Editorial

Smoking Guns: Beyond the Murray Case

The acquittal of Ken Murray for obstruction of justice comes as no great surprise. His actions in keeping the horrific videotapes in the Bernardo/Homolka case for 14 months constituted the *actus reus* of an act having the tendency to obstruct justice, but there was a reasonable doubt whether he had the high degree of *mens rea* required to wilfully attempt to obstruct justice. It would, however, be a serious mistake to conclude that what Mr. Murray did was all right. *Mens rea* defences are no way to think about ethical obligations or to foster the repute of the administration of justice.

There are two broad issues raised by the case: (1) should a lawyer have retrieved or accepted the tapes? (2) having done so, what were the lawyer’s obligations? The judgment in the Murray case only offers guidance on the second issue. The first issue, however, is the most difficult and the most likely to reoccur.

The practical lesson of the whole sorry saga for some lawyers may simply be not to touch anything that smells of evidence. If Mr. Murray had simply refused to retrieve the tapes, this may have ended the matter. The tapes would have remained in the house. Not accepting the smoking gun avoids the most obvious ethical dilemmas. Or does it?

Some refusals to deal with the smoking gun may run the danger of counseling or abetting the client or others in obstruction of justice. The *mens rea* issue will remain a live one, but that does not settle the ethical point. At the same time, the lawyer who learns about the smoking gun cannot be expected to tell. It would have been wrong for Mr. Murray to drop a dime on his own client and inform the police of their grievous oversight in their 71-day search of 57 Bayview Drive.

Refusals to look at the smoking gun may do the client a disservice and compromise the lawyer’s ethical duty to the client. Just as lawyers should in all cases request disclosure from the Crown, they should look at the smoking gun to appreciate its significance in the case. What seems wrong is accepting something on instructions not to look at it. The lawyer runs the risk of being used by the client as the safest place to conceal incriminatory evidence.

The Law Societies should make clear that lawyers should not accept items without examining them. A lawyer should also be required to inform a client of his or her ethical obligations before accepting the item, includ-
ing the possibility of having to hand the evidence over to the court or the prosecution. So informed, the client may go elsewhere and the smoking gun may remain hidden. This may be the tragic price paid for preserving the integrity of the solicitor-client relationship, including privilege.

The second issue of what the lawyer should do after having accepted and examined the smoking gun seems easier. The judgment in the Murray case provides helpful guidance. Helping the client or others dispose of the smoking gun is wrong and probably illegal. As Justice Gravely concluded: “Murray could not be a party to concealing this evidence. Having removed the tapes from their hiding place, he could not hide them again.” (R. v. Murray, [2000] O.J. No 2182 at para. 123).

The smoking gun, as pre-existing evidence that was not produced to obtain legal advice, should be given to the authorities. As Justice Gravely concluded: “once he had discovered the overwhelming significance of the critical tapes, Murray, in my opinion, was left with but three legally justifiable options: a) immediately turn over the tapes to the prosecution, either directly or anonymously; b) deposit them with the trial judge; or c) disclose their existence to the prosecution and prepare to do battle to retain them” (R. v. Murray, at para. 124).

Waiting to spring the smoking gun at trial also seems wrong. The exclu-
patory value of the evidence will be preserved even when it is turned over. In credibility cases, the judge can decide whether the prosecutor should be kept in the dark. Bernardo’s subsequent counsel did not hesitate to make tactical use of the tapes in pre-trial negotiations with the Crown. Lawyers can get into both ethical and tactical trouble by following the human instinct to avoid problems and damning evidence.

The lawyer who has examined the smoking gun should also withdraw from the case. He or she could be called as a witness to testify about the smoking gun. The lawyer should retain counsel to hand over the evidence to either the prosecution or the court in order to ensure that the former client’s confidences are preserved. Again, as Justice Gravely pointed out: “Murray’s discussions with his clients about the tapes are covered by the privilege; the physical objects, the tapes are not.” (R. v. Murray, at para. 115).

Withdrawal by Murray and the turning of the tapes over to the trial judge was in fact what was recommended by a three-person panel of the Law Society in September, 1994. Despite Justice Gravely’s comments about the lack of guidance from the Rules of Professional Conduct and the possibility that the lawyer might remain confused after researching the issue, the dilemma of what to do after having accepted the smoking gun does not seem overly difficult. There is, however, a need for guidance on the prior issue of whether to accept the smoking gun and on what conditions.

The fact that the case has caused so much difficulty and pain for all concerned suggests that all of us, including legal educators and the bar, may be placing too much emphasis on the adversarial ethic and not enough on the ethical constraints placed on lawyers. Except in narrow definitions that did not apply in this case, lawyers must protect their client’s confidences, but not pre-existing evidence of their crimes.

K.R.