2011

A Discourse on the ABA's Criminal Justice Standards: Prosecution and Defense Functions: The Physical Evidence Dilemma: Does ABA Standard 4-4.6 Offer Appropriate Guidance?

Rodney J. Uphoff

University of Missouri School of Law, UphoffR@missouri.edu

Follow this and additional works at: http://scholarship.law.missouri.edu/facpubs

Part of the Evidence Commons, and the Legal Profession Commons

Recommended Citation

The Physical Evidence Dilemma: Does ABA Standard 4-4.6 Offer Appropriate Guidance?

RODNEY J. UPHOFF*

Since 1966, when criminal defense lawyer Richard Ryder was disciplined for retaining physical evidence that connected his client to a bank robbery, lawyers and courts have struggled with the ethical dilemma of how defense lawyers should deal with physical evidence that potentially incriminates one of their clients. When a lawyer takes possession of an evidentiary item, must she always turn it over to the authorities, as required by most courts that have addressed this dilemma? Or, can defense counsel return the evidence to the source from whom counsel received it as recommended by Standard 4-4.6 of the ABA Criminal Justice Standards for Prosecution and Defense Functions?

This Article explores three scenarios that present variations of the physical evidence conundrum and explores the extent to which existing authority provides clear guidance when lawyers find themselves wrestling with a physical evidence quandary. The Article concludes that Standard 4-4.6's more nuanced return-to-the-source rule strikes a better balance between defense counsel's duty as an officer of the court and her duties as a zealous advocate than the mandatory turnover rule championed by most courts and by section 119 of Restatement (Third) of the Laws Governing Lawyers. Finally, the Article urges those revising Standard 4-4.6 to retain its basic approach, but to address some of the weaknesses of the Standard.

* Elwood L. Thomas Missouri Endowed Professor of Law, University of Missouri. I would like to thank Peter Joy, Ellen Yaroshefsky, Bruce Green, and the participants of the ABA-sponsored roundtables at Vanderbilt University Law School, Cardozo Law School, and Washington & Lee University Law School for their constructive comments. I would also like to thank Andrew Blackwell, Tressa Kelly, Justine Guyer, Cheryl Poelling, and Cindy Shearrer for their assistance in the preparation of this Article.

[1177]
INTRODUCTION

In August 1966, Richard Ryder, an experienced criminal defense lawyer in Richmond, Virginia learned that one of his clients, Charles Cook, was a suspect in a bank robbery. After talking with Cook, who denied any involvement in a robbery, Ryder spoke with the FBI, who told him that some of the stolen money included bait money. Ryder spoke again with Cook who admitted to him that he had placed some money in a safety deposit box. Worried that Cook might try to dispose of the money, but also concerned that the FBI would soon discover the

---

2. *Id.* at 362.
3. *Id.* Ryder testified that Cook concocted a story regarding the money that he did not believe. The court subsequently held that Ryder “knew” the money in the safety deposit box was stolen. *Id.* at 362, 364.
stolen money in Cook's safety deposit box, thereby establishing Cook's guilt, Ryder consulted with a well-regarded lawyer about his predicament. Ryder discussed his plan to transfer the money from Cook's safety deposit box to his own, believing that by doing so he could prevent Cook from disposing of the stolen money. Both of the lawyers thought that eventually the FBI would discover the money in Ryder's safety deposit box. They also thought that, at that point, Ryder could assert the attorney-client privilege and thereby thwart the government's ability to link the money to Cook. The other lawyer never suggested to Ryder that by transferring the money, he was acting illegally or unethically. He did advise Ryder, however, not to act surreptitiously and to let Cook know that the money was going back to the rightful owners.

Ryder proceeded to draft a power of attorney, which Cook signed, giving him the right to enter Cook's safety deposit box and remove the contents to be disposed of as Ryder saw fit. Although Ryder did not specifically tell his client that the money was going back to the rightful owners, Ryder claimed that he intended to return the money to the owners when he could do so without harming Cook. Ryder took the power of attorney to the bank, rented his own safety deposit box, and then used the power of attorney to gain access to Cook's safety deposit box. In Cook's box, he found the stolen money and a sawed-off shotgun. Ryder transferred both the money and the sawed-off shotgun to his own safety deposit box.

Unsure of the propriety of what he had just done, Ryder went almost immediately to talk to a distinguished law professor, who also was a retired judge, and told him about the transfer. Ryder told the retired judge that he intended to return the money to the rightful owners once the case was disposed of and wanted "responsible people in the community" to know. The retired judge did not give Ryder the impression that Ryder had acted unlawfully or unethically. That same day, Ryder also spoke to a state court judge and a state prosecutor.

4. Id. at 362. The lawyer Ryder consulted was a former officer of the Richmond Bar Association.

Id. at 363.
telling both of them about his actions.\textsuperscript{18} They advised him that he could neither receive such property nor retain possession of it.\textsuperscript{19}

Cook was subsequently charged with bank robbery, and Ryder appeared with him in court.\textsuperscript{20} Unfortunately for Mr. Ryder, the FBI obtained a search warrant for his and Cook's safety deposit boxes.\textsuperscript{21} The money and the weapon were seized, and Ryder was charged with professional misconduct for knowingly taking possession of and secreting the instrumentalities and fruits of a crime.\textsuperscript{22} Flatly rejecting his defense that his ethical duties and the attorney-client privilege legitimized his actions, the court held that no statute or ethical canon authorized Ryder to knowingly conceal the items in this manner.\textsuperscript{23} Ryder's duty to be a zealous advocate for his client did not permit him to aid Cook by taking possession of the items to purposefully hinder the government's prosecution of his client.\textsuperscript{24} The court accepted Ryder's claim that he eventually intended to return the money to the rightful owners, but said, "no attorney should ever place himself in such a position."\textsuperscript{25} Accordingly, the court found Ryder guilty of receiving stolen property and possession of illegal weapons, and suspended him from practice in federal court for eighteen months.\textsuperscript{26}

The dilemma that Richard Ryder mishandled in 1966 continues to bedevil criminal practitioners in 2011. Unlike Ryder, however, today's criminal defense lawyers have the benefit of Standard 4-4.6\textsuperscript{27} of the ABA Criminal Justice Standards for Defense Function and a host of articles that have been written in the past forty years offering guidance on how defense lawyers should deal with physical evidence that potentially incriminates one of their clients.\textsuperscript{28} Additionally, numerous courts\textsuperscript{29} and

\begin{itemize}
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id. (citing Virginian State Bar Canons of Prof'l Ethics Canons 15, 32).
  \item \textsuperscript{23} Id. at 369.
  \item \textsuperscript{24} Id. at 365.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Id. at 370. Ryder's suspension was upheld on appeal. In re Ryder, 381 F.2d 713, 714 (4th Cir. 1967) ("Ryder made himself an active participant in a criminal act, ostensibly wearing the mantle of the loyal advocate, but in reality serving as accessory after the fact.").
  \item \textsuperscript{27} The third edition of the ABA Criminal Justice Standards for Defense Function was adopted by the ABA House of Delegates on February 11, 1991. Standards for Criminal Justice: Prosecution and Defense Function, at iii (3d ed. 1993). The complete text of the current version of Standard 4-4.6 entitled "Physical Evidence" is set forth infra Appendix A.
  \item \textsuperscript{28} See, e.g., Michael B. Dashjian, People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights, 70 Calif. L. Rev. 1048 (1982); Stephanie J. Frye, Disclosure of Incriminating Physical Evidence Received from a Client: The Defense Lawyer's Dilemma, 52 U. Colo. L. Rev. 419 (1981); Jane M. Graffeo, Ethics, Law, and Loyalty: The Attorney's Duty to Turn over Incriminating Physical Evidence, 32 Stan. L. Rev. 977 (1980); David Layton, Incriminating Physical Evidence, Ethical Codes and Source Return, Prof. Law., 2002 Symposium, at 59; Norman
\end{itemize}
bar ethics committees over the years have addressed variations of the physical evidence conundrum. Finally, many professional responsibility treatises and texts now include a discussion of In re Ryder, or at least discuss the topic of counsel's ethical responsibilities with respect to incriminating physical evidence. Thus, today's practitioner ought to be better prepared and better positioned to respond effectively to the ethical quandary that tripped up Richard Ryder.

Nevertheless, while today's criminal defense lawyer may be in a somewhat better position than Ryder to avoid the suspension he suffered, variations on the physical evidence dilemma often arise in circumstances that do not allow for careful reflection and meaningful consultation. The criminal practitioner facing this dilemma for the first time will find that neither the Model Rules of Professional Conduct nor any state variations offer any clear guidance with respect to this ethical quandary. Although some state courts have rendered decisions that illustrate the complexity of this ethical conundrum, many state courts have not addressed the issue. Given the complexity of this ethical conundrum, it is not surprising that conscientious criminal defense lawyers continue to discuss the topic of counsel's ethical responsibilities with respect to incriminating physical evidence. For example, various state bar ethics committees over the years have addressed variations of the physical evidence dilemma. Finally, many professional responsibility treatises and texts now include a discussion of the physical evidence dilemma.
struggle to ascertain how to deal properly with potentially incriminating physical evidence.

On the other hand, for a few criminal defense lawyers, such complex ethical issues seemingly do not present any difficulties. Some defense lawyers are so closely aligned with their clients that they will do anything to further their client's interests. Such unbridled partisanship on behalf of one's clients leads some lawyers to engage in clearly illegal or unethical conduct. For these lawyers, neither Standard 4-4.6 nor ethical ambiguity is likely to matter.

In Richard Ryder's case, however, his consultations with others about his ethical responsibilities demonstrated a desire to act ethically. It is highly unlikely that he would have alerted others to his actions and sought advice if ethical concerns were irrelevant to him. If his primary motivation had been to conceal or destroy the evidence Ryder would not have openly transferred the money and shotgun to a safety deposit box at the same bank as Cook's own safety deposit box because he knew that the FBI had Cook under surveillance. Rather, Ryder appears to have been a conscientious lawyer faced with a tricky predicament he had not previously encountered, whose interest in zealously defending his client clouded his judgment.

Part I of this Article begins by presenting three scenarios that depict common variations on the physical evidence dilemma Ryder confronted. Part II briefly reviews the conflicting guidance lawyers must wade through before deciding how to respond to such a dilemma. As Part II discusses, a defense lawyer's options are significantly limited in some jurisdictions, because courts in those jurisdictions unequivocally require defense counsel who take possession of any physical evidence to turn it over, sua sponte, to the appropriate authorities. In many jurisdictions, however, a criminal defense lawyer possessing such an item will have to decide whether she is obligated to deliver that evidence to law enforcement authorities as demanded by most courts, bar ethics committees, and section 119 of Restatement (Third) of the Law

33. See, e.g., In re Millett, 241 P.3d 35 (Kan. 2010) (sanctioning defense counsel who conspired with client to trick the client's brother into telling a false story to aid the client's defense, and then tampering with a recording device in an attempt to cover up his misconduct); State ex rel. Okla. Bar Ass'n v. Harlton, 669 P.2d 774 (Okla. 1983) (suspending counsel for five years for willfully concealing a gun used by another to commit a crime for the express purpose of hindering the arrest and prosecution of this person).

34. Indeed, Ryder testified that he intended to return the money to the bank as soon as he could safely do so. In re Ryder, 263 F. Supp. 360, 365 (E.D. Va. 1967), aff'd per curiam, 381 F.2d 715 (4th Cir. 1967).

35. See, e.g., People v. Superior Court (Fairbank), 237 Cal. Rptr. 158, 163 (Ct. App. 1987).

36. See authorities cited supra note 29.

Governing Lawyers,\(^{38}\) or whether she can take other action as recommended by Standard 4-4.6,\(^{39}\) other courts,\(^{40}\) and some commentators.\(^{41}\) In light of this conflicting guidance, then, how ought a criminal defense lawyer respond when faced with a variation on the quandary that confounded Richard Ryder? Does Standard 4-4.6 properly balance defense counsel’s role as her client’s champion with her duties as an officer of the court? Does the return-to-the-source option articulated in Standard 4-4.6 allow counsel the flexibility needed to assist her client effectively without becoming an agent for the prosecution, or does it serve to undermine the fair administration of justice?

Part III explores these questions by first analyzing how the lawyers should have responded in the three scenarios outlined in Part I and then by examining the defense lawyer’s conduct in one of the most recent physical evidence cases, *In re Olson*.\(^{42}\) Like the Montana Commission on Practice ("Montana Commission") and the Montana Supreme Court, I believe that Olson handled the ethical dilemma he faced in a professionally appropriate manner and that he did not unlawfully obstruct justice or conceal evidence. I also agree that Standard 4-4.6 offers appropriate guidance for a lawyer confronting such a dilemma.

As Part IV concludes, however, neither the current version of Standard 4-4.6 nor its proposed replacement, Standard 4-4.8, entitled "Handling Incriminating Physical Evidence,"\(^{43}\) provides a complete set of answers to all of the questions that may arise when defense counsel must decide what to do with an item of potentially incriminating physical evidence. In fact, the revised version of Standard 4-4.6 still leaves some important questions unanswered. Moreover, given the variations in state law regarding obstructing or hindering justice and tampering or concealing evidence, no matter how this Standard is crafted it cannot provide criminal defense lawyers a safe harbor, immunizing them from criminal prosecution or disciplinary action.\(^{44}\) Nevertheless, Standard 4-4.6


\(^{40}\) Standards for Criminal Justice: Defense Function § 4-4.6 (3d ed. 1993).

\(^{41}\) See, e.g., Hitch v. Pima Cnty. Superior Court, 708 P.2d 72, 78 (Ariz. 1985) (stating that if counsel reasonably believes that evidence will not be destroyed, he may return it to the source); Commonwealth v. Stenhach, 514 A.2d 114, 123 (Pa. Super. Ct. 1986) (stating that counsel may return physical evidence to the source under certain circumstances).

\(^{42}\) 222 P.3d 632 (Mont. 2009).

\(^{43}\) Standards for Criminal Justice: Defense Function § 4-4.8 (Proposed Revisions 2009); see text of the proposed Standard infra Appendix B.

\(^{44}\) For an excellent article that discusses the interplay between criminal law and professional norms, concluding that both courts and prosecutors should be more accommodating of criminal defense lawyers acting in concert with professional norms, see Bruce A. Green, *The Criminal
strikes a more appropriate balance than does section 119 of the
Restatement or many of the courts that have confronted this troublesome
quandary.

I. THE PHYSICAL EVIDENCE DILEMMA: THREE COMMON SCENARIOS

A. THE MURDER WEAPON

Sally Smith, a public defender, has been assigned to represent Bob Brown who was recently arrested for the murder of his wife. She goes to
interview Brown in the county jail. Reluctant to talk, Brown is persuaded
by Smith that she will maintain his confidences and zealously defend him,
whatever he may or may not have done. Reassured, Brown then tells
Smith that he stabbed his wife and hid the knife in a trash dumpster near
his home. Brown also informs Smith that he knows the dumpster will be
emptied later that day, so he is confident that the weapon will not be
discovered. Should Smith or her investigator go to the dumpster and take
possession of the knife? If Smith takes possession, is she obligated to
turn over the weapon to the authorities? If she opts not to go, is she still
permitted or required to inform the authorities to ensure that the
weapon is not destroyed?

B. THE SHOES

Attorney Tom Black’s secretary informs him that a young woman
whom he represents in another matter has just arrived at his law office
wishing to discuss a possible criminal matter. The woman is escorted into
Black’s office holding a brown paper bag. After asking what he could do
to assist her, Black learns that the police had just come to the woman’s
apartment looking for her. The police told her roommate that they
wanted to talk to her about a possible shoplifting at a local department
store. The woman tearfully admits that she had shoplifted some shoes,
and that they were in the bag she was carrying. Assuming that Black
takes the case, should he take possession of the shoes or let the woman
leave with the shoes? If Black does take possession, may he return the
shoes to the store or is he required to turn them over to the police? If
Black returns them to the store may he do it anonymously?

C. THE DAMAGED CAR WITH THE BLOODY SMEAR

Art Wall comes to see attorney Sue Jones for legal advice. Wall tells
Jones that he went to a party the night before and got very intoxicated.
He recalls starting to drive home but has no memory of anything else
until waking up in his bed with a massive hangover. As he was lying in

bed, he heard on the radio that the police were looking for a white car involved in a hit-and-run accident with a pedestrian on Western Boulevard. The victim, a little girl, was in critical condition. Wall said he drove a white Honda but did not think anything more of the story until he went to his garage and noticed damage to the right front side of his car. He was positive that this damage had not been there before the party. He also noticed what appeared to be a bloody smear. Wall said he panicked at that point because, given the location of the party, he may well have been on Western and involved in the accident. When asked where the car was right now, Wall replied that it was still in his garage. He had taken the bus to Jones's office.

Assuming again that Jones takes Wall's case, should she and/or her investigator go to Wall's garage and look at the damage? Should she take photos of the damage? Should she examine or test the blood-like substance? What, if anything, will Jones be required to disclose to the authorities? What, if anything, can Jones say to Wall about the car?

II. CONFLICTING ETHICAL NORMS AND CASE LAW

A lawyer contemplating taking possession of physical evidence will find that ethical rules and case law offer conflicting guidance as to how she ought to deal with this dilemma. Counsel also must recognize that state law in her jurisdiction may limit her ability to take or retain possession of the item without turning it over to law enforcement authorities. Standard 4-4.6, however, recommends that generally defense counsel return the item to its source rather than turn it over to the authorities. This Part concludes by revisiting Ryder's dilemma and considering how in light of Standard 4-4.6 he should have dealt with his conundrum.

A. ETHICAL RULES

Like all lawyers, the criminal defense lawyer owes her clients the duties of competence, confidentiality, and loyalty.45 No one questions that defense counsel must serve the best interests of her client despite the unpopularity of her client or the heinous nature of the alleged crime. Zealous representation by a loyal advocate is critical to an adversarial system that presumes the defendant innocent and places the burden of proof squarely on the prosecution.46

45. As Standard 4-1.2(b) concisely states, "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.2(b) (3d ed. 1993).

Defense counsel’s zealous advocacy is not, however, unbounded. As the preamble to the Model Rules of Professional Conduct stresses, a lawyer must act “within the bounds of the law” in carrying out her duty to “zealously” protect and pursue a client’s “legitimate interests.”\(^4\) Obviously a lawyer cannot assist her client by acting outside the law or by pursuing illegitimate interests. The bounds of law, however, are not always easily determined.\(^4\) As the preamble acknowledges, a lawyer’s conflicting responsibilities to her client and to the legal system raise difficult issues requiring “the exercise of sensitive professional and moral judgment.”\(^4\) Indeed, in some instances, a lawyer “has duties to the tribunal, to the public, and even to adversaries that can create tension with and even trump the same advocate’s duties to advance his client’s cause.”\(^5\)

Unfortunately, the Model Rules offer little constructive guidance for resolving the dilemmas presented above. Model Rule 8.4 commands that a lawyer not commit a criminal act, engage in dishonest or deceitful conduct, or engage in conduct prejudicial to the administration of justice.\(^5\) This provision standing alone cannot reasonably be read to forbid a lawyer from taking temporary possession of an item of physical evidence absent some intent on the part of the lawyer to alter, destroy, or conceal the item from the authorities. Model Rule 3.4(a) states only that a lawyer shall not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”\(^5\) Additionally, Rule 3.4(a) prohibits a lawyer from counseling or assisting another person to do any of the acts she is forbidden to do.\(^5\) The Rule’s use of the word “unlawfully” is significant, clearly indicating that not all conduct that obstructs, alters, destroys or conceals evidence violates Rule 3.4.\(^4\) The comment to Rule 3.4 observes,

> Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.\(^5\)

---

\(^4\) Model Rules of Prof’l Conduct pmbl. ¶ 9 (2010).
\(^5\) See Green, supra note 44, at 353–71.
\(^6\) Model Rules of Prof’l Conduct pmbl. ¶ 9 (2010).
\(^8\) Model Rules of Prof’l Conduct R. 8.4 (2010).
\(^9\) Id. R. 3.4(a).
\(^10\) Id.
\(^12\) Model Rules of Prof’l Conduct R. 3.4 cmt. 2 (2010). This language was added in 2002.
Although such advice alerts criminal practitioners of the need to examine state law on the subject, it offers little guidance to lawyers who ultimately must decide how to respond ethically to a particular physical evidence dilemma.

Nor was the Model Code any better. Model Code Disciplinary Rule 7-109(A) stated that “[a] lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.” It is difficult to conclude that this duty not to suppress evidence necessarily includes an affirmative obligation to retain incriminating evidence and then produce it without any request or order. Nor is it clear under what circumstances failing to produce evidence sua sponte constitutes suppressing evidence. It is not surprising, therefore, that a lawyer in Ryder’s situation might read Disciplinary Rule 7-109(A) and fail to find the answer as to whether he could or could not take possession of the stolen money.

B. STATE STATUTES

Neither the Model Rules nor the Model Code suggests that a lawyer may disregard state law when she takes or retains possession of any physical evidence. Thus, to understand her legal obligations with respect to the possession of physical evidence, counsel must determine whether her possession of the evidence will run afoul of her jurisdiction’s laws dealing with obstruction of justice, tampering with evidence, or any other offense related to the alteration, concealment, or destruction of evidence. That determination is not necessarily straightforward. Rather, “[t]he criminal law relating to obstruction of justice is complicated, ambiguous, and subject to considerable jurisdictional variation.” In some jurisdictions, lawyers are specifically excluded from the reach of certain criminal statutes. Generally, however, state statutes do not provide an exemption for a lawyer whose handling of physical evidence may constitute altering, concealing, or destroying evidence. Some courts have construed their statutes dealing with obstruction of justice or tampering with evidence to block defense lawyers from criminal convictions or disciplinary action if counsel was acting in a good faith belief that her conduct was professionally required. That may be little

---

56. Model Code of Prof'l Responsibility DR 7-109(A) (1983); see also ABA Canons of Prof'l Ethics Canon 5 (1969).
58. See Tex. Penal Code Ann. § 37.09(b) (West 1999) (stating that the offense of tampering with or fabricating evidence does not apply if the record, document, or thing concealed is privileged); see also 18 U.S.C. § 1515(c) (2006) (“This chapter does not prohibit or punish the providing of lawful, bona fide legal representation services in connection with or anticipation of an official proceeding.”).
59. See Lefstein, supra note 28, at 918-21.
60. See In re Olson, 222 P.3d 652, 638-39 (Mont. 2009) (finding that a criminal defense lawyer who acted in accordance with the ABA Criminal Justice Standards by taking possession of items of child pornography in defending his client did not violate Montana's version of Model Rule 3.4(a) or
solace to the lawyer forced to defend herself in a criminal prosecution or disciplinary matter. Indeed, the mere threat of criminal prosecution or disciplinary sanctions may well chill some defense lawyers from taking action that a zealous advocate ought to be willing to take in defending a client.\(^6\) Although it may be good policy not to prosecute criminal defense lawyers whose conduct is consistent with that seemingly demanded by professional norms,\(^6\) a defense lawyer with a particularly contentious relationship with local prosecutors undoubtedly is at some risk.\(^6\)

C. CASE LAW

In 1966, Ryder would not have been able to look to Standard 4-4.6 for assistance. Standard 4-4.6 appeared for the first time in 1993 in the third edition of the Defense Function Standards.\(^6\) Had he searched for guidance from other cases, it is likely that the only case Ryder would have found would have been *State ex rel. Sowers v. Olwell.*\(^6\) Nothing in *Olwell* suggests that the defense lawyer acted unethically in taking possession of the knife his client used in a stabbing.\(^6\) Although the court indicated that the lawyer had a duty to turn over the knife to the authorities at some point, the court expressly found that the lawyer could withhold the knife "for a reasonable period of time."\(^6\) Moreover, the *Olwell* court agreed that even though counsel had to surrender the knife in response to the prosecutor's subpoena duces tecum, the prosecutor would not be allowed to reveal to the jury that defense counsel was the source of the knife.\(^6\)

8.4(b)-(d) or Montana's tampering with evidence statute, because there was no evidence he intended to tamper with physical evidence or to prejudice the administration of justice); Commonwealth v. Stenhach, 514 A.2d 114, 125-27 (Pa. Super. Ct. 1986).


63. Lefstein, *supra* note 28, at 919. Professor Lefstein describes an unreported case, *Commonwealth v. Schaffner*, involving the criminal prosecution of Schaffner, a criminal defense lawyer. *Id.* Following a discussion with his client, a suspect in a homicide investigation, Schaffner sent his agent to recover a knife from a city park. *Id.* The client shortly thereafter got a new lawyer and Schaffner gave the knife to the client's brother to deliver to the new lawyer. *Id.* (citing No. 81-CR-371 (Kenton Cnty. Cir. Ct. Ky. 1982 (unreported))). The knife never surfaced and Schaffner was prosecuted for violating Kentucky's tampering with physical evidence statute. *Id.* The jury acquitted Schaffner. *Id.* Despite the risk of prosecution, "no reported decision involves the imposition of criminal sanctions against a criminal defense lawyer who retains physically incriminating evidence which the lawyer was required to produce." HAZARD ET AL., *supra* note 31, at 39.


66. *Id.* at 682-83.

67. *Id.* at 684.

68. *Id.* at 685 ("Therefore, the state, when attempting to introduce such evidence at the trial, should take extreme precautions to make certain that the source of the evidence is not disclosed in the
Since the Ryder decision, a smattering of cases around the country have discussed the duty of defense counsel with respect to physical evidence given to counsel or her investigator by her client or by a third person. In most of these cases, courts have rejected the notion that either the principle of confidentiality or the attorney-client privilege shields evidence from seizure by the State simply because a client gives an evidentiary item to her attorney or to a member of the attorney's staff. Indeed, courts have consistently held that law offices could not become depositories for a client's illicit property or for incriminating items connected to that client's possible criminal conduct. Courts undoubtedly do not want to encourage clients to attempt to hide an evidentiary item by giving it to counsel, or to empower lawyers to unfairly hinder law enforcement's efforts to gain access to evidence. Fearful that a defense lawyer's retention of evidence might frustrate the search for truth, many courts have held that if a defense lawyer or her investigator takes physical possession of an item of physical evidence, she is ethically required on her own, even without a court order or subpoena, to turn over such item to the authorities.

In some states, therefore, case law clearly limits what defense counsel may do if she or her investigator takes possession of incriminating physical evidence. In California, for example, a criminal defense lawyer who takes possession of an item of physical evidence has no option but to turn the item over to the authorities. California law obligates lawyers to turn over physical evidence to the authorities regardless of whether defense counsel received the evidence from a third person or retrieved the evidence based on a privileged communication presence of the jury and prejudicial error is not committed.

For a critical look at the underpinnings of Olwell and the extent to which the duty imposed on defense counsel voluntarily to produce incriminating evidence compromises the criminal defendant's Fifth Amendment passivity rights, see Kevin Reitz, Clients, Lawyers, and the Fifth Amendment: The Need for a Projected Privilege, 41 DUKE L.J. 572 (1991).

69. See, e.g., Clutchette v. Rushen, 770 F.2d 1469, 1471–73 (9th Cir. 1985).
70. See, e.g., Olwell, 394 P.2d at 683–84.
75. See Clutchette v. Rushen, 770 F.2d 1469, 1472 (9th Cir. 1985); People v. Meredith, 631 P.2d 46, 53–54 (Cal. 1981); People v. Superior Court (Fairbank), 237 Cal. Rptr. 158, 161–63 (Ct. App. 1987); Lee, 83 Cal. Rptr. at 722. But see Evan A. Jenness, Hot Potatoes: The Perplexing Problem of Evidence of Crime, CNTR. BAR UPDATE (Mar. 2010), http://www.lacba.org/showpage.cfm?pageid=11583 (arguing that while California law requires lawyers to disclose or to deliver fruits or instrumentalities of a crime to the authorities sua sponte, ordinary materials with evidentiary significance need not be disclosed sua sponte, but only if required by a court order or subpoena).
76. Lee, 83 Cal. Rptr. at 722.
from her client. Not only must California lawyers turn over the evidence sua sponte, but whenever counsel or her investigator removes or alters evidence, counsel must also disclose the original location of the item, even though counsel learned of the location as a result of a confidential client communication. Given California case law, a California lawyer who instructs her investigator to go retrieve a clearly incriminating item will be ensuring that the prosecution gains access to evidence that may be critical in convicting her client. Such lawyering does not measure up to the competent, zealous advocacy called for by the ABA Standards.

D. Restatement (Third) of the Law Governing Lawyers

Section 119 of the Restatement (Third) of the Law Governing Lawyers also favors the mandatory disclosure or turn-over rule espoused by a majority of courts that have addressed the question of defense counsel's duties regarding items of incriminating physical evidence. Section 119, entitled "Physical Evidence of a Client Crime," states:

With respect to physical evidence of a client crime, a lawyer:

(1) may, when reasonably necessary for purposes of the representation, take possession of the evidence and retain it for the time reasonably necessary to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence; but

(2) following possession under Subsection (1), the lawyer must notify prosecuting authorities of the lawyer's possession of the evidence or turn the evidence over to them.

Although an earlier draft of section 119 allowed lawyers to return evidence to the source if that could be accomplished without destroying or altering material characteristics of the evidence, the final version of section 119 rejected such an approach. Comment c to section 119 acknowledges that some decisions have "alluded to an additional option—returning the evidence to the site from which it was taken, when that can be accomplished without destroying or altering material

---

77. Clutchette, 770 F.2d at 1472 (holding that if counsel's investigator retrieves an evidentiary item and gives it to counsel, counsel is also required to turn it over to the authorities).
78. Superior Court (Fairbank), 237 Cal. Rptr. at 162-63.
79. Meredith, 631 P.2d at 54.
80. Clutchette, 770 F.2d at 1470. The lawyer instructed his investigator to retrieve some receipts that the investigator herself later turned over to the police. Id. Although the receipts were, in fact, "the cornerstone of the prosecution's case against Clutchette," counsel's decision to move the receipts from their original location created a duty on his part to turn them over to the prosecution. Id. at 1470, 1472. The court found that the receipts were properly admissible against Clutchette. Id. at 1472-73.
83. Restatement (Third) of Law Governing Lawyers § 179(2)(a) (Tentative Draft No. 8, Mar. 21, 1997).
THE PHYSICAL EVIDENCE DILEMMA

characteristics of the evidence.\textsuperscript{85} Comment c concludes, however, that this option "will often be impossible."\textsuperscript{86} Moreover, such an option would be unavailable if counsel reasonably should know that the client or another person will intentionally alter or destroy the evidence.\textsuperscript{87} Nonetheless, neither comment c nor the Reporter’s Note to section 119 explains why this option ought not be available in those circumstances where the item can, in fact, be promptly returned to the source and counsel has no reason to believe that the item will be altered or destroyed.

E. ABA STANDARD 4-4.6

For some legal scholars who have addressed the physical evidence quandary, the return-to-the-source rule reflects a sounder, more nuanced approach.\textsuperscript{88} Standard 4-4.6 embraces an approach that seeks to balance defense counsel’s duty of loyalty to her client with her duty as an officer of the court not to hinder unfairly the prosecution’s access to evidence. Standard 4-4.6 acknowledges that, ordinarily, defense lawyers cannot simply receive and retain physical evidence related to an investigation or pending criminal charges.\textsuperscript{89} The commentary to Standard 4-4.6 echoes the oft-repeated notion that “law offices must not become depositories for physical evidence.”\textsuperscript{90} Standard 4-4.6(a) does not generally require lawyers, however, to deliver physical evidence to law enforcement authorities unless required to do so by law or a court order, or as provided in 4-4.6(d).\textsuperscript{91} Rather, Standard 4-4.6(b) states:

Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.\textsuperscript{92}

\textsuperscript{85. Id. § 119 cmt. c.}
\textsuperscript{86. Id.}
\textsuperscript{87. Id.}
\textsuperscript{88. See, e.g., Lefstein, supra note 28, at 928-29, 937-38. But see Stephen A. Saltzburg, Communications Falling Within the Attorney-Client Privilege, 66 IOWA L. REV. 811, 839-40 (1981) (arguing that the attorney-client privilege should be interpreted to preclude clients from showing documents and other physical evidence to their lawyers and then not disclosing that evidence to the government, and should also be interpreted to permit the government to compel a lawyer to testify against the client about any nondisclosed evidence counsel had in her possession).}
\textsuperscript{89. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-4.6 cmt. at 193 (3d ed. 1993).}
\textsuperscript{90. Id.}
\textsuperscript{91. Id. § 4-4.6(a) (“Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).”).}
\textsuperscript{92. Id. § 4-4.6(b).}
Thus, Standard 4-4.6 contemplates that normally defense counsel will not keep possession of incriminating evidence but will return the item of physical evidence to the location or person from whom counsel received it.93

Standard 4-4.6 recognizes, however, that at times, defense counsel may have to temporarily retain possession of physical evidence. Standard 4-4.6(c) expressly allows defense lawyers to possess physical evidence temporarily, including contraband, for a limited period of time before returning the item to the source.94 That provision reads:

Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is a reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.95

The commentary to Standard 4-4.6 provides the rationale for the Standard's markedly different approach from both Restatement section 119 as well as that demanded by the majority of courts that have addressed the physical evidence dilemma.96 Noting that other provisions of the Defense Function Standards trumpet the importance of encouraging frank communication between lawyer and client, the commentary stresses that protecting client confidences is critical if

---

93. Id. § 4-4.6 cmt. at 194 ("This rule of return to the source applies whether the source is the client, a third party, or a physical location.").
94. Id. § 4-4.6(c). Paragraph (d) deals with contraband. It currently reads:

If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

Id. § 4-4.6(d). Because (d) only requires disclosure or delivery in the situation where the item cannot be safely retained, the obvious implication is that unlike other physical evidence, counsel should generally retain contraband instead of returning it to the source. Id.

95. Id. § 4-4.6(c).

96. Most state court decisions argue that a mandatory disclosure rule is necessary to avoid defense counsel racing the police to the scene to take possession of evidence or to discourage clients from using lawyers' offices as a hiding place for evidence. 1 HAZARD & HODES, supra note 31, § 9.29, at 9-121.
THE PHYSICAL EVIDENCE DILEMMA

lawyers are to establish and maintain a good attorney-client relationship. Without such a relationship, it would be difficult for counsel to provide effective representation. The commentary to Standard 4-4.6 concludes, therefore, that mandating that defense counsel turn over all physical evidence to the police or prosecutor will discourage candid client-lawyer communication, compromise a full defense investigation, and ultimately, undermine trust between client and defense counsel.

Certainly some in the academic community question the need for strong confidentiality rules. These critics point out that there are already a number of recognized exceptions both to the attorney-client privilege and to the ethical duty of confidentiality as articulated in Model Rule 1.6. In their view, there is little evidence to suggest that the existence of such exceptions has undermined attorney-client relationships or the ability of criminal defense lawyers to represent their clients effectively. Thus, they argue, requiring lawyers to warn clients about an additional exception whereby counsel might be obligated to disclose or turn over incriminating physical evidence will not significantly affect the client’s willingness to trust his lawyer. Nor will such a warning adversely affect the client’s willingness to disclose fully all relevant facts to counsel.

Simply put, the critics are wrong. A sound attorney-client relationship is based on trust, and in my experience, absent that trust, few criminal defendants will fully disclose all relevant facts to counsel.

In the first scenario, for example, Smith’s ability as an indigent defender

97. Standards for Criminal Justice: Defense Function § 4-4.6 cmt. at 192 (3d ed. 1993) (citing §§ 4-3.1, 4-3.2, 4-3.7 cmt.).
98. Id. § 4-4.6 cmt. at 196.
100. Subin, supra note 99, at 1143-44; Zacharias, supra note 99, at 352 n.5; Simon, supra note 99, at 115.
101. Zacharias, supra note 99, at 378 ("While a preference for nondisclosure rules exists, a substantial majority of laypersons would continue to use lawyers even if secrecy were limited.").
102. A full defense of the need for strong confidentiality rules and of the importance of confidentiality to effective representation is beyond the scope of this Article. For a broader discussion of the importance of confidentiality to effective lawyering, especially in the criminal defense context, see generally Monroe H. Freedman & Abbe Smith, Understanding Lawyers' Ethics (4th ed. 2010); John B. Mitchell, Reasonable Doubts Are Where You Find Them: A Response to Professor Subin’s Position on the Criminal Lawyers’ “Different Mission”, 1 Geo. J. Legal Ethics 339 (1987).
103. My view is based on six years as a public defender in Milwaukee, Wisconsin, fourteen years as a clinical professor handling criminal cases, countless conversations with criminal defense lawyers at CLEs and conferences across the U.S., and the observations of other commentators such as Anthony Amsterdam, Monroe H. Freedman, and Abbe Smith. See, e.g., 1 Anthony G. Amsterdam, Trial Manual for the Defense of Criminal Cases § 80 (1984); Freedman & Smith, supra note 102, at 128-39. In Swidler & Berlin v. United States, the U.S. Supreme Court recognized that “a substantial number of clients and attorneys think the privilege encourages candor.” 524 U.S. 399, 409 n.4 (1998).
to gain Brown's trust depends largely on her willingness to look her client in the eye and pledge her loyalty, including her firm commitment to maintain the confidentiality of their communications. Convincing an indigent client to trust a defense lawyer provided and paid for by the State is never easy. If the defender offers a weak pledge of confidentiality, detailing a long list of exceptions that permit or require counsel to disclose her client's confidences, then it becomes virtually impossible to secure the client's trust. In practice, conscientious defense lawyers understand this reality and generally give an absolute pledge, because they believe it is the only viable way to gain the trust of most mistrustful indigent defendants. Having given that pledge and gained the client's confidence, most criminal defense lawyers are loath to betray their clients unless they have no other choice.

That does not mean that defense counsel can alter, conceal, or destroy relevant evidence. Such conduct is undoubtedly improper. Nonetheless, defense counsel's duty not to alter, conceal, or destroy evidence does not imply a corresponding duty to preserve evidence for the prosecution. Under our adversary system, defense counsel does not have an affirmative obligation to assist the prosecution in obtaining physical evidence, even though that evidence may be critical to the successful prosecution of defense counsel's client. Rather, defense counsel's role in the adversary system is to zealously advance her client's "undivided interest," not the interests of the State. As Justice White eloquently summarized:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present

---

104. Many have discussed the difficulty that indigent defenders face in overcoming the mistrust of their clients. See, e.g., Jones v. Barnes, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting).
106. Annotated Model Rules of Prof'l Conduct R. 3.4(a) & cmts. 1, 2 (2007). Sadly, not all lawyers adhere to this clear command. See, e.g., United States v. Scruggs, 549 F.2d 1097, 1099 (6th Cir. 1977) (affirming the convictions of two defense lawyers who, in the course of defending their client, accepted stolen money as a fee, lied about the money to authorities, and then burned the money).
107. See, e.g., Wemark v. State, 602 N.W.2d 810, 816-17 (Iowa 1999).
108. As Justice Powell observed, "a defense lawyer best serves the public, not acting on behalf of the state or in concert with it, but rather by advancing "the undivided interests of his client."" Polk Cnty. v. Dodson, 454 U.S. 312, 318-19 (1981) (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979)).
nothing, even if he knows what the truth is. He need not furnish any
witnesses to the police, or reveal any confidences of his client, or
furnish any other information to help the prosecution’s case. If he can
confuse a witness, even a truthful one, or make him appear at a
disadvantage, unsure or indecisive, that will be his normal course. Our
interest in not convicting the innocent permits counsel to put the State
to its proof, to put the State’s case in the worst possible light, regardless
of what he thinks or knows to be the truth. Undoubtedly there are
some limits which defense counsel must observe but more often than
not, defense counsel will cross-examine a prosecution witness, and
impeach him if he can, even if he thinks the witness is telling the truth,
just as he will attempt to destroy a witness who he thinks is lying. In
this respect, as part of our modified adversary system and as part of the
duty imposed on the most honorable defense counsel, we countenance
or require conduct which in many instances has little, if any, relation to
the search for truth.

Standard 4-4.6 reflects Justice White’s view of defense counsel’s role
in the adversary system. Although counsel may not unfairly or illegally
obstruct access to evidence, a defense lawyer certainly ought not be in
the business of knowingly aiding the prosecutor to secure evidence that
implicates her client. Accordingly, in the course of properly defending
one’s client, a criminal defense lawyer may properly take action that will
frustrate the truth and the prosecutor’s ability to win a conviction. A
lawyer may properly advise a client to refuse to speak to the police,
thereby preventing the police from securing a confession from a client
who otherwise might be willing to talk. A defense lawyer may also, for
example, properly cross-examine a witness she knows is truthful in an
effort to discredit that witness. Defense counsel may also refuse to
divulge the location of physical evidence, even though she knows that her
refusal may well prevent law enforcement authorities from ever
obtaining this evidence. Her refusal does not constitute hindering or
obstructing justice, even though defense counsel’s deliberate failure to
cooperate with law enforcement may enable her guilty client to escape
conviction.

concurring in part) (footnotes omitted).
110. See 2 HAZARD & HODES, supra note 50, § 29.12, illus. 29-5 (discussing a case where defense
counsel is ethically permitted to present truthful testimony, even though it will create a false,
misleading impression for the jury).
111. As Justice Jackson observed, “[A]ny lawyer worth his salt will tell the suspect in no uncertain
terms to make no statement to the police under any circumstances.” Watts v. Indiana, 338 U.S. 49,
59 (1949) (Jackson, J., concurring in part and dissenting in part).
112. See STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-7.6 (3d ed. 1993); Mitchell,
supra note 102, at 346-49.
113. See People v. Belge, 372 N.Y.S.2d 798, 802-03 (Onondaga Cnty. Ct. 1975), aff’d mem.,
376 N.Y.S.2d 771 (N.Y. App. Div. 1975), aff’d per curiam, 359 N.E.2d 377 (N.Y. 1976); see also
F. Ryder's Dilemma Revisited

In the situation that Ryder faced, the fact that Ryder learned that there was stolen money in the client's safety deposit box did not create a duty to disclose the whereabouts of the money to law enforcement authorities. To the contrary, Ryder was obligated to keep that information confidential. Under the circumstances, Ryder should have discussed with his client the advantages and disadvantages of attempting to negotiate a deal with the prosecutor at that point, compared to simply leaving the money where it was, and waiting to see if the authorities could secure a search warrant and develop sufficient evidence to charge and convict the defendant. Any discussion of the money itself should have been handled very carefully, including warning the defendant of the adverse consequences of destroying or continuing to conceal the evidence.

In Ryder's situation, there was absolutely no reason for him to have taken possession of the stolen money unless he was doing so because he intended to promptly return it to the owner. Standard 4-4.6 encourages counsel to take such action, but she must do so within a "reasonable period" and "in the way best designed to protect the client's interests." In the case of stolen money, it would not be reasonable to retain the money any longer than was reasonably necessary to make the arrangements to deliver the money to the bank. Standard 4-4.6 would not provide Ryder a safe harbor given his testimony that he intended to return the money only after it was safe to do so at the end of the investigation or the case against his client.

Assuming that Ryder went to the safety deposit box with the intent of taking the money and promptly delivering it back to the bank, what should he have done with the sawed-off shotgun he discovered? Given his belief that it was the weapon used in the bank robbery and with no reasonable belief that it could possibly be a piece of potentially exculpatory evidence, given his knowledge of the alleged crime, Ryder should have left the shotgun exactly where he found it. If defense counsel is unsure of her duties regarding a particular item of physical evidence, generally she should seek advice or do research before taking possession of the evidence. If the situation is such that she has no time to consult with another or do any research, then she ought to decline to take

114. See Model Rules of Prof'l Conduct R. 1.6 (2010); Restatement (Third) of Law Governing Lawyers § 60 (2000). The information was also protected by the attorney-client privilege. See People v. Meredith, 631 P.2d 46, 51-53 (Cal. 1981).
115. See Standards for Criminal Justice: Defense Function § 4-4.6(b) (3d ed. 1993); Lefstein, supra note 28, at 919-20.
117. Id. § 4-4.6(e).
III. UNPACKING THE PHYSICAL EVIDENCE SCENARIOS

This Part of the Article explores the limitations of the mandatory turnover rule by looking at the three physical evidence scenarios set forth earlier. This Part then turns to an extensive look at In re Olson, a recent Montana case involving a criminal defense lawyer accused of ethical violations for retaining physical evidence that he collected while defending his client.

A. THE BROWN CASE

In the Brown scenario noted earlier, neither Sally Smith nor her investigator should go to the dumpster to try to retrieve the weapon. Nothing in the facts of the scenario suggests that any exculpatory evidence might be preserved by securing the knife. Thus, there is no legitimate reason for Smith to take possession of the knife. Thus, there is no legitimate reason for Smith to take possession of the knife, and doing so only puts her in a complicated dilemma that may end badly for her or for her client. Consequently, Brown has nothing to gain but much to lose if Smith takes possession of the weapon.

Unfortunately, some criminal defense lawyers do not focus on their “responsibility of furthering the defendant’s interest to the fullest extent that the law and the applicable standards of professional conduct permit.” Certainly the defense lawyer in People v. Meredith lacked that focus. In that case, defense counsel learned from his client who was accused of murder that he had thrown a wallet belonging to the victim in a burn barrel behind his house. Without consulting his client, counsel instructed his investigator to retrieve the wallet. As instructed, the investigator found the wallet and gave it to counsel who promptly turned it over to the investigating detective. Defense counsel betrayed his client, but the opinion offers no explanation as to why counsel acted in total disregard of his client’s best interests. Counsel was not taking possession of the wallet to test, to examine, or to use the evidence in a manner consistent with properly defending his client. Perhaps counsel...

118. See discussion supra Part I.A.
119. See discussion supra Parts I.A–C. In all three scenarios, defense counsel should try to gain as much information as possible from her client and other sources before making any decision regarding taking possession of physical evidence. The final decision should be the client’s. See infra notes 148 & 213 and accompanying text.
120. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.2 cmt. at 122 (3d ed. 1993); see, e.g., Von Moltke v. Gillies, 332 U.S. 708, 725-26 (1948) (stating that the right to counsel demands undivided allegiance and service devoted solely to the interests of the client).
122. Id. at 49.
123. Id.
acted under the misguided belief that knowledge of the whereabouts of physical evidence required him as an officer of the court to recover the evidence in order to assist the prosecution to convict a guilty person. Or perhaps he had his investigator retrieve the evidence without fully considering the consequences of doing so and then, having taken possession of the wallet, felt he had no option but to deliver it to the authorities. Possibly, he was more interested in currying favor with local law enforcement authorities than with effectively defending his client and gave little thought to the ramifications of his actions.

As will be discussed in more detail later, sometimes circumstances make it extremely difficult for defense counsel or her investigator to recognize whether an item has evidentiary value or whether it may, in fact, be exculpatory as opposed to inculpatory. In People v. Meredith,\textsuperscript{124} Clutchette v. Rushen,\textsuperscript{125} and Ryder, however, none of the lawyers should have taken possession of the evidence involved in the case. In none of these cases was there any reasonably foreseeable possibility that taking possession of the evidence was necessary to aid in any way in counsel’s defense efforts. It was not uncertainty about the potential exculpatory nature of the evidence, but apparent confusion about their ethical responsibilities that led the lawyers in these cases astray. In the end, the lawyers in Meredith and Clutchette bungled their ethical responsibilities to the obvious detriment of both of their clients. In Ryder’s case, although he was motivated both to help his client and to act within ethical bounds, his missteps led to his own downfall.

B. RETURNING EVIDENCE TO THE OWNER OR THE SOURCE

Standard 4-4.6 was drafted to provide lawyers like Ryder the guidance necessary to enable them to successfully navigate their way through similar ethical thicket. Had Ryder reviewed Standard 4-4.6 and discussed it with the retired judge he consulted, he presumably either would have not gone to his client’s safety deposit box or would have gone to remove the stolen money for the purpose of returning it promptly to the bank that his client had robbed. Relying on 4-4.6, he would have temporarily retained the money in his office, where it still may have been seized pursuant to a search warrant or a court order.\textsuperscript{126}

\textsuperscript{124} Id.
\textsuperscript{125} 770 F.2d 1469 (9th Cir. 1985). In Clutchette, counsel had his investigator recover some incriminating receipts which the investigator turned over to the police. The court noted that counsel should not have sought to take possession of the receipts because doing so was unnecessary to the defense of the case. Id. at 1473.
\textsuperscript{126} Had he taken only the money, Ryder might still have faced disciplinary charges. Nevertheless, in that case, if his intent to return the money promptly per Standard 4-4.6 could have been corroborated, he would have been in a markedly better position to defend his actions.
Within a few days, he should have arranged to have the money delivered to the bank in a manner that best protected the identity of the client.

In the shoplifting scenario, Tom Black may want to speak with someone in the prosecutor's office about returning the shoes for an agreement not to prosecute his client. The merits of this approach may turn on the client's record, the value of the shoes, Black's relationship with the prosecutor, the policies of that prosecutor's office, and the policies of the store involved. For various reasons, that approach may be foreclosed. Even if it is viable, the client may be disinterested because of the risk or certainty of a criminal conviction. Black may then believe that his client's interest would best be served by assisting her to get the shoes back to the department store. Since the client has not simply thrown the shoes away but has sought his legal advice, she presumably would be receptive to that advice. Standard 4-4.6(c) permits Black to take possession of the shoes for the purpose of returning them to the rightful owner. It allows Black to do so even though the shoes are the fruits of a crime that the police are actively investigating. Moreover, the commentary to Standard 4-4.6 states that it is proper for the delivery to be made to the owner anonymously or through another lawyer.

If, during their discussion, the young woman says that she has changed her mind and does not want the shoes delivered to the store for fear she will be linked to the shoes despite counsel's effort, then what are Black's options? He need not confiscate the shoes merely because she brought them into his office. Even if she left them in his office while she went to an ATM or to check her parking meter, Black's temporary possession of the shoes ought not trigger a duty to retain them and then to deliver them to the authorities. Indeed, if a lawyer's brief examination of an item of physical evidence constitutes possession triggering a duty to retain and to deliver the item to the authorities, then the ability of clients to obtain effective legal advice and counsel would be unduly restricted.

Consistent with Standard 4-4.6(c), Black should be permitted to let the woman leave with the shoes absent some reasonable basis to believe she intends to destroy them. The mere possibility that she may dispose of them is not enough to warrant Black's seizure of the shoes, because that possibility exists in every case, and such a low threshold would effectively eviscerate the return-to-the-source option.

127. See discussion supra Part I.B.

128. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-4.6(d) cmt. at 196 (3d ed. 1993); see also Dean v. Dean, 607 So. 2d 494 (Fla. Dist. Ct. App. 1992) (advising defense counsel to return the proceeds of embezzlement to the authorities or to the rightful owner, but without revealing client communications about the proceeds).

129. See 1 HAZARD & HODES, supra note 31, § 9.29, at 9-124 (acknowledging that if a client is proffering physical evidence to the lawyer, the client has the right to be told what the lawyer will do with the evidence and can demand it back, even though the client may then hide the evidence).
One objection to Black’s returning the shoes to the store is that doing so may interfere with the prosecution’s ability to find the shoes in a location that connects the client with the stolen shoes. Thus, counsel’s intervention may make it more difficult, or perhaps even impossible, to secure the conviction of a guilty person, thereby undermining the fair administration of justice. Additionally, opponents worry that the return-to-the-source alternative will allow evidence to be routinely destroyed.

Admittedly, both concerns are legitimate. Black’s goal in returning the stolen shoes is not only to mitigate the consequences of the client’s offense, but also to complicate the ability of the authorities to connect his client to a crime. Yet, defense counsel’s role generally is to force the prosecution to shoulder the burden of proof, not to make that burden easier. The defendant’s decision to consult with an attorney ought not put her in a worse position by compelling counsel to hand over to the prosecution the evidence it needs to secure a conviction. “[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.” Counsel ought to be able to deliver evidence to the authorities in a manner that requires them to labor to make the requisite connection to her client rather than demanding that counsel turn over an item in a manner that essentially acknowledges her client’s involvement in a crime.

Although not all courts agree that the client’s identity ought to be protected under such circumstances, considerable authority exists to protect a defendant’s words and conduct if counsel receives physical evidence as part of a legitimate attorney-client communication. Thus, even though many courts mandate that physical evidence must be voluntarily disclosed to the authorities, those same courts usually preclude the prosecution from establishing at trial how it came into

---

130. See Layton, supra note 28, at 75; Saltzburg, supra note 88, at 838.
131. Layton, supra note 28, at 81.
132. 1 Hazard & Hodes, supra note 31, § 9.29, at 9-121 (observing that requiring lawyers to voluntarily turn over physical evidence does make the police officer’s job easier).
134. The commentary to Standard 4-4.6 states that it is proper to deliver an item anonymously or through bar counsel’s office. Standards for Criminal Justice: Defense Functions § 4-4.6 cmt. at 196 (3d ed. 1993). But see Lefstein, supra note 28, at 936-37 (rejecting the anonymous approach, and saying courts should have final say as to whether client identity should be protected).
135. See, e.g., Hughes v. Meade, 453 S.W.2d 538, 540 (Ky. 1970); see also Saltzburg, supra note 88, at 828-41 (arguing that defense lawyers should be required to disclose physical evidence, and the attorney-client privilege ought not protect the client from being identified as the source); authorities cited infra note 142.
possession of the evidence.\textsuperscript{137} Moreover, "the cases requiring voluntary
disclosure of incriminating evidence are all limited to non-testimonial
evidence, precisely the category of evidence that is \textit{not} protected by the
Fifth Amendment."\textsuperscript{138} Nonetheless, even though defense counsel should
make every effort to prevent the prosecution from informing the jury
that counsel was the source of a particular item of evidence,\textsuperscript{139} some
courts have construed the defendant's Fifth Amendment rights and the
attorney-client privilege very narrowly in the physical evidence context.\textsuperscript{140}

A criminal defendant ought not be required to sacrifice his Fifth
Amendment right as a cost of consulting with counsel or seeking
counsel's assistance in defending criminal
charges.\textsuperscript{141} Not only does a
mandatory disclosure rule run counter to the tradition of client loyalty, it
may enable the government to obtain from defense counsel voluntarily
what it cannot constitutionally obtain from a defendant by use of a
subpoena.\textsuperscript{142} Unquestionably, courts and commentators disagree as to the
precise interplay between the Fifth and Sixth Amendments and the
attorney-client privilege when dealing with physical evidence, especially
documents and writings, given to defense counsel by her client.\textsuperscript{143} Yet,
even if one accepts the constitutionality of the turn-over doctrine,
defense counsel ultimately ought not be required both to disclose
incriminating evidence and then to be compelled to lay the foundation
linking the evidence to her client.\textsuperscript{144}

\textsuperscript{137} See 1 HAZARD \& HODES, supra note 31, § 9.29, at 9-123.

\textsuperscript{138} 2 HAZARD \& HODES, supra note 50, § 30.5, at 30-14.

\textsuperscript{139} See, e.g., Anderson v. State, 297 So. 2d 871, 873 (Fla. Dist. Ct. App. 1974); People v. Nash, 313
CONDUCT R. 1.6 (2010); Lefstein, supra note 28, at 937.

.Ct. Mar. 12, 1999); see also Magill v. Superior Court, 103 Cal. Rptr. 2d 355, 384 ( Ct. App. 2001)
(orderd unpublished).

\textsuperscript{141} See Reitz, supra note 68, at 650; see also Fisher v. United States, 425 U.S. 391, 403 (1976).

\textsuperscript{142} See, e.g., Hyder v. Superior Court, 625 P.2d 316, 320 (Ariz. 1981) (stating that counsel was not
required to comply with a subpoena seeking a letter the client wrote, because the letter was protected
by the Fifth Amendment and therefore protected by the attorney-client privilege); Commonwealth v.
States, 425 U.S. 391, 411-12 (1976)) (finding that defendant was not required to produce a weapon he
allegedly possessed, because to do so would implicitly authenticate it in violation of his Fifth
Amendment rights).

\textsuperscript{143} Lefstein, supra note 28, at 901-15; see also 1 HAZARD \& HODES, supra note 31, § 9.13, at 9-51 to
9-54 (discussing the interplay between the Fifth and Sixth Amendments and the attorney-client
privilege and counsel's duty to maintain her client's confidences); Reitz, supra note 68 (exploring the
extent to which a criminal defendant's rights of testimonial passivity are adversely affected by
requiring counsel to turn over incriminating evidence she possesses).

\textsuperscript{144} 2 HAZARD \& HODES, supra note 50, § 30.5, at 30-15; see Sanford v. State, 21 S.W.3d 337, 344
(Tex. Ct. App. 2000) (reversing a conviction because testimony was admitted that defense counsel was
the source of information that led the police to the evidence linking the defendant to the crime).
Although counsel's action in returning the shoes may frustrate the state's ability to proceed with a criminal prosecution, counsel's intervention will have ensured that stolen property has been promptly returned to the rightful owner, limiting the damage done to the victim. It may well be that the lawyer's ability to forge a relationship of trust with her client caused the client to seek counsel's advice. Absent such a relationship, the client may have simply thrown the shoes away, making it very unlikely that the evidence would have been available for use against the defendant anyway. Thus, without counsel's intervention, law enforcement may well have never recovered the stolen shoes, and the store would have permanently lost its property. Moreover, regardless of counsel's efforts to make it more difficult for the authorities to connect the shoes to Black, the police may still be able to link the returned evidence to the defendant and still successfully prosecute her. On balance, therefore, the potential costs identified by the opponents of the return-to-the-source rule may well be exaggerated, and they are clearly outweighed by the damage done to the attorney-client relationship and to legitimate defense investigation by a mandatory turn-over rule.

Indeed, in Dean v. Dean, Florida's Fourth District Court of Appeal recognized that it promoted public policy to permit a lawyer to return stolen property to the police without being compelled to identify the client.\(^{145}\) Defense counsel successfully argued that under the circumstances of the case, the attorney-client privilege should extend to cover his client's identity, even though counsel was hired specifically to facilitate the return of the stolen property. As the Dean court noted:

Surely there is a public purpose served by getting stolen property in the hands of the police authorities, even if the identity of the thief is not thereby revealed. Here the consultation resulted in exactly that. Krischer advised his client to turn over the property to the state attorney or the police. A lawyer's advice can be expected to result in the return of the property if the confidentiality of the consultation is insured.\(^{146}\)

As for the claim that returning an item to the source will routinely lead to the destruction of evidence, that risk also exists whenever defense counsel fails to take possession of evidence. No one suggests that defense counsel has an affirmative obligation to seek out and gain possession of incriminating physical evidence to preserve it for the prosecution. Such an obligation would turn defense counsel into an agent of the state, acting against the best interests of her client. Instead, defense counsel is usually cautioned not to take possession of incriminating physical evidence and to warn a client of the consequences if she is to take

---

146. Id.
possession—the item will be turned over to the prosecution.\footnote{147} Properly warned, few clients are likely to give such evidence to counsel or to her investigator, and many may choose to hide or destroy the evidence.\footnote{148} The return-to-the-source rule merely puts the defendant in the same position she would have been had counsel not taken possession of evidence because of her inexperience, inadequate communication with her staff, or the possible exculpatory nature of the item.

In the vast majority of cases discussing defense counsel’s responsibilities in handling items of incriminating physical evidence, the lawyers who took possession of the evidence had absolutely no strategic or legitimate reason to do so.\footnote{149} Although a defense lawyer cannot alter, conceal, or destroy evidence, or advise another to do so, she does not have a corresponding duty to preserve incriminating evidence not in her possession or control.\footnote{150} Unquestionably, in cases in which defense counsel inexplicably took possession of incriminating evidence and then turned that evidence over to the authorities, the defendant would have been much better off had she never consulted counsel. As opposed to the worrisome image of defense counsel racing to the scene of a crime to grab evidence to keep it from the prosecution, counsel’s intervention in these cases ensured that damning evidence was delivered to the authorities—even though, but for counsel or her investigator’s actions, it might never actually have found its way into the prosecutor’s hands.\footnote{151} The best interests of these defendants were unwittingly compromised by lawyers who apparently did not appreciate their role or fully understand their ethical responsibilities.

\footnote{147} West Virginia State Bar, LEI 98-02 (Sept. 4, 1998) (“However, if the lawyer removes the potential evidence or alters the potential evidence, whether to examine and test it or for whatever reason, then the original location and condition of the evidence will likely lose the protection of the attorney-client privilege.”); see also Colorado Ethics Handbook, Formal Op. 60 (July 24, 1982).

\footnote{148} Professors Hazard and Hodes recognize that clients need to be told what will happen to the evidence if counsel retains possession, and that once warned, the client “will indeed probably take back the evidence and hide it himself.” 1 Hazard & Hodes, supra note 31, § 9.29, at 9-124.


\footnote{150} See 1 Hazard & Hodes, supra note 31, § 9-29, illus. 9-4, at 9-85 (discussing a hypothetical similar to People v. Belge and noting that lawyer duty bound to withhold information from the authorities and that “no exception even arguably applied”); see also Clutchette v. Rushen, 770 F.2d 1469, 1473 (9th Cir. 1985) (noting that the defense lawyer would have discharged his duties had he simply left evidence where it was located). Such an affirmative duty would be wholly inconsistent with the zealous advocate role espoused by Justice White in United States v. Wade, 388 U.S. 218, 256-58 (1967) (White, J., dissenting in part and concurring in part).

\footnote{151} As the court noted in Clutchette v. Rushen, had the defense counsel simply left the physical evidence in its original resting place, he could have successfully shielded his knowledge of the location of the evidence from the authorities. 770 F.2d 1469, 1472-73 (9th Cir. 1985).
C. *In re Olson*: Handling Contraband

In contrast to the lame representation provided to the defendants in cases like *Clutchette* and *Meredith*, the recent case of *In re Olson* \(^{152}\) highlights the difficulty that the physical evidence dilemma presents to the conscientious criminal defense lawyer when dealing with contraband. Olson had been a lawyer for thirteen years and was the Chief Public Defender in Cascade County when he took on the representation of Kelly Mortenson. \(^{153}\) Mortenson and her husband were charged with thirty-eight counts of sexual abuse of children following a search of their apartment in which various items of possible child pornography were seized. \(^{154}\) After interviewing his client, Olson hired an investigator, Dan Kohm, to assist him and began exploring the viability of a compulsion defense. \(^{155}\)

Within two weeks of undertaking his representation of Mortenson, Olson was contacted by Mortenson's mother who suggested that there were items in the Mortenson's apartment that Olson should view. \(^{156}\) Olson and Kohm promptly went to the apartment and collected various items that they believed "would be potentially helpful in formulating a defense," including thirteen photographs. \(^{157}\) These photographs had apparently been downloaded from the Internet and each depicted young girls posing erotically. \(^{158}\) Olson had Kohm tag and seal the items and then take them to Kohm's office, where they were securely stored. \(^{159}\) Prior to removing the items, Olson and Kohm were aware both that an eviction notice had been issued to the Mortensons and that the Great Falls Police Department had searched and released the apartment. \(^{160}\)

Although neither Olson nor Kohm believed that the items were child pornography, they recognized that others might conclude differently. \(^{161}\) Given that possibility, Kohm questioned if they could be subject to prosecution for possessing the items. Consequently, Olson conferred with Tony Gallagher, the Chief Federal Defender in Montana, who had extensive experience defending child pornography cases. \(^{162}\) Gallagher opined that the items were not pornographic, but he

---

152. 222 P.3d 632 (Mont. 2009).
153. Id. at 634.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id. at 634-35. Olson would testify that because he believed the items were not pornographic, he also did not consider the items to be contraband. Id.
162. Id. at 635. Despite his years of experience, neither Olson nor anyone in his office had ever previously handled a child pornography case. Id. at 634.
encouraged Olson, nevertheless, to seek an ex parte protective order in case someone might conclude otherwise.\textsuperscript{163} Gallagher clearly did not believe that Olson had acted unethically or unprofessionally in taking possession of the items.\textsuperscript{164} As he would subsequently testify, Gallagher believed that Olson had an obligation to gather such items in preparing his client's defense, and he did not have a duty to turn over the information at that point.\textsuperscript{165}

Olson acted on Gallagher's advice and obtained a protective order.\textsuperscript{166} He also hired a forensic psychologist to evaluate Mortenson and to advise him regarding his theory of defense.\textsuperscript{167} The psychologist not only agreed with Olson's compulsion theory, but also concurred that the photographs were not pornographic.\textsuperscript{168}

Within ten days of removing the items from his client's apartment, Olson received an email from the state prosecutor informing Olson that the case would likely be handled by federal authorities and the state charges dismissed.\textsuperscript{169} Later that month, Olson was hired to be training coordinator for the Office of the Montana State Public Defender.\textsuperscript{170} As a result of the prosecutor's email and his new job, Olson did not go forward with his defense of Mortenson.\textsuperscript{171}

Prior to leaving the Cascade County Public Defender's Office, Olson did not turn over any of the seized evidence to the authorities.\textsuperscript{172} He did seek to speak with Carl Jensen, the lawyer assigned to take over Kelly Mortenson's case, but Jensen stated he was too busy to meet and asked Olson for a memo.\textsuperscript{173} After receiving that memo, Jensen contacted Kohm and ordered him to take all of the items and deliver them to the state prosecutor.\textsuperscript{174} Remarkably, Jensen ordered the delivery of items without even reviewing any of the evidence and without discussing the matter with Olson or Mortenson.\textsuperscript{175}

The Montana Office of Disciplinary Counsel ("ODC") eventually charged Olson with violating Montana Rule of Professional Conduct 3.4, arguing that he unlawfully obstructed another party's access to evidence.

\textsuperscript{163} Id. at 635.
\textsuperscript{164} See id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id.

\textsuperscript{175} Id. The opinion notes that the evidence included "some of Kelly Mortenson's private writing," items which may well have been protected from disclosure even had the state subpoenaed them. Id. at 636.
and/or concealed documents or other material having potential evidentiary value. The ODC also complained that Olson violated Montana Rule of Professional Conduct 8.4(b), because he tampered with or fabricated physical evidence, as proscribed by Montana Code section 45-7-207. Finally, the ODC alleged that Olson violated Montana Rule of Professional Conduct 8.4(c) by virtue of his “dishonest and deceitful conduct” and Rule 8.4(d) because his conduct was “prejudicial to the administration of justice.”

The Montana Commission did not find any misconduct on Olson’s part. Rather, the Montana Commission rightfully concluded that “his conduct was a ‘text book example’ of the type of functioning expected of defense counsel.” The Commission emphasized that Olson had a clear duty to conduct a diligent investigation and found that, as part of such investigation, it may be necessary for defense counsel to take possession of evidentiary material in order to make a judgment about its possible utility in defending the client. It also stressed that Olson had a “good faith belief” that the items taken from the apartment needed to be examined, because they possibly supported a defense, included privileged material, and were not child pornography or contraband. In addition, the Montana Commission found that because Olson preserved the evidence in a safe manner and sought a protective order, there was no evidence that he intended to commit the offense of tampering with evidence.

The Montana Supreme Court adopted the recommendations of the Montana Commission and found that the ODC failed to prove that Olson violated Rule 3.4 or 8.4. It dismissed the complaint against Olson despite disagreeing with the Montana Commission’s conclusion that the disputed photographs were not examples of child pornography. In the court’s view, however, the nature of the seized evidence was not dispositive, thereby implicitly recognizing, as did the Montana

176. Id.
177. Section 45-7-207 reads:

Tampering with or fabricating physical evidence. (1) A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, the person:

(a) alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or availability in the proceeding or investigation . . . .

MONT. CODE ANN. § 45-7-207 (2009).
178. In re Olson, 222 P.3d at 636 (internal quotation marks omitted).
179. Id. at 637.
180. Id.
181. Id. (internal quotation marks omitted).
182. Id.
183. Id. at 638.
184. Id. ("[I]t is difficult for the Court to comprehend how anyone would not ‘know’ that these are examples of child pornography.").
Commission, that defense counsel may need to temporarily take possession of an incriminating item, even if it is contraband, in order to carry out her duty to prepare a defense for her client.\textsuperscript{185} Nor did the court find that defense counsel was required to deliver the item to the authorities immediately, stating that "Olson was not, at that point in the proceedings, obligated to turn the items over to the police or prosecutor by virtue of a statute or court order."\textsuperscript{186} The majority did not indicate whether Olson would have been obligated to turn over the evidence sua sponte at some point, even without a court order.\textsuperscript{187} The court did note that the Montana Commission properly relied on the ABA Criminal Justice Standards for guidance in analyzing this issue.\textsuperscript{188}

The Montana court also quickly disposed of the Rule 8.4 allegations, finding neither evidence of Olson's intent to tamper with physical evidence nor sufficient evidence to find that he was "dishonest or deceitful" or that his conduct was "prejudicial to the administration of justice."\textsuperscript{189} In so holding, the majority clearly rejected the dissent's position that Olson both violated Rule 3.4 and was guilty of concealing evidence in violation of section 45-7-207.\textsuperscript{190} In the end, the court's decision affirms the legitimacy of Olson's conduct in responding to the dilemma he confronted.

Both the Montana Commission and the Montana Supreme Court seemed to appreciate the difficulty of the predicament that Olson faced. Olson was intent on providing his client a vigorous defense. He conducted a lengthy client interview, retained an investigator and forensic expert, and began a prompt investigation to develop a viable defense theory. When alerted that possible evidence may be at his client's apartment, he promptly went there with his investigator.\textsuperscript{191} Given the nature of his possible defense and the uncertain status of the photographs, his decision to collect the evidence was professionally reasonable. His decision was clearly not designed to thwart the prosecution's access to evidence or to conceal evidence. After all, the authorities already had full access to this evidence and, for whatever reason, decided not to take possession of the items.\textsuperscript{192} Indeed, Olson

\begin{footnotes}
\item[185] \textit{Id.}
\item[186] \textit{Id.}
\item[187] The concurring opinion observed that had counsel intended to use the items at trial, he would have been prohibited from concealing contraband or physical evidence, suggesting that Olson at some point would have been required sua sponte to disclose them. \textit{Id.} at 640. (McGrath, C.J., concurring).
\item[188] \textit{Id.} at 638 (majority opinion).
\item[189] \textit{Id.} at 638–39.
\item[190] \textit{Id.} at 639.
\item[191] \textit{Id.} at 634. In going to the apartment with his investigator, Olson was better positioned to resolve questions as to whether to collect evidence or to leave it where he found it. In addition, the presence of the investigator gave him a witness to attest to the propriety of his actions.
\item[192] \textit{Id.} Nothing in the record suggests that the items were hidden in the apartment and
\end{footnotes}
knew that the police had already searched the apartment and released it.\textsuperscript{93} He had no reason to think that the police had any intention of returning to the apartment to conduct any additional searches.

Just as courts are properly concerned that law offices not become depositories for physical evidence, courts also do not want lawyers and their investigators to race the police to a possible crime scene to grab evidence and thereby interfere with the ability of law enforcement officials to investigate crimes and successfully prosecute criminals.\textsuperscript{94} Geoffrey Hazard and William Hodes argue that while the turn-over rule "run[s] counter to the tradition of client loyalty, any other rule would inevitably degenerate into a race between the police and a suspect's lawyer to be first to take possession of evidence."\textsuperscript{95} Certainly in some instances, the timing of defense counsel's actions, the nature of the items collected, the crime involved, and counsel's intent may warrant a finding that counsel violated a state's analogue to Model Rule 3.4 or a criminal tampering statute.\textsuperscript{96} In the vast majority of criminal cases, however, concerns about lawyers racing the police to the scene are completely unfounded. The vast majority of criminal defendants in this country are indigent.\textsuperscript{97} As in Olson, rarely are public defenders or appointed counsel involved in a case until charges have been issued and the police investigation already concluded.\textsuperscript{98} Moreover, too few indigent defense lawyers even have access to investigators, and many lack the time to conduct any investigation.\textsuperscript{99} Those defense lawyers who undertake an appropriate investigation as called for by Standard 4-4.1 are almost always trying to find evidence long after the events related to their clients' charges occurred.\textsuperscript{200}

Unquestionably, there are cases in which defense counsel ought not to disturb evidence that is clearly both incriminating and unrelated to any possible defense. Such a decision may well mean that such evidence never gets to the authorities. In Olson, had he not collected the items in undiscovered until Mortenson's mother located them.

\textsuperscript{93} Id.


\textsuperscript{95} I HAZARD \& HODES, supra note 31, § 9.29, at 9-121.

\textsuperscript{96} For a case in which a lawyer purposefully disposed of certain incriminating physical evidence and was prosecuted for hindering the prosecution of a felon, see State v. Werdell, 136 P.3d 17, 18 (Or. 2006). The conviction was overturned on appeal, however, because the court found that the defendant's acts did not constitute a crime, given the precise wording of Oregon's hindering statute. Id. at 21.


\textsuperscript{99} See Rodney Uphoff, Convicting the Innocent: Aberration or Systemic Problem?, 2006 WIS. L. REV. 739, 779-82.

\textsuperscript{200} STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-4.1 (3d ed. 1993).
the apartment, they would have been either thrown out with the trash, retained by the apartment owner, or possibly, turned over to the police. It is highly unlikely that the police were actually going to return to the apartment to continue to search for evidence. What is clear, however, is that had Olson decided to leave the items in the apartment, he may well have forfeited his ability to use the evidence should he have later determined that the evidence might have helped in the defense of his client.

Both the Montana court and the Montana Commission were understandably concerned that defense counsel be given some leeway in collecting potential evidence that may prove exculpatory. Obligating defense counsel to disclose immediately all evidence to the authorities will discourage zealous defense counsel from ever taking possession of an item unless it is obviously exculpatory. As the next scenario illustrates, however, items of evidence cannot always be easily identified as exculpatory or inculpatory. Penalizing a conscientious lawyer like Olson under the circumstances of this case would deter other defense lawyers from collecting potentially exculpatory material because the risk to their clients and to themselves would be too great. A mandatory disclosure rule, therefore, chills legitimate defense investigation and, ultimately, compromises the ability of defense lawyers to represent their clients effectively.

To his credit, Olson was motivated to provide his client with an effective defense. The dissent, however, paints a very different picture of Olson, claiming that he misled Judge McKittrick to secure the protective order.\footnote{In re Olson, 222 P.3d 632, 641–42 (Mont. 2009) (Nelson, J., dissenting) (claiming Olson misled Judge McKittrick to secure the protective order).} Yet, Judge McKittrick testified on Olson’s behalf at that disciplinary hearing, saying that he was an aggressive lawyer just trying to investigate his client’s case.\footnote{Id. at 635 (majority opinion).} Had Judge McKittrick felt he was purposely misled by a sharp lawyer who lied to him, he would not have hesitated to criticize Olson at the hearing. Instead, Judge McKittrick expressed his view that use of the tampering statute to expose criminal defense lawyers to criminal liability merely for investigating charges lodged against their clients would have a chilling effect on defense lawyers.\footnote{Id.}

D. The Damaged Car Scenario

Given the story that Wall related to Jones in this scenario,\footnote{See discussion supra Part I.C.} Jones would be remiss in not going to Wall’s garage or at least sending an investigator to look at Wall’s car. Standard 4-4.1 encourages defense

\footnotesize{201. In re Olson, 222 P.3d 632, 641–42 (Mont. 2009) (Nelson, J., dissenting) (claiming Olson misled Judge McKittrick at the ex parte hearing regarding where and how he obtained the photographs).  
202. Id. at 635 (majority opinion).  
203. Id.  
204. See discussion supra Part I.C.}
counsel to do a prompt investigation, and here, the circumstances demand that Jones or her investigator at least inspect the car. At this point Jones does not know if her client committed any criminal offense other than driving under the influence during the previous night. Once she inspects the car, however, Jones will be in a better position to make an informed recommendation to Wall as to how they should proceed.

Assuming that Jones, along with some member of her office, goes to the garage and inspects the damaged car, she and her client will face some difficult decisions. For example, she may wish to take photographs of the damage if she is confident that those photographs will be protected by the attorney-client privilege. Yet taking such photographs is never risk-free. For various reasons, the photographs may end up in the hands of law enforcement authorities to the detriment of the client.

The more challenging question is what, if anything, she should do with the bloody smear. Her visual inspection of the damage may be of limited help or very revealing. The nature and extent of the damage may also be instructive. Based on her experience or that of her investigator, Jones may now be in a much better position to recommend action. On the other hand, Jones may still be totally unable to decide if the damage and smear are the result of Wall hitting an animal, a person, or an object. No one can tell by visual inspection alone whether the substance is human or animal blood, or even blood at all.

If Jones has the substance tested and it is determined to be animal blood, Wall would not only be greatly relieved, but also extremely well-positioned to defend against any criminal charge. There is a significant risk, however, that testing may well reveal that the substance is, in fact, human blood. By conducting a test, therefore, counsel may be preserving very incriminating evidence that ultimately may lead to Wall’s conviction.

205. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-4.1(a) (3d ed. 1993) (“Defense counsel should conduct a prompt investigation of the circumstances of the case . . . .”).
206. Counsel should be wary of inspecting the car by herself. If Jones does not have an investigator to accompany her, then she should bring a law clerk or paralegal with her. Counsel needs to minimize the possibility that she will become a necessary witness and be forced to withdraw as counsel. See MODEL RULES OF PROF’L CONDUCT R. 3.7 (2010). On the other hand, time may be of the essence, so Jones may need to run that risk if she cannot find anyone to accompany her to view the car.
208. See infra notes 233–245 and accompanying text.
209. This scenario assumes that the accident occurred in one of the many places in the U.S. where collisions with deer or other animals are relatively common.
210. To determine if an alleged bloodstain is in fact blood, confirmatory tests must be conducted because paint, rust, ketchup, shoe polish, dye, and ink all visually resemble blood. ANDRE A. MOENSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 982–83 (5th ed. 2007).
of a serious crime. Thus, prior to making any decision to test, Jones must ascertain whether there is a sufficient amount of the substance such that she can take a sample to test without eliminating the ability of the police to test the substance should they discover the evidence. If she tests the sample and discovers it is human blood—and, therefore, possibly incriminating once compared with the victim's blood—she need not disclose the evidence sua sponte, however, as long as a sufficient quantity still exists to allow for testing should the police investigation lead to Wall's car.\textsuperscript{211} If testing will use up the entire sample, however, and then Jones decides to test anyway, she is obligated to reveal the results to the authorities even if doing so might prove incriminating.\textsuperscript{212}

The decision to test is, therefore, very risky. Indeed, because any decision regarding taking possession of physical evidence includes the risk that such evidence may have to be turned over to law enforcement, counsel should, whenever feasible, consult with her client before taking possession of such evidence. As this situation highlights, since testing the substance may exculpate Wall or supply the critical evidence that may well lead to his conviction, the decision whether to test ultimately ought to be Wall's.\textsuperscript{213} After discussing Wall's concerns and interests, Jones should give Wall her best advice as to how to proceed given the range of potential options. Unquestionably, Jones's advice must include how she will respond if the testing reveals human blood. One option that might be considered is preserving a sample of the substance and only having it tested if the situation later warrants it.\textsuperscript{214} In the end, Jones should act based on Wall's choice.

It is extremely likely that Wall will ask what he can do with the car if he does not want to take the risk of testing the substance or, in the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{211} Defense counsel arguably has not removed evidence from its location if she has neither made it more difficult for law enforcement to find the substance nor taken steps to hinder or obstruct the police from discovering it.
\item \textsuperscript{212} Counsel may not even be able to make this determination without having an expert come inspect the car.
\item \textsuperscript{213} The significance of the decision demands that the client generally have the final say on the decision to take physical possession of or to test physical evidence. For an extended look at the difficult question of whether defense counsel or the client should have the final say in important tactical decisions and the related issue of when defense counsel might override a client's wishes regarding a significant tactical decision, see generally Rodney J. Uphoff, \textit{Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices}, 68 U. Cin. L. Rev. 763 (2000).
\item \textsuperscript{214} Washington & Lee Professor Tim MacDonnell suggested this option at an ABA sponsored round table discussion of this scenario. Tim MacDonnell, Professor, Washington & Lee Univ. Sch. of Law, Remarks at the ABA Roundtable at Washington & Lee University School of Law (Nov. 19, 2010) (discussing the draft revisions to the ABA Criminal Justice Standards for Prosecution and Defense Functions). The merits of the option turn on counsel's assessment of a host of factors, including access to an expert, time pressures, counsel's relationship with local prosecutors, the diligence and competence of the local police, the interests and fears of the clients, and other facts related to the situation that counsel may have already learned.
\end{itemize}
\end{footnotesize}
interim, while they are waiting to have the substance tested. In either instance, Jones should warn Wall of the dangers of altering the condition of the car, especially since a test of the bloody smear might exculpate him. Jones should also caution Wall that altering, concealing, or destroying evidence is a crime. Even though Wall may push for more guidance as to what he can do with the car, any advice that Jones gives is potentially very problematic. Clearly she cannot suggest that Wall get the damage repaired or that he wash the car. She cannot suggest that he take the car out of the jurisdiction, given that the police may be actively looking for any registered white car. Even advising Wall to stop driving the car and to keep it in the garage could be construed as encouraging him to conceal evidence.215 In short, Jones may not be able to offer much advice regarding the car other than to repeat the admonition that altering or destroying evidence may lead to additional charges.

In some instances, defense counsel may well want to have another lawyer or a member of her staff present during this discussion to ensure that the client cannot later claim that he was advised to dispose of or destroy the evidence. Although a client may decide to take steps to get rid of certain evidence, counsel cannot in any way encourage the client to do so or suggest how it can best be accomplished. Such advice would be clearly improper and may appropriately subject the lawyer to criminal prosecution, a disciplinary proceeding, or both.216

E. Too Much or Too Little Zeal

As this damaged-car scenario highlights, defense lawyers at times face an exceptionally difficult challenge in deciding whether to take possession of or test an uncertain item of physical evidence. Few defense lawyers want to take any action that might contribute to their clients' conviction. Standard 4-4.6 rightfully acknowledges this difficulty and allows counsel to return evidentiary items to the source, thereby encouraging counsel to conduct a vigorous investigation.217 Restatement section 119, on the other hand, while recognizing the necessity of defense lawyers taking possession of evidence to examine or test the items in preparation of a defense, still insists that counsel, after a reasonable time, notify the authorities or deliver the evidence to them.218 Demanding the

215. On the other hand, if the forecast is for rain, counsel's suggestion that Wall drive the car could be interpreted as encouraging the client to alter or destroy evidence. Thus, counsel ought to advise Wall to maintain the status quo by keeping the car in the garage until she has an opportunity to explore Wall's alternatives.
218. See Restatement (Third) of Law Governing § 119 cmts. b, c (2000). Comment 2 to Model Rule of Professional Conduct 3.4 also recognizes that a lawyer can take temporary possession of incriminating physical evidence "for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence" and notes that "applicable law may require
delivery of all such evidence to law enforcement will chill defense investigation. Zealous defense lawyers will be extremely reluctant to take possession of evidentiary items at all, if doing so always requires disclosure to the authorities.\textsuperscript{219}

It is not excessive zeal, however, but too little zeal by too many criminal defense lawyers that threatens the integrity and fair administration of the criminal justice system in this country.\textsuperscript{220} Compare, for example, the efforts taken by Olson to try to marshal a defense for Kelly Mortenson with the efforts of another Montana lawyer, Eduardo Falla.\textsuperscript{221} From 1994 to 1997, as the chief contract lawyer in Flathead County, Montana, Falla never had a jury trial, filed a suppression motion, or got a case dismissed.\textsuperscript{222} Or consider the representation that Carl Jensen provided to the defendant after he took over for Olson. The record does not reflect why Jensen concluded he was obligated to immediately deliver the items to the prosecution. Perhaps he carefully researched the issue and concluded that he had a mandatory disclosure obligation. Given his failure to discuss the matter with Olson or to review the items to make an evaluation of whether any particular item warranted different treatment—for example, Mortenson’s private writings—his haste in turning over the evidence is inconsistent with the careful consideration that conscientious defense counsel ought to give to such a tough issue.

Regrettably, neither the Standards nor ethical norms appear to be a major concern for a sizable number of criminal defense lawyers around the country, handling crushing caseloads in a perfunctory manner.\textsuperscript{223} Too many defense lawyers have so many cases that they do not have the time or resources to do even basic investigation or research, let alone to wrestle with complex, time-consuming ethical dilemmas. Lawyers providing their clients ineffective assistance of counsel or, at best, marginally competent representation, may not fully appreciate their ethical responsibilities. Rarely will such lawyers take the time to do any research, consult with another lawyer, or sort through ethical nuances to determine how they should respond to a particular dilemma they face.

Thus, it is not so much the danger of defense lawyers rushing to the crime scene to disturb evidence that threatens the integrity of the

---

\textsuperscript{219} Model Rules of Prof’l Conduct R. 3.4 cmt. 2 (2010) (emphasis added).

\textsuperscript{219} Standards for Criminal Justice: Defense Function § 4-4.6 cmt. at 193 (3d ed. 1993).

\textsuperscript{220} See Freedman & Smith, supra note 102, at 125–26; Bruce A. Green, Criminal Neglect: Indigent Defense from a Legal Ethics Perspective, 52 Emory L.J. 1169, 1169–70 (2003).


\textsuperscript{222} Id.

criminal justice system, but a failure of many defense lawyers to do an adequate, timely investigation that undermines the functioning of the adversarial system. In addition, it is the failure of law enforcement authorities to adequately investigate or properly preserve evidence that poses a more serious systemic problem than that of defense lawyers destroying or concealing evidence. The Brenton Butler case highlighted in the award-winning documentary *Murder on a Sunday Morning* represents a glaring example of police shortcutting that almost led to the conviction of an innocent teenager. Fortunately for Butler, excellent defense lawyering resulted in a not guilty verdict despite the eyewitness testimony of the victim's spouse and the testimony of several police officers who claimed that Butler confessed to the murder. Months after the trial, one of Butler's lawyers learned from another client that an inmate had bragged to him about the murder, and the lawyer passed this information onto the police. The police then tested some physical evidence that they had collected initially but failed to test, because they were convinced that Butler committed the murder. This testing confirmed that the other inmate was the murderer.

Similarly, in *Arizona v. Youngblood*, the police took a sample from a victim who identified Larry Youngblood as his attacker. The sample was not properly preserved, so it could not be tested. Youngblood was convicted, and his complaint that the case should be dismissed because the police destroyed potentially exculpatory evidence eventually found its way to the U.S. Supreme Court. Citing the overwhelming evidence against him, the Supreme Court reversed the Arizona Court of Appeals and reinstated Youngblood's conviction, holding that the defendant failed to demonstrate that the loss of the evidence stemmed from any bad faith on the part of the police. Years later, however, more sophisticated DNA testing established that Youngblood was innocent and that another inmate had, in fact, victimized the young boy who had erroneously identified Youngblood.

224. The documentary was directed by Jean-Xavier DeLestrade. *Murder on a Sunday Morning* (Centre Nationale de la Cinématographie 2001).
227. See id.
231. Id. at 58.
232. Uphoff, supra note 199, at 777-79.
If the adversary system is to function properly, defense lawyers must not only have access to investigators and expert assistance, they must be able to conduct an investigation without fear that their investigation will unearth—or create—critical evidence that will ultimately lead to their client's convictions. Take, for example, Ronald Hall, a federal public defender in Kansas City who interviewed a young woman from Texas who the authorities believed had kidnapped and killed an infant she had been babysitting. During his client interview, Hall stepped out of the room and requested—and later obtained—a map of Texas. Hall returned to the interview room and had his client draw a detailed map showing where his client had buried the baby. Hall forwarded the two maps to his client's lawyers in Texas who unsuccessfully fought a subpoena demanding that the maps be turned over to the authorities. After the court ordered the maps to be disclosed, the authorities used them to find the baby's body.

The maps were neither introduced into evidence at the defendant's trial nor was any mention made of them. The victim's body, however, was a critical piece of the prosecution's case, and that evidence, the defense claimed, was secured in violation of the attorney-client privilege. Contrary to the trial court, the appellate court found that the maps were a fruit of privileged communication. Nonetheless, the court concluded that under the facts, the attorney-client privilege was "legitimately required to yield to the strong public policy interest of protecting a child from death or serious bodily injury." Although the standard proposed by the Texas Court of Criminal Appeals may be appropriate, its application in this case seems particularly strained given the "remote possibility" that the baby was alive.

Nonetheless, Henderson represents another compelling illustration of the difficulties that conscientious defense lawyers face in trying to zealously, but ethically, represent a criminal defendant. Hall unwittingly

234. Id.
235. Id.
236. Id.
237. Id. at 550.
238. Id. at 551.
239. Id.
240. Id. at 557.
241. Id.
242. Id. This decision represents a good example of the judiciary's willingness to carve out a specific and newly minted exception to a well-established general principle in order to reach what the majority feels is the appropriate result in a particularly thorny situation. For an excellent discussion of the extent to which certain judicial decisions may reflect a "reconsidering" by the court in light of fuller information, as opposed to examples of the bench and bar's different visions of the law, see generally Fred C. Zacharias, Are Evidence-Related Ethics Provisions "Law"?, 76 FORDHAM L. REV. 1315 (2007).
created the physical evidence that led to his client's demise.\footnote{Henderson received the death penalty but has not been executed. \textit{Offenders on Death Row}, Tex. Dep't Crim. Just., http://www.tdcj.state.tx.us/stat/offendersondrow.htm (last visited May. 23, 2011).} Undoubtedly, Hall believed that the map that his client drew was a confidential, privileged communication that could not be seized by the authorities. Section 119 of the Restatement certainly supports such a belief.\footnote{\textit{Restatement (Third) of Law Governing Lawyers} § 119 (2000).} Yet, once this potentially very incriminating evidence was created, Hall could not be certain that his client's other lawyers—or the courts—would share his view of the protected nature of the map.\footnote{\textit{Id.} In \textit{Morrell v. State}, 575 P.2d 1200, 1207 (Alaska 1978), defense counsel turned over to the authorities kidnapping plans written by his client that counsel had received from a third party. Although \textit{Morrell} is distinguishable because evidence received from a third party is not covered by the attorney-client privilege, the requirement that counsel disclose physical evidence could easily be misunderstood or misconstrued, as did the trial court in \textit{Henderson}, to require counsel to disclose the map drawn by the client. \textit{See Standards for Criminal Justice: Defense Function} § 4:4.6 cmt. at 194 (3d ed. 1993) (cautioning counsel not to give a written record to client or source for fear that this "secondary piece of physical evidence" could compromise the client's interests).} In the end, Hall's efforts to aid his client backfired dramatically.

IV. Standard 4-4.6: Unanswered Questions

As a number of commentators have observed, the courts and the bar have a different vision of the importance of client confidentiality.\footnote{See, e.g., Susan P. Koniak, \textit{The Law Between the Bar and the State}, 70 N.C. L. Rev. 1389, 1390 (1992).} For the bar, confidentiality must be jealously protected, because it is critical to fostering the trust that is the "hallmark" of the attorney-client relationship.\footnote{\textit{Model Rules of Prof'l Conduct} R.1.6, cmt. 2 (2010).} Although the courts acknowledge the importance of confidentiality, judges are often quite willing to find exceptions to the attorney-client privilege, to construe the privilege narrowly, or to find that the privilege has been waived in a particular case in order to minimize the negative impact of the privilege on the search for truth.\footnote{\textit{See Fred C. Zacharias, Harmonizing Privilege and Confidentiality}, 41 S. Tex. L. Rev. 69, 73–75 (1999).}

It is not surprising, then, that Standard 4-4.6 is more protective of the attorney-client relationship, more sensitive to the importance of an unencumbered defense investigation, and less concerned with facilitating the successful conviction of an accused person than are many of the judicial decisions on the subject of defense counsel's handling of physical evidence. As the commentary to the Standard observes:

If counsel were required to promptly turn over all physical evidence received from a client or some other source relating to an investigation or pending criminal charges, counsel would refrain both from receiving any such evidence or searching for it, whether or not it might help his or her client. Such a policy of restraint would unduly hamper defense
counsel’s obligation to undertake as full a factual investigation as possible.

The commentary concludes, therefore, that “to assure effective representation, defense counsel must be encouraged to acquire physical evidence if he or she believes the client’s defense might genuinely be enhanced thereby.”

Nonetheless, Standard 4-4.6 is not designed to provide a safe harbor for unscrupulous lawyers or a vehicle to enable clients to hide incriminating evidence safely with their lawyers. Rather, Standard 4-4.6 represents a thoughtful approach that seeks to balance a defense counsel’s conflicting duties to her client and her duties as an officer of the court. By rejecting the more rigid mandatory disclosure or turn-over approach, Standard 4-4.6 offers a more nuanced framework for lawyers seeking to reconcile their conflicting duties in a manner that does not harm their clients. Moreover, as Olson demonstrates, the Standard can influence courts to resolve tough cases in a way that does not punish counsel for acting in a professionally proper manner or her client for confiding in her lawyer.

An ABA Task Force reviewed the existing ABA Criminal Justice Standards for Defense Function and proposed various revisions. Those draft revisions went, in turn, to the ABA Criminal Justice Standards Committee and ultimately will go to the Council of the ABA Criminal Justice Section for debate, revision, and approval. Proposed Standard 4-4.8 is the revised version of current Standard 4-4.6. Most importantly, Standard 4-4.8 wisely retains the return-to-the-source perspective of Standard 4-4.6 and it virtually tracks the same language as Standard 4-4.6. The only significant change set forth in 4-4.8 is the inclusion of a new paragraph (a) that reads: “Defense counsel should not tamper with, conceal, or destroy physical evidence which may incriminate the client, unless authorized by the court.” Somewhat similar language can be found in the current commentary to section 4-4.6, cautioning that “[i]t is, accordingly, improper and may even be criminal conduct for a defense attorney to alter, conceal, or destroy relevant items of physical evidence that are the lawful subject of such legal process.”

250. Id.
251. Id. (“[I]t is also ordinarily improper for attorneys simply to receive and to retain such evidence. As mentioned, law offices must not become depositories for physical evidence.”).
252. See Memorandum from Bruce A. Green, Professor of Law, to Rodney J. Uphoff, Professor of Law (Feb. 2010) (on file with the Hastings Law Journal) (describing the process and soliciting the participation of academics, lawyers and judges in a series of roundtables to discuss the proposed revisions (on file with the Author); Memorandum from Bruce A. Green, Professor of Law, to Rodney J. Uphoff, Professor of Law (Dec. 2009) (on file with the Hastings Law Journal) (same).
Presumably, the proposed change is designed only to emphasize that criminal defense lawyers are not immune from the prohibition barring anyone from concealing, altering, or destroying physical evidence. Assuming that is the case, then the drafters should add the word “unlawfully” to minimize the possibility that the Standard will be misread or misconstrued to mean that merely taking temporary possession of evidence constitutes tampering or concealing. Moreover, the new commentary must reinforce this point by keeping the current language that encourages defense counsel to acquire physical evidence if she believes doing so may enhance her client’s defense, as well as the language that permits defense counsel to retain items for a reasonable period of time.

Although Standard 4-4.8 appropriately adopts Standard 4-4.6’s nuanced approach, the proposed Standard fails to address some of its flaws. The commentary to Standard 4-4.6 warns the defense attorney not to alter, conceal, or destroy relevant items of physical evidence. Yet, neither the Standard nor the commentary sufficiently cautions defense counsel and her investigator not to take possession of items that are clearly incriminating. Taking possession of an item always creates the risk that evidence will be altered and also ensures, at least temporarily, that the police will have a reduced opportunity to discover the item in a relevant location. By encouraging defense counsel only to take possession of an item that might genuinely enhance the client’s defense, the commentary implicitly recognizes that it can be difficult at times to determine the potential exculpatory nature of some evidentiary items. In those instances where the incriminating nature of an item is obvious, however, defense counsel is not justified in removing the item from its location or in temporarily possessing the item and running the risk of altering it in some fashion—by smudging incriminating fingerprints, for example.

Not only should the commentary emphasize that defense counsel and her investigator ought not handle physical evidence that is obviously
incriminating, but it also should advise criminal defense lawyers to examine carefully the criminal statutes in their jurisdiction whenever they contemplate taking possession of any physical evidence. As noted earlier, such statutes rarely offer defense lawyers a clear safe harbor from criminal prosecution even when counsel has taken possession of evidence solely for the purpose of rendering legitimate legal services. Nonetheless, counsel is in a better position to fend off disciplinary action or criminal charges if she can demonstrate a good faith belief that acquiring the evidence was reasonably related to her client’s defense.

Good prosecutors and fair-minded disciplinary boards recognize that conscientious defense lawyers must have the ability to take temporary possession of physical evidence if they are to render effective assistance of counsel to their clients. A broad reading of hindering or obstructing justice statutes would unduly chill defense lawyers from performing tasks commonly undertaken by the best, most ethical defense lawyers. Take, for example, the client who brings some business records to counsel to review to determine if he properly filed last year’s income tax return. If counsel determines that the records show the client grossly underpaid his taxes, can she lawfully retain that evidence in the client’s file or return that evidence to the client? Does such documentary evidence ever have to be disclosed to law enforcement authorities sua sponte?

Or consider a lawyer whose client wants to know if a tape that he found in his son’s closet is child pornography. Does the mere fact that counsel views the tape and deems it pornographic mean that his temporary possession of it is criminal? May counsel destroy the tape or return it to her client, or must she turn the tape over to law enforcement authorities?

As Standard 4-4.6 recognizes, counsel must be provided the latitude to review documents, tapes, and any other physical evidence so that clients can consult freely with counsel and secure proper legal services. See supra note 59 and accompanying text.

260. Neither Model Rule 3.4(a) nor state statutes on obstruction of justice or tampering draw a distinction between physical evidence and documentary evidence. Indeed, documents in the possession of a lawyer are only protected by the attorney-client privilege to the extent that the documents would be shielded by the Fifth Amendment if still in the hands of the client. See Fisher v. United States, 425 U.S. 391, 401 (1976). For a persuasive discussion of the claim that there is no principled reason to distinguish a lawyer’s duties with respect to a smoking gun document from those regarding a smoking gun, see Reitz, supra note 68, at 634–36. Many cases support Reitz’s claim. See, e.g., Clutchette v. Rushen, 770 F.2d 1469, 1472–73 (9th Cir. 1985); Morrell v. State, 575 P.2d 1200, 1207–11 (Alaska 1979); State v. Guthrie, 631 N.W.2d 190, 194 (S.D. 2001). Nonetheless, no reported decision has extended the obligation to turn over physical evidence to include ordinary business documents, even though theoretically, it should apply. HAZARD ET AL., supra note 31, at 39–41.

261. For a controversial case in which defense counsel pleaded guilty for destroying a computer that contained pornographic images, see United States v. Russell, 639 F. Supp. 2d 226 (D. Conn. 2007); Alison Leigh Cowan, Lawyer Admits Destroying Evidence of Pornography, N.Y. TIMES, Sept. 28, 2007, at B5.
representation. Clients must be able to show documents or evidence to counsel without fear that counsel’s examination and temporary possession will automatically result in counsel turning that evidence over to law enforcement authorities. Moreover, counsel must be free to temporarily possess such evidence without fear that she will be criminally prosecuted or disciplined for doing nothing more than attempting to render appropriate legal assistance. Although the ABA Criminal Justice Standards cannot guarantee defense lawyers an absolute safe harbor, Standard 4-4.6 needs to be a powerful voice urging prosecutors, disciplinary authorities, and courts not to unduly restrict the ability of criminal defense lawyers to provide their clients effective representation.

There will, of course, be times when defense counsel comes into possession of an incriminating piece of physical evidence through no fault of her own. An inexperienced law clerk may receive an item from the defendant or a family member, a bag may be left at the lawyer’s office, or counsel may receive a piece of incriminating evidence in the mail. The defense lawyer now has possession of an incriminating item that she does not want to retain because it cannot in any way aid the defense. Unless required to do so by the law in counsel’s jurisdiction or by a court order, defense counsel is directed by Standard 4-4.6(b) to return the item to the source “except as provided in paragraphs (c) and (d).”

The commentary to 4-4.6 offers useful guidance for those situations in which defense counsel cannot “promptly” return the item to the source. It properly insists that items be retained at counsel’s office in a manner that does not impede the lawful ability of the authorities to obtain the item. The commentary does not, however, direct defense counsel as to what she should do after she has retained the evidence “for a limited period of time” and cannot return the item to the source. If, for example, defense counsel does not feel she can return a murder weapon to the source—her client’s mother—because the mother unequivocally said she would throw it in a nearby lake, then how long can defense counsel retain possession of the item? What does counsel do with the item after the limited period expires? Neither Standard 4-4.6 nor the commentary answers these questions.

Standard 4-4.6’s failure to limit how long defense counsel can retain contraband is puzzling. The commentary to 4-4.6 rightfully warns that defense counsel might be “loathe” to return contraband to the source. Absent a pending case or contrary legal authority in counsel’s

262. Standards for Criminal Justice: Defense Function § 4-4.6(b) (3d ed. 1993).
263. Id. § 4-4.6 cmt. at 195.
264. Id.
265. See id.
266. Id. § 4-4.6 cmt. at 196.
jurisdiction, the commentary urges counsel to destroy the contraband. The commentary indicates that contraband that cannot be lawfully destroyed or an item whose return to the source poses an unreasonable risk of physical harm must be disclosed to law enforcement authorities or delivered to them. The commentary implies, therefore, that other items that cannot be returned to the source but need not be turned over to the authorities may be held indefinitely. That is problematic. Standard 4-4.6 ought not permit defense lawyers to hold onto items permanently, especially contraband, but rather should be revised to require that such items be delivered to the authorities in the same manner as evidence that poses an unreasonable risk of physical harm if returned to the source. Standard 4-4.6(c) directs defense counsel to disclose or deliver items in a way “best designed to protect the client’s interests.” Generally, the delivery should be made anonymously. That provides law enforcement an opportunity to use the evidence should they be able to connect it to the defendant and avoid counsel’s law office from being a repository for an incriminating item. Ideally, more jurisdictions would follow the lead of the District of Columbia Bar Association, which has been accepting incriminating items from lawyers for delivery to the police since 1983.

Finally, the commentary to Standard 4-4.6 should expressly provide that if defense counsel wants to conduct a test on an item like the bloody smear on the damaged car in the scenario above, she ought not be able to use up the entire sample, leaving nothing or an insufficient sample for the authorities to test. If there is a sufficient sample, counsel tests a portion of it, and the results are potentially incriminating, then counsel must promptly return the item to the source. Counsel should not be obligated to disclose the results to the authorities unless the testing or delay has now eliminated the possibility of prosecutorial testing should the item be discovered by the authorities. If defense counsel’s decision to test has, in fact, eliminated that possibility, then counsel should be required to disclose the results to the authorities. Given the adverse impact on the defendant by such a disclosure, counsel should involve the defendant in the decision whether to test the item.

267. Id.
268. Id.
269. Id. § 4-4.6(c).
270. The commentary specifically invites counsel to make disclosures “anonymously or through the offices of a third party, e.g., through the bar association or bar disciplinary counsel.” Id.; see also Oregon Ethics Op. 2005-105 (2005) (noting that defense counsel who takes a murder weapon from a client must turn it over to the police, but advising this should be done anonymously or through an intermediary to avoid implicating the client).
272. See discussion supra Parts I.C. & III.D.
273. Because of the significance of such a decision, the client ought to have the final say in this decision. A full discussion of that issue, however, is beyond the scope of this Article.
CONCLUSION

Standard 4-4.6 provides lawyers and the courts with a reasonably clear path through a very thorny thicket. For those who share Justice White’s vision of the role of the criminal defense lawyer,74 Standard 4-4.6 rightfully allows defense counsel to seek to minimize harm to her client, if she takes possession of any piece of incriminating evidence, by permitting counsel to return the evidence to the source instead of turning it over to the authorities. It is not surprising that most defense lawyers would prefer this approach, because they are not forced to betray their clients or to take action that is so contrary to their clients’ best interests.75 Taking disloyal action is particularly hard when counsel gained her client’s trust through an unequivocal pledge of confidentiality.

For those who envision a different, less partisan role for defense counsel,76 Standard 4-4.6 may draw fire for undervaluing the criminal defense lawyer’s responsibilities as an officer of the court to promote truth. A mandatory disclosure rule best ensures that defense lawyers do not interfere with law enforcement authorities’ access to evidence and that their law offices do not become hiding places for evidentiary items. The return-to-the-source rule provides more opportunities for tactical maneuvering by defense counsel and their clients and inevitably means that the authorities will have a more difficult time, in some cases, in securing the conviction of the guilty.

In the end, one’s view of the merits of Standard 4-4.6 is likely to turn—as is so often the case—on where one sits. For the conscientious defense lawyer, anxious to provide a zealous defense and advance the interests of her client without betraying her confidences, Standard 4-4.6 offers viable options. For prosecutors, Restatement section 119 may be a more attractive approach, because it seemingly ensures that more incriminating evidence will find its way into their possession, thereby enabling them to secure more convictions. Yet, if all criminal defense lawyers knew that taking possession of an item of physical evidence always obligated them to deliver the item to the authorities, then rarely, if ever, would defense counsel take possession of incriminating physical evidence. The evidence would be left where it was located, and it might or might not be discovered by the police. Or the lawyer would refuse to take possession of an item in the first place, frequently resulting in the evidence being discarded or destroyed. The authorities would only

274. See supra note 109 and accompanying text.
275. In my experience as a public defender and clinical teacher, variations of the physical evidence dilemma surface quite regularly. The fact that, since the adoption of Standard 4-4.6, there have been relatively few reported decisions involving lawyers’ retention of physical evidence may reflect the fact that criminal defense lawyers generally utilize the return-to-the-source option.
receive evidence from lawyers who did not understand their responsibilities and unwittingly took possession of incriminating evidence, or did so under the mistaken belief that the evidence might be exculpatory.277

Thus, it is not clear that the authorities would actually gain much evidence under a mandatory disclosure regime. On the other hand, the cost to those clients who reveal the location of incriminating evidence to counsel and then learn that their lawyers foolishly took possession of the evidence only to hand the evidence promptly over to the authorities is enormous. Such betrayals would further discourage clients from trusting their lawyers, which in turn will weaken the ability of defense lawyers to effectively represent their clients. Equally important, a mandatory disclosure regime discourages criminal defense lawyers from ever taking possession of physical evidence where the significance of the evidence is uncertain or questionable, for fear that it may be incriminating and warrant disclosure to the authorities. This may well lead to the wrongful prosecution or conviction of more innocent defendants, whose lawyers fail to take possession of or to discover evidence that ultimately would have been exculpatory. For those who, like Justice White, believe in the adversary system, such costs certainly outweigh the modest gains of a mandatory disclosure regime.

277. See 1 HAZARD & HODES, supra note 31, § 9.29, at 9-124 (acknowledging that once clients are properly warned, they will insist on being allowed to leave with the evidence).
APPENDIX A

Standard 4-4.6: Physical Evidence

(a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).

(b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraphs (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

(c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.
APPENDIX B

Standard 4-4.8: Handling Incriminating Physical Evidence

(a) Defense counsel should not tamper with, conceal, or destroy physical evidence which may incriminate the client, unless authorized by the court.

(b) Defense counsel who receives a physical item implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (e).

(c) Unless required to disclose, defense counsel should return the item to the source from whom, or place from which, defense counsel received it, except as provided below. In returning the item, defense counsel should advise the source of the possible legal consequences pertaining to possession or destruction of the item. Defense counsel should prepare a written record of these events and should maintain that record in the work-product file, but should not give the source a copy of such record.

(d) Defense counsel may receive such a physical item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item will result in its destruction; (3) reasonably fears that return of the item will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) is unable to return the item. Counsel should take steps to ensure that any testing does not alter the item or interfere with its later testing by the government. If defense counsel tests or examines the item, counsel should thereafter return it unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel does not return the item, the lawyer should not keep the item in a location with other clients' privileged materials, which could be exposed to governmental examination if a search is conducted. Rather, counsel should either retain the item in a clearly separate and independent manner, or deliver it to a third-party lawyer who will be obligated to maintain the confidences of the client and defense counsel. Defense counsel should not knowingly impede lawful efforts of law enforcement authorities to obtain the item.

(e) If the item received is contraband (that is, an item possession of which is in and of itself unlawful, such as narcotics), defense counsel may suggest that the client destroy it if there is no pending case or investigation relating to the evidence and if such destruction is clearly not in violation of any criminal statute nor obstructing any lawful law enforcement process. If such destruction is not permitted by law and defense counsel determines that the item cannot be retained, whether or
not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(f) If defense counsel discloses the location of or delivers the item to law enforcement authorities, counsel should do so in a manner that protects the client's interests.