

3-1-1988

A First Step Toward Resolution of the Physical Evidence Dilemma: State v. Green

John Randall Trahan

Louisiana State University Law Center, randy.trahan@law.lsu.edu

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/lalrev>



Part of the [Law Commons](#)

Repository Citation

John Randall Trahan, *A First Step Toward Resolution of the Physical Evidence Dilemma: State v. Green*, 48 La. L. Rev. (1988)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol48/iss4/10>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

A First Step Toward Resolution of the Physical Evidence Dilemma: *State v. Green*

When a criminal defense attorney consults with a client concerning a criminal charge, it may happen that the client will present the attorney with some highly incriminating physical evidence, such as the weapon that the client used to commit the acts forming the basis for the charge. While such a situation certainly is not uncommon, it engenders some uncommonly difficult ethical and legal questions for the attorney.¹ May the attorney retain the evidence for a limited time in order to test or to examine it? If he may, what must he do with the evidence once he has completed his examination—may he permanently retain the evidence, must he return it to the client, or must he turn it over to the authorities? Assuming that the last of these alternatives is correct, then an equally troubling question arises: in a criminal prosecution against the client, may the government call the attorney to the stand and ask him to divulge the source from which he received the evidence? In the recent case of *State v. Green*, 493 So. 2d 1178 (La.

Copyright 1988, by LOUISIANA LAW REVIEW.

1. This complex of ethical and legal questions, commonly known as the "physical evidence dilemma," has been the subject of extensive scholarly commentary. See, e.g., Lefstein, *Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules*, 64 N.C.L. Rev. 897 (1986); Martin, *Incriminating Criminal Evidence: Practical Solutions*, 15 Pac. L.J. 807 (1984); Abramovsky, *Confidentiality: The Future Crime-Contraband Dilemmas*, 85 W. Va. L. Rev. 929 (1983); Comment, *Extending the Attorney-Client Privilege: A Constitutional Mandate*, 13 Pac. L.J. 437 (1982) [hereinafter cited as *Extending the Privilege*]; Note, *People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights*, 70 Calif. L. Rev. 1048 (1982) [hereinafter cited as *Defendant's Constitutional Rights*]; Comment, *Disclosure of Incriminating Physical Evidence Received from a Client: The Defense Attorney's Dilemma*, 52 U. Colo. L. Rev. 419 (1981) [hereinafter cited as *Defense Attorney's Dilemma*]; Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, 66 Iowa L. Rev. 811 (1981); Comment, *Ethics, Law, and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 Stan. L. Rev. 977 (1980) [hereinafter cited as *Ethics, Law and Loyalty*]; Seidelson, *The Attorney-Client Privilege and Client's Constitutional Rights*, 6 Hofstra L. Rev. 693 (1978); Comment, *The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from His Client*, 38 U. Chi. L. Rev. 211 (1970) [hereinafter cited as *Right to Withhold*]; Note, *Professional Responsibility and In re Ryder: Can an Attorney Serve Two Masters?*, 54 Va. L. Rev. 145 (1968) [hereinafter cited as *Serve Two Masters*]; Comment, *Fruits of the Attorney-Client Privilege: Incriminating Evidence and Conflicting Duties*, 3 Duq. L. Rev. 239 (1965) [hereinafter cited as *Fruits*].

1986), the Louisiana Supreme Court attempted to provide some answers to these perplexing questions.²

In *Green*, the defendant, after shooting his victim with a small revolver, contacted an attorney by telephone to ask for advice on how he might give himself up. At the attorney's request, the defendant met with the attorney in his office, where the two discussed the case at some length. Their consultation completed, the two prepared to go to the police so that the defendant could surrender himself. Before leaving for the station house, the defendant, fearing that his vehicle might be burglarized, collected several items from it into a box and left them in the attorney's office. After the defendant surrendered and was booked for second degree murder, the attorney returned to his office. While rummaging through the defendant's possessions, he discovered a pistol which he assumed was involved in the shooting. The attorney immediately turned the pistol over to the authorities³ and, shortly thereafter, resigned from the case.

At the trial, the state sought to introduce the pistol into evidence. In order to establish the connexity of the weapon with the offense, the state called the attorney as a witness. Over objections based upon the attorney-client privilege, the attorney testified that he had represented the defendant, that he had received the gun from the defendant, and that he had turned the gun over to the police. On the basis of this testimony, the trial court ruled the pistol admissible as evidence. The jury returned a verdict of guilty on the lesser included offense of manslaughter.⁴

On appeal, the defendant contended that both the gun and his former attorney's testimony were admitted into evidence in violation of the attorney-client privilege.⁵ The Louisiana First Circuit Court of Appeal

2. The court considered several closely related problems in *State v. Taylor*, 502 So. 2d 537 (La. 1986) (on second reh'g), which originally was consolidated with *Green* on certiorari. In general terms, the issues in *Taylor* concerned how the principles announced in *Green* are affected by proof that the attorney and client conspired together to secret incriminating physical evidence from the authorities. Because the focus of this note is upon the application of the attorney-client privilege and rules of legal ethics to situations in which the attorney receives incriminating evidence from his client *in good faith*, there will be no extensive treatment of the *Taylor* opinion here.

3. *State v. Green*, 493 So. 2d 1178, 1179 (La. 1986).

4. *Id.* at 1180.

5. *State v. Green*, 484 So. 2d 698 (La. App. 1st Cir. 1985). In his appeal, the defendant raised several claims in addition to those based upon the attorney-client privilege. Those claims included: (1) that the prosecutor failed to comply adequately with the defendant's motions for discovery; (2) that he was prejudiced by the admission of irrelevant testimony; and (3) that his sentence was "enhanced" under La. Code Crim. P. art. 893.1 and La. R.S. 14:95.2. Of these, the first circuit found that only the third had merit. Accordingly, that court ordered that the case be remanded for the limiting purpose of resentencing.

affirmed, holding that the gun, because it was not a "communication," was outside the scope of the privilege and that the testimony of the attorney, because it concerned a transfer of information that was not made during the consultation, was also not barred by the privilege.⁶ On writs,⁷ the Louisiana Supreme Court affirmed. According to the supreme court, the gun was properly admitted. Because the attorney had an affirmative ethical obligation to deliver the gun to the authorities, the attorney-client privilege could not bar its admission into evidence.⁸ The court further concluded, however, that the attorney's testimony was erroneously admitted. The testimony concerned information received from the client and therefore was protected by the attorney-client privilege.⁹ The court found, however, that the error was harmless under the facts of the case.¹⁰

The purpose of this note is (1) to analyze the rationale for the supreme court's conclusions in *Green* regarding the admissibility of physical evidence delivered to an attorney by his client and of testimony about the source of such evidence and (2) to explore the implications of that rationale. In order to provide a basis for assessing the soundness of the court's conclusions, it first will be necessary to explore briefly the legal context and background of the decision. Accordingly, Part I of this note will be devoted to that subject. In Part II the rationale of the *Green* decision will be explored in detail and in Part III several criticisms of that rationale will be presented. Part IV will address several important questions that the *Green* court failed to answer. In the final section, Part V, some suggestions for practicing attorneys, designed to assist them in complying with the *Green* decision, will be offered.

I. THE LEGAL CONTEXT OF *Green*

Although the supreme court did not expressly acknowledge this fact in its opinion, the issues presented in *Green* were matters of first impression in Louisiana. There was, therefore, no prior Louisiana jurisprudence available to assist the court in its resolution of the troubling questions posed in that case. Outside Louisiana, however, the issue raised in *Green* had been addressed by the courts of several jurisdictions, and a considerable body of law on the subject of the "physical evidence dilemma" had already been developed. As will be shown below,¹¹ the

6. *Id.* at 701.

7. The supreme court granted writs of review in connection with the two privilege questions raised on appeal. See *State v. Green*, 486 So. 2d 728 (La. 1986).

8. *Green*, 493 So. 2d at 1182.

9. *Id.* at 1183-85.

10. *Id.* at 1185-86.

11. See *infra* text accompanying notes 45, 47-50, 57-58, 64.

Louisiana high court relied heavily upon this body of law in its treatment of the various issues of privilege and ethics presented in *Green*. Several of the most significant and most representative of the decisions within this body of law, including those that were cited as authority by the *Green* court, will be reviewed briefly below.

The most important decision in this area, and the earliest, is *State ex rel. Sowers v. Olwell*,¹² a decision out of Washington. In that case, Olwell was retained as attorney by a defendant who was accused of having stabbed someone to death. During his investigation of the crime Olwell came into possession of a knife that belonged to the client. Subsequently, the coroner, in preparation for an inquest into the death of the victim, issued a subpoena duces tecum to Olwell, directing him to appear at the inquest and to bring with him "all knives in your possession and under your control relating to" the defendant.¹³ Olwell appeared as required, but refused to produce the knife or to answer any questions about it on the ground that doing so would violate the attorney-client privilege. When the coroner found him in contempt, Olwell appealed.¹⁴

On appeal, the Washington Supreme Court reversed. According to the court, the subpoena, insofar as it required the attorney to testify in such a way as to reveal that the client had delivered the evidence to the attorney, ran afoul of the attorney-client privilege. Such testimony regarding the source of the evidence, the court reasoned, concerned "information received by [the attorney] from his client in the course of their conferences," information that therefore fell within the scope of the privilege.¹⁵ The court pointed out, however, that its holding was not to be construed as justifying the "permanent" retention of physical evidence by an attorney. On the contrary, the court indicated, evidence received by an attorney from his client during the course of a confidential communication, though technically privileged, would nevertheless have to be turned over to the authorities after a "reasonable period of time."¹⁶ The court added that, even where there has been no subpoena ordering the production of the evidence, the attorney would still be obligated, by virtue of his capacity as an officer of the court, to turn over the evidence to the authorities *on his own motion*.¹⁷

The court's rationale for requiring that evidence delivered to an attorney by his client eventually must be produced, even in the absence

12. 64 Wash. 2d 828, 394 P.2d 681 (1964).

13. Id. at 829, 394 P.2d at 682.

14. Id. at 830-31, 394 P.2d at 683.

15. Id. at 833, 394 P.2d at 684.

16. Id. at 834, 394 P.2d at 684.

17. Id., 394 P.2d at 684-85.

of a court order, was founded primarily upon considerations of policy and ethics. In the words of the court:

We are in agreement that the attorney-client privilege is applicable to the knife . . . but do not agree that the privilege warrants the attorney, as an officer of the court, from withholding it. . . . The attorney should not be a depository for criminal evidence . . . which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense Such evidence . . . could clearly be withheld for a reasonable period of time. It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution.¹⁸

The court's conclusions regarding the disclosure of the evidence reflect its view that, as a general rule, the attorney should not become a depository for incriminating evidence. Such a practice not only reflects unfavorably upon the legal profession, but also would permit clients to remove physical evidence from "circulation," thereby hindering the government's investigative efforts. Coupled with this practical consideration was the court's estimation that the attorney, as an officer of the court, owes some vaguely defined duty not to keep from the authorities evidence which is relevant to a criminal prosecution.¹⁹ The court, however, cited no authority for the existence of such a duty.

In concluding its remarks regarding the privilege issue presented in *Olwell*, the court suggested that its approach to the various problems associated with the physical evidence dilemma represented a fair balance of the competing interests involved.²⁰ On the one hand, the court noted, the rule preventing the state from compelling the attorney to disclose the source of physical evidence tends to preserve the client's privilege and his interest in confidentiality. On the other hand, the rule permitting the state to recover physical evidence from the attorney tends to serve the public's interest in the discovery of evidence that is pertinent to criminal investigations. Courts that have subsequently considered cases involving the physical evidence dilemma apparently have agreed that the *Olwell* formula represents an appropriate accommodation of the client's and the state's competing interests.

In *Anderson v. State*,²¹ a Florida appellate court applied the *Olwell* analysis to a situation that was somewhat similar to that presented in *Green*. The defendant, after retaining an attorney to represent him in

18. Id. at 833-34, 394 P.2d at 684-85.

19. Id.

20. Id. at 832, 834, 394 P.2d at 684, 685.

21. 297 So. 2d 871 (Fla. Dist. Ct. App. 1974).

his defense against a charge of receiving stolen property, delivered to the attorney's receptionist the property that he allegedly had received, namely, a dictaphone and a calculator. When the state later subpoenaed the attorney and his receptionist to testify at trial, the attorney filed a motion to quash on the ground that any testimony regarding the source from which the evidence was obtained would be barred by virtue of the attorney-client privilege. The Florida appellate court agreed. Quoting the *Olwell* court's discussion of the testimonial question, the court concluded that neither the attorney nor the receptionist could be "required to divulge the source of the stolen items" and, further, that the state could not introduce evidence that it had received the items from the attorney's office.²² The court therefore, consistent with the *Olwell* analysis, refused to permit the state to divulge the source of the evidence, either directly or indirectly. To hold otherwise, the court indicated, "would be to do violence to the fundamental concept of the attorney-client privilege."²³ Although the issue was not actually presented, the court also took the opportunity to approve the actions of the attorney. According to the court, "[H]e did what the court in *State v. Olwell*, supra, said the attorney should have done—turned the items over to the police."²⁴ The court, however, like the court in *Olwell*, failed to articulate the precise source of this "duty to disclose."

Similar ethical problems were presented in *In re Ryder*.²⁵ There the attorney (Ryder), who was representing a client charged with bank robbery, learned from the client that he had secreted stolen money and an illegal weapon (a sawed-off shotgun) in a safety deposit box. Ryder, after consulting with two judges and a respected member of the bar, decided to transfer these items to his safety deposit box and hold them there until after his client's trial. Subsequently, the FBI obtained a search warrant for Ryder's box and recovered the weapon and money. The United States Attorney thereafter charged Ryder with violating Canon 32 (prohibiting "disloyalty to the law") and Canon 15 (requiring that the attorney avoid "violation of law") of the ABA Canons of Professional Ethics. The laws that Ryder allegedly violated were the federal statutes prohibiting the receipt of stolen evidence and the possession of illegal weapons.²⁶

At his disciplinary hearing, Ryder attempted to defend his conduct on grounds of the attorney-client privilege and his ethical duties to his client. The district court rejected both of these defenses. According to

22. *Id.* at 875.

23. *Id.*

24. *Id.*

25. 263 F. Supp. 360 (E.D. Va. 1967).

26. *Id.* at 361-64, 369.

the court, "Ryder's conduct went far beyond the receipt and retention of a confidential communication from his client."²⁷ Rather, the court reasoned, Ryder "took possession of [the evidence] to hinder the government in its prosecution of the case, and he intended not to reveal it pending trial unless the government discovered it and a court compelled its production. No statute or canon of ethics authorized Ryder to take possession . . . for this purpose."²⁸ Because Ryder was aware that the money was stolen and the weapon was illegal, the court found he was guilty of the crimes of receiving stolen goods and possession of illegal weapons. The court accordingly suspended Ryder from practice for eighteen months.²⁹ The federal Fourth Circuit, in later affirming the suspension, maintained that an attorney abuses his professional responsibility by knowingly taking possession of and secreting instrumentalities or fruits of a crime. According to the court, such acts "bear no reasonable relation to the privilege and duty to refuse to divulge a client's confidential communication."³⁰

In the later case of *In re January 1976 Grand Jury*,³¹ the court took a slightly different approach to the physical evidence dilemma from that adopted in *Olwell* and its progeny. Three hours after the commission of a bank robbery, two persons appeared at the office of attorney Genson and delivered to him two hundred dollars in cash for some undisclosed purpose. The government investigation tended to implicate these two persons in the crime. Subsequently, Genson was served with a subpoena duces tecum, ordering him to appear before the grand jury and to carry with him "any and all monies" delivered to him by the two suspects. Genson's motion to quash the subpoena, which was grounded in part upon the attorney-client privilege, was denied. When Genson subsequently refused to testify, he was adjudged in contempt.³²

On appeal, the Seventh Circuit affirmed. According to Judge Tone, who authored the majority opinion on the attorney-client privilege issue,³³ the client's act of delivering the money to the attorney could be construed in either of two ways. On the one hand, the money could have been tendered as a fee. However, since "the payment of a fee is not a

27. Id. at 365.

28. Id. at 369.

29. Id. at 370.

30. *In re Ryder*, 381 F.2d 713, 714 (4th Cir. 1967).

31. 534 F.2d 719 (7th Cir. 1976).

32. Id. at 720-21.

33. The opinion of the court, which addressed several issues in addition to the attorney-client privilege issue, was written by Judge Pell. Judge Tone and the other member of the panel, though agreeing with the result reached by Judge Pell, were of the view that it was unnecessary to consider those additional issues and therefore decided to write a separate opinion. Id. at 730.

privileged communication" under standard attorney-client privilege analysis, if the money was designed for this purpose, neither the money itself nor the fact of the transfer of the money would be protected by that privilege.³⁴ On the other hand, the money could have been tendered, not as a fee, but as part of an effort to secrete the money from the authorities by placing it in the hands of an unwitting attorney. In that event, the transfer of the money would be in furtherance of a crime—concealment of the evidence—and so, would fall within the so-called "crime-fraud exception" to the privilege.³⁵ Thus, in the majority's view, the transfer of the money, regardless of its actual significance, was not a privileged communication. Accordingly, the attorney could be required to produce the money and to testify to the fact of the transfer.³⁶

In light of the cases reviewed above, it is evident that a considerable body of law on the subject of the physical evidence dilemma had already been developed prior to the *Green* decision.³⁷ Regarding this body of law, the following generalizations may be made. First, there is universal support for the proposition that, when an attorney in possession of physical evidence is served with a subpoena ordering the production of that evidence, the attorney is obligated to comply. Second, there is strong support for the view that the attorney, because he is an officer of the court, has an ethical obligation to turn such evidence over to the authorities on his own motion after a reasonable period of time. Third, at least where the transfer of the evidence to the attorney was

34. *Id.* at 731.

35. *Id.* The so called "crime-fraud exception" to the attorney-client privilege (which might better be viewed as a limitation upon the scope of the privilege than as an exception to it) is triggered whenever it appears that the client's purpose in consulting with the attorney was to secure her assistance "in carrying out an illegal or fraudulent scheme." McCormick's Hornbook on Evidence § 95, at 229 (3d ed. 1984) [hereinafter referred to as McCormick]. See also 8 Wigmore on Evidence §§ 2298, 2299 (McNaughten rev. 1961). The policy underlying this exception to the privilege is that extending the protection of the privilege to communications made for fraudulent or illegal ends would subvert one of the purposes that the privilege is designed to serve, namely, promoting the administration of justice. McCormick § 95, at 229.

36. 534 F.2d at 731.

37. The cases summarized above are not by any means the only ones bearing on the physical evidence dilemma that were decided before *Green*. For additional cases in the same vein see *People v. Nash*, 418 Mich. 196, 342 N.W. 2d 439 (1983) (testimony revealing that items of evidence were retrieved from defense attorney's office violated privilege); *People v. Meredith*, 29 Cal. 3d 682, 145 Cal. Rptr. 612 (1981) (where defense attorney's investigator, acting on information given by client to attorney, located and retrieved victim's wallet, attorney-client privilege did not bar admission of wallet or of investigator's testimony concerning its location and condition); *Morrell v. State*, 575 P.2d 1200 (Alaska 1978) (dicta: where an attorney receives from third person a note pad containing detailed plan of kidnapping written in client's handwriting, attorney has an ethical obligation to turn note pad over to the authorities).

not made for a criminal purpose, the fact of the transfer is privileged and so the attorney may not be compelled to disclose the source of the evidence. It now remains to consider precisely what use the *Green* court made of this body of law.

II. ANALYSIS OF THE *Green* RATIONALE

A. *The Attorney-Client Privilege: Basic Principles*

As a prelude to its consideration of the particular issues raised in *Green*—whether the weapon and the attorney's testimony concerning his receipt of the weapon were privileged matters—the court set out, in textbook-like fashion, the history,³⁸ purpose,³⁹ and nature⁴⁰ of the attorney-client privilege in Louisiana, as well as the prerequisites for its application.⁴¹ Of the points made by the court during this preliminary

38. The court observed that the privilege, which can be traced to Elizabethan England, is one of the "oldest of the privileges for confidential communications known to common law." *State v. Green*, 493 So. 2d 1178, 1180 (La. 1986) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981)).

39. According to the court, the purpose of the privilege is to "encourage the client to confide fully in his counsel without fear that his disclosures could be used against him by his adversaries." *Id.* (quoting *State v. Rankin*, 465 So. 2d 679, 682 (La. 1985)). Without this privilege, the court suggested, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Id.* (quoting *State v. Rankin*, 465 So. 2d 679, 682 (La. 1985)). Although the court did not explain why this policy of promoting full disclosure by the client is itself desirable, in the companion case of *Green*—*State v. Taylor*, 502 So. 2d 537 (La. 1986) (on second reh'g)—the court suggested that the interests served by the privilege are "closely linked to the federal and state constitutional guarantees of effective assistance of counsel." *Id.* at 540 (citing U.S. Const. amend. VI; La. Const. art. I, § 13 (1974)).

40. The attorney-client privilege, the court explained, is "*client-centered*" and "purely personal," and therefore may be asserted and waived by the client alone. *Green*, 493 So. 2d at 1180.

41. As the court pointed out, the attorney-client privilege applicable to criminal cases in Louisiana is found in La. R.S. 15:475, which provides as follows:

No legal advisor is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication made to him as such legal advisor by or on behalf of his client, or any advice given by him to his client, or any information that he may have gotten by reason of his being such legal advisor.

Construing this statute, the court found that there are three basic prerequisites to the application of the attorney-client privilege: (1) an attorney-client relationship must be established; (2) the communication, information, or advice must be given "in confidence"; and (3) the communication, information, or advice must be "sufficiently connected to the representation." *Green*, 493 So. 2d at 1180-81.

Although these prerequisites were supposedly drawn out of La. R.S. 15:475, the court drew extensively from various common law authorities, including Wigmore, McCormick and several federal decisions, in fleshing out the details of each. The court's reliance

discussion, two had particular significance for the court's resolution of the issues of the case.

First, the court, citing Wigmore, observed that the attorney-client privilege "is not without exception."⁴² While expressly declining to develop an exhaustive list, the court noted three instances in which the privilege does not operate to bar the disclosure of confidential information conveyed to an attorney: (1) where the client expressly consents to the disclosure, (2) where the representation is sought to further criminal or fraudulent conduct, and (3) where disclosure is mandated by law. As support for the last of these exceptions the court cited, among other authorities, *In re Ryder*.⁴³

Second, and perhaps more significant for its resolution of the specific issues presented in *Green*, the court indicated that "[i]n the area of the attorney-client privilege, lawyers should be guided by the Ethical Considerations and Disciplinary Rules of the Louisiana State Bar Association's Code of Professional Responsibility."⁴⁴ According to the court, these rules do not approve the use of the privilege as a "subterfuge" and, further, indicate that any "conspiracies" to interfere with the administration of justice "will vitiate the privilege."⁴⁵ In making these

upon common law sources for this purpose is illustrative of the fact that Louisiana courts historically have turned to the common law for assistance in determining the scope and application of Louisiana's attorney-client privilege. See Comment, Purpose and Extent of the Attorney-Client Privilege in Louisiana, 18 La. L. Rev. 162, 164 & n.15 (1957); *State v. Montgomery*, 499 So. 2d 709, 711 (La. App. 3d Cir. 1986) ("[I]n analyzing the attorney-client privilege, Louisiana courts have relied on common law authorities.").

That Louisiana courts have made use of common law authorities in construing various provisions of article 475 does not mean, however, that the privilege which is embodied in that statute is identical in *all* respects to that which existed at common law. In fact there is one crucial difference between the two privileges. Whereas the common law privilege accorded protection only to *communications* made to the attorney by his *client*, the privilege of article 475 extends protection to *any information* obtained by the attorney, regardless of the source. See Comment, *supra* this note, at 167-68. Commentators differ in their assessments of the value of extending the scope of the privilege in the manner provided by article 475. For a favorable evaluation, see Comment, *supra* this note, at 169-71. A critical evaluation can be found in McCormick, *supra* note 35, § 89, at 212; 8 Wigmore on Evidence § 2292, at 554.

42. *Green*, 493 So. 2d at 1181. The court quoted Professor Wigmore's now famous remarks about the hostility of evidence law to the privilege:

Nevertheless, the privilege remains an exception to the general duty to disclose.

Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

8 Wigmore on Evidence § 2291 (McNaughton rev. 1961).

43. *Green*, 493 So. 2d at 1182.

44. *Id.*

45. *Id.*

remarks, the court announced two related principles that would ultimately shape its response to the questions of the case. The first is that, in delineating the proper scope of the privilege, ethical considerations are of considerable importance. Second, in view of the attorney's ethical obligations to the court, any application of the attorney-client privilege that would tend to promote the suppression of evidence should be resisted.

B. The Admissibility of the Gun

The first issue presented in *Green* was whether the gun, which the defendant had delivered to his attorney and which the attorney in turn had handed over to the police, should have been excluded from evidence by virtue of the attorney-client privilege. The court answered this question in the negative, relying upon two distinct rationales.

The first rationale proposed by the court, and apparently the more important of the two,⁴⁶ drew upon one of the principles announced in its general discussion of the privilege, namely, that the ethical responsibilities of the attorney are a primary determinant of the scope and application of the privilege. According to the court, the gun was "not excludable by operation of the attorney-client privilege" because the attorney, once he acquired a reasonable belief that the gun was material to the crime or to the investigation of the crime, became obligated to turn it over to the police.⁴⁷ This argument contains two separate premises which should be distinguished.

The major premise is that when the attorney has an ethical obligation to turn over physical evidence to the authorities, then this evidence may not be excluded at trial on the ground that it is protected by the attorney-client privilege. As authority for this premise, the court cited the various leading cases in the field, including *Olwell*, *Anderson*, and *In re Ryder*.⁴⁸ The court's position therefore does not represent a radical development, but is in keeping with consistent jurisprudential pronouncements on the relation between the ethical duty to divulge information and the application of the attorney-client privilege.

46. That the first of the two rationales is the more important is supported by two considerations. First, the court introduced the second rationale by saying, "Our holding is strengthened by the fact that the gun . . . could have been seized from the defendant were it still in his possession." 493 So. 2d at 1103. This statement suggests that the second rationale was not critical to the court's holding. Second, in the companion case of *Green*, *State v. Taylor*, 502 So. 2d 537 (La. 1986) (on second reh'g), the court, in resolving the issue of whether the gun recovered from the defendant's attorney could be admitted into evidence despite the attorney-client privilege, adverted to only the first of the rationales articulated in *Green*.

47. *Green*, 493 So. 2d at 1182.

48. *Id.*

The minor premise is that an attorney who is presented with evidence that he "reasonably believes" is connected with a crime or a criminal investigation has an ethical obligation to turn the evidence over to the authorities.⁴⁹ For this premise, the court also relied upon *Olwell* and its progeny.⁵⁰ However, unlike the courts which rendered those decisions, the Louisiana high court cited the provisions of the Disciplinary Rules and of the criminal law upon which the duty to divulge incriminating physical evidence supposedly rests. Of the Disciplinary Rules, the court cited three: (1) Rule 1-102(A)(5), which prohibits an attorney from engaging in "conduct that is prejudicial to the administration of justice"; (2) Rule 7-102(A)(3), which prohibits an attorney from knowingly failing to disclose "that which is required by law to reveal"; and (3) Rule 7-102(A)(7), which forbids an attorney to "assist his client in conduct that the lawyer knows to be illegal or fraudulent."⁵¹ In addition, the court noted that an attorney who retains evidence that is linked to a crime may be guilty of "obstruction of justice," a violation of Louisiana Revised Statutes (La. R.S.) 14:130.1.⁵²

The second rationale for the court's conclusion that the attorney-client privilege did not apply to the gun was a more traditional one, namely, that because the gun would have been subject to production by subpoena had it remained in the hands of the defendant, it was not protected in the hands of the attorney.⁵³ This principle—that evidence pre-dating the existence of the attorney-client relationship, when turned over to the attorney by the client, is not privileged unless the client himself would have enjoyed a privilege against producing the evidence—has long been recognized in the common law⁵⁴ and was recently endorsed by the United States Supreme Court in *Fisher v. United States*.⁵⁵ The policy underlying this rule, as the *Green* court suggested, is that the client should not be able to render evidence privileged, and therefore immune from discovery by the state, merely by transferring it to his attorney.⁵⁶

At the close of the discussion of its second rationale, the court made explicit one of the policy considerations that no doubt weighed heavily in the court's deliberations. According to the court, if it had

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1183.

54. See McCormick, *supra* note 35, § 89, at 214 & n.18; 8 Wigmore on Evidence § 2307, at 591.

55. 425 U.S. 391, 404-06, 96 S. Ct. 1569, 1577-78 (1976).

56. See sources cited *supra* note 54..

reached any other conclusion concerning the application of the attorney-client privilege to physical evidence received by an attorney, it "would be sanctioning attorneys acting as nothing more than conduits for the 'laundering' of relevant evidence material to criminal prosecutions."⁵⁷ The court thus adopted the policy of *Olwell* and its progeny⁵⁸ that clients should not be permitted to take advantage of the attorney-client relationship by using it as a means of disposing of highly damaging evidence. As other courts have noted, this "use" of the attorney-client privilege goes far beyond the purpose that the privilege was designed to serve, namely, assuring the client fully informed and reasonably competent legal advice and assistance.

C. *The Admissibility of the Attorney's Testimony*

The second issue presented in *Green* was whether requiring the defendant's attorney to testify regarding the source from which he received the gun violated the attorney-client privilege. The defendant maintained that the attorney's knowledge of his ownership and possession of the gun was obtained as a result of a "communication" or of "information" given by him to his attorney.⁵⁹ The state's counter-argument was two-fold.⁶⁰ First, the state contended that the privilege did not apply because no *verbal* communication was involved. Second, the state argued that under the facts of the case, the gun was not given to the attorney in connection with or as a part of the defendant's effort to obtain legal advice, but rather was given to the attorney for reasons of security and safekeeping. Thus, the state argued, the "communication" regarding the defendant's possession of the gun was not obtained by the attorney in his capacity as "legal advisor." The court, finding that the state's arguments were without merit, concluded that the testimony in question was barred by the privilege.

In reaching this conclusion, the court began by pointing out that La. R.S. 15:475 prohibits the attorney from disclosing three things: "communications" made by the client to the attorney, the attorney's "advice" to the client, and "information" that the attorney may have received by virtue of his being the client's legal advisor. Of these three categories, the court indicated, the last was applicable to the attorney's testimony. Relying upon the civil law maxim that the words of the law

57. *Green*, 493 So. 2d at 1183.

58. See *supra* text accompanying notes 12-36.

59. Brief for Appellant at 9-11, *State v. Green*, 493 So. 2d 1178 (La. 1986) (No. 86-K-0197).

60. Brief for Appellee at 4-6, *State v. Green*, 493 So. 2d 1178 (La. 1986) (No. 86-K-0197).

are to be understood in their most usual signification,⁶¹ the court reasoned that the term "information" refers to any "knowledge" that the attorney may acquire concerning the defendant's legal situation or predicament.⁶² The court then found that what the state sought from the attorney through his testimony at trial was his "knowledge" that the defendant possessed the gun prior to its acquisition by the police. Summarily rejecting the state's contention that this knowledge was not acquired by the attorney in his capacity as legal advisor, the court concluded that the testimony of the attorney concerned "information" that was protected by the privilege.⁶³

Lest anyone should miss the import of the court's holding for future cases, the court, in the closing part of its discussion, spelled it out clearly. In language reminiscent of that in *Otwell*, the court explained that

[o]ur holding today mandates [that] the state prove the connection between a piece of physical evidence and the defendant without in any way relying on the testimony of the client's attorney who initially received the evidence. *The attorney may not be called to the stand and examined* as to any of the circumstances which preceded his possession and subsequent delivery to police of a piece of physical evidence⁶⁴

As the court explained in a footnote,⁶⁵ this general rule is broad enough to cover the situation in which the prosecution attempts to elicit the source of the evidence from the attorney indirectly, for example, by calling the attorney to the stand and forcing him to reveal merely that he delivered the evidence to the authorities and that he was representing the defendant at that time. Although such questioning would not directly reveal that the attorney received the evidence from the defendant, it would permit such an inference to be drawn and therefore is impermissible. The prosecution should not be able to accomplish indirectly what it may not accomplish directly.⁶⁶

61. La. Civ. Code art. 14 (1870) (amended and reenacted as La. Civ. Code art. 11).

62. The court derived its definition of "information" from Webster's Third New International Dictionary—Unabridged (1970). *Green*, 493 So. 2d at 1184.

63. *Green*, 493 So. 2d at 1184.

64. *Id.*

65. *Id.* at 1184 n.5.

66. While the court clearly denounced any efforts by the prosecution to elicit from the attorney testimony that tends either directly or indirectly to show that the evidence passed from the defendant to the attorney and then onto the authorities, it did not clearly indicate whether the prosecution is prohibited from proving this chain of custody by *some other means*. For example, the prosecution might attempt to prove the chain of custody indirectly by (1) calling the police officer who received the evidence from the attorney to

In the final statement of the its discussion, the court disclosed the underlying policy concerns that help to explain not only the court's ruling on the attorney's testimony about the source of the evidence, but also the court's ruling on the status of the gun itself. By "allowing the prosecutor to recover . . . [physical] evidence," the court stated, "the public interest is served, and by refusing the prosecution an opportunity to elicit the source of the evidence from the attorney, the client's privilege is preserved and a balance is reached between the conflicting interests."⁶⁷ By making this statement the court commendably made explicit what many of the other courts that have considered the "physical evidence dilemma" have failed to acknowledge, that is, that a proper resolution of this dilemma requires a careful balancing of two competing interests—the state's interest in discovering and punishing criminal wrongdoing and the defendant's personal and constitutional interest in securing fully informed and competent legal advice. The statement indicates something further, however. In the court's view, the position adopted in *Green* concerning the two aspects of the physical evidence dilemma—whether the attorney must disclose such evidence and whether he may be compelled to testify about its source—represents the best possible balance and accommodation of the competing interests involved. As will be shown below,⁶⁸ there may be some reason to question this conclusion.

III. EVALUATION OF THE *Green* RATIONALE

The *Green* decision, though no doubt thoughtfully considered and superior in many ways to previous decisions that have addressed the physical evidence dilemma, is nevertheless open to objection in several respects. Several of these objections will be presented and evaluated below, beginning with those that apply particularly to the three topics

the stand and having the officer testify to that fact and (2) establishing by means of independent evidence, such as the testimony of a third party, that the attorney represented the defendant at the time that the evidence was delivered to the authorities. Some language in the *Green* opinion might be used to justify such a tactic. See *id.* ("the state must prove the existence of the [attorney-client] relationship by other independent admissible evidence"). It is respectfully submitted, however, that permitting such indirect proof of the chain of custody of the evidence is highly undesirable. If this avenue of proof were left open to the prosecution, then the defense attorney would be compelled, by virtue of his professional responsibilities to his client, to make the delivery to the authorities anonymously so that the evidence could not be traced back to him. The spectre of defense attorneys lurking in the shadows under cover of night and stealthily dropping incriminating evidence on the doorsteps of police station houses is one that does not commend itself to reasonable minds. See generally Lefstein, *supra* note 1, at 936-67; *People v. Nash*, 110 Mich. App. 428, 447, 313 N.W.2d 307, 314 (1981), *rev'd on other grounds, aff'd in part*, 418 Mich. 196, 344 N.W.2d 439 (1983).

67. *Id.* at 1184-85.

68. See *infra* text accompanying notes 101-27.

addressed in *Green*—(1) the attorney's duty to disclose incriminating physical evidence, (2) the application of the privilege to evidence so disclosed, and (3) the application of the privilege to testimony concerning the source of the evidence—and concluding with those that pertain to the value and wisdom of the court's overall solution to the physical evidence dilemma.

A. *The Duty to Disclose*

The court, as was noted earlier,⁶⁹ suggested in dicta that when an attorney comes into possession of evidence that he "reasonably believes" is connected with a crime or a criminal investigation, he acquires a duty to turn that evidence over to the authorities. The court's articulation of this general rule and the rationale underlying it suffer from several difficulties.

The first problem lies in the court's statement of the rule, a statement that leaves unexplained two points of critical concern. First, the court, in announcing the duty of disclosure, neglected to identify precisely the point at which the attorney's duty to turn over the evidence arises. There are, of course, several possibilities. The duty might arise when the client arrives in the attorney's office, carrying the evidence with him. On the other hand, the attorney might not acquire the duty unless and until he physically holds the evidence, that is, has actual physical custody. Or, the duty might not arise until the client relinquishes both his actual and constructive possession until the client relinquishes both his actual and constructive possession of the evidence by leaving it with the attorney and departing from the office. Second, the court's discussion does not indicate whether the attorney may, after the duty to disclose actually arises, withhold that evidence from the authorities for a "reasonable time" for the purpose of testing or evaluating it. The *Olwell* court, it will be recalled, made this concession to the client and his attorney.⁷⁰

A more serious objection that might be raised against the court's statement regarding the attorney's duty to disclose incriminating physical evidence is that the various provisions of the Disciplinary Rules⁷¹ and

69. See *supra* text accompanying notes 49-52.

70. See *supra* note 16 and accompanying text.

71. Shortly after *Green* was decided, the state supreme court adopted the Model Rules of Professional Conduct for the Louisiana Bar Association, rules which superseded the Code of Professional Responsibility. Because the concern of this note is to evaluate the soundness of *Green* at the time that it was decided, there will be no effort here to determine whether the decision might be better justified under the Model Rules than under the Code. It should be noted, however, that the changes which the Model Rules effect in the attorney's respective duties to the court and to the client are relatively minor. In all probability then, had the decision been rendered under the Model Rules, the criticisms of the *Green* court's rationale presented here would still be applicable.

of the state's criminal statutes which the court cites do not convincingly establish that the attorney in fact owes such a duty. The various Disciplinary Rules that together set out the attorney's duties as an "officer of the court," including those that involve the disclosure of information, do not seem to be self-executing or self-defining. Rather, for their meaning and content, they are dependent upon sources of substantive law external to the Rules, such as state criminal statutes. For example, Rule 1-102, which forbids the attorney from engaging in "*illegal* conduct involving moral turpitude," obviously is meaningless unless it is read alongside some criminal statute. The same is true of Rule 7-102(A)(3), which sanctions the attorney for failing to disclose "that which he is required *by law* to reveal," and Rule 7-102(A)(7), which prohibits the attorney from aiding his client in "conduct that the lawyer knows to be *illegal* or fraudulent." This assessment of the Disciplinary Rules, it should be noted, draws indirect support from several decisions of the ABA Ethics Committee,⁷² rendered under the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility, and enjoys almost unanimous support among commentators on the subject.⁷³ To sum up, the Disciplinary Rules establishing the attorney's role as officer of the court do not in themselves give rise to any duty on the part of the attorney to disclose incriminating evidence. If such a duty exists, it is to be found in the sources of substantive law to which those rules point.

Unfortunately, although the court did cite a criminal statute in its discussion of the attorney's duty to disclose (La. R.S. 14:130.1, the "obstruction of justice" statute), it did not do so for the purpose of "filling in," or giving substantive content to, the ethical provisions that it had previously listed. Rather, it is apparent from the language of the opinion that the court viewed the criminal statute as a separate and

72. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Opinion 1057 (1968). In that case, which involved a situation somewhat similar to that in *Green*, the committee advised the attorney that he was ethically bound not to violate any state *criminal statutes* prohibiting the suppression of evidence. See also *Morrell v. State*, 575 P.2d 1200 (Alaska 1978). There an attorney who had received from a third party evidence that incriminated his client sought advice from the state bar association concerning what he should do with the evidence. In an advisory opinion, the ethics committee stated that the attorney "would be ethically obligated not to reveal the existence of the physical evidence 'unless required to do so *by statute*.'" *Id.* at 1211 (emphasis added).

73. See *Defense Attorney's Dilemma*, *supra* note 1, at 422, 424 ("The ABA Code . . . makes the determination whether an attorney may or must disclose physical evidence given him in confidence turn largely on sources outside of the Code."); *Right to Withhold*, *supra* note 1, at 214-18 (arguing that any contention to the effect that the Canons or the Code supports a duty to disclose physical evidence "begs the question" because whether there is such an ethical duty "is really one of law, not of ethics").

independent source of the duty to disclose.⁷⁴ Evidently, then, the court concluded erroneously that the ethical provisions listed, apart from any consideration of statutes prohibiting acts like those of suppressing or concealing evidence, establish a duty on the part of the defense attorney to turn over incriminating evidence to the state.

It should be noted, however, that even if the court had attempted to use the statute in question as authority for a general duty to disclose, this proposition would have been debatable.⁷⁵ Given the wording of La. R.S. 14:130.1, it would appear that the manner in which the attorney obtained the evidence would have a critical bearing upon his potential liability for tampering with evidence. It seems fairly clear, for example, that an attorney who himself recovers evidence from the scene of the crime or from some place where the client has stored the evidence would be guilty of tampering,⁷⁶ assuming of course that he acted with the requisite intent. On the other hand, it is not clear that an attorney who receives evidence that his client has brought to him in his office could ever be guilty of the crime. In order for the attorney to be liable for tampering under such circumstances, it would have to be said that the attorney's office was "the location of storage, transfer, or place of review" of the evidence,⁷⁷ a proposition that is not self-evident. Unfortunately, this phrase has not yet received any definitive interpretation from the courts. Another factor of critical importance to the attorney's potential liability for "tampering with evidence" is his state of mind. The statute requires a specific intent,⁷⁸ that is, an active desire, that the alteration, movement, or removal of the evidence work to distort the

74. After listing the Disciplinary Rules that purportedly established the ethical duty of the attorney to disclose physical evidence, the court introduced its brief reference to La. R.S. 14:130.1 with the word, "Additionally." *State v. Green*, 493 So. 2d 1178, 1182 (La. 1986).

75. La. R.S. 14:130.1 provides as follows:

A. The crime of obstruction of justice is any of the following when committed with the knowledge that such act has, reasonably may, or will affect an actual or potential present, past, or future criminal proceeding as hereinafter described:

(1) Tampering with evidence with the specific intent of distorting the results of any criminal investigation or proceeding which may reasonably prove relevant to a criminal investigation or proceeding. Tampering with evidence shall include the intentional alteration, movement, removal, or addition of any object or substance either:

(a) At the location of any incident which the perpetrator knows or has good reason to believe will be the subject of any investigation by state, local, or United States law enforcement officers; or

(b) At the location of storage, transfer, or place of review of any such evidence.

76. See *id.* (A)(1)(a)-(b).

77. See *id.* (A)(1)(b).

78. See *id.* (A).

results of a criminal investigation.⁷⁹ Arguably, an attorney who receives and retains evidence in the good faith belief that his ethical obligations require him to do so would lack such specific intent. Even the court seemed uncertain of the application of this statute to an attorney who receives physical evidence, for it said that such an attorney “*may be guilty*” of a violation.⁸⁰ In short, La. R.S. 14:130.1 is dubious authority for the proposition that an attorney who receives incriminating physical evidence from a client has a duty (legal or ethical) to turn that evidence over to the authorities.

Yet another difficulty with the court’s contention that an attorney presented with incriminating evidence has an affirmative duty to disclose that evidence is that it ignores the attorney’s ethical responsibilities toward his client and the manner in which those responsibilities have been interpreted by the ethics committees of the national and state bar associations. The Code of Professional Responsibility contains several Canons and Rules that describe the attorney’s duties to his client, including his duty to preserve his client’s communications and secrets, his duty to represent the client zealously, and his duty to serve his client’s cause with undivided loyalty.⁸¹ These duties, not surprisingly, come into conflict with the attorney’s duties to the court in some instances, including the situation in which a client delivers incriminating evidence to his attorney. The *Green* court, however, not only failed to explain why, under such circumstances, these duties must yield to those that the attorney owes to the court, but failed even to mention them.

This omission on the court’s part is even more distressing when one considers that, from their earliest opinions reconciling the attorney’s conflicting duties under the old Canons, the ethics committees of the national and state bar associations have consistently resolved conflicts in the duties in favor of those owed to the client.⁸² For example, in

79. See La. R.S. 14:10(1) (“Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.”).

80. *Green*, 493 So. 2d at 1182.

81. See, e.g., Louisiana Code of Professional Responsibility DR 4-101(B)(1) (Prohibiting an attorney from knowingly “reveal[ing] a confidence or secret of his client”); EC 7-1 (imposing upon the attorney a duty to “represent his client zealously within the bounds of the law”); EC 6-1 (requiring the attorney to “act with competence and proper care in representing clients”); DR 6-101(A)(2) (prohibiting the attorney from “[h]andl[ing] a legal matter without preparation adequate in the circumstances”). This last rule imposes upon the attorney an obligation to investigate fully the client’s version of the facts, an obligation that some argue may include a duty to take custody of and to test physical evidence associated with the crime.

82. For more extended discussions of this point see Comment, Defense Attorney’s Dilemma, *supra* note 1, at 420-24; Comment, Serve Two Masters, *supra* note 1, at 166-68; Comment, Fruits, *supra* note 1, at 243-44.

Opinion 280, which was rendered under the old Canons, the ABA Committee on Ethics wrote: "[W]e do not consider that either the duty of candor and fairness to the court as stated in Canon 22 or the provisions of Canons 29 and 41 [which required the attorney to disclose perjury and to "rectify" any "fraud or deception" committed by his client, respectively] . . . are sufficient to override the purposes, policy and express obligations under Canon 37 [which imposed on the attorney a duty to preserve her client's confidences.]" This position was reiterated in Opinion 287, where the Committee concluded that an attorney who learned after trial that his client had committed perjury, had no duty to disclose this fact to the court. Later, after the adoption of the Code of Professional Responsibility, the Committee was called upon to consider whether, when the attorney learns that his client has perpetrated a fraud upon the court in a prior proceeding, the attorney's duty to disclose the fraud under Rule 7-102(B)(1) is superior to his duty to preserve his client's confidences under Rule 4-101(A). Answering the question in the negative, the Committee noted that "there has long been an accommodation in favor of preserving confidences"⁸³ The *Green* court's conclusion that the attorney's vaguely defined duties concerning the revelation of incriminating information take precedence over the contrary duties of preserving client confidences and zealous advocacy runs counter to this longstanding accommodation.

B. Physical Evidence and the Attorney-Client Privilege

In *Green*, it will be recalled,⁸⁴ the court concluded that the defendant's gun was not barred from evidence by virtue of the attorney-client privilege. This conclusion rests upon two separate rationales. First, as a general rule, evidence turned over to the authorities by an attorney, acting pursuant to his duty to disclose incriminating evidence, is not excludable on the basis of the privilege. For convenience, this rationale will be referred to below as the "ethical duty" theory. Second, physical evidence pre-dating the attorney-client relationship, if not privileged from production when in the client's possession, does not enjoy the protection of the attorney-client privilege if it is transferred to the attorney. This rationale, in the discussion below, will be referred to as the "vicarious fifth amendment privilege" theory. These rationales, like that underlying the court's conclusion concerning the attorney's duty to disclose evidence, are troubling in several respects.

The first difficulty lies in the ethical duty theory. As articulated by the court, that theory contains a troubling conceptual ambiguity. The

83. ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 341 (1975).

84. See *supra* text accompanying notes 42-58.

problem is that the court's statement does not indicate whether such evidence is or is not *covered* by the privilege. Given the language in which the court cast the rationale, two different constructions are possible. On the one hand, it may be that the evidence is within the scope of the privilege, and so is, properly speaking, "privileged," but that the attorney's ethical obligation to divulge such evidence overrides the privilege. Under this view, the evidence would be "privileged, but nevertheless admissible." That was the position adopted by the *Olwell* court.⁸⁵ On the other hand, it may be that the privilege does not apply at all to such evidence because the attorney's ethical obligations limit its scope in some way or create an exception to it. If this construction is correct, then the evidence simply would not be privileged. This ambiguity in the supreme court's first rationale is unlikely to have much, if any, practical significance; regardless of which construction of the rationale is correct, the result will remain the same. However, depending upon the way in which the ambiguity is resolved, the court's ethical duty theory will be subject to various criticisms.

The latter of the above constructions of ethical duty theory, it will be recalled, rests upon the assumption that the attorney's ethical responsibilities somehow restrict the scope of the attorney-client privilege. It might be objected, however, that this assumption confuses what are, or should be, two quite different conceptual problems, namely, whether the attorney has an affirmative ethical duty to disclose incriminating evidence and whether such evidence is privileged.⁸⁶ There is no basis in reason, logic, or history for using an attorney's ethical responsibilities to the court and to his client as a tool in delineating the proper scope of the attorney-client privilege. Indeed, as many commentators have pointed out, if there is any relation between ethical obligations and the attorney-client privilege at all, the relation is actually the inverse of that envisioned by the court.⁸⁷ As was noted earlier, most of the Disciplinary Rules that collectively establish the attorney's general duties as an "officer of the court," including those cited in *Green*, are not self-executing but rather point to sources of *substantive* law outside of the Code for the definition of their vague phrases.⁸⁸ One of these external sources of

85. See *supra* note 16 and accompanying text.

86. That these questions are, or should be, distinct is a proposition accepted by nearly all of the commentators who have addressed the physical evidence dilemma. See, e.g., Lefstein, *supra* note 1, at 916 ("[T]his discussion has focused on whether the attorney-client . . . privilege is a bar to compelled production of physical evidence. A separate but related question is whether an attorney must as a matter of ethical duty *voluntarily* disclose physical evidence . . .").

87. See authorities cited *supra* note 73.

88. See authorities cited *supra* note 73.

law, several commentators have sensibly suggested, might be the state's law concerning the attorney-client privilege.⁸⁹ If this suggestion is correct, then it is the attorney-client privilege that supplies meaning and scope to the ethical responsibilities of the attorney, and not the other way around. In short, the court's assumption that ethical considerations somehow limit the scope of the attorney-client privilege is without justification.

If, on the other hand, the first construction of the ethical duty theory—that incriminating evidence delivered by a client to his attorney is privileged, but that the privilege is overridden by the client's superior ethical obligation to divulge such evidence—is the correct one, then the court's argument is of course not subject to the criticism presented in the previous paragraph. This construction, however, raises troubling questions of its own. One concerns the acceptability of "allowing privileged items into evidence," that is, of saying that evidence truly privileged is nevertheless admissible.⁹⁰ Further, it might be asked whether it is legitimate to permit a valid claim of privilege, which is based upon provisions of substantive law, to be overcome by various Disciplinary Rules or Ethical Canons that exist primarily for the purpose of regulating the conduct of members of the legal profession.

Assuming that the ambiguity in the ethical duty theory should be resolved in favor of the second construction—that is, that the incriminating evidence is *not* privileged—then a potentially more serious problem may arise. Put simply, the two rationales—the ethical duty theory and the vicarious fifth amendment theory—may not always lead to the same result. It is not difficult to imagine a situation in which a particular item of incriminating physical evidence might not be privileged under the ethical duty theory, but would be privileged under the vicarious fifth amendment theory.⁹¹ An illustration will help to demonstrate this point.

89. See, e.g., *Right to Withhold*, *supra* note 1, at 217-18.

90. This point was made in *People v. Nash*, 418 Mich. 196, 341 N.W.2d 439, 449 (1983). In *Nash*, the defense attorney received from some undisclosed source a wallet, an ammunition box, a revolver with two spent cartridges, and a holster, all of which were connected with the homicide charge pending against his client. After obtaining an informal opinion from the state bar association, the attorney advised the prosecutor that he was in possession of the items. A few days later, police, armed with search warrants, arrived at the attorney's office and seized the items. At trial, one of the officers who participated in the raid testified that the materials were recovered from the office of the attorney. On appeal, the court of appeal reversed, finding that the testimony of the officers concerning the site of the seizure was impermissible under *Olwell*. The supreme court, widely divided, affirmed. Though only one justice (whose opinion is quoted in the text above) rejected the *Olwell* approach in toto, a majority of the justices appear to have rejected the suggestion of *Olwell* that physical evidence delivered to an attorney is privileged.

91. The conflict between the "duty to disclose" requirement of *Olwell* and its progeny and the common law notion that evidence privileged in the hands of the client is privileged

Suppose that a woman, who was the wife of a medical doctor, is found dead in her home; the apparent cause of death, poisoning. Research reveals that the particular type of poison used may be administered either orally or intravenously. The police suspect that the husband was the perpetrator and, further, that he poisoned his wife either by means of sprinkling the poison on her food or by means of an injection which he administered to the wife under the pretext of giving her her monthly allergy shot. Unfortunately, a search of the husband and wife's home and vehicles reveals no vials of poison or hypodermic needles. Meanwhile, the distraught husband shows up at his attorney's office, admits to the attorney that he poisoned his wife after he learned she was having an affair, and turns over to the attorney the hypodermic needle which he claims he used to poison his wife. Under protest, the attorney agrees to hold onto the needle. A few days later the police, their investigation not having produced any results, decide to take a longshot and obtain a subpoena duces tecum, directed to the attorney, which requires her to bring with her to the grand jury "any vials of poison, hypodermic needles, or other poison-related materials" that her client may have given her.

Under the ethical duty theory, it would appear not only that the attorney has an affirmative obligation to produce the needle but also that it would not be privileged. Surely the attorney in the hypothetical "reasonably believes" that the evidence she received is connected with a crime or with a criminal investigation. If that is so, then, under *Green*, she must turn over the evidence to the authorities and the evidence falls outside the privilege. The principles applicable to the vicarious fifth amendment privilege theory—that physical evidence in the possession of the attorney is not privileged if the client could not have resisted a subpoena for that evidence—suggest a different conclusion. In *Fisher v. United States*,⁹² the United States Supreme Court indicated that a person's fifth amendment privilege is abridged not only when he is required to give directly incriminating testimony against himself, but also when, in the act of producing non-testimonial evidence pursuant to a court order, he implicitly "authenticates," "discloses the location" of or "affirms the existence" of such evidence.⁹³ Under the facts of the hypothetical case above, it seems undeniable that had the client himself been compelled to produce the needle, his doing so would have

in the hands of the attorney is a favorite topic of critics of the *Olwell* rule. For an illuminating exposition of this conflict see Seidelson, *supra* note 1, at 724-27. See also Lefstein, *supra* note 1, at 910-15, 917, 918-19; Comment, Defendant's Constitutional Rights, *supra* note 1, at 1059-62; Martin, *supra* note 1, at 836.

92. 425 U.S. 391, 96 S. Ct. 1569 (1976).

93. *Id.* at 410-11, 96 S. Ct. at 1581.

included all three of these tacit averments. Prior to obtaining the subpoena, it must be recalled, the police did not know whether such a needle existed, much less where it was located. By complying with the subpoena, the client himself would have been forced to supply these missing links in the state's case. Because the client therefore could have resisted an order to produce the evidence by asserting his fifth amendment privilege, the attorney, under the second rationale of *Green*, would have been barred from complying with the subpoena by virtue of the attorney-client privilege.

It therefore appears that, if one assumes that the import of the ethical duty theory is that physical evidence delivered to an attorney is not privileged, then, under some circumstances, that rationale and the alternative rationale may lead to opposite conclusions regarding whether such evidence is privileged. Of course, this inconsistency can arise only if the two rationales stand on an equal footing. As was suggested earlier,⁹⁴ however, there is strong reason to believe that in the event of a conflict between the results suggested by the two rationales, the court would follow the ethical duty theory, namely, that incriminating evidence supplied to the authorities by an attorney acting pursuant to his duty to disclose such evidence is not excludable by virtue of the privilege.

C. Testimony Concerning the Source of Physical Evidence and the Attorney-Client Privilege

While the court concluded that the attorney who receives incriminating evidence is ethically bound to turn that evidence over to the authorities, it ruled that the attorney may not be forced to testify concerning the source from which he received that evidence.⁹⁵ This ruling, though free from the kinds of conceptual difficulties that plague the court's analysis of the admissibility of physical evidence, is nevertheless subject to objection.

As was noted earlier in the discussion of the court's rationale for its ruling regarding the admissibility of the gun in *Green*,⁹⁶ one of the policies underlying the court's ruling on that matter was that of preventing the use of attorneys as conduits for the "'laundering' of relevant evidence material to criminal prosecutions."⁹⁷ This policy also underlies the similar rulings of the *Owll* court and others that physical evidence delivered to an attorney must be disclosed. As several commentators have pointed out, this policy is not furthered, but is in fact defeated,

94. See *supra* note 46 and accompanying text.

95. See *supra* text accompanying notes 61-66.

96. See *supra* text accompanying notes 57-58.

97. *State v. Green*, 493 So. 2d 1178, 1183 (La. 1986).

by the rule that the attorney who delivers such evidence may not be called to testify about the source of the evidence.⁹⁸ By having the attorney "transfer the evidence to the government . . . [,] the client [is] able to [launder] the evidence—that is, remove it from her [the client's] possession and place it in the hands of the government without having the government connect it up with its source."⁹⁹ Thus, for example, a sophisticated criminal who is aware of the *Green* rule concerning the testimony of attorneys about the source of evidence might consciously choose to deliver incriminating evidence to an attorney, knowing that he will thereby dissolve a critical link between the evidence and himself, rather than to attempt to dispose of the evidence in some other way and risk being caught in the act. If the evidence cannot be linked to the criminal by fingerprints (which the criminal could easily remove) or by eyewitnesses (which should not be a problem for the sophisticated criminal, who knows better than to commit his crime before an audience), then the criminal's strategy should work well. As has been noted, "This is not the kind of behavior that the attorney-client privilege should encourage."¹⁰⁰

D. The Green Approach as an Overall Solution to the Physical Evidence Dilemma

In the closing remarks of the *Green* opinion, the court suggested that the solution to the physical evidence and testimonial questions of the case which it had provided achieved a proper balance of the client's and the state's competing interests.¹⁰¹ This contention, however, is open to question. The solution proposed by the *Green* court, which is the solution that most other courts that have been presented with the problem have proposed, has been the subject of considerable criticism, both by those who feel that it tips the balance improperly in favor of the state and by those who feel that it unfairly benefits the client at the expense of the truth-seeking process. These criticisms will be addressed and evaluated below.

1. The Case Against Green From the Point of View of the Client

Of the commentators that have written recently on the subject of the physical evidence dilemma, a large majority have argued that the type of approach taken by the *Green* court (the "*Olwell* rule") im-

98. See Lefstein, *supra* note 1, at 909; Saltzburg, *supra* note 1, at 837.

99. Saltzburg, *supra* note 1, at 838.

100. *Id.*

101. See *supra* text accompanying notes 67-68.

properly benefits the state at the expense of the client.¹⁰² Although the particular criticisms upon which this judgment rests are, not surprisingly, as diverse and numerous as the commentators themselves, there are three that are fairly standard and that appear to be the most substantial. These three criticisms, it will be noted, are not entirely distinct; rather, each addresses a different aspect of one larger related problem, namely, interference with the client's ability to obtain an adequate defense.

The first of these criticisms of the *Green* approach concerns the role of the attorney in the adversary system. It is argued that this approach, by requiring the attorney to turn over to the prosecution evidence that is highly damaging to his client, subverts the role that the attorney is designed to play in the adversary system.¹⁰³ According to the proponents of this argument, the defense attorney "is the last bastion of liberty—the final barrier between an overreaching government and its citizens," one who assists the client in standing up against "the vast resources of the government with all its personnel, agencies and machinery . . . working against a defendant."¹⁰⁴ The task of the defense attorney, therefore, is to represent the client with undivided loyalty against a foe of considerable power and resources. The type of solution adopted by the *Green* court, it is argued, compromises the defense attorney's ability to accomplish this task by converting him from a zealous advocate and defender to an accomplice in the government's endeavor to convict.¹⁰⁵

There are at least two objections that might be raised against this argument. First, in one sense the argument begs the question, for it assumes beforehand the answer to one of the critical questions raised in cases like *Green*, namely, what precisely should be the role of a defense attorney in the so-called adversarial system of justice? While the answer to this question that is given by the critics is not necessarily incorrect, it is not by any means universally accepted. Today the majority view seems to be that although the criminal defense attorney should function primarily as the zealous defender of his client, he should also undertake some responsibilities to the court, responsibilities that may in some circumstances require him to take a position adverse to the interests

102. See, e.g., Lefstein, *supra* note 1; Comment, Extending the Privilege, *supra* note 1; Note, Defendant's Constitutional Rights, *supra* note 1; Comment, Ethics, Law, and Loyalty, note 1; Seidelson, *supra* note 1; Comment, Serve Two Masters, *supra* note 1.

103. See Lefstein, *supra* note 1, at 927-28.

104. A. Dershowitz, *The Best Defense* 415 (1982).

105. See Comment, Ethics, Law and Loyalty, *supra* note 1, at 998; see also Comment, Serve Two Masters, *supra* note 1, at 166-68.

of his client.¹⁰⁶ Indeed, in recent years there have been ethical reform proposals calling for the defense attorney to assume a more aggressive role in promoting the truth-finding process.¹⁰⁷

A second objection that might be raised against the argument is that it ignores the role that the criminal defense attorney in fact plays under ethical guidelines now in force. The Model Rules, like the Code of Professional Responsibility before them, require the attorney to disclose information in some circumstances that would be detrimental to his client, for example, when the attorney discovers at the conclusion of litigation that his client has perpetrated a fraud upon the opposing party or the tribunal.¹⁰⁸ In other circumstances, the attorney is permitted, though not required, to reveal certain types of client misconduct.¹⁰⁹ Thus, under the present system the defense attorney may be required to engage in conduct that undermines his client's cause or even exposes him to criminal prosecution. Because that is so, it hardly can be maintained that a duty on the part of the attorney to turn over to the government incriminating evidence presented to him by his client constitutes a radical departure from the role that the attorney plays in the present adversarial system.

The second major criticism that has been made of the *Green* approach concerns the effect that the approach may have upon the candor and extent of disclosure by the client to his attorney.¹¹⁰ If the client learns that his attorney must hand over incriminating evidence to the state, it is argued, the client's confidence and trust in his attorney will be undermined. Lacking the knowledge necessary to make "fine distinctions respecting the limits of the attorney-client privilege," the client may be fearful that other types of communications, once made to his attorney, will be passed on to the government as well.¹¹¹ As a result of his distrust of the attorney and his uncertainty regarding the scope of confidential communications, the client may be reluctant to reveal to his attorney all of the relevant information he has, including information

106. This view is reflected in the Model Code of Professional Responsibility, which requires the attorney to "rectify" any "fraud perpetrated upon a person or tribunal" by her client (DR 7-102(B)(1)); forbids her from using "perjured testimony or false evidence" (DR 7-102(A)(4)); and permits her to disclose her client's confidences when (1) it is authorized under the disciplinary rules or by law or court order (DR 4-101(C)(2)), and (2) the confidences reveal the client's intention to commit a crime in the future (DR 4-101(C)(3)).

107. See Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031 (1975); Pye, *The Role of Counsel in the Suppression of Truth*, 1978 Duke L.J. 921.

108. Model Rules of Professional Conduct Rules 1.6(b)(1); 3.3(a)(2).

109. See, e.g., *id.* Rule 1.6(b). See also *supra* note 106.

110. See Lefstein, *supra* note 1, at 927-28.

111. *Id.*

that, unknown to him, could be of immense assistance to his defense. If the client were in this way induced to remain silent, then the quality of his defense might very well suffer.

This argument, though not as easily dismissed as the first, is nevertheless not persuasive. If the attorney properly performs his role as advocate, the kind of distrust and uncertainty described above should be largely dispelled. The competent and conscientious attorney, after explaining that he has a duty to disclose incriminating evidence to the state, will advise his client that that duty is somewhat exceptional and will earnestly assure the client that *anything* he might have to say about the crime to the attorney is absolutely privileged and will be held in the strictest confidence. The suggestion that the typical client lacks the capacity to understand such simple and straightforward advice is simply not convincing.

Another objection to this second criticism of the *Green* rule is that, contrary to the assumption of its proponents, there is no clear evidence to suggest that small degrees of "uncertainty" concerning the scope of the protection afforded by the attorney-client privilege or the attorney's duty to keep secrets confidential has a significant "chilling effect" upon client disclosures.¹¹² Indeed, what evidence there is seems to suggest that there is in fact no correlation between "uncertainty" in the application of the privilege and the degree of disclosure made by the client.¹¹³ This contention is borne out by the fact that, despite "the vague and open-textured criteria which govern application of the privilege" in certain arenas, legal communications continue to take place without noticeable difficulty.¹¹⁴ That such communications continue unabated despite present uncertainties is attributable to two simple facts about the adversarial system, facts of which clients are no doubt aware: there are no alternative means whereby the client may secure a legal defense and the costs of withholding information from the attorney are likely to outweigh the consequences which might result from disclosure.¹¹⁵ Given these unavoidable facts of legal life, it is extremely doubtful whether the additional "uncertainty" in the application of the attorney-client privilege generated by *Green* will have any significant effect upon client disclosures.

112. See Comment, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 Harv. L. Rev. 464, 470 (1977) [hereinafter cited as Fixed Rules].

113. Id. at 470 & n.29.

114. Id. at 471. See also Saltzburg, *supra* note 1, at 836 (arguing that because clients presently seem to understand and to tolerate the work product privilege, which provides only uncertain protection for evidence developed by the attorney, they should also be able "to live comfortably with" an attorney-client privilege of restricted or uncertain scope).

115. Comment, *supra* note 112, at 470-71.

The third major criticism of the *Green* approach that might be made from the point of view of the client is that the approach ignores, or gives improper weight to, the client's constitutional rights.¹¹⁶ As was noted earlier, under the approach adopted in *Green*, the client may in some circumstances be forced to "choose" between his fifth amendment privilege against self-incrimination and his sixth amendment right to an adequately prepared, fully informed defense. Suppose, for example, that the client would be able to resist a subpoena for a certain item of evidence because of his privilege against self-incrimination. If he gives the evidence to his attorney for inspection and testing in order to pursue his right to make out a defense, the attorney will have to turn that evidence over to the authorities. Thus, in order to realize his sixth amendment right, the client would have to sacrifice his fifth amendment privilege claim. This prospect, however, might be sufficient to dissuade the client from delivering the evidence to his attorney, in which case the client's sixth amendment right to a fully informed defense might be compromised. This "impermissible tension"¹¹⁷ between the client's fifth and sixth amendment rights, it has been argued, not only is undesirable from the standpoint of policy, but also is unconstitutional.

In evaluating this criticism, one must bear in mind the precise nature of the "fifth amendment" interest that the client might conceivably be forced to waive. First, the privilege against self-incrimination extends only to tacit averments implicit in the act of production itself, not to the "contents" of the evidence or the evidence itself. Thus, if the client could be forced to relinquish the evidence to the authorities through a grant of use immunity, then the government could, consistent with the immunity agreement and the client's privilege, use the contents of the evidence or any identifying marks thereon, such as a serial number or fingerprints. Second, this privilege accords to the client merely the right to resist a subpoena for production of the evidence, not the right to prevent the government from discovering the evidence. If the government obtains a search warrant for the evidence based upon probable cause, then the government may, assuming it can locate the evidence, seize it despite the existence of the client's privilege against production. Third, the privilege does not embrace a right to conceal or to destroy the evidence. Indeed, in view of the criminal statutes concerning suppression of the evidence, it is clear that the client has a legal duty to hold incriminating evidence where it might be discovered by the government. Any effort to conceal or destroy the evidence would constitute a criminal act.

116. See generally Comment, Extending the Privilege, *supra* note 1; Note, Defendant's Constitutional Rights, *supra* note 1; Seidelson, *supra* note 1.

117. This term is found in Comment, Defendant's Constitutional Rights, *supra* note 1, at 1056.

Addressing first the contention that the allegedly "impermissible tension" between the client's fifth and sixth amendment rights created by the *Green* rule is unconstitutional, it must be acknowledged that the United States Supreme Court has, at least in one case, indicated that such tension may amount to a constitutional violation under some circumstances. In *Simmons v. United States*,¹¹⁸ the defendant, in order to gain standing to assert that a seizure of his suitcase deprived him of his fourth amendment rights, was "required" to admit that he possessed the suitcase. After his motion to suppress the evidence was denied, the government used his admission against him at trial. On appeal, the Supreme Court concluded that it was "constitutionally impermissible to force the defendant to choose between giving up what he believed to be a valid fourth amendment claim and waiving his privilege against self-incrimination."¹¹⁹ In the court's view, it was "intolerable that one constitutional right should have to be surrendered in order to assert another."¹²⁰ Because the tension between the two rights present in *Simmons*' situation created "compulsion" which violated his fifth amendment privilege, the court concluded that his admission of possession should have been excluded at trial.¹²¹

There are nevertheless good reasons for questioning whether the kind of tension created in *Green* runs afoul of the holding of *Simmons*. For one thing, in the later case of *McGautha v. California*,¹²² the Supreme Court made it clear that not all such tensions "are per se unconstitutional."¹²³ In that case the defendant complained that the state's unitary capital trial system "created an impermissible tension between his fourteenth amendment due process right to be heard on the issue of punishment and his fifth amendment privilege against self-incrimination."¹²⁴ The defendant's complaint was that he could not testify on the issue of punishment without enabling the government to use that testimony against him on the issue of guilt. The court rejected this argument. The fact that there is some tension in the exercise of constitutional rights therefore does not necessarily establish that there is a constitutional problem.

Furthermore, the kind of tension created by *Green* is not of the same character as that which was condemned in *Simmons*. In *Simmons*, the tension between the defendant's fourth and fifth amendment rights

118. 390 U.S. 377, 88 S. Ct. 967 (1968).

119. Comment, Defendant's Constitutional Rights, *supra* note 1, at 1056.

120. *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976.

121. *Id.*, 88 S. Ct. at 976.

122. 402 U.S. 183, 91 S. Ct. 1454 (1971).

123. Comment, Defendant's Constitutional Rights, *supra* note 1, at 1056 n.47.

124. *Id.*

gave rise to a situation in which the defendant was "compelled" to offer testimony that otherwise would have been protected by his privilege. By contrast, in *Green* it cannot be said that there is any "compulsion" of the kind experienced by the defendant in *Simmons*. More importantly, what the client is required to give up under *Green* is *not* testimony that would have been privileged. Under *Green* the delivery of the evidence to the government may be, and perhaps should be,¹²⁵ accomplished anonymously without revealing the source of the evidence. Thus, the act of delivery does not involve any of the "tacit averments" associated with production of the evidence under court order. Because the client's only fifth amendment interest is in avoiding such averments, it follows that the requirement of *Green* that the evidence be turned over to the state does not involve the compulsion of any testimony that is in fact protected by the privilege.

Not only is the "tension" problem created by *Green* not unconstitutional, but it is also extremely unlikely to occur in practice. Under the fifth amendment analysis of *Fisher*, the circumstances in which a client would be able to resist a subpoena for physical evidence on the basis of the privilege will very rarely arise. Even for those clients who do have such a privilege, the "impermissible tensions" problem would not necessarily be present. Under *Green*, the only time that there is any genuine tension created is when it appears that there is a reasonable chance that the attorney, by holding and testing the evidence, will be able to derive some benefit for the defense. In those circumstances, the attorney and client will be required to weigh carefully the advantages to the defense of testing the evidence against the disadvantages of disclosure. If there is no conceivable advantage in the attorney's receiving the evidence, then the choice is clear—the client should keep the evidence—and there is therefore no Hobson's choice to be made. Because the chance that examination and testing of the evidence would be helpful to the defense is slim indeed, the likelihood that "impermissible tensions" will arise is similarly remote. To sum up, then, when it is considered that the client rarely will have a legitimate fifth amendment claim against production of the evidence and that there is little chance that the defense would ever need to examine physical evidence, then it becomes apparent that the "impermissible tensions" problem will arise only on the rarest of occasions.

125. See *supra* note 66. Anonymous delivery may be necessary to prevent the prosecution from tracing the evidence to the attorney. Once the prosecution learns of the attorney's identity, it may be able to trace the evidence through him back to the defendant, provided it can obtain "independence evidence" of the professional relationship between the two.

Of course, the fact that "impermissible tensions" are unlikely to arise does not warrant ignoring the problem. However, it must be remembered that in *Green* the court was attempting to articulate general principles, applicable to a wide variety of situations, that would on the whole produce just and proper results. Not only that, but the principles adopted by the court reflect an effort to balance various interests that come into competition once the client delivers evidence to his attorney. Given the nature of the interests involved, it is not to be expected that general solutions devised by courts could produce ideal or perfect results in every case or that interests on one side of the "balance" would be protected to the fullest extent possible. Where there is balancing of interests, there must inevitably be compromise of interests.

2. *The Case Against Green from the Point of View of the State*

Some critics of the type of approach to the physical evidence dilemma that was adopted in *Green* maintain that that approach unfairly benefits the client at the expense of the state.¹²⁶ This contention rests upon a single, though compelling, argument. The client, it is argued, could easily misuse the second prong of the *Green* approach—that the attorney may not be compelled to disclose the source of the evidence—in order to eliminate the link between himself and the evidence. Thus, for example, a client might willingly turn over evidence to his attorney, hoping that, because the attorney could not be forced to testify concerning his receipt of the evidence, the government would be unable to link it up to him at trial. If the client is sufficiently sophisticated to avoid revealing the evidence to any witnesses before, during or after the crime and to remove his fingerprints and any other identifying marks from it before giving it to the attorney, then the strategy should prove successful. The result of this abuse of the system established in *Green*, it is argued, is that the state is deprived of highly relevant evidence which it might otherwise have been able to discover and that legal representation is reduced to a means of "laundering" incriminating evidence.¹²⁷

While it is true that the *Green* approach is susceptible of being abused in this way, the fear that such abuse will be rampant, or even common, under *Green* is undoubtedly exaggerated. Most criminal defendants, it may fairly be said, are far from sophisticated. The typical defendant not only is unlikely to be aware of the *Green* rule, but also is unlikely to be very adept at obliterating the evidentiary links between himself and the evidence. More importantly, the criminal defense attorney

126. See, e.g., Saltzburg, *supra* note 1, at 837-39; McCormick, *supra* note 35, § 89, at 213 & n.14 (citing Saltzburg).

127. See Saltzburg, *supra* note 1, at 838-39.

in the typical case, even one involving a relatively sophisticated client, will no doubt be very reluctant to "gamble" on the chance that the state does not have some independent means of connecting the evidence to his client. This possibility, which is always presented, should be sufficient to deter defense attorneys from too eagerly receiving evidence and then turning it over to the state. Finally, it should be noted that the state probably does not stand to lose much even when the *Green* rule is clearly abused. The client who is sufficiently sophisticated to be able to manipulate that rule in the manner feared by the critics would no doubt also be capable of disposing of the evidence successfully in some other manner.

IV. RESOLVING SOME OF *Green's* UNANSWERED QUESTIONS

It might fairly be said that the *Green* decision raises as many questions as it answers, if not more. Among these unanswered questions are those that arise from apparent deficiencies in the court's analysis, questions that include whether the ethical "duty to disclose" discovered by the court has any basis other than the court's view of sound policy¹²⁸ and whether evidence that must be disclosed pursuant to this duty is "privileged, but admissible" or not privileged at all.¹²⁹ Still other questions arise because of the court's failure to "flesh out" certain aspects of the newly-discovered duty to disclose. Examples include when the duty to disclose arises¹³⁰ and whether the attorney, after this duty does arise, may nevertheless hold onto the evidence for a reasonable time to test and examine it.¹³¹ In addition to these genuinely unanswered questions, there are those that arise as one considers how the principles developed in *Green* might be applied to future cases presenting comparable, yet potentially distinguishable, factual situations. Should those principles control, for example, when the client delivers evidence to an employee of the attorney, rather than the attorney himself, or when the evidence delivered is contraband or documentary evidence, rather than an instrumentality of the crime?

Of the questions noted above, the most profound and troubling are those listed at the beginning, especially that which concerns the ultimate source of the new "duty to disclose." Nevertheless, these questions are now largely academic and perhaps even insoluble. The remaining questions, however, are of immense practical significance, for they will undoubtedly be raised in future litigation as attorneys engaged in the

128. See *supra* text accompanying notes 72-80.

129. See *supra* pp. 1038-40.

130. See *supra* p. 1034.

131. See *supra* text accompanying note 70.

adversary struggle seek to persuade the courts to extend or narrow the *Green* holding in one way or another. The purpose of this section of the note is to consider how the courts should resolve these questions.

A. The Duty to Disclose: When Does It Arise?

As has been noted,¹³² one of the shortcomings in the *Green* court's treatment of the attorney's duty to disclose incriminating evidence is that it fails to identify the precise point at which this duty vests in the attorney. To shore up this omission, there are several approaches that might be taken. One promising approach involves the use of a temporal criterion. Considering the problem in the abstract, it would seem that there are at least three natural points at which the attorney's obligation to disclose might arise: (1) when the client, bearing the evidence with him, arrives at the attorney's office; (2) when, after the client presents the evidence to the attorney, the latter handles or manipulates the evidence in some way; or (3) when the client departs from the attorney's office, leaving the evidence behind him. One clear advantage of this temporal approach is that it is simple, straightforward, and easy for both the practitioner and the court to apply. Furthermore, this approach avoids the difficult and time-consuming inquiries that would be required if the onset of the duty were tied to the notion of actual or constructive possession by the attorney.

Assuming that the problem should be resolved along temporal lines, the only question that remains is which of the three points in time noted above should mark the beginning of the attorney's duty. In order to answer that question, it is necessary to consider a facet of the *Green* rationale that might be easily overlooked. Under the rule announced in *Green* regarding the disclosure of incriminating evidence, it would make no sense at all for an attorney to receive such evidence unless he were first fairly certain that the defense would thereby be benefitted and that this benefit would outweigh the advantage to the prosecution that would be realized upon his subsequent disclosure of the evidence. If the attorney cannot confidently reach this conclusion, then his receiving the evidence will amount to a tactical blunder, if not incompetent assistance: the defense will profit nothing, while the prosecution will gain sure access to evidence it might otherwise have been unable to discover. Thus, in practice it is to be expected that the defense attorney, operating under the *Green* rule, will not agree to receive incriminating evidence from his client unless he has first determined that his doing so will, on balance, aid his client's defense. This effect of the rule requiring attorneys to disclose incriminating evidence is probably not accidental. Rather, the courts which have adopted such a rule, including the *Green* court,

132. See *supra* p. 1034.

probably have done so in the hope that the rule will encourage just such a pre-transfer evaluation, that is, a "strategy session" between the attorney and the client in which they confer carefully about the costs and benefits of transferring the evidence to the attorney. Such a conference between the attorney and the client not only serves to prevent the former from becoming engaged unnecessarily in the unseemly business of handling evidence of a crime; it also protects the latter against unwittingly relinquishing any legitimate fifth amendment claim that he might have against court ordered production of the evidence.¹³³

Given that one of the aims of the *Green* rule is to encourage the attorney and client to confer about the pros and cons of the attorney's receiving incriminating evidence, the task of determining when the attorney's duty to disclose such evidence should arise becomes relatively uncomplicated. The first of the alternatives noted above is clearly unacceptable. If the duty to disclose arises as soon as the client arrives in the attorney's office with the evidence, the court's goal of encouraging an attorney-client strategy session will not be realized. It is to be expected that, in the ordinary case, the client will be unacquainted with the niceties of the *Green* rule and so will proceed to the attorney's office, carrying the evidence with him, without first contacting the attorney. Under the first alternative, therefore, conferral regarding the advantages and disadvantages of transferring the evidence would be foreclosed: from the moment that the client steps through the office door, the evidence would have to be turned over. The second possibility is unacceptable for similar reasons. If the attorney cannot touch, move, or examine closely the evidence without thereby acquiring a duty to divulge it, then he will be handicapped in his efforts to determine the possible advantages to the defense of submitting the evidence to professional testing and examination. The hope of *Green*, that the attorney and client will make an informed judgment regarding the merits and demerits of transferring the evidence to the attorney, would not be fully realized. The third possibility, on the other hand, seems to accommodate this aim of the *Green* decision. If the duty does not arise until after the defendant has left the evidence in the attorney's office, then the attorney and client will be afforded the opportunity and time to scrutinize the evidence in order to determine whether testing would be of benefit to the defense. Furthermore, drawing the line at this third point in time does not seem to impose upon the investigative process an undue burden.

B. Retention for a Reasonable Period of Time

In *Green*, the supreme court, perhaps because it was not squarely presented with the question, failed to express an opinion regarding

133. See, generally, Martin, *supra* note 1, at 810-11, 872-73.

whether an attorney, after her duty to turn over incriminating evidence arises, may nevertheless retain that evidence for a "reasonable period of time" before turning it over to the authorities. As was noted earlier,¹³⁴ in the *Olwell* decision this prerogative was extended to the attorney.¹³⁵ One question that remains after *Green* is whether the Louisiana high court should follow the *Olwell* court in this regard.

Some critics of the *Olwell* rule have argued that permitting the attorney to retain the evidence for a brief period after she obtains possession of it is unnecessary and potentially harmful to the criminal justice system.¹³⁶ The only purpose that could be advanced by permitting her to do so, it is argued, would be that of enabling the attorney to test and evaluate such evidence in the hope of discovering some information that would be useful to the defense *at trial*. However, such testing and evaluation could be accomplished just as easily after delivery of the evidence to the authorities. Under modern discovery rules, the defense would be able to obtain the evidence from the government pursuant to a court order and could then subject it to various tests and analyses.¹³⁷ Not only is retention of the evidence before delivery unnecessary, these critics argue, but it might also be prejudicial to the interests of the criminal justice system. Any delay in the delivery of incriminating evidence to the government might hinder the government's investigation or afford the client, assuming he is guilty, time to commit further crimes.

This argument, however, is flawed in several respects. First, it ignores one of the important purposes that might be accomplished by pre-delivery testing, namely, the discovery of information that would convincingly exonerate the client and so, persuade the authorities not to investigate or to arrest the client in the first place.¹³⁸ It cannot be denied that the client has a legitimate interest in avoiding unjustified investigation or arrest. Second, the argument exaggerates to some degree the harm that might inure to the government as a result of an attorney's of pre-delivery retention of incriminating evidence. Any delay in the government's effort to bring the guilty client to justice occasioned by pre-delivery retention of evidence would at worst be simply an inconvenience to the govern-

134. See *supra* text accompanying note 16.

135. See *supra* note 16 and accompanying text.

136. See, e.g., Comment, Right to Withhold, *supra* note 1, at 227-28.

137. Obtaining physical evidence from the government in this manner is certainly possible in Louisiana. La. Code Crim. P. art. 718 (1981) provides in part as follows: "[O]n motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect, . . . examine, test scientifically . . . tangible objects . . . which are within the possession, custody, or control of the state"

138. See Martin, *supra* note 1, at 872.

ment, for no genuinely important governmental interests are compromised by the mere fact of such a delay. Further, concerns about the commission of additional crimes by the guilty client are highly speculative and, in the typical case, are unlikely to arise. Thus, on balance, it would appear that the better course is to permit the attorney to retain the evidence for a "reasonable period of time" before turning it over to authorities so that she might test and evaluate it.

C. Receipt of the Evidence by an Employee of the Attorney

Because defense attorneys cannot spend all of their time at their offices, it is to be expected that, in a considerable number of cases, clients who wish to transfer incriminating evidence to their attorneys will attempt to do so through the attorneys' employees, such as secretaries or investigators. One question that naturally arises after *Green* is whether the principles announced in that decision will apply to such cases; that is, must evidence delivered to an attorney's employee be turned over to the authorities and may the employee be called to the stand to reveal the source of the evidence?

There are several good reasons for concluding that Louisiana courts would and should answer these questions in the affirmative. First, in one of the cases cited approvingly in *Green*—*Anderson v. State*—the *Olwell* rule was applied in toto to a situation in which the defendant delivered stolen items to his attorney's receptionist. As was noted earlier,¹³⁹ the *Anderson* court concluded that the attorney was ethically bound to turn over this evidence to the authorities and that neither the attorney nor the receptionist could be required to divulge the source of that evidence. Second, as a general matter the attorney-client privilege extends to communications made to an attorney's employee, at least to those communications that are made in confidence for the purpose of securing legal advice from the attorney. According to Professor Wigmore,

It has never been questioned that the privilege protects communications to the attorney's clerks and his other agents . . . for rendering his services. The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them . . . , the privilege must include all the persons who act as the attorney's agents.¹⁴⁰

This proposition apparently enjoys the support of a majority of the states and was recently embraced by the Louisiana third circuit.¹⁴¹ Thus, for purposes of the attorney-client privilege, it should make no difference

139. See *supra* text accompanying notes 21-24.

140. Wigmore, *supra* note 33, § 2301, at 583.

141. *State v. Montgomery*, 499 So. 2d 709, 711-12 (La. App. 3d Cir. 1986).

whether the recipient of incriminating evidence is the attorney himself or one of his employees.

A third consideration weighing in favor of extending the rule of *Green* to deliveries of incriminating evidence made to attorneys' employees is that, in view of the interests that the *Green* rule is designed to protect, there is no sound reason for refusing to so extend the rule. Considering first the interests of the prosecution, it is difficult to discern any basis for concluding that those interests are somehow differently affected in the case in which delivery of the evidence is made to the attorney himself than in the case in which delivery of such evidence is made to an employee of the attorney. Admittedly, extending the rule of *Green* to attorneys' employees would expand the number of channels through which a criminal might launder incriminating evidence. However, insofar as the criminal could just as easily accomplish this end by waiting to consult with the attorney himself, this enhanced danger to the prosecution's interests appears insignificant. Similarly, with one possible exception noted below, the interests of the client remain the same regardless of the person to whom delivery of the evidence is made. In either case, the client's legitimate interest is in securing competent legal assistance, both concerning his defense in general and concerning the proper disposition of the incriminating evidence. Clearly, in the case of a delivery of evidence to his attorney's employee, the client has no heightened interest that would justify dispensing with the attorney's duty to disclose the evidence.

Delivering physical evidence to an employee of the attorney, however, poses a risk to the client not generally present when he delivers the evidence directly to the attorney. Before an attorney will agree to accept incriminating evidence from his client, he presumably will explain the rule of *Green* to the client, pointing out to him the possible advantages and disadvantages of his receiving the evidence. Thus, the attorney, by virtue of his knowledge of *Green*, should be able to protect the client from unwittingly divulging damning evidence to the authorities. Arguably, this safeguard is not present in the case in which the client delivers incriminating evidence to an employee of the attorney. It is unlikely that the attorney's secretaries and investigators will be well-versed in the law of attorney-client privilege, including the rules announced in *Green*. Thus, there is a danger that such employees will not, before receiving the evidence from the client, warn him of the possible consequences. If the rule of *Green* applies to deliveries of incriminating evidence to attorneys' employees, then in many cases clients will unwittingly fall into the trap of *Green*, aiding the prosecution in the recovery of incriminating evidence without receiving any benefit for their defense.

There are several possible solutions to the problem posed above. One solution is to apply the *Green* rule in full to cases involving attorneys' employees and then leave it to the attorneys to educate their employees about the dangers of receiving physical evidence and the need to warn clients of those dangers. Undoubtedly, if the rule of *Green* were so applied, attorneys would, out of self-interest, provide this information to their employees; if an attorney did not, and his employee accepted incriminating evidence from a client without warning him of the consequences, the client might have a valid malpractice claim against the attorney. Furthermore, there is no reason to believe that an understanding of the basic principles of *Green*, and of the dangers to clients posed thereby, is beyond the grasp of legal secretaries and investigators.

Even if one finds this solution unacceptable, the answer cannot be to dispense altogether with the rule requiring disclosure of incriminating evidence. If that course were taken, then the client could easily avoid the disclosure rule of *Green* and successfully secrete incriminating evidence merely by delivering the evidence to an attorney's employee, rather than to an attorney. Rather, the only reasonable alternative is to afford the client a sort of "grace period," that is, a period of time after the delivery sufficient to allow the attorney and client to meet together and to discuss the advantages and disadvantages of transferring the evidence to the attorney, during which time the duty to disclose would be suspended. If the attorney and client decide that the attorney should receive the evidence, then the duty to disclose would arise. If they decide otherwise, however, then the client would be free to retrieve the evidence from the employee and carry it away. Although this alternative does have the advantage of insuring the client against unwittingly handing evidence over to the prosecution, it may lead to situations in which incriminating physical evidence will be hidden in attorneys' offices, and therefore will be out of "circulation," for significant periods of time. For this reason, it would appear that of the two alternatives discussed above, the first is preferable.

D. Other Types of Physical Evidence: Fruits of the Crime, Contraband and Documentary Evidence

While the holding in *Green* is, strictly speaking, limited to instrumentalities used in the commission of the crime, the principles underlying the decision have a potential application of much greater scope. The language of the decision itself points to the possible extension of the *Green* holding to other classes of evidence. Instead of speaking of "weapons" or "instrumentalities of the crime," the court repeatedly used the term "physical evidence" in formulating the general principles governing the case. The question, then, is what other types of evidence

might be considered "physical evidence" for purposes of the rule of *Green*.

Two obvious candidates for admission to the "physical evidence" category are (1) the fruits or proceeds of the crime and (2) contraband. As far as the state's and the client's competing interests are concerned, these two types of evidence stand on a footing no different from that of instrumentalities of the crime. Furthermore, there appears to be even more reason to subject these types of evidence to the rule of *Green*. First, while it is unclear whether it is illegal for an attorney to take possession of and hold a weapon that he knows has been used to commit an offense, it cannot be doubted that the possession by an attorney of the fruits of a crime or of illegal contraband would constitute a crime. One who, for example, takes possession of stolen jewelry would be guilty of "receiving stolen goods";¹⁴² one who agrees to accept illegal narcotics would thereby become guilty of possession of a controlled dangerous substance.¹⁴³ Second, whereas the client usually has a proprietary interest in the instrumentality of the crime, he has no such interest in the fruits of the crime or in illegal contraband. In short, it would seem that both the fruits of crimes and contraband would fall within the scope of the *Green* rule. Consequently, such evidence, if it is turned over to the attorney, is not privileged and should be turned over to the authorities immediately.

Yet another class of evidence that might conceivably fall within the scope of the *Green* rule is documentary evidence, at least documentary evidence that does not arise as a result of communications between the attorney and the client.¹⁴⁴ The case for extending the rule in this way rests in part upon several similarities between such evidence and the various types of "real" evidence considered earlier. First, this evidence, like real evidence, is "physical," at least in some sense, and exists independently of the relationship between the attorney and his client. Second, for purposes of the pre-transfer "strategy session" between the

142. The knowing possession of stolen goods is prohibited by La. R.S. 14:69(A) (1986), which provides that

[i]llegal possession of stolen things is the intentional possessing, procuring, receiving, or concealing of anything of value which has been the subject of any robbery or theft, under circumstances which indicate that the offender knew or had good reason to believe that the thing was the subject of one of these offenses.

143. See La. R.S. 40:966-970 (1977 & Supp. 1987).

144. Documentary evidence involving communications between the attorney and his client, for example, a letter sent by the client to his attorney requesting legal advice, would clearly fall within the scope of the attorney-client privilege. See McCormick, *supra* note 35, § 89, at 214.

attorney and the client, whether the evidence is real or documentary is of no consequence.

Given the nature of documentary evidence, particularly the fact that its significance and value are not always immediately apparent, the attorney ordinarily will require considerably more time to review such evidence than to review the typical item of physical evidence. In the usual case, however, the attorney should be able, within the span of a single meeting with his client, to examine the documentary evidence in sufficient depth and at sufficient length to determine whether his receiving the evidence could possibly benefit the defense. Thus, assuming that the attorney's duty to disclose does not arise until after the client leaves the evidence behind with the attorney, the client who is thinking of handing over documentary evidence to his attorney should be able to have the benefit of a full and complete "strategy session" before he becomes obligated to relinquish the evidence to the authorities. Third, the prosecution's interest in discovering incriminating documentary evidence is, of course, the same as its interest in discovering incriminating real evidence.

These similarities between documentary and real evidence have led many commentators, including some who are hostile to *Olwell* and its progeny, to suggest that the *Olwell* rule should apply generally to documentary evidence.¹⁴⁵ Despite these similarities between the standings of documentary evidence and real evidence under the *Green* rationale, there is, nevertheless, reason to be cautious about extending the rule of *Green* to documents. Historically, courts have treated some types of documentary evidence differently from real evidence, at least for some purposes. Thus, before it can be concluded that *Green* extends to documentary evidence, the nature of this distinction must be explored and evaluated.

The differential treatment of real and documentary evidence arose in the context of fifth amendment analysis. It has been held that, as a general rule, court orders for the production of real evidence and many types of documentary evidence may not be resisted on the ground that they abridge the privilege against self-incrimination, unless, of course, the act of production itself would amount to a "tacit averment" concerning the evidence.¹⁴⁶ Early on, however, the federal courts suggested that a certain class of documentary evidence, namely, a person's "private books and papers," should be treated differently and so, would enjoy

145. See, e.g., Lefstein, *supra* note 1, at 926 & n.159.

146. This general rule applies to physical evidence, such as the fruits and instrumentalities of crimes, and to documentary evidence that does not fall within the category of "private books and papers," that is, documents that are prepared either by the producer himself or by someone who is acting under his direct supervision. See generally *Fisher v. United States*, 425 U.S. 391, 405-12, 96 S. Ct. 1569, 1578-81 (1976).

fifth amendment protection.¹⁴⁷ Although the courts did not always use these terms to explain the special treatment accorded to such evidence, it appears that the courts' assumption was that such evidence, because prepared by the person himself or by someone acting under his immediate supervision, was inherently, or at least typically, "testimonial" by virtue of its content.¹⁴⁸ In several recent decisions, however, the United States Supreme Court has consistently whittled away at the special protection extended to such personally-prepared documents. In *Fisher v. United States*,¹⁴⁹ for example, the Court noted that "the foundations for th[is] rule have been washed away" by recent decisions and, further, described the "prohibition against forcing production of private papers" as "a rule searching for a rationale."¹⁵⁰ In responding to an issue raised in that case, the Court indicated that a taxpayer may not avoid compliance with a subpoena "merely by asserting that the item of evidence which he is required to produce contains 'incriminating writing, whether his own or that of someone else.'"¹⁵¹ In the more recent case of *United States v. Doe*,¹⁵² Justice O'Connor, writing in concurrence, stated that "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."¹⁵³ Her conclusion was founded upon *Fisher*, which, in her view, "sounded the death knell" for the old rule.¹⁵⁴

In light of these recent pronouncements from the Supreme Court, it appears doubtful whether the former distinction between documentary evidence and other types of evidence in the fifth amendment context remains viable. If that is true, then the defendant has no greater fifth amendment interest in private documentary evidence than in other types of evidence. As a heightened fifth amendment interest in documentary evidence is the only apparent reason for exempting such evidence from the rule of *Green*, it follows that there should be no such exemption.

It should be noted, however, that even if the old rule concerning "private books and papers" survives *Fisher* in some narrow form, there might nevertheless be no sound reason for exempting that narrow class of documentary evidence from *Green*. Under *Green*, as under *Olwell* and its progeny, the primary justification for the proposition that physical evidence delivered to an attorney is not privileged and must be disclosed does not rest upon the fifth amendment. Indeed, the rationale employed

147. This proposition was first established in *Boyd v. United States*, 116 U.S. 616, 634-35, 68 S. Ct. 524, 534 (1886).

148. See Lefstein, *supra* note 1, at 912 n.73.

149. 425 U.S. 391, 96 S. Ct. 1569.

150. *Id.* at 409, 96 S. Ct. at 1580.

151. *Id.* at 410, 96 S. Ct. at 1580-81.

152. 465 U.S. 605, 104 S. Ct. 1237 (1984).

153. *Id.* at 618, 104 S. Ct. at 1245.

154. *Id.*

in *Green* largely ignores whatever fifth amendment interests the client might have in resisting an order for production of the evidence. Simply put, under the primary *Green* rationale, the client's fifth amendment interests seem to be immaterial. Thus, even if the client does have a heightened fifth amendment interest in connection with personal papers, that fact might not be sufficient to remove such papers from the scope of the *Green* rule.

V. PRACTICAL ADVICE TO THE ATTORNEY FACING THE PHYSICAL EVIDENCE DILEMMA

Whatever one might think of the merits of the *Green* decision, it is now the law of this state and probably will not be overturned, or even modified, within the near future. Now that the decision has been handed down, the task of the attorney is to attempt to draw from the decision guidelines that will enable him to serve his client's best interests while at the same time to avoid violating the ethical obligations set out in the decision. Although this task is complicated somewhat by the questions that the decision leaves unanswered, in particular, the question of when the duty to disclose arises, some generalizations may nevertheless be made.¹⁵⁵

The cardinal rule that may be derived from the *Green* decision is this: the attorney should "avoid taking possession [of incriminating evidence] unless testing or analysis of the evidence will most likely result in a decision by the prosecution either not to file charges or to dismiss the charges, or unless taking possession will otherwise assist in the defense."¹⁵⁶ By following this principle the attorney may avoid the unfortunate situation in which he is forced to give up to the prosecution evidence that may aid its investigation without having obtained any benefit for his client. Although there will of course be exceptions, as a general matter this "cardinal rule" will require the attorney to decline to accept incriminating evidence from his client or his client's agents. Only rarely will it be the case that by obtaining and examining the evidence, the attorney will be able to gain anything of value to the defense. This is particularly true for certain kinds of evidence, such as narcotics and stolen money; it may safely be said that no advantage could ever be obtained by the attorney's receiving such evidence.

In order to assure that he will be able to adhere to this cardinal rule without oversight or mistake, the attorney should undertake the following common sense measures. First, the attorney should inform his

155. Many of the suggestions presented below are drawn from Martin, *supra* note 1, at 872-77.

156. *Id.* at 872.

staff, including his secretaries, clerks and investigators, that they should not receive from a client or potential client any physical evidence without first consulting with the attorney. As was noted earlier, although the *Green* opinion does not address this question, it cannot be doubted that incriminating evidence obtained by an attorney's agents, like that obtained directly by the attorney, would have to be turned over to the state.

Second, and perhaps more important, if the attorney learns that his client is interested in delivering incriminating evidence to him, the attorney should, before accepting the evidence, have a candid discussion with the client, informing him of the alternatives and the risks involved in each. In particular, the attorney should inform his client that (1) if the attorney obtains possession of the evidence he will have to turn that evidence over to the authorities, if not immediately, then at least after the passage of a "reasonable" amount of time;¹⁵⁷ (2) if the attorney receives the evidence and hands it over to the authorities, he cannot be required to disclose the source from which he obtained the evidence;¹⁵⁸ (3) although their conversations about any past crimes of the client are confidential, any conversations about a future crime, such as the concealment or destruction of evidence, probably are not;¹⁵⁹ (4) concealment or destruction of the evidence in question or tampering with it in any way is itself a crime;¹⁶⁰ (5) if the evidence is not found by the authorities, or if a witness can establish that the evidence is missing from its usual place, an inference may be raised at trial that the client has disposed of it, an inference that may contribute to his conviction;¹⁶¹ (6) if the evidence remains in the client's possession, then his privilege against self-incrimination may entitle him to resist a subpoena for the evidence;¹⁶² and (7) the evidence, if it remains in the client's possession, may be subject to seizure during a valid search by the police.¹⁶³ After the attorney and client have discussed these matters, the two should carefully weigh the possible advantages of permitting the attorney to examine or test the evidence against the possible disadvantages of turning the evidence over to the authorities. Only if the two agree that the advantages clearly outweigh the disadvantages should the attorney accept the evidence.

Whether, and if so, under what circumstances, this extended strategy session can take place is, of course, dependent upon the time at which

157. See *supra* pp. 1030, 1034, 1053-55.

158. See *supra* text accompanying notes 59-66.

159. See *supra* note 35 and text accompanying notes 42-43.

160. See *supra* text accompanying notes 75-80.

161. See Martin, *supra* note 1.

162. See *supra* text accompanying notes 92-93, 116-17.

163. See generally La. Code Crim. P. arts. 161-62 (West 1988).

the "duty to disclose" arises.¹⁶⁴ If, for example, the attorney's duty is triggered the moment that the client carries the evidence into his office, then the only hope that the attorney can have of being able to conduct a strategy conference with his client, to avoid getting caught in the trap of *Green*, is if the client contacts the attorney prior to going to the attorney's office. Assuming that the client does make such a prior contact, for example, by telephone, the attorney may discuss the various alternatives and risks with the client as outlined above before the client makes the mistake of bringing the evidence in.¹⁶⁵ If, however, the duty to disclose does not arise until the attorney touches, handles, or manipulates the evidence in some way, then the strategy session can take place after the client has brought the evidence into the attorney's office. The same is true if, as appears most likely, this duty is not triggered until a still later point, that is, when the client departs from the office leaving the evidence behind. In that case, however, the attorney may, without acquiring a duty to turn the evidence over to the police, examine it firsthand and, if necessary, even handle the evidence. If the attorney is willing to accept the risk that the courts will accept this third alternative view of when the duty to disclose arises, then he should take a close look at the evidence. Such a cursory examination may be of invaluable assistance to him in determining whether any advantage is to be gained by having the evidence tested further. In handling the evidence, however, the attorney should be careful not to alter its character in any way, for example, by removing fingerprints. Such conduct could amount to tampering with evidence, punishable under La. R.S. 14:130.1.¹⁶⁶

Finally, once the attorney receives evidence from his client, he should consider carefully the manner in which he will deliver it to the authorities. Under the "testimonial" rule announced in *Green* it is clear that the prosecution may not prove the chain of custody of the evidence by forcing the attorney to testify about the source from which he obtained it. Nor may the prosecution prove this claim more indirectly by calling the attorney to the stand and forcing him to admit that he delivered the evidence to the authorities and that he was representing the defendant at that time. As was noted earlier,¹⁶⁷ however, it is conceivable that the courts would permit the prosecution in such a case to prove the chain of custody by an even more circuitous route, that is, by proving on the basis of independent evidence that the attorney represented the defendant and by calling the officer who received the evidence from the attorney to testify to that fact. Thus, it is possible that the attorney, by delivering evidence in an open and undisguised manner to the authorities, might

164. See *supra* pp. 1052-53.

165. See *supra* p. 1053.

166. See *supra* text accompanying notes 75-80.

167. See *supra* note 66 and accompanying text.

end up assisting the prosecution in tracing the evidence back to his client. To avoid this eventuality, defense attorneys would be well-advised to deliver evidence to the authorities anonymously, at least until the courts rule that efforts by the prosecution to prove the chain of custody by means of independent evidence are, like more direct methods of proof, impermissible.

VI. CONCLUSION

In *Green*, the Louisiana Supreme Court took an important step forward along the road to resolving the difficult ethical and legal dilemmas that arise when a client, in an effort to obtain legal advice, hands over incriminating physical evidence to his attorney. In taking that step, the court announced three simple and straightforward rules for the guidance of defense attorneys and trial courts: (1) an attorney presented with such evidence has an ethical obligation to turn it over to the authorities; (2) evidence so disclosed is not excludable at trial by operation of the attorney-client privilege; and (3) when evidence has been so disclosed, the prosecution is prohibited from disclosing to the jury, either directly through the testimony of the attorney or indirectly, that the client transferred the evidence to the attorney or that the attorney transferred the evidence to the authorities.

While the position adopted by the court is consistent with that of the majority of courts which have struggled to resolve the "physical evidence dilemma," it nevertheless suffers from serious conceptual difficulties and may be subject to objections of constitutional dimension. Furthermore, the decision leaves unanswered some rather important questions, including when the attorney's duty to disclose arises and what types of evidence other than "instrumentalities of crimes" may be considered "physical evidence." Despite these shortcomings, however, the opinion does strike a fair balance between the competing interests at stake, namely, the client's interest in securing fully-informed legal advice and the prosecution's interest in uncovering the truth. Perhaps more importantly, the decision provides clear and simple "bright line rules" to guide attorneys and courts through hitherto uncharted ethical territory.

John Randall Trahan