent a client in a criminal trial, it may be necessary to take possession of physical evidence. According to Renke, the accused has the right to have inculpatory evidence assessed by his lawyer and has no obligation to voluntarily provide non-privileged evidence to the prosecution. For the evidence to be properly assessed, it may have to pass into the hands of the lawyer. Renke asks: “should the mere fact that counsel obtains custody of the evidence for the purposes of an assessment cause a constitutional transformation, so that now counsel has the immediate obligation to disclose the evidence to the State?”<sup>181</sup> This would interfere with the accused’s right to remain silent and would impose an unreasonable obligation to disclose to the prosecution, merely because the client is exercising his right to retain and instruct

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<sup>177</sup> Mackenzie, *supra* note 102 at 7-6.

<sup>178</sup> Renke, *supra* note 122 at 197.

<sup>179</sup> Fogl, *supra* note 140 at 190.

<sup>180</sup> Renke, *supra* note 122 at 205.

<sup>181</sup> *Ibid.* at 199-200.

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counsel.<sup>182</sup> Gravelly J held that the tapes did, in fact, undergo a constitutional transformation when they were retrieved by Murray.

Compelling the disclosure of evidence provided to an accused's lawyer with the understanding of the existence and paramount nature of privilege causes significant problems. As per the SCC in *Seaboyer* and *Mills*, the right to full answer and defence is a principle of fundamental justice. This right includes being able to call the evidence necessary to establish a defence. Moreover, to establish an effective defence, a lawyer must be fully-informed from the client about the facts of the case. Without trust that there will be no disclosure to third parties, it is unlikely that a client will provide all information or evidence relevant to his defence. Compelling the defence to disclose evidence produced under the belief that it is protected by privilege and will remain confidential undermines entirely the trust between the lawyer and client.

## VIII

### IS THERE A DUTY TO DISCLOSE?

As the holding in *Murray* confirmed, there is a duty to disclose physical evidence in the possession of defence counsel in certain circumstances. The oft-mentioned bloody knife or smoking gun, for example, is physical evidence that must be turned over. Defence lawyer Randall Martin explains that by retaining this type of evidence, the defence may be hiding a key piece of evidence that has little or no exculpatory value.<sup>183</sup> Similarly, lawyer Earl Cherniak claims that counsel cannot "harbour for the safe keeping a bloody piece of clothing given to him by a client, where he knows or suspects that the clothing will be evidence on a pending charge."<sup>184</sup> Although this may force a lawyer to withdraw from the case, a lawyer has a duty to turn evidence that is overwhelmingly inculpatory over to the prosecution.<sup>185</sup>

Save examples of bloody murder weapons, whether a duty to disclose exists remains unclear. Although Rachel Fogl explains that

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<sup>182</sup> *Ibid.* at 200.

<sup>183</sup> "Martin Interview", *supra* note 70.

<sup>184</sup> Cherniak, *supra* note 46 at 147.

<sup>185</sup> *Ibid.*

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“lawyers have a duty to turn over evidence relevant to a criminal offense,”<sup>186</sup> Assistant Crown Attorney Humphreys claims that he does not expect to see much evidence volunteered by the defendant.<sup>187</sup> Humphreys adds that although the Crown would like to see evidence, the defence is often under no obligation to turn the evidence over.<sup>188</sup> Former Ontario Attorney General David Young, however, is of a stronger view, believing that there is never an excuse for withholding evidence.<sup>189</sup>

The ruling in *Murray* that counsel may not oppose the legitimate seizure of evidence does not necessarily mean that there is a reciprocal duty to disclose the evidence to the prosecution. Gravely J held that “it does not follow that because concealment of incriminating physical evidence is forbidden there is always a corresponding positive obligation to disclose.”<sup>190</sup> There is a difference, Gravely J maintains, between actively concealing evidence and holding it with a willingness to comply with a legal seizure order. Professor Renke agrees, suggesting that “the lack of a right to oppose disclosure is not equivalent to a duty to disclose.”<sup>191</sup> He adds that “because the accused has the (general) right not to incriminate himself or herself, the accused is not obligated or has no legal duty to assist the State in gathering evidence against himself or herself” subject to the limitation that the defence cannot destroy the evidence or prevent the authorities from obtaining the evidence by legitimate means.<sup>192</sup>

Alan Gold, former head of the Criminal Lawyers’ Association, claims that requiring the defence to turn physical evidence over to the Crown would “turn the [defence] lawyer into an assistant of the police...[and defence] lawyers...are not part of the Crown team.”<sup>193</sup> Randall Martin likens the situation to the discovery of a witness that

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<sup>186</sup> Fogl, *supra* note 140 at 200.

<sup>187</sup> “Humphreys Interview”, *supra* note 56.

<sup>188</sup> *Ibid.*

<sup>189</sup> Kirk Makin, “Lawyers draft new rules on evidence” *The Globe and Mail* (21 March 2002) A10 [Makin, “Lawyers Draft”].

<sup>190</sup> *Murray*, *supra* note 3 at para.120.

<sup>191</sup> Renke, *supra* note 122 at 198.

<sup>192</sup> *Ibid.* at 195; See also *Ingleton v. Dibble*, [1972] 1 All E.R. 275 (Q.B.D.); *R. v. Lajoie* (1989), 47 C.C.C. (3d) 380 (Que. C.A.); *R. v. Lavin* (1992), 76 C.C.C. (3d) 279 (Que. C.A.); *R. v. Akrofi* (1997), 113 C.C.C. (3d) 201 (Ont. C.A.).

<sup>193</sup> Tom Blackwell, “Lawyers on a collision course with Ontario’s top law man” *Ottawa Citizen* (27 April 2001) A1 [Blackwell].

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could devastate the accused's case: "if, in private, I examined a witness and I find out that my client is clearly guilty, I have no obligation to tell the Crown or to turn over this evidence. If the Crown can't uncover it themselves, then there is no duty to turn the information over."<sup>194</sup> Similarly, lawyer Daniel Monteith considers the tapes in Murray to be more like a confession than a murder weapon. He claims that the Bernardo tapes were the "ultimate confession" and "everyone accepts that if a lawyer's client confesses, the lawyer has no duty to provide the confession to the Crown."<sup>195</sup> He adds that "the situation is much different from the case where a lawyer's client hands over the murder weapon. Turning over the murder weapon is not tantamount to a confession."<sup>196</sup> Ultimately, the fact that evidence may not be protected in any way by solicitor-client privilege does not necessarily confer an obligation of disclosure to the Crown.

If physical evidence is to be disclosed, it seems that defence lawyers may retain evidence for a reasonable amount of time before turning it over. Austin Cooper claims that inculpatory physical evidence given to a defence lawyer during a legal consultation could "clearly be withheld for a reasonable period of time."<sup>197</sup> After the expiry of this period, however, Cooper claims that the lawyer should, "as an officer of the court, on his own motion turn the [evidence] over to the prosecution."<sup>198</sup> Assistant Crown Attorney Humphreys agrees, claiming that "the defence can retain the evidence for a reasonably short period of time."<sup>199</sup> When the evidence is disclosed, however, the defence lawyer must be careful how this is done. The evidence should be turned over without comment or through a third party to maintain confidentiality.<sup>200</sup> Consequently, the prosecution, when presenting the evidence, must be careful not to reveal the source of the evidence to the jury.<sup>201</sup> This will help to preserve the integrity of the lawyer-client relationship.

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<sup>194</sup> "Martin Interview", *supra* note 70.

<sup>195</sup> Daniel Monteith, "Not clear that Murray had to turn over tapes" Editorial, *Lawyer's Weekly* (11 August 2000) 5 [Monteith].

<sup>196</sup> *Ibid.*

<sup>197</sup> Cooper, *supra* note 68 at 149.

<sup>198</sup> *Ibid.*

<sup>199</sup> "Humphreys Interview", *supra* note 56.

<sup>200</sup> Cherniak, *supra* note 46 at 147; The Canadian Press, "Trial could shed light on lawyers' obligations" *The Ottawa Citizen* (25 January 1997) E11 [Canadian Press].

<sup>201</sup> Cooper, *supra* note 68.

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## IX

### OPPOSING DUTIES OF CANDOR AND CONFIDENTIALITY

As has been established, it is clear that lawyers have duties both to their clients and to the administration of justice. These duties pull defence lawyers in opposite directions and force them to strike a delicate balance. In the *Murray* ordeal, the balance between the competing obligations of candor<sup>202</sup> and confidentiality was at definite odds. Unfortunately for Murray, these duties seem to have been mutually exclusive in certain respects. This paper will now examine the tension created by the competing duties faced by criminal defence lawyers, in an effort to demonstrate how the Bernardo case placed Murray in an exceptionally difficult position.

The competing duties of candor and confidentiality are extremely difficult to reconcile. The expectations of the LSUC are unclear, compelling lawyers to determine the relative value they will place on candor and confidentiality. Monroe Freedman calls this the “lawyer’s dilemma,” and illustrates the contradicting expectations by explaining that “the lawyer has a duty to know everything, to hold it in confidence, and to reveal it to the court.”<sup>203</sup> The problem is immediately apparent: lawyers have an obligation to be candid with the court; they also have a duty of strict confidentiality about much that is learned during the course of their professional relationship.<sup>204</sup> Although lawyers have a general duty not to destroy or conceal physical evidence of a crime, there is significant “tension...between that duty to not either conceal or destroy evidence of a crime on the one hand and a lawyer’s duty to confidentiality on the other.”<sup>205</sup> Professor Renke clarifies that when a lawyer takes possession of physical evidence, they are tugged in opposing directions by competing duties:

On the one hand, considerations of confidentiality and advocacy support retaining the evidence without disclosure.  
On the other hand, considerations of the lawyer’s

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<sup>202</sup> To maintain uniformity, the spelling of ‘candor’ found in the LSUC’s *Rules* has been adopted. The obligation of candor with the Court will be subsequently discussed.

<sup>203</sup> Freedman, “Ethics”, *supra* note 130 at 27-28.

<sup>204</sup> Mackenzie, *supra* note 102 at 7-6.

<sup>205</sup> Canadian Press, *supra* note 200.

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professional independence from the client and the lawyer's relationship with the administration of justice support turning the evidence over to the Crown.<sup>206</sup>

This was exactly the problem faced by Murray. His duty of loyalty to Bernardo suggested that it was in his client's interest to have the tapes emerge during the cross-examination of Homolka. Conversely, his obligation to the administration of justice suggested that the tapes should have been disclosed to the Crown. This put Murray in an incredibly difficult position. Randall Martin claims that he is "always sympathetic for Ken [Murray]"<sup>207</sup> and K.R., in an editorial in *Law Times*, writes that "no criminal lawyer wants to be placed in the position in which Mr. Murray found himself."<sup>208</sup> Associate Professor Benedet, who is generally unsympathetic towards Murray, notes that his dilemma was significant.<sup>209</sup> Even John Rosen, Murray's replacement, took three weeks after viewing the tapes to decide what to do. "I think, though, that...members of the legal profession, understand that a lawyer's obligation to a client, the solicitor-client privilege aspect, supersedes just about every other obligation that we have," commented Murray on the difficulties he faced.<sup>210</sup> He added that although the public may not understand, as long as lawyers respect the LSUC guidelines and historical limits of the solicitor-client relationship, they are acting within the allowable bounds. According to Murray, this rule was "one that I abided by to the end, when I was directed to do otherwise."<sup>211</sup> The ultimate question becomes "where is the line to be drawn between counsel's duty to the administration of justice and his or her duties to the clients?"<sup>212</sup>

With little guidance on where to draw the line between candor and confidentiality from the *Rules*, lawyers are left to try to

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<sup>206</sup> Renke, *supra* note 122 at 191.

<sup>207</sup> "Martin Interview", *supra* note 70.

<sup>208</sup> K.R., "Editorial: Ethics and Criminal Justice" (Mar. 2003) 47:2 *Crim. L.Q.* 121 at 121 [K.R.].

<sup>209</sup> "Benedet Interview", *supra* note 72.

<sup>210</sup> Cairns, *supra* note 53 at 5.

<sup>211</sup> *Ibid.*

<sup>212</sup> Layton, *supra* note 44 at 490.

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find existing jurisprudence on the matter at issue<sup>213</sup>, to fend for themselves<sup>214</sup>, or else, they are forced to contact the LSUC for advice. Unfortunately, Murray's case served to demonstrate the ineffectiveness of LSUC assistance during times of evidentiary uncertainty. After Austin Cooper's request for guidance on what to do with the tapes, the LSUC directed that the tapes be "delivered to His Honour Judge P. LeSage in a sealed packet."<sup>215</sup> On September 12, 1994 these instructions were followed, but the LSUC's advice and resulting adjournment allowed Rosen to retain the tapes until at least October 7.<sup>216</sup>

Without effective LSUC guidance, defence lawyers are themselves forced to determine how to balance the duties of confidentiality and candor. David Layton suggests that this requires that a lawyer determine whether and how the duty of loyalty will be engaged.<sup>217</sup> When deciding where to draw the line, Monroe Freedman suggests that the duty of candor should be interpreted narrowly to avoid interfering with a lawyer's duty not to disclose confidential information to the court, either directly or indirectly.<sup>218</sup> The holding in *Seaboyer* may help to clarify the issue. McLachlin J (as she then was) held that the principles of fundamental justice, including the right to call evidence for full answer and defence, should reflect a "spectrum of interests, from the rights of the accused to broader societal concerns."<sup>219</sup> This holding favours a highly contextual approach, where a lawyer balances the rights of the accused with the rights of society to determine the weight with which the conflicting duties should be engaged. However, there are no clear answers –

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<sup>213</sup> See *Murray*, *supra* note 3 at paras. 80, 149.

<sup>214</sup> It is important to note here that when Rosen took over the case (and tapes) in September 1994, he reviewed the relevant jurisprudence to determine whether he could continue to retain the tapes. As was reported in *Murray*, "by September 17, according to Rosen, his research team had found in every single case they had looked at, that physical items were not covered by privilege and counsel was held to be obliged to deliver the items to the authorities." This suggests that even without sufficiently clear Rules or guidance from the LSUC, Murray could have discovered jurisprudential indications as to what should have happened with the tapes. *Murray*, *supra* note 3 at para. 80.

<sup>215</sup> *Ibid.* at para. 70.

<sup>216</sup> *Ibid.* at para. 74.

<sup>217</sup> Layton, *supra* note 44 at 489.

<sup>218</sup> Mackenzie, *supra* note 102 at 1-8.

<sup>219</sup> *Seaboyer*, *supra* note 168 at para. 19.

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lawyers are forced to make a personal judgment while the defence is underway.

The balance between the competing duties of confidentiality and candor is difficult to achieve and led to Murray's struggles. He had duties of loyalty and confidentiality to Bernardo, which favoured retaining the tapes until Homolka took the stand. Conversely, Murray also had a duty to be candid with the court and to avoid obstruction of justice, which suggested that the tapes should have been disclosed. In attempting to achieve a very difficult balance between the somewhat exclusive duties, Murray decided to suppress the tapes until trial. Although there was little guidance available to Murray, Gravely J later decided that Murray's decision to value the duty to his client over his obligation to candor was wrong. Murray's request for direction from the LSUC demonstrated the ineffective guidance provided by the rules by themselves and suggests that lawyers are left with few options but to determine a course of action on their own. According to University of Toronto Law Professor Peter Rosenthal this "is a very tricky problem," and knowing "where to draw the line is very difficult."<sup>220</sup> Without guidance, the conflict between the duties of candor and confidentiality leaves lawyers in possession of physical evidence "stuck between a rock and a hard place."<sup>221</sup>

## X

### THE IMPORTANCE OF ETHICAL GUIDELINES

Establishing and maintaining a minimum ethical standard is essential to ensuring that the public remains confident in the ability of the legal profession to self-regulate. According to K.R.'s editorial in *Law Times*, "nothing is more important to the long-term future of the profession than its ethics," and if lawyers do not keep their "ethical houses in order," there will be a lack of confidence in the profession. The result will be "significant incursions by governments on the self-governing nature of the profession," such as those seen by accountants in the *Enron* affair.<sup>222</sup> To avoid this loss of confidence, the LSUC must

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<sup>220</sup> Rudy Platiel & Donn Downey, "Trial of lawyers may offer guidance" *The Globe and Mail* (24 January 1997) A10.

<sup>221</sup> "Martin Interview", *supra* note 70.

<sup>222</sup> K.R., *supra* note 208 at 121-122.

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establish minimum ethical guidelines. This helps to maintain confidence in the profession, and consequently, its ability to self-govern. Not only do ethical standards have to be well-known among lawyers, but the sanctions for transgressions must be publicized – the public must see that ethical lapses will not be tolerated. According to Cooper, Murray faced criminal and professional sanction to maintain the appearance of ethical standards – he was, in essence, “a scapegoat to public indignation.”<sup>223</sup>

Regardless of whether the nuances of Murray’s duty to confidentiality and loyalty to Bernardo were understood by the public, there was a widespread belief that Murray’s suppression of the tapes had solely led to Homolka’s successful plea bargain. According to Lucinda Vandervort, some hold a belief that lawyers consider themselves to hold *de facto* immunity from criminal prosecution for obstruction of justice, which “is not in the public interest and risks bringing both the administration of justice and the legal profession into contempt.”<sup>224</sup> Vandervort claims that the Crown’s failure to appeal the *Murray* decision may be taken as tacit support for the belief that lawyers are immune from prosecution.<sup>225</sup> Furthermore, as alluded to by American defence attorney Gerry Spence, there seems to be a public belief that in cases of horrendous crimes, accused persons do not deserve the full benefits of a full defence.<sup>226</sup> It follows that there is also some disdain amongst the public for those who defend individuals accused of these crimes. As such, despite the nuanced ethical and legal rules allowing lawyers to suppress evidence in certain circumstances, the public is likely to see these tactics as illegitimate. In the public eye, Murray’s actions allowed Homolka to negotiate a deal that halved her likely sentence from the one she would have received had the videotapes surfaced earlier.<sup>227</sup> Either unaware or unconcerned with the subtleties of criminal defence, the public saw Murray’s dealing with the tapes as a culpable act. Murray’s

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<sup>223</sup> Cooper, *supra* note 68 at 154.

<sup>224</sup> Vandervort, *supra* note 43 at 183.

<sup>225</sup> *Ibid.* at 184.

<sup>226</sup> Spence, *supra* note 109 at 31.

<sup>227</sup> At the time of the negotiation, Crown Attorney Murray Segal had “reached the conclusion that a twelve year sentence would be in the public interest. That sentence would enable prosecutions for murder to be launched against the person whom he believed was the principal offender yet impose a substantial jail sentence upon the accomplice”. Galligan Report, *supra* note 1 at 86.

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suppression of the tapes was not acceptable to the public and, as this paper has discussed, public confidence is essential to the continued self-regulation of the profession and the maintenance of the solicitor-client relationship. Therefore, clear ethical guidance for lawyers is essential to help ensure that the problems in *Murray* never occur again.

#### A. PERSONAL ETHICAL CODES

Although guidelines set out by the LSUC are important, they cannot entirely create ethical standards for individual lawyers. Developing personal standards allows individual lawyers to pre-empt ethical problems, as opposed to relying on the LSUC to react to ethical transgressions. Neither the public nor the profession is well-served by relying on criminal or disciplinary proceedings to express ethical standards.<sup>228</sup> Since the *Rules* cannot address every possible situation, Rule 1.03(1)(f) instructs that “a lawyer should observe the rules in the spirit as well as in the letter.”<sup>229</sup> Although this Rule would not have applied to *Murray* (it was adopted in 2000 and amended in 2007), it illustrates that the Law Society recognizes the natural limitations of a universal code of conduct. Lawyers must develop personal ethical codes to address deficiencies inherent in any code of conduct. Such action will help the personal reputation of the lawyer and may help increase public confidence in the profession.

#### B. THE FORMER RULE 10

In *Murray*, Gravelly J examined Rule 10<sup>230</sup> of the LSUC Professional Conduct handbook, concluding that “it is of small help either to counsel or to clients who may believe that both their secrets and their evidence are safe with their lawyers.”<sup>231</sup> The Rule read in part:

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<sup>228</sup> K.R., *supra* note 208 at 121-122.

<sup>229</sup> The Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2000 ), online: LSUC <<http://www.lsuc.on.ca/media/rpc.pdf>> at 7 [*Rules of Professional Conduct*].

<sup>230</sup> Rule 10 remains largely intact and has now been incorporated into Rules 4.01(1) and 4.01(2)(e) of the *Rules of Professional Conduct*, which will be discussed.

<sup>231</sup> *Murray*, *supra* note 3 at para. 148.

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2. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the tribunal with candor, fairness, courtesy and respect.

The lawyer must not, for example:

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- (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence... suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct...<sup>232</sup>

The Rule, according to Gravely J, gave Murray the belief that “he had no legal duty to disclose the tapes until resolution discussions or trial” as there is no guidance as to what “ought to be disclosed.”<sup>233</sup> Partially as a result of the vagueness of the rules of professional conduct, it was held that Murray had a genuine belief in the legality of withholding the tapes. Therefore, he did not have the requisite *mens rea* to be guilty of obstruction of justice.

Murray’s confusion by the imprecision of Rule 10 was shared by others. Gravely J refers to “extensive discussion” about how the Rule applies to the particular facts of the *Bernardo* case and held that there were at least 15 journals discussing the topic. He ruled that, although Murray had only made a superficial attempt to establish the parameters of his ethical obligations, had he conducted thorough research, he may have remained confused.<sup>234</sup> Although Murray eventually contacted the LSUC for advice, he was not given any substantial direction because “the rules were so vague as to be useless to his plight.”<sup>235</sup> LSUC Treasurer Gavin MacKenzie (then Chair of the Professional Regulation Committee) claimed that “the Canadian authorities...don’t assist in answering the question of just where are

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<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.* at para. 151.

<sup>234</sup> *Ibid.* at para. 149.

<sup>235</sup> Gail Cohen, “The thorny issue of ethics and disclosure” Editorial, *Law Times* (26 March 2001) 6 [Cohen].

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the limits of the lawyer's duty not to conceal evidence of a crime."<sup>236</sup> Moreover, some Canadian commentators investigating a lawyer's ethical duties relating to inculpatory physical evidence "have complained about the serious lack of guidance provided by the governing bodies' rules of professional conduct."<sup>237</sup> Although commentators differ as to whether this confusion should have been used to justify an acquittal,<sup>238</sup> there is consensus that the rules were unclear.

The expectations of ethical standards must be made well-known and transgressions must be dealt with publicly. There seems to be a belief among the public that a defendant accused of horrible crimes should not be afforded the full protection of the law during his investigation and trial. The accused's lawyer, it follows, faces public criticism when nuanced legal and ethical techniques allow her client to escape punishment when the public has determined that that individual is guilty. When the ethical allowances of techniques like the suppression of evidence until trial are misunderstood, lawyers are seen as being wrong and deserving of punishment. Ethical guidance is important for lawyers facing difficult ethical dilemmas. The *Murray* case has, to some degree, helped to "clarify for defence lawyers what has long been a gray area – their obligations concerning evidence."<sup>239</sup>

## XI

### SOME GUIDANCE

Although many of the ethical and legal questions faced by defence lawyers in possession of physical evidence remain unclear, the *Murray* case has provided some general direction. Gravely J's

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<sup>236</sup> Canadian Press, *supra* note 200.

<sup>237</sup> Layton, *supra* note 44 at 484.

<sup>238</sup> Lawyers David Layton and Michel Proulx claim that to the extent that the rules are unclear, "counsel should err on the side of caution and seek if at all possible to resolve the uncertainty without putting himself or herself at risk of prosecution." They add that this is much like what should happen when an emergency on an airplane deploys the oxygen masks: take care of yourself first or you will be unable to help others, Layton, *supra* note 44 at 492-493. Conversely, lawyer Daniel Monteith feels that "where even criminal lawyers and judges are uncertain of the law and, thus, the law is not readily ascertainable, ignorance of the law should be a [defence]," Monteith, *supra* note 195.

<sup>239</sup> Gorham, *supra* note 36.

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three options have left defence lawyers with some, albeit few, avenues when they are in possession of inculpatory physical evidence. The holding in *Murray* imparts on a defence lawyer an obligation to disclose evidence in her possession and a corresponding obligation to inform her client that the evidence may be compelled before accepting that evidence. In addition to the three outlined by Gravely J, a potential fourth option, advanced by lawyer George Carter will be discussed below along with the other above-mentioned options; a discussion of the implications of copying the tapes in *Murray* will follow. The LSUC's proposed rule will then be discussed and it will be shown that although the rule addressed many of the concerns in the *Murray* case, it faced significant opposition, leading to its demise. Finally, in light of the direction provided by the *Murray* case, advice for lawyers will be outlined. Although many of the legal and ethical questions arising from the *Murray* case remain unanswered, the case has added to the patchwork of guidance currently available to lawyers.

#### A. OPTIONS AND OBLIGATIONS FROM MURRAY

In *Murray*, Gravely J provided three options for lawyers dealing with inculpatory physical evidence. The choices range from an extreme option, which would require immediate forfeiture of the evidence to the authorities, to a limited option, which would treat all evidence produced during the solicitor-client relationship as something over which privilege could be argued.<sup>240</sup> In the latter option, the defence would be obliged to disclose the existence of the tapes only in very limited circumstances.<sup>241</sup> According to lawyers Peter Brauti and Gena Argitis, formulating a problem-free solution is extremely difficult, as a rule balancing conflicting duties can always be seen as being too one-sided.<sup>242</sup> Gravely J, however, formulated a rule that strikes a balance between the extreme and limited options

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<sup>240</sup> For commentary on the extreme option (disclose all), see A.L. Macdonald and J.E. Pink, "Murder, Silence and Physical Evidence: The Dilemma of Client Confidentiality" (1997) 2 Can. Crim. L.R. 111 at 124. For commentary on the limited option (disclose very little), see David Tanovich, "Smoking Guns, Bloody Shirts, and Videotapes: A Virtual Round Table Discussion" (1997) 18:2 Ontario Criminal Lawyers' Association Newsletter 7, online: QL (CLAN).

<sup>241</sup> Brauti, *supra* note 49 at 223.

<sup>242</sup> *Ibid.*

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mentioned above. It was held that Murray, once he had discovered the “overwhelming significance” of the tapes, was left with three legally justifiable options:

- (a) Immediately turn over the tapes to the prosecution, either directly or anonymously;
- (b) Deposit them with the trial judge; or
- (c) Disclose their existence to the prosecution and prepare to do battle to retain them.<sup>243</sup>

Although these options eliminate the element of surprise, the defence has the chance to justify its case for suppression of the evidence under option (c). The options strike a balance between mandating that the tapes be turned over and allowing them to be withheld for trial. Murray’s tactic of complete suppression, however, is impossible.

Gravelly J’s options direct that all inculpatory physical evidence should, at the very least, be disclosed to either the Crown or the trial judge. The ruling, Wayne Renke claims, would make it “difficult for post-*Murray* lawyers to claim in *Murray*-like circumstances that they believed that concealing evidence was lawful.”<sup>244</sup> Cooper agrees, claiming that following *Murray*, defence counsel would have trouble contending that there is no duty to disclose the existence of incriminating evidence.<sup>245</sup> The practical effect therefore, is that lawyers no longer have surprise as a tactical advantage, or as Associate Professor Benedet calls it, “defence by ambush,” available to them at trial.<sup>246</sup> The options limit the difficult ethical and legal questions that Murray faced when lawyers come into possession of inculpatory physical evidence. Although having surrendered the “defence by ambush” tactic, criminal defence lawyers are now faced with less uncertainty.

The decision in *Murray* has also created a duty for defence lawyers to advise their clients that the possession of physical evidence by the lawyer might not be covered by privilege. Cooper suggests that post-*Murray* lawyers should advise their clients that inculpatory

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<sup>243</sup> *Murray*, *supra* note 3 at para. 124.

<sup>244</sup> Renke, *supra* note 122 at 194.

<sup>245</sup> Cooper, *supra* note 68 at 155.

<sup>246</sup> “Benedet Interview”, *supra* note 72.

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physical evidence could lead to a conviction and that, if the evidence is turned over to the defence lawyer, there may be a legal compulsion to disclose the evidence to the Crown or trial judge. Therefore, accused persons should keep the evidence but must be advised of the potential for criminal prosecution if they destroy it.<sup>247</sup> Although Gravely J's options imply a duty to warn the client about the dangers of turning over physical evidence, this warning can create problems. Cooper suggests that some clients may not be concerned with being prosecuted for the destruction of evidence, particularly if the evidence is central to serious charges, as was the case in *Bernardo*. Moreover, lawyers face the possibility of being accused of counseling the destruction of evidence, despite their warnings to the contrary.<sup>248</sup> The options necessitate that a lawyer warns her client that her possession of evidence could eventually lead to compelled disclosure.

#### B. AN ALTERNATIVE TO THE JUSTICE GRAVELY RULING

Former Ontario Judge George Carter has put forward a fourth option not mentioned in *Murray*. Carter claims that Murray could, and should, have “immediately viewed and forthwith returned the tapes to their hiding place and kept his mouth shut about their existence.”<sup>249</sup> This option would have allowed investigators to return to Bernardo's residence to retrieve the tapes after their 71-day investigation had finished, thereby circumventing the substance of the obstruction of justice problem stemming from their lengthy suppression. However, Carter's option would still render Murray a witness to the location of the tapes, if they were discovered and presented in trial. As a result, Murray would have had to recuse himself from the case and could be called to testify against his former client. A similar problem would occur if Murray had copied the tapes (as he did in May 1993)<sup>250</sup> and returned them to their original location in Bernardo's home. Although this would have allowed Murray to retain the tactical advantage of surprising the Crown during Homolka's cross-examination, it could again result in his being called

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<sup>247</sup> Cooper, *supra* note 68 at 153.

<sup>248</sup> *Ibid.*

<sup>249</sup> George Carter, “Acquittal ‘Very Good News for the Defense Bar’” Editorial, *Lawyer's Weekly* (14 July 2000) 5.

<sup>250</sup> *Murray*, *supra* note 3 at para. 29.

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as an evidentiary witness, given that he knew the location of the tapes in Bernardo's home.

### C. THE LSUC'S PROPOSED RULE

Although Gravely J's holding in *Murray* illuminates some of the issues faced by defence lawyers in possession of inculpatory physical evidence, there is a need for further clarification from the LSUC. In the statement dropping the professional misconduct complaints against Murray, the LSUC announced that it would draft a new rule for the handling of incriminating evidence that would be beneficial to both sides.<sup>251</sup> The need for the rule was apparent. According to Murray, "if it ever comes up in the future, other lawyers won't have the same difficulties wallowing through an unknown field" if there was a new rule.<sup>252</sup> According to LSUC Professional Regulation Committee member Clayton Ruby, "the committee will look at how to make guidelines that are clear enough so that even the dumbest lawyer on Earth will be able to figure out you can't do this."<sup>253</sup> Of course, all lawyers should refer to existing jurisprudence as well, as Rosen did and Murray did not.<sup>254</sup> K.R.'s editorial in *Law Times* claimed that it was vitally important that the benchers of the LSUC work to provide guidance on the issue of inculpatory physical evidence.<sup>255</sup> Similarly, Gail Cohen claimed that the LSUC needed to bring about changes to provide guidance to lawyers facing this dilemma.<sup>256</sup> Bowing to the pressure of its membership and the comments on the lack of guidance made by Gravely J, the LSUC's Special Committee on Lawyer's Duties with Respect to Physical Evidence Relevant to a Crime developed a proposed rule in 2001.<sup>257</sup>

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<sup>251</sup> LSUC Committee, *supra* note 35.

<sup>252</sup> James McCarten, "Law body drops charges against Bernardo's lawyer" *The Ottawa Citizen* (30 November 2000) C21.

<sup>253</sup> Gay Abbate, "Lawyers to get code of conduct on evidence" *The Globe and Mail* (30 November 2000) A22.

<sup>254</sup> *Murray*, *supra* note 3 at para. 80, 149.

<sup>255</sup> K.R., *supra* note 208 at 122.

<sup>256</sup> Cohen, *supra* note 235.

<sup>257</sup> The Committee was comprised of benchers Gavin MacKenzie (chair), Stephen Bindman, Todd Ducharme, Niels Ortved, Sydney Robins (former Court of Appeal Justice), Heather Ross, Clayton Ruby, Alan Gold (president of the Criminal Lawyers Association), Paul Lindsay (Director, Crown Law Office - Criminal,

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The LSUC's proposed rule recognized the conflict between a lawyer's duties to a client and to the administration of justice, directing that any lawyer who comes into the possession of physical evidence should seek the advice of senior counsel or the LSUC. The proposed rule, to apply to all non-privileged evidence, read as follows:

4.01(10) A lawyer who is asked to receive or does receive from a client or another person on behalf of a client physical evidence relevant to a crime shall not

- (a) counsel or participate in the concealment of the evidence, or
- (b) destroy, alter or otherwise deal with the evidence or permit the evidence to be dealt with in a manner which the lawyer reasonably believes
  - (i) may lead to its destruction or alteration,
  - (ii) poses a risk of physical harm to any person, or
  - (iii) may otherwise lead to an obstruction of justice.<sup>258</sup>

The commentary accompanying the proposed rule recognized that “[a] lawyer owes duties of loyalty and confidentiality to his or her client and must act in the client’s best interests by providing competent and dedicated representation.” However, “[a] lawyer also owes duties to the administration of justice, which require, at minimum, that the lawyer not violate the law, improperly impede a police investigation, or otherwise obstruct the course of justice.”<sup>259</sup>

The rule contained a handful of exemptions that would allow lawyers to retain evidence in certain circumstances. According to Committee member Todd Ducharme, the exemptions were vital to allow defence lawyers to represent their clients without

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Ministry of the Attorney General), and Tony Loparco (president of the Ontario Crown Attorneys’ Association). The Law Society of Upper Canada (Policy Secretariat), “Special Committee on Lawyer’s Duties with Respect to Physical Evidence Relevant to a Crime, Second Interim Report to Convocation” (22 June 2001), online: LSUC <<http://www.lsuc.on.ca/media/evidencecommitteeprt.pdf>> [LSUC Proposal].

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

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compromising the clients or violating solicitor-client privilege. Before using an exemption, lawyers would have to obtain the consent of the Evidence Review Committee.<sup>260</sup> Lawyers could temporarily withhold evidence under five circumstances:

1. To avoid future harm;
2. To prevent destruction of evidence;
3. To make arrangements to transfer evidence to authorities pursuant to instructions;
4. To examine or test the evidence; and
5. To make effective use of evidence at trial.<sup>261</sup>

The ability to temporarily withhold evidence is similar to the American Bar Association's Code of Conduct for defence lawyers.<sup>262</sup> The Committee was absolute in its opposition to a rule that would compel all evidence to be turned over to the Crown.<sup>263</sup> It addressed the significant problems arising in *Murray* and struck a compromise between prosecutors and defence lawyers, without requiring that all evidence be surrendered without question. Instead of being embraced, however, the rule faced vehement opposition.

#### D. OPPOSITION TO THE LSUC'S PROPOSED RULE

Despite incorporating elements designed to strike a compromise between the duty to clients and to the administration of justice, the proposed rule faced significant opposition. Much of the resistance came from prosecutors and the police, who felt that the rule allowed for the inappropriate suppression of evidence. Former Ontario Attorney General David Young claimed that even the temporary concealment of evidence can be seen as the obstruction of justice and "that a rule of professional conduct of the Law Society of Upper Canada would purport to sanction such conduct is nothing

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<sup>260</sup> Makin, "Doubts Cast" *supra* note 189.

<sup>261</sup> LSUC Proposal, *supra* note 257.

<sup>262</sup> David Gambrell, "May be okay to hide evidence in rare cases" *Law Times* (26 March 2001) 2.

<sup>263</sup> Blackwell, *supra* note 193.

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short of scandalous.”<sup>264</sup> Prosecutors and the Attorney General took the position that there is never an excuse to withhold evidence from the authorities<sup>265</sup> and the proposal allowed for evidence to be suppressed for significant periods of time.<sup>266</sup> Consequently, David Young considered overriding the rule if it was adopted.<sup>267</sup>

The Ontario Association of Chiefs of Police (“OACP”) also opposed the proposal, claiming that it would not have provided sufficient guidance to cause Murray to “act as Mr. Justice Gravelly ruled he ought to have acted.”<sup>268</sup> Going further than merely failing to provide guidance, the OACP added, that “the draft Rule would have actively led Mr. Murray to [make a] decision that the Court found to be criminal acts.”<sup>269</sup> The OACP claimed that, under the proposed rule, the tapes could have been protected from disclosure by solicitor-client privilege or could have been returned to Bernardo’s house until the house was destroyed.<sup>270</sup>

There were also concerns about seeking the advice of the LSUC without disclosing the evidence to the prosecution. Asking the LSUC to review the evidence without disclosing it to the prosecution deprives the Committee of the prosecution’s opinion on the allegations. The Committee would not be told of any plea negotiations that were occurring with a co-accused, nor would information arising out of the ongoing investigation be presented. Therefore, the concern was that “the [C]ommittee will not possess sufficient information to ensure that the administration of justice is not harmed by the withholding of evidence.”<sup>271</sup> There was also opposition to the drafting of a bright line rule in these situations by defence lawyers.<sup>272</sup> Despite the LSUC’s efforts to cater to the competing interests of prosecutors and defence teams, opposition to the proposed rule was strong.

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<sup>264</sup> David Gambrell, “Stringent new rules on criminal evidence” *Law Times* (25 March 2002) 1 [Gambrell, 25 March].

<sup>265</sup> Makin, “Doubts Cast”, *supra* note 189.

<sup>266</sup> Blackwell, *supra* note 193.

<sup>267</sup> *Ibid.*

<sup>268</sup> Ontario Association of Chiefs of Police, Press Release “OACP Response to “Lawyers’ Duties Respecting Physical Evidence Relevant to a Crime” (31 May 2001), online: <[http://www.oacp.on.ca/uploads/pdfs/PhysicalEvidence\\_LSUC.pdf](http://www.oacp.on.ca/uploads/pdfs/PhysicalEvidence_LSUC.pdf)>.

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> Brauti, *supra* note 49 at 220.

<sup>272</sup> “Benedet Interview”, *supra* note 72.

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Consequently, the rule was never adopted and lawyers facing ethical dilemmas involving inculpatory physical evidence remain without strong guidance in the *Rules*.

#### E. ADVICE FOR LAWYERS

The failure to draft rules to help lawyers facing problems with physical evidence has left defence lawyers in a state of uncertainty relating to the possession of physical evidence. Some guidance, however, does emerge from the *Murray* case. According to Gavin Mackenzie, “the overwhelming lesson [from the *Murray* case] is that generally speaking, you shouldn’t take possession of property that’s related to an offense.”<sup>273</sup> Indeed, Randall Martin feels that “*Murray* should never have come into possession of the tapes.”<sup>274</sup> University of Toronto Law Professor Kent Roach states that “this whole sorry episode would have gone no further” if *Murray* “had simply refused to go and get the tapes.”<sup>275</sup> If a client will not disclose the contents of the evidence that they are instructing their lawyer to collect, Martin claims that the lawyer should not retrieve it. He adds that the evidence “already...sounds like something that I don’t want to have” and that *Murray* happened to get Pandora’s Box.<sup>276</sup> Crown Attorney Ian Scott claims that after *Murray*, it would be hard for defence lawyers to argue that suppression of inculpatory evidence would not be a crime.<sup>277</sup> Clayton Ruby, a member of the Committee that drafted the proposed rule, claims that although there is no problem in keeping secret exculpatory evidence for use at trial, there “is grave danger in taking possession or control of evidence that is useful to the Crown.”<sup>278</sup> Therefore, lawyers should be very careful before taking possession of any item of evidence. Although there is still significant uncertainty relating to physical evidence, defence lawyers should act

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<sup>273</sup> Gambrill, 25 March, *supra* note 262.

<sup>274</sup> “Martin Interview”, *supra* note 70.

<sup>275</sup> Kirk Makin, “A clean escape from the house of Bernardo” *The Globe and Mail* (30 November 2000) A1.

<sup>276</sup> “Martin Interview”, *supra* note 70.

<sup>277</sup> Kirk Makin, “*Murray* acquitted of obstructing justice” *The Globe and Mail* (14 June 2000) A1.

<sup>278</sup> Clayton Ruby, “Hear no evil, see no evil, prove no evil” *The Globe and Mail* (14 June 2000) A17.

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cautiously and remember that “if you don’t want to have to turn the evidence over, don’t come into possession of it.”<sup>279</sup>

## XII

### THE CURRENT *RULES OF PROFESSIONAL CONDUCT*

Although adopted after the completion of much of Murray’s ordeal and having undergone several amendments since, today’s *Rules* provide only partial guidance on many of the issues faced by Murray. The provisions relating to physical evidence are characterized by general language, often only hinting at what is expected of lawyers. Conversely, the rules relating to confidentiality and the duties owed by lawyers both to clients and the administration of justice are quite clear. This analysis will now examine the rules relating to the suppression of evidence, client confidentiality, duties to the client, and the duty to the administration of justice.

As could be expected from the failed rule proposal, the *Rules* contain very little about withholding physical evidence relating to a crime. Rule 4.01(2) contains the most direct guidance for lawyers dealing with physical evidence. That Rule instructs that “when acting as an advocate, a lawyer shall not...(e) knowingly attempt to deceive a tribunal or influence the course of justice by...suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct.”<sup>280</sup> As was noted in Gravelly J’s discussion of the former Rule 10, there is no indication as to what “ought to be disclosed.” This rule, therefore, offers little in the way of guidance to lawyers dealing with questions involving the possession of physical evidence.

The definition of “professional misconduct” is also ambiguous, yet it could be interpreted to speak to problems of suppressing physical evidence. “Professional misconduct” is defined in Rule 1.02 as professional conduct that tends to bring discredit on the profession, including “(e) engaging in conduct that is prejudicial to the administration of justice.”<sup>281</sup> As was demonstrated in the previous discussion, it is possible to interpret the suppression of physical evidence in certain situations as being prejudicial to the

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<sup>279</sup> “Martin Interview”, *supra* note 70.

<sup>280</sup> *Rules of Professional Conduct*, *supra* note 229229 at 69.

<sup>281</sup> *Ibid.* at 2.

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administration of justice. However, it was also shown that the suppression of evidence in order to mount a defence for a client may actually uphold the administration of justice. The guidance provided by Rules 4.02(e) and 1.02 is ambiguous and provides little help when lawyers face the issue of possession of physical evidence.

The rules relating to client confidentiality, however, are much clearer. Rule 2.03(1) instructs that

a lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.<sup>282</sup>

The Rule's commentary does allow for confidentiality to be broken, but only when there is an immanent risk of death or serious bodily harm to an identifiable person, when a lawyer is accused of wrongdoing (criminal, civil, or professional),<sup>283</sup> or "when required by law or by order of a tribunal of competent jurisdiction."<sup>284</sup> In these cases, a lawyer must not disclose more information than is required. This Rule recognizes the importance of lawyer-client confidentiality, declaring that "the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed or discussed with the lawyer will be held in strict confidence" and that "confidentiality and loyalty are fundamental to the relationship between a lawyer and client."<sup>285</sup> There is no ambiguity that the duty to maintain confidentiality is nearly absolute. There are questions however, as to whether the tapes in the Bernardo case would qualify as "information." In the *Rules*, the words 'information' and 'evidence' are used in ways that demonstrate that they are not necessarily synonymous and therefore it is unclear whether the tapes would have been protected.<sup>286</sup> It is clear that

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<sup>282</sup> *Ibid.* at 19.

<sup>283</sup> *Ibid.* at 21.

<sup>284</sup> *Ibid.* at 20.

<sup>285</sup> *Ibid.* at 19.

<sup>286</sup> See, for example, how the word 'information' is used in the commentary accompanying Rule 2.03(1) and the word 'evidence' in the commentary accompanying Rule 4.01; *Ibid.*, at 19, 67.

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lawyers have an almost absolute duty to hold in strict confidence any information that arises from the lawyer-client relationship.

The *Rules* are also clear that the lawyer has a duty to the client. Rule 4.01(1) holds that “when acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candor, fairness, courtesy, and respect.”<sup>287</sup> In a defence role, a lawyer has a duty to protect her client from being convicted “except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged.”<sup>288</sup> Moreover, a lawyer should never waive her client’s rights; the commentary mentions that, save legal compulsion, the lawyer should never “assist an adversary or advance matters derogatory to [her] client’s case.”<sup>289</sup> Therefore, a lawyer has a clear duty to represent her client fully and loyally. In his defence of Bernardo, it is reasonable to believe that Murray would have interpreted this Rule as allowing for the suppression of the tapes until trial, although a closer consultation with the existing jurisprudence may have lead him to a different conclusion.<sup>290</sup> He has a clear duty both to avoid helping the Crown and to represent his client resolutely.

The *Rules* also set out clear duties to the administration of justice. Rule 4.06(1) instructs that “a lawyer shall encourage public respect for and try to improve the administration of justice” and Rule 4.01(1) mandates that the lawyers treat the tribunal with candor and fairness.<sup>291</sup> Lawyers must be committed to the concept of equal justice for all within an impartial system. Moreover, without the respect of the public, the legal system could not function and thus, “constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.”<sup>292</sup> To this end, Rule 6.01(1) dictates that “a lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession” such that public confidence in the administration of justice is not eroded.<sup>293</sup> This Rule,

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<sup>287</sup> *Ibid.* at 67.

<sup>288</sup> *Ibid.* at 68.

<sup>289</sup> *Ibid.*

<sup>290</sup> *Murray*, *supra* note 3 at para. 80, 149.

<sup>291</sup> *Rules of Professional Conduct*, *supra* note 229 at 67, 80.

<sup>292</sup> *Ibid.* at 80.

<sup>293</sup> *Ibid.* at 96.

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however, would have done little to help Murray. The vague language surrounding the duty to the administration of justice could have been construed so as to permit the suppression of the tapes. As was shown, Murray felt that “no matter...how egregious his crimes,” Bernardo was “entitled to good counsel that will defend him to the best of their ability.”<sup>294</sup> According to Murray’s defence strategy, the suppression of the tapes represented a significant part of Bernardo’s defence and thus, arguably helped to further the administration of justice. Although there is a clear duty to the administration of justice, this duty could be interpreted in a manner that would have allowed the suppression of the tapes.

Even though today’s *Rules* provide some direction with respect to the problems Murray faced, lawyers are left with little guidance on certain issues, at least by the *Rules* themselves. As was shown, the rules relating to incriminating physical evidence do little to help lawyers facing this situation. Despite the problems with the language identified by Gravelly J, lawyers are simply directed not to “suppress what ought to be disclosed.”<sup>295</sup>

### XIII

#### CONCLUSION

In the early-1990s, Paul Bernardo and Karla Homolka committed unthinkable crimes. Their subsequent prosecutions did, however, reignite debates over the issues faced by criminal defence lawyers as they attempt to balance competing duties to clients and to the administration of justice. This balance is extremely difficult to achieve, especially with the minimal ethical and legal guidelines available to lawyers today. Despite all of the discussion, *Murray* changed very little for defence lawyers.

The impetus behind Murray’s obstruction charge was that had he disclosed the content of the tapes, the Crown would not have agreed to the lenient plea bargain with Homolka. In so doing, he seemed to obstruct the course of justice. But when examining his tactical use of the tapes, Murray’s guilt could not easily be determined given the ambiguity inherent in the professional and legal guidelines

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<sup>294</sup> Makin, “Doubts Cast”, *supra* note 100.

<sup>295</sup> *Murray*, *supra* at note 3 at para. 148.

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available to him at the time. Despite the fact that the tapes may have harmed Bernardo's case, Murray had a justifiable reason for withholding the evidence.

Following Murray's acquittal, the LSUC recognized its lack of guidance on the issue, established a committee to draft a proposed rule, and withdrew the charges of professional misconduct against Murray. By the end of 2000, Murray had emerged from the Bernardo affair having avoided criminal and professional sanction, with new LSUC guidelines to come.

Once retained, lawyers have several duties to their clients. They have an almost absolute duty of loyalty, which requires that a lawyer do everything under the law to represent her client as fully as possible. As officers of the court, however, lawyers also have a potentially conflicting duty to the administration of justice. This is a duty owed to society as a whole, which requires that the lawyer treat the court with candor, not to lie or present deceptive evidence. Adherence to these somewhat mutually-exclusive duties gave rise to many of the problems faced by Murray.

The duty of confidentiality is inextricably linked to solicitor-client privilege and imposes a positive obligation on the defence lawyer to maintain silence and to refrain from helping the prosecution in any manner. The limits of confidentiality restrict solicitor-client privilege from applying to criminal acts or intentions, or non-communications that pre-date the lawyer-client relationship. The applicability of these limits to physical evidence was then discussed. It was demonstrated that privilege does not apply to inculpatory physical evidence, as per the judgment of Justice Gravely. This finding posed a particular problem for Murray. Since the tapes were not protected, he did not have any legal justification to suppress them for use in the trial. Ultimately, although Murray was under the impression that he was acting lawfully, his suppression of the tapes was not protected by privilege and thus, was unlawful.

The importance of integrity to the criminal system was discussed and it was shown that this requires that every accused person be given an opportunity to defend herself at an impartial trial. Relying on *Seaboyer* and *Mills*, it was shown that the accused is entitled to full answer and defence to protect herself from criminal conviction. To exercise this right, the accused must be able to inform

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her lawyer fully as to the facts of the case. Clients, it was suggested, will not disclose all of the relevant facts unless there is absolute faith that the information entrusted to the lawyer will remain strictly confidential. Furthermore, developing a full defence may require possession of physical evidence by the lawyer. Therefore, requiring that evidence in the lawyer's possession be disclosed or turned over has the potential to undermine the relationship between the defence lawyer and her client. This has the practical effect of denying the accused the opportunity to have all relevant information assessed by the lawyer, raises serious questions, and threatens the integrity of the criminal system.

Perceptions of a duty to disclose were then discussed and it was shown that perhaps the biggest challenge facing Murray was uncertainty surrounding whether or when there was a duty to disclose evidence to the Crown. Some evidence, such as the oft-mentioned smoking gun, clearly must be disclosed. With other evidence, such as the tapes in the *Bernardo* case, the obligations are much less clear. Some feel that there is rarely a duty to disclose, while others feel that evidence cannot be suppressed under any circumstances. Although there is no duty to aid in the investigation against their client, *Murray* demonstrates that lawyers face confusion about when physical evidence must be disclosed. Ultimately, it was demonstrated that there is a need for the LSUC to provide a definitive statement on physical evidence, and remove the need for lawyers to have to rely upon the existing jurisprudence.

This paper then discussed the conflict between candor and confidentiality, which caused major problems for Murray in his defence of Bernardo. Murray had an unquestionable obligation to loyalty and confidentiality, which suggested that the tapes should have been suppressed for use at trial. Conversely, Murray also had a duty to be candid with the court and to avoid obstructing justice, which favoured disclosure of the tapes. Although Murray's decision to suppress the tapes was later determined to be unlawful, it demonstrates the difficult situation lawyers face when they take possession of physical evidence. Moreover, the guidelines and advice provided by the LSUC failed to provide clarity. Ultimately, without guidance, lawyers trying to balance the duties of confidentiality and candor are often left in a difficult position.

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When Murray was faced with his ethical dilemma surrounding the tapes, guidance was essential. Unfortunately, this guidance was almost entirely lacking. Guidance is essential if lawyers are to maintain minimum standards of ethical practice. Without these standards, the legal profession may lose the confidence of the public, which is vital to self-regulation. The consensus among the legal community was that there was an overwhelming lack of guidance for Murray as he struggled with the tapes.

The *Murray* judgment helped to clarify some of the questions arising when defence lawyers take possession of physical evidence. Gravely J provided three legally justifiable options when defence lawyers face the problem of physical evidence, mandating disclosure and potential surrender of the evidence. As a result of the duty to disclose the evidence, there is a corresponding duty to advise clients that the lawyer's possession of the evidence may lead to it being turned over to the Crown. As was discussed, this is likely to have the practical effect of denying the accused the right to have their cases fully interpreted by lawyers and may lead to the destruction of evidence by the client. It was shown that other options, such as returning the evidence after it has been viewed and possibly copied, carry with them inherent problems. There was and is a need for a definitive statement by the LSUC. However, due to the lack of guidance, defence lawyers are well-served to avoid taking possession of any inculpatory evidence.

Finally, the current *Rules of Professional Conduct* were examined as they applied to the problems raised in the *Murray* case. It was demonstrated that there is still an incredible void with respect to rules relating to physical evidence. Lawyers are advised to disclose "what ought to be disclosed," despite a lack of clarity as to this phrase's meaning. The rules relating to confidentiality, duty to clients, and the duty to the administration of justice are clearer. Lawyers owe an almost absolute duty of confidentiality to the information that is obtained during the course of the lawyer-client relationship. Similarly, there is a duty to resolutely and loyally represent the client, within the confines of the law. Lawyers also have a duty to the administration of justice, including treating the court with candor and respect. These duties, however, are open to wide interpretations and therefore, are of limited use when lawyers face tough ethical issues. As was shown, it would not be unreasonable for Murray to have

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justified his defence of Bernardo under today's *Rules*. Therefore, to be of real use to lawyers in times of ethical dilemmas, further clarification is required.

Kenneth Murray faced an incredibly difficult dilemma in his defence of Paul Bernardo. Murray interpreted his duties of loyalty and confidentiality broadly, using them to justify the suppression of the tapes for 17 months. As was accepted by Gravelly J, it was Murray's intention to use the tapes to undermine the credibility of Homolka as a witness during Bernardo's trial. Due to the lack of clarity in the rules respecting his duty to the administration of justice and disclosure, and Murray's lack of research into his obligations as articulated in the existing case law, Murray did not feel that the suppression of the tapes was at odds with his obligations. Thus, in addition to having no knowledge of Homolka's plea bargain, Murray did not have any reason to turn the tapes over to the Crown. However, when the tapes became known, he was widely criticized and faced both criminal and professional sanctions. His case highlighted the need for significant improvements in the guidelines given to lawyers facing similar circumstances, as well as the need for lawyers to engage in thorough case law research to assist them in clarifying their obligations. Despite substantial debate and effort by the LSUC, no changes were made and no guidance provided. Murray's case ultimately achieved very little. Today, a lack of guidance remains and defence lawyers are left with little help.

It is unfortunate that, despite the efforts of the LSUC and Justice Gravelly's decision, lawyers are still left without complete guidance on how to handle physical evidence brought to them by a client that is relevant to a criminal proceeding. Encouraging disclosure is a simple answer that tips the scale of justice too far to the side of the prosecution, ignoring the rights and privileges afforded to an accused and her relationship with her counsel. In the end, much more must be done to ensure that we as a society do not ignore the value we place on our confidences or the trust we place in our legal system. The rights of the accused and the desire to uphold the administration of justice will always be in conflict. However, it is wrong to assume that enough has been done to better the balance between our individual rights and our societal goals.