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## What Do I Do with the Porn on My Computer: How a Lawyer Should Counsel Clients about Physical Evidence

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# “WHAT DO I DO WITH THE PORN ON MY COMPUTER?”: HOW A LAWYER SHOULD COUNSEL CLIENTS ABOUT PHYSICAL EVIDENCE

Peter A. Joy\* & Rodney J. Uphoff\*\*

## INTRODUCTION

Imagine you are a parent, and a plastic bag containing white powder falls out of your twenty-year-old child’s jacket as you move it to hang up your own jacket. Based on what you’ve seen in movies and on television, you are sure the baggie contains drugs. You confront your child, and, after she accuses you of spying on her, she tearfully admits that the bag contains cocaine. What do you do? If you are like most parents, even the most law-abiding, you are unlikely to march your child down to the nearest police station. Rather, your impulse will be to destroy the cocaine. Given your concern for your child, you are likely to take such action without even considering whether your destruction of the cocaine might be a crime.

Next, imagine that you are a third-year law student home on break, and you are using your brother’s computer because your laptop is not working. Your brother is a twenty-year-old college sophomore and he is out with friends. You open his laptop and go to Google. As you start typing an inquiry, Google suggests an inquiry that contains the word “porn” in it. You are mildly interested because you suspect that your brother may have been surfing porn sites. You are curious, so you look at his photo files and see a number of photos involving nude persons, some performing sex acts. When you see that some of the photos appear to contain images of children, you panic. It appears that your brother may be in possession of child pornography. You are disgusted and worried about your brother. What has he gotten himself into? You decide to confront your brother about what you discovered. He admits that he was surfing some porn websites and that he downloaded some images. He tells you that he will not do it again and promises to delete all the images from his laptop. You are aware, however, that even if he deletes the images, they may still exist on the hard drive. You decide that he needs to seek some legal advice.

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Now imagine that you are a lawyer, and the first client you see on Monday is the parent who found the cocaine. Instead of destroying the drugs, the parent comes to see you with the bag of cocaine and asks you what to do with it. What do you tell your client?

After that client leaves, the next clients are the law student who clerked for you this past summer and her brother.<sup>1</sup> They tell you that he has downloaded some images that they think are child porn. They come to you with the laptop. The brother says that if the images are illegal to possess, he wants to erase the files. The sister says that she told her brother that he needed legal advice before he did anything. What do you tell them?

For years, criminal defense lawyers and commentators have wrestled with thorny ethical and legal issues surrounding defense counsel's obligations with respect to handling items of physical evidence. Commentators have usually focused on the question of whether the lawyer should take possession of physical evidence of a crime as well as on counsel's obligations and options once the lawyer purposively or inadvertently comes into possession of such evidence.<sup>2</sup> After discussing what the ethics rules and the law require concerning handling physical evidence, commentators have generally cautioned lawyers not to take possession of suspected contraband or possible evidence of a crime, except in very limited situations, such as when the evidence may aid in the client's defense or its evidentiary value is ambiguous without further examination or testing of it.<sup>3</sup> Rarely, however, is much attention devoted to the issue of what advice the lawyer

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1. Before representing both the brother and sister, conflict-of-interest rules require that the lawyer reasonably believe that the lawyer will be able to represent each of them competently and diligently; that the representation not be prohibited by law; that the representation not involve the assertion of a claim by one client against the other in the same litigation or proceeding; and that both clients give informed consent, confirmed in writing. See MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR ASS'N 2015) [hereinafter MODEL RULES]. For the purposes of this Article, we assume that the lawyer in the hypothetical has resolved the potential conflict of interest and has obtained informed consent, confirmed in writing, before starting the counseling session with the brother and sister.

2. See generally Stephen Gillers, *Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence*, 63 STAN. L. REV. 813 (2011) (discussing what lawyers should do with evidence that is illegal to possess); Peter A. Joy & Kevin C. McMunigal, *Incriminating Evidence—Too Hot to Handle?*, 24 CRIM. JUST. 42 (2009) (outlining ethical and legal framework for what a lawyer should do with incriminating evidence); Norman Lefstein, *Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules*, 64 N.C. L. REV. 897 (1986) (discussing what attorneys should do with evidence that implicates their client in a crime); Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege*, 41 DUKE L.J. 572 (1992) (suggesting that lawyers should be able to assert their clients' Fifth Amendment privilege with respect to incriminating evidence); Gregory C. Sisk, *The Legal Ethics of Real Evidence: Of Child Porn on the Choirmaster's Computer and Bloody Knives Under the Stairs*, 89 WASH. L. REV. 819, 819, 822 (2014) (examining how the law of real evidence relates to "professional responsibility, attorney-client confidentiality, and the constitutional rights of criminal defendants"); Rodney J. Uphoff, *Handling Physical Evidence: Guidance Found in ABA Standard 4-4.6*, 26 CRIM. JUST. 4 (2011) (discussing handling incriminating physical evidence); Rodney J. Uphoff, *The Physical Evidence Dilemma: Does ABA Standard 4-4.6 Offer Appropriate Guidance?*, 62 HASTINGS L.J. 1177 (2011) [hereinafter Uphoff, *Physical Evidence Dilemma*].

3. The American Bar Association ("ABA") Criminal Justice Standards recommend practices for lawyers handling possible evidence of a crime. Defense Function 4-4.7 provides, in pertinent part:

should give the client if the lawyer declines to take possession of the physical evidence.<sup>4</sup>

Indeed, commentators are largely silent when it comes to the advice a lawyer may give to the client about what to do with contraband or possible evidence of a crime once the lawyer has declined to accept that evidence. Two recent articles, one by Stephen Gillers<sup>5</sup> and the other by Gregory Sisk,<sup>6</sup> highlight the extent to which scholars have stressed the pitfalls that a lawyer encounters when taking possession of evidence, without offering much guidance once the lawyer tells the client that the lawyer is not taking possession of evidence. Gillers's and Sisk's articles analyze *United States v. Russell*,<sup>7</sup> a case in which church leaders discovered child pornography on a laptop belonging to the longtime choirmaster. The *Russell* case highlights the serious consequences that a lawyer may suffer if he or she takes possession of contraband or other evidence and does not handle it properly.

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(a) *Counseling the client*: If defense counsel knows that the client possesses physical evidence that the client may not legally possess (such as contraband or stolen property) or evidence that might be used to incriminate the client, counsel should examine and comply with the law and rules of the jurisdiction on topics such as obstruction of justice, tampering with evidence, and protection for the client's confidentiality and against self-incrimination. Counsel should then competently advise the client about lawful options and obligations.

....

(d) *Receipt of physical evidence*: Defense counsel should not take possession of such physical evidence, personally or through third parties, and should advise the client not to give such evidence to defense counsel, except in circumstances in which defense counsel may lawfully take possession of the evidence. Such circumstances may include:

....

(v) when defense counsel reasonably believes that examining or testing such evidence is necessary for effective representation of the client.

ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION AND DEFENSE FUNCTION at Defense Function 4-4.7 (AM. BAR ASS'N 4th ed. 2015) [Hereinafter ABA CRIMINAL JUSTICE STANDARDS]. In addition, the *Restatement of the Law Governing Lawyers* provides, in pertinent part:

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.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 (AM. LAW INST. 2000) [hereinafter RESTATEMENT].

Uphoff analyzes these provisions, which permit a lawyer to take possession of potential evidence for the purpose of testing, and he provides some examples of when doing so is advisable to render competent client representation. See Uphoff, *Physical Evidence Dilemma*, *supra* note 2, at 1191–98.

4. See *infra* Part I.

5. Gillers, *supra* note 2.

6. Sisk, *supra* note 2.

7. 639 F. Supp. 2d 226 (D. Conn. 2007).

After the pornography was reported to the church leaders, they sealed up the laptop and asked a lawyer, Philip Russell, for his advice.<sup>8</sup> The church leaders and Russell confronted the choirmaster, Robert Tate, who admitted that he had downloaded inappropriate images.<sup>9</sup> Tate resigned from the church,<sup>10</sup> and the church leaders apparently preferred to allow him to retire quietly rather than to report him to the police.<sup>11</sup> Russell advised the church leaders that they could not continue to possess the laptop with child pornography because possession of child pornography was unlawful.<sup>12</sup> Russell then took possession of the laptop, returned to his office, and destroyed the hard drive.<sup>13</sup> Russell later stated that he did not know that there was—nor did he think there would be—a criminal investigation into the choirmaster’s possession of child pornography.<sup>14</sup>

Unbeknownst to Russell, the government had started an investigation into the choirmaster two days before the church officials and Russell confronted the choirmaster.<sup>15</sup> The choirmaster was later arrested and found with other pornography, pleaded guilty, and cooperated with prosecutors in the case against Russell.<sup>16</sup> Russell was indicted for two counts of obstruction of justice for destroying the laptop.<sup>17</sup>

After unsuccessfully bringing a motion to dismiss the indictment, Russell pleaded guilty to a single count of misprision of a felony.<sup>18</sup> Russell was sentenced to six months of home confinement and ordered to pay a \$25,000 fine.<sup>19</sup> In a subsequent disciplinary action based on his actions and conviction, Russell also received a six-month suspension from the practice of law.<sup>20</sup>

In discussing the case and Russell’s destruction of the hard drive, Gillers opines that “even when a lawyer honestly believes that destruction of potential evidence is

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8. *Id.* at 231–32.

9. *Id.* at 232.

10. *Id.*

11. Church leaders wanted to avoid embarrassment or harm to the strong national and international reputation of the choir. *See Sisk, supra* note 2, at 845.

12. *See id.* at 844–45.

13. *See id.*

14. At a change-of-plea hearing, Russell stated: “[I]t was a mistake on my part, and I’m not contesting what happened here, but I did not foresee that there was gonna be law enforcement involvement, and I apologize for that oversight, and I freely admit everything else that I am accused of.” Transcript of Change of Plea Hearing at 37, *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn. 2007) (No. 3:07-CR-00031 (AHN)); *see also Sisk, supra* note 2, at 845.

15. *See Sisk, supra* note 2, at 846.

16. *See id.* at 846–47. The former choirmaster, Robert Tate, pleaded guilty to possession of child pornography and was sentenced to five and a half years in prison in 2008, but was given credit for cooperating with prosecutors and was released from prison four years after he was sentenced. *See id.*

17. *See id.* at 847.

18. *See id.* at 847–51.

19. *See id.* at 851. Sisk points out that the felony conviction also means that Russell may not vote, hold public office, serve on a jury, or possess a firearm. *Id.*

20. *See id.*

lawful, the lawyer should not be the one to do it.”<sup>21</sup> Gillers does not indicate what a lawyer can or should say when talking to the client about destroying evidence.

Sisk does discuss what a lawyer may generally say when he or she believes that destruction of potential evidence is lawful. Sisk quotes Gillers’s reference to the *Russell* case and adds, “In other words, the lawyer might counsel the client to destroy the material but the lawyer should not undertake to do it herself.”<sup>22</sup>

Gillers also explains the difficulty that Russell faced:

The troubling aspect of Russell’s case is that for a lawyer in Russell’s position, the only safe options would have been to refrain from taking possession of the laptop or to take it and give it to the authorities despite his client’s desire not to report the choirmaster. Russell might have questioned whether he could even have left the laptop with the church. His client would then have been guilty of possessing child pornography. He could have warned his client of this risk, but a warning might have led church officials to destroy the laptop themselves. The problem becomes exponentially more complex if we imagine that the choirmaster, not the church, was Russell’s client.<sup>23</sup>

We agree with Gillers’s assessment of Russell’s safe options, but we strongly disagree that Russell should have questioned whether he could leave the laptop with the church leaders. The fact that a client brings contraband to a meeting with a lawyer does not obligate the lawyer to take possession of the contraband, even if it means the client leaves with the contraband.<sup>24</sup> And, as we will discuss below, the fact that a client may destroy evidence after being warned of the risk of continuing to possess it does not mean that a lawyer should withhold information from a client about the risks that the client faces and the options that he or she has.<sup>25</sup>

In discussing the handling of contraband in several different contexts, Gillers contemplates the lawyer coming into possession of the contraband in every scenario. Gillers does not discuss the type of situation that we believe is much more likely to occur: where a client asks the lawyer for advice about what to do with physical evidence or contraband once a lawyer declines to take possession it.

Sisk similarly does not discuss specific advice for clients when destruction of evidence may be unlawful, though he does play out a scenario where the lawyer advises the client that destruction is legitimate but leaves the destroying to the client.<sup>26</sup> Sisk does not delve into the advice itself but explains why leaving the

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21. Gillers, *supra* note 2, at 816.

22. Sisk, *supra* note 2, at 851–52.

23. Gillers, *supra* note 2, at 835–36.

24. Indeed, in most instances, a lawyer should not take possession of contraband or evidence of a client’s crime because doing so may well trigger the obligation to turn it over to the authorities. *See supra* notes 2–3 and accompanying text.

25. *See infra* Parts I, II, III.

26. *See* Sisk, *supra* note 2, at 822, 851–52.

destroying up to the client is the better option.<sup>27</sup>

Like Gillers and Sisk, we are among those commentators who have focused on advice to lawyers about handling physical evidence,<sup>28</sup> rather than on the other troubling—and certainly more likely—situations, in which clients seek advice of what to do with the contraband or other evidence of a crime that they possess. With the proliferation of laptops, tablets, and smartphones, the number of instances in which clients will be in possession of evidence that may be inculpatory, exculpatory, or both has grown exponentially. Lawyers are increasingly being asked by their clients—as in the two hypotheticals involving drugs and pornography, as well as in the *Russell* case—what they can or should do with physical evidence or other incriminating evidence on their computers, phones, or other devices.<sup>29</sup>

In this Article, we analyze ethics authorities, cases, and federal and state criminal laws to explain the limits of the legal and ethical advice that a lawyer may give. We also provide concrete examples of what a lawyer may tell a client who is seeking practical, helpful advice. Some may disagree with our advice, preferring to play it safe, withhold their honest assessment of how the law may apply, and instead tell clients only what the law is. Clients deserve more, and most lawyers are anxious to provide helpful guidance. Yet widespread uncertainty surrounds what a lawyer may tell a client without violating the law or ethics rules,<sup>30</sup> because ethics authorities and commentators have largely neglected this aspect of legal representation. This Article, therefore, fills the void in legal-ethics literature on how to be both an ethical and an effective lawyer when a client seeks straightforward advice about handling contraband or other evidence of possible crimes.

In Part I, we provide sample advice that a lawyer may give for our hypotheticals concerning drugs and pornography. Part I also explores how that advice may be tailored to other situations. In Part II, we review controlling ethics authorities to demonstrate why this advice is ethical. In Part III, we analyze our sample advice in reference to the law to demonstrate that our suggested advice does not constitute counseling illegal activity that could expose the lawyer to criminal liability under federal or state laws. Finally, in Part IV, we describe the advice that a lawyer might have given when confronted with the situation in the *Russell* case, and then we discuss what advice might be given to a client when dealing with evidence on smartphones, laptops, or other electronic devices. We conclude that in many—if

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27. *See id.* at 851–53.

28. *See generally* Joy & McMunigal, *supra* note 2; Uphoff, *Physical Evidence Dilemma*, *supra* note 2.

29. In the past ten years, we have received several inquiries from public defenders and other criminal defense lawyers about what they should advise clients who may have evidence on cellphones, tablets, laptops, or digital cameras. Several of the participants at the 2016 Criminal Justice Ethics Schmooze acknowledged that an increasing number of defense lawyers are facing this issue.

30. Our experience in presenting at continuing legal education (“CLE”) programs around the country, where we also field questions and hear comments during our presentations, indicates that many lawyers now appreciate the dangers of taking possession of contraband or physical evidence. Lawyers seem to have little idea, however, what they can or cannot say to their clients once they decline to accept possession of an evidentiary item.

not most—situations, providing clear advice to the client is superior to a lawyer's either destroying incriminating physical evidence, as Russell elected to do, or merely telling the client what the law is.

### I. ADVICE TO CLIENTS ABOUT EVIDENCE OF CRIMES

Unquestionably, there are times when a person is in possession of contraband or other evidence of crimes that, for a variety of reasons, he or she does not want to continue to possess. In such instances, most people are likely to discard or destroy the evidence without ever consulting a lawyer. Nonetheless, in some situations, such as in our two hypotheticals and in the *Russell* case, clients may seek legal advice regarding what to do with contraband or evidence of a crime, especially when continued possession is a crime.

When advising a client about contraband, such as drugs or child pornography, the lawyer is permitted to discuss the legal consequences of any proposed course of conduct with the client.<sup>31</sup> When neither the client nor the lawyer has any knowledge of a pending investigation or a reasonable expectation that there will be an investigation, this advice can—and should, in our view—include an assessment of the risks and possible legal consequences of destroying the contraband. We contend that the lawyer is also permitted to give an honest opinion about the likelihood of those legal consequences under whatever course of conduct the client might select.<sup>32</sup> Under this set of conditions, a lawyer may ethically provide advice that explains that continued possession of the contraband is a crime, that turning over the contraband to law enforcement would likely result in arrest, and, in some instances, that destruction of contraband may also be a crime. The lawyer is ethically and legally obligated to make clear to the client that the lawyer is not instructing the client to break the law.<sup>33</sup> Rather, by explaining the legal consequences of the various courses of action available to the client, the lawyer is providing to the client the information needed to make an informed choice about which course of action to follow. To give this advice competently, a lawyer must understand the applicable law and explain it to the client. The following are examples of how that advice may be given. The sample advice is presented in narrative form for purposes of illustration when, in reality, we anticipate that such advice is likely to unfold in stages, with give and take between the client and lawyer.

#### *A. Advice to a Parent After Finding Child's Cocaine*

This is a difficult situation; as I will explain, it is illegal to possess the drugs, and it may also be illegal to destroy the drugs. I cannot and will not advise you

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31. See *infra* Part II.

32. For an analysis of why this is permitted under prevailing ethics rules, see *infra* Part II.

33. See *infra* Parts II, III.



to break any law, but I am going to provide you with my honest assessment of the various options you have and the possible risks associated with those options. As I am sure you know, it is against the law to possess cocaine.<sup>34</sup> At this point, you could be arrested if the police found the cocaine on you or in your home. You should not continue to possess or conceal the cocaine.

If there is already an ongoing investigation into your child's possessing cocaine, your destruction of the cocaine may violate the applicable laws concerning destroying or tampering with evidence<sup>35</sup> or the obstruction of justice.<sup>36</sup> That assumes, however, that the prosecutor could prove that you knew or reasonably should have known about a pending investigation involving your child. Because you do not have any indication that there is any such investigation at this time, it is very unlikely that you would be successfully prosecuted if you chose to destroy the cocaine.

In addition, if you were to destroy the cocaine, then you or your child would probably not face criminal drug-possession charges. In fact, destroying the cocaine would substantially minimize the risk that you or your child would ever be charged with possession of cocaine because neither you nor your child would continue to possess the drugs.

Nevertheless, if your child got the cocaine from a police informant, then it is possible that the police may already be investigating your child. If that occurred, it is possible that your child will be prosecuted. On the other hand, if your child does not purchase or accept any other drugs, then the investigation may end. Because there is no reason to expect that there is any investigation, there is all the more reason to believe that, as long as your child does not have any other contact with illegal drugs, your destruction of the cocaine may end the risk of arrest and prosecution for you and for her. Absent a pending investigation, I do not believe that your destroying the contraband that you do not wish to possess or have your child possess is a crime such as obstruction of justice, destruction of evidence, or tampering with evidence.

There is another crime, however, called misprision of felony, which makes it a crime under federal law to conceal the commission of a felony—usually a felony committed by another person.<sup>37</sup> Like a majority of states, our state does

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34. The crime's classification as a felony or a misdemeanor and the range of punishment depend on the jurisdiction and generally on the amount of cocaine involved. The client should be told specifically the level of crime, the range of punishment, and the likely punishment if convicted of possession of the cocaine in the jurisdiction where the advice is given.

35. For a discussion of destruction-of- or tampering-with-evidence laws, see *infra* Section II.A.1.

36. A lawyer giving advice about destruction of contraband should investigate the applicable law and provide specific advice to the client based upon both state and federal statutes.

37. The federal misprision-of-felony law provides:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 4 (2012). As we discuss more fully in Section II.A.1, misprision of felony requires taking some act to conceal the underlying felony, which would include destroying or concealing evidence of the underlying crime.

not have a misprision-of-felony law.<sup>38</sup> The act of concealing requires some affirmative act, and destroying the cocaine could fit that definition. Before there can be a misprision-of-felony charge, the Government has to prove the underlying crime—here, the possession of cocaine.<sup>39</sup> If there were no cocaine, then it would be difficult to prove possession. As a result of these requirements, misprision of felony is a rarely prosecuted offense. Nonetheless, it may be illegal for you to destroy the cocaine, and, as I explained at the start, I am ethically prohibited from advising you to destroy the cocaine. It could also be a crime for me to advise you to destroy evidence. As a lawyer, I cannot counsel or encourage you to break the law.

On the other hand, it clearly is a crime for you or your daughter to continue to possess the cocaine. It would also be a crime for you to return the drugs to your daughter. And, as I mentioned earlier, it is my duty to advise you not to continue to break the law by possessing the cocaine. Bottom line, it is a crime if you keep the cocaine at your house, conceal it anywhere, or give it back to your child, and it is likely a crime if you destroy it. If you decide to destroy the cocaine and your child is caught with drugs in the future, then it is possible that your child may tell the police that you previously destroyed some of the drugs, so there may be some continuing risk to you if you destroy the drugs.

One legal alternative is to turn the cocaine over to the police or have me arrange for you to do so. The police may choose to respond favorably to your gesture and not pursue any criminal charges against you or your child. However, if you turn the drugs over to the police or the prosecutor, then you or your child could be arrested for possession of cocaine. In my opinion, turning the cocaine over to the police is likely to cause you or your child to be arrested.<sup>40</sup> At the very least, the police will want to question your child about where she got the cocaine, and such questioning will likely raise a host of issues for her.

Finally, no matter what you decide to do, if your daughter or you are approached by any law-enforcement officer and asked about drugs, then I

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As we explain in Section II.A.1, misprision-of-felony charges are rarely brought against a person who has committed the underlying felony.

38. The assumption here is that the advice is not given in one of the few states that have misprision-of-felony statutes. Only two states, Ohio and South Dakota, have misprision-of-felony statutes, *see* Gabriel D. M. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L.J. 697, 726–27 (2003), and violation of either statute is a misdemeanor. OHIO REV. CODE ANN. § 2921.22 (West 2016); S.D. CODIFIED LAWS § 22-11-12 (2017). Ohio’s law specifically exempts information that is privileged due to attorney-client privilege or that would tend to incriminate a member of the one’s immediate family. OHIO REV. CODE ANN. § 2921.22(G)(1)–(2). This exception would therefore insulate a parent who destroyed her child’s drugs. South Dakota’s law does not have such an exception. Most states do not retain common-law offenses, and most courts in states where common-law offenses still exist have rejected the common-law misprision-of-felony offense. *See* Ciociola, *supra*, at 710–21 (discussing misprision of felony as a potential common-law offense).

39. A misprision-of-felony charge is possible only if possession of the cocaine is a felony and not a misdemeanor. For a discussion of those states that treat possession of cocaine as a misdemeanor under some circumstances, *see infra* note 67.

40. The viability of this option is likely to turn on counsel’s familiarity with the policies and practices of the prosecutors in the given jurisdiction and on counsel’s relationship with individual prosecutors.

advise you to refuse to answer any question and to tell the officer you want to speak to your lawyer right away.

After receiving such advice, the client may well ask the lawyer:

If I understand you correctly, it seems like I will be committing a crime no matter what I do with the cocaine. That is, unless I turn it over to the police or have you do that. But that may mean my daughter will be charged with a crime, and I certainly don't want that to happen. So, what do you recommend, or what would you do if you were in my position?

The cautious lawyer may answer: "It is your call, and I do not feel comfortable giving any recommendation. I am not in your position, so I really cannot say what I would do. You are going to have to reach your own decision."

Few clients are likely to find this response helpful. In our view, a more helpful approach would be for the lawyer to say what the lawyer might do but to make clear that the lawyer is not expressly or implicitly telling the client what to do. For example, if the lawyer would destroy the drugs, the lawyer might say:

I am not telling you what to do, but, if I were in your situation, I probably would destroy the drugs because I wouldn't want my child caught up in the legal system. I am not telling you to do that because, as I explained, that could be or would be breaking the law, and I am not advising you to break any law.<sup>41</sup>

The lawyer might continue by adding:

Let me be clear: I am not telling you or recommending what you should do in this situation. As we've discussed, however, I believe there is a high likelihood that destroying the cocaine would be the end of this problem. In deciding what to do, you should also know that the penalties for possession of cocaine are higher under federal law than for any federal charge that might conceivably be brought against you for destruction of evidence.<sup>42</sup>

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41. We recognize that saying the lawyer would "probably" destroy the drugs is equivocal and that some lawyers may be more direct in stating that they either would or would not destroy the drugs if they were in the parent's position. We used "probably" for two reasons. First, it is difficult to know what one might do without being in the actual situation, so stating that one would "probably" do something is accurate in that it accounts for the uncertainty one has in predicting one's actions in a particular situation. Second, by saying "probably," the lawyer is not telling the client that the lawyer would definitely do something that could be a crime, such as misprision of felony. We believe that this keeps the lawyer's advice and counseling within the bounds of what is both legal and ethical.

42. The lawyer should also discuss the comparative penalties that the client faces for destruction of the cocaine versus a state possession charge. In many states, the penalties for the possession charge are more severe than those for destroying or tampering with evidence. In Missouri, for example, an offender possessing cocaine faces up to seven years for a Class D felony, while he or she faces a maximum sentence of only four years if convicted of tampering with evidence, a Class E felony. *See* MO. REV. STAT. § 558.011 (2016). In other states, however, destruction of or tampering with evidence may be more serious than mere possession. In Kentucky, for example, a first-time offender possessing cocaine faces a maximum of three years, KY. REV. STAT. ANN. § 218A.1415 (West

As we discuss in depth later, the lawyer who engages in this type of counseling—telling the client what the lawyer might do in a similar situation—comes close to, but does not cross, the line between providing ethical, legal counseling and rendering advice that is unethical, illegal, or both. That line is crossed if the lawyer tells the client to destroy the evidence or if a reasonable person would conclude that the lawyer is encouraging the client to do so.<sup>43</sup> The lawyer should not tell a client what the lawyer would do in the client's situation if the lawyer believes that a reasonable person or that specific client would interpret that information as advising or encouraging the client to commit a crime.

### *B. Advice Concerning Child Pornography on Brother's Laptop*

The second hypothetical, involving the sister's finding child pornography on her brother's laptop, would also start with the lawyer's explaining that she is ethically and legally prohibited from advising the siblings to break any law. The lawyer would then explain that she is not advising them to break any law, but rather providing them with her honest opinion of the various options they have and the possible risks associated with those options.<sup>44</sup> The counseling session would proceed much the same way as the above advice to the parent about her child's drugs, though with some important variations.

First, the lawyer should explain that, if the brother continues to possess the laptop with the child pornography at his parents' home, he will possibly be exposing his sister and his parents to arrest for constructive possession of child pornography. The explanation should go like this:

If you continue to possess the laptop with the child pornography, then you could be arrested if the police found you with the laptop. In addition, if the police seize the laptop at your parents' home, then your parents or even your sister might be arrested for being in constructive possession of child pornography.<sup>45</sup> Moreover, if you (referring to the sister) return the laptop to your brother and he is subsequently arrested, then you might be charged with delivery of child pornography if he tells the police you took his computer to a lawyer and then gave it back to him. I must warn you that neither of you should continue to possess or conceal child pornography.

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2017), while one found guilty of tampering with evidence faces a maximum of five years, KY. REV. STAT. ANN. § 524.100.

43. See *infra* Section II.A.2. We recognize that telling a client what a lawyer thinks the lawyer may do in the client's place is not something that every defense lawyer will feel comfortable doing. A lawyer should not do so unless the lawyer feels comfortable that a reasonable person would not believe the lawyer was thereby advising or encouraging the client to commit a crime. This judgment call will depend on the client, the particular facts, and the client-attorney relationship.

44. For a discussion of the possible conflict of interest in representing both the brother and sister in this situation, see *supra* note 1.

45. The police might have probable cause to arrest others in the house depending on what the brother says regarding access of others to the computer.

Next, the lawyer should explain that prosecuting persons with child pornography is a high priority and that simply deleting the images does not remove them from the laptop's hard drive. The explanation should go like this:

The arrest and prosecution of persons with child pornography is a high priority for the government on both the state and federal levels.<sup>46</sup> That means that law-enforcement agents are constantly trying to determine who has child pornography. The problem is that you do not know if the police or other law-enforcement officials are currently investigating you. You both told me that you are worried that someone will discover the child pornography on the laptop and that you have considered deleting the images. If there is a pending investigation into your (referring to the brother) downloading child pornography, then any attempt to destroy the pornography may violate applicable laws concerning attempted destruction of evidence and so subject you to criminal prosecution.<sup>47</sup>

I say "attempted" destruction because deleting the images on the laptop may not destroy proof that they were on the laptop. When a file is deleted, it remains on the hard drive.<sup>48</sup> Even files that were not downloaded but rather simply viewed are automatically downloaded to "cache files" or "temporary Internet files."<sup>49</sup> While there is some special software and other devices that claim to wipe clean a hard drive,<sup>50</sup> the only other way to completely remove the images is to destroy the hard drive. If you (referring to the brother) have viewed images or downloaded images on any other computer, then those hard drives would also contain the images.

If there isn't a current investigation involving you (referring to the brother) and the hard drive is destroyed, then that should end your risk of being charged with possession of child pornography if you do not view or download child pornography again. Because neither of you have any reason to expect that there is any ongoing investigation, it may be reasonably safe to assume that, as long as you do not continue to view or download child pornography, completely erasing or destroying the hard drives on every computer where you have viewed the images may end the risk of arrest and prosecution.

Third, the lawyer should explain that misprision of felony normally does not apply when a person destroys evidence of his or her own crime. In the pornography

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46. See *Child Porn Prosecutions Soaring in U.S.*, DENVER POST (Feb. 5, 2011, 3:16 PM), <https://perma.cc/W2PN-JS85> (explaining the dramatic increase in state and federal prosecutions of child pornography).

47. A lawyer giving advice about destruction of contraband should investigate the applicable law and provide specific advice to the client based upon the law concerning possible obstruction-of-justice or misprision-of-felony charges in the jurisdiction.

48. It remains on the hard drive in what is known as "the unallocated space." *Georgia Sex Offense Law: What Constitutes "Possession" of Child Pornography?*, BRODY LAW FIRM, <https://perma.cc/287G-H4L5> (last visited Feb. 20, 2017). This means that the user does not see the file but the file can still be accessed using forensic software such as EnCase. *Id.*

49. *Id.*

50. There is both software and hardware that can completely erase a hard drive. Tim Fisher, *How to Completely Erase a Hard Drive*, LIFEWIRE (Oct. 19, 2016), <https://perma.cc/SES3-ZFYR>.

hypothetical, that means that the brother may be able to destroy the hard drive without violating the misprision-of-felony law, even though it may be a crime for the sister to do so. Here is an example of that advice:

Absent a pending investigation, I do not believe that your destruction (referring to the brother) of the contraband that you do not wish to possess is a crime such as obstruction of justice. There is another crime, however, called misprision of felony, which makes it a crime under federal law to conceal the commission of a felony.<sup>51</sup> In our state, there is no such crime.<sup>52</sup> The act of concealing a crime requires some affirmative act, and destroying all the images or the hard drive could fit that definition. To be convicted of this crime, however, most legal authority also requires that one conceal the crime of another, so it is unlikely that this possible charge could be brought against you (referring to the brother) if you destroy the images or the hard drive yourself.

Also, before there can be a misprision-of-felony charge and conviction, the Government has to prove the underlying crime—here, the possession of child pornography. If there is no child pornography, then it will be difficult to prove possession. Because of these requirements, misprision of felony is rarely prosecuted as an offense. Based on these considerations, it seems unlikely that it would be illegal for you (referring to the brother) to destroy the pornographic images by erasing or destroying the hard drive.

Because I cannot be 100% certain that it is not a crime, I am ethically and legally prohibited from telling you to destroy the images or counseling you to have anyone else do so. On the other hand, your continued possession of the laptop with the pornographic images is definitely a crime, and I advise both of you not to continue to possess any images of child pornography. Indeed, under federal law, it is a more serious crime with more significant penalties to possess child pornography than to destroy evidence of a crime. The same is true under state law in our state.<sup>53</sup>

Finally, if you (referring to the sister) decide to turn the laptop over to the police, then your brother will be arrested for possession of child pornography, and you may also face possible arrest for possession of child pornography. In my opinion, turning the laptop with the images over to the police would cause your brother and possibly you to be caught up in the criminal-justice system. It may also affect your ability to be admitted to practice law.

After receiving such advice, these clients are likely to ask the lawyer what he or she would do. As we discussed previously, the lawyer may state what he or she would do but must emphasize that he or she is not advising the clients

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51. For a discussion of misprision of felony under federal and state laws, see *supra* notes 37–38; *infra* Section II.A.1.

52. For a discussion of how few states have misprision-of-felony laws, see *supra* note 38.

53. For a discussion of the comparative penalties for destruction of evidence and for the underlying offense, see *supra* note 42.

to break any law.<sup>54</sup>

### C. Giving Meaningful Advice to Clients

As the foregoing discussion of the advice to clients in the hypotheticals indicates, advice concerning evidence of a crime requires a lawyer to be well versed in the applicable law. If, for example, the evidence is a small amount of marijuana, the possession of which would be only a misdemeanor under state law, then there is no need to counsel the client concerning misprision of felony. Similarly, there is no need to explore a possible state charge of misprision of felony if the state is among the majority of jurisdictions that do not have such a law.

As Sisk concludes in his article discussing the *Russell* case, there may be some situations where a lawyer may be able to simply advise a client to destroy the contraband because doing so would not violate any applicable law.<sup>55</sup> Before giving such advice, the lawyer must carefully review all possible federal and state criminal offenses that may apply.

In giving the advice in all these situations, we recommend that the lawyer document what is said in case the client should discuss the conversation with someone else and mischaracterize the lawyer's advice. Depending on the client, the lawyer may wish to have a law clerk, paralegal, or investigator present to witness what is said to the client. Some lawyers may wish to record the discussion, but raising the issue of recording the session with the client may well interfere with the client-lawyer relationship.<sup>56</sup> Given the significance of the client's decision and the real possibility that a client's decision to destroy contraband or other evidence of a crime will not be well received should law enforcement later learn of the destruction, counsel should take appropriate measures to memorialize the advice proffered to the client by writing a detailed memo to the file that accurately reflects the advice. As in any situation, the advice that a lawyer gives should be candid, but the lawyer should also be sufficiently confident in the advice that he or she would be willing to stand by it should it be made public.

The practical implication of the suggested advice in both hypotheticals is that both the parent and the brother may well destroy the contraband. Some may say

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54. See *supra* notes 41–43 and accompanying text.

55. See Sisk, *supra* note 2, at 851–53.

56. Asking to tape a session may alarm some clients and undermine the trust that counsel is seeking to build. A lawyer in most states may secretly record the conversation, since federal law and more than two-thirds of state statutes permit taping conversations if one party consents. See PETER A. JOY & KEVIN C. McMUNIGAL, *DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS* 106 (2009). Secret taping, however, raises ethical concerns. The ABA Model Rules of Professional Conduct do not explicitly address covert recording by a lawyer, but secret recordings, especially of clients, implicate several ethical standards—for example, under Model Rule 8.4, it is “professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” MODEL RULES, *supra* note 1, r. 8.4. A lawyer also owes a duty of loyalty to a client, which weighs against secretly recording advice to a client, and state advisory ethics opinions are divided over whether it is unethical for a lawyer to secretly record a conversation with a client. See JOY & McMUNIGAL, *supra*, at 109.

that, by discussing the law and risks in detail with the clients, the lawyer in the two hypotheticals is improperly counseling each client to destroy the contraband. Others may say that, in fact, the lawyer has unethically assisted both clients in engaging in criminal conduct. We disagree. The next section demonstrates that the advice given to each client is ethical.

## II. THE ETHICS OF ADVISING CLIENTS ABOUT CONTRABAND

There are several places to which a lawyer would turn to understand the ethical limitations on advising a client about handling contraband: principally, the jurisdiction's rules of ethics and cases interpreting the rules, the ABA Criminal Justice Standards, and the *Restatement of the Law Governing Lawyers*. As we will demonstrate, these sources provide general guidance, but they do not provide a clear roadmap to lawyers on the advice they may give a client who is contemplating what to do with contraband or other evidence of a crime.

### A. Rules of Professional Conduct

The Model Rules of Professional Conduct,<sup>57</sup> upon which virtually all jurisdictions' ethics rules are modeled,<sup>58</sup> draws an important distinction in describing how a lawyer is to counsel a client. Model Rule 1.2(d) states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.<sup>59</sup>

As Comment 9 to Model Rule 1.2 explains:

[This] does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a *critical distinction between* presenting an *analysis of legal aspects* of questionable conduct *and recommending the means by which a crime or fraud might be committed* with impunity.<sup>60</sup>

The original draft version of Model Rule 1.2(d) did not contain the language that a lawyer could "discuss the legal consequences of any proposed course of conduct

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57. MODEL RULES, *supra* note 1. The ABA adopted the Model Rules in 1983, and the Model Rules replaced the Model Code of Professional Responsibility, which the ABA adopted in 1969. STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 4 (2013).

58. Today, all states except California and the District of Columbia have adopted the number system and most of the language in the Model Rules. GILLERS ET AL., *supra* note 57, at 3.

59. MODEL RULES, *supra* note 1, r. 1.2(d).

60. *Id.* r. 1.2 cmt. 9 (emphasis added).



with a client.”<sup>61</sup> This language was added through an amendment, and proponents believed it was necessary because “the Rule as [originally] proposed . . . could operate to characterize the mere discussion of illegal conduct as assistance in a client’s crime or fraud, and thus inhibit effective counsel.”<sup>62</sup> Thus, the intent of the final version of Model Rule 1.2(d) is clear—counsel may ethically discuss the possible legal consequences of illegal conduct.

Furthermore, Model Rule 2.1, which defines the role of a lawyer as advisor, requires that a lawyer “render candid advice” and states that, in doing so, “a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”<sup>63</sup> A comment to this rule also states that “[a] client is entitled to straightforward advice expressing the lawyer’s honest assessment.”<sup>64</sup> We believe that, read together, Model Rules 1.2 and 2.1 require a lawyer counseling clients about evidence of crimes to explain various options and likely consequences.

Advising a client of the possible consequences of violating the law, even when a client may use that information to decide to violate the law, was the subject of the Blue Law Cases hypotheticals, which Monroe Freedman used to illustrate how Model Rule 1.2 gave lawyers a degree of discretion in advising clients.<sup>65</sup> In a series of three hypotheticals, Freedman illustrated how information about the law, possible penalties, and the law’s likely interpretation could lead some clients to engage in a cost–benefit analysis of lawbreaking. Freedman concludes that, even when a client may use the advice in deciding that the risk of violating the law was worth the benefit, Model Rule 1.2 permits the lawyer to give advice provided the lawyer does not “*counsel a client to engage in unlawful conduct.*”<sup>66</sup> Thus, the first question to consider is whether destroying contraband or other evidence is a crime;

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61. AM. BAR ASS’N CTR. FOR PROF’L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982–2005 at 44 (2006).

62. *Id.*

63. MODEL RULES, *supra* note 1, r. 2.1.

64. *Id.* r. 2.1 cmt. 1.

65. The original version of the Blue Law Cases appeared in 1990, in the first edition of a book about lawyer ethics by Monroe Freedman. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 143–47 (1st ed. 1990). The analysis was updated in later editions. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS § 7.01 (4th ed. 2010). In the Blue Law Cases, a lawyer is advising a client who owns a chain of liquor stores near the state line, in a state that recently passed a law that does not permit the stores to stay open on Sundays. *Id.* In the adjoining state, there are also several liquor stores, and that state’s law permits them to stay open. *Id.* The client is incurring a loss of business and wants to know what the penalty would be if the client’s stores stayed open on Sunday. *Id.* In Blue Law Case #3, the lawyer goes beyond giving the client an honest opinion of the likely consequences of violating the law and provides the client with an estimate of the odds of convincing the state supreme court that “each violation” of the law in the penalty clause refers to each Sunday a store remains open and does not refer to each sale made on a Sunday. *Id.* In the first edition, Freedman states that Model Rule 1.2 permits the lawyer “to propose that the client violate the law in order to determine what the penalty clause means.” FREEDMAN, *supra*, at 146. Thus, in later editions of his book, it appears that Freedman backed off this claim concerning the extent to which Model Rule 1.2 would permit such advice.

66. FREEDMAN & SMITH, *supra* note 65, § 7.02.

if so, the next question is whether apprising a client of the law, possible penalties, and how the law would likely be interpreted constitutes counseling a client to engage in breaking the law.

*1. Is Destruction of Contraband a Crime?*

Is destroying contraband, such as illegal drugs, a crime? In our first hypothetical, it may be a crime for the parent to destroy the child's drugs because possessing some drugs, like cocaine, is a felony in most states<sup>67</sup> and under federal law.<sup>68</sup> Thus, destroying a drug such as cocaine could fit the definition of a "misprision of felony" under federal law<sup>69</sup> and under state law, if the state is among the minority of states that have a misprision-of-felony statute or recognize misprision of felony as a common-law offense.<sup>70</sup>

The federal statute provides that one having knowledge of a felony who "conceals and does not as soon as possible make known" the commission of a felony may be guilty of misprision of felony.<sup>71</sup> Courts have interpreted this as requiring a defendant to engage in an affirmative act to conceal the underlying felony, "such as making a false statement to an investigator, seeking to divert the attention of the police, harboring a felon, or retrieving and secreting proceeds of evidence of a crime."<sup>72</sup>

In order to bring and successfully prosecute a misprision-of-felony charge, "the government must prove that the principal perpetrator actually committed the offense the defendant is alleged to have covered up."<sup>73</sup> That means that, in our first hypothetical, the Government would have to prove that the parent's child has possessed the cocaine, which would be difficult if in fact the cocaine were destroyed and neither the child nor the parent ever admitted to possessing or destroying the cocaine. In the second hypothetical—involving the possible destruction of the images or the hard drive containing child pornography—whether it is a felony under state or federal law would likely depend on who destroys the evidence.

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67. Some states treat the possession of small amounts of cocaine as a misdemeanor. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-3401 to 13-3423, 36-2501 to 36-2553 (2016) (stating that courts can treat the possession of a small amount of cocaine as a misdemeanor if the defendant has no prior felony convictions); DEL. CODE ANN. tit. 16, §§ 4701–4799 (2017) (stating that possession, use, or consumption of cocaine is a misdemeanor); MD. CODE ANN., CRIM. LAW § 5-601 (West 2017) (treating possession of cocaine as misdemeanor); 35 PA. CONS. STAT. §§ 780-101 to 780-144 (2016) (treating first-time possession of cocaine as misdemeanor). A majority of states, however, treat possession of cocaine as a felony. *See generally* 50 State Statutory Surveys: Illegal Drugs: Cocaine (2007), 0030 SURVEYS 1 (Westlaw).

68. 21 U.S.C. § 844 (2012).

69. 18 U.S.C. § 4 (2012); *see supra* note 37.

70. Only two states have misprision-of-felony statutes, and only a handful more recognize misprision of felony as a common-law offense. *See supra* note 38.

71. 18 U.S.C. § 4.

72. Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 23 (2005) (footnotes omitted).

73. *Id.* (citing *United States v. Davila*, 698 F.2d 715, 717 (5th Cir. 1983)).

In the case in which Philip Russell destroyed the choirmaster's laptop with child pornography, Russell pleaded guilty to the federal misprision-of-felony offense, which requires knowledge of the commission of a felony by another, failure to report the felony to the authorities, and taking steps to conceal the crime.<sup>74</sup> All these elements were met in the *Russell* case and would also be met in the hypothetical if the sister, instead of the brother, destroyed the hard drive of her brother's laptop.

In our second hypothetical, however, the lawyer is also counseling the brother, who possessed the pornography. It is unlikely that the brother's destruction of his own contraband would be a crime because, except for "a handful of cases holding that a defendant who takes affirmative steps to conceal his own crime has committed misprision, the usual rule has been that such prosecutions are barred by the Fifth Amendment's prohibition on compelled self-incrimination."<sup>75</sup>

Thus, the likelihood of charges for misprision of felony is slim in either hypothetical, where there is the destruction of contraband that is illegal to possess, even though the destruction of the contraband could be a crime in itself. One commentator, Stuart Green, notes that, in analyzing prosecutions for covering up crimes, misprision of felony "appears to be the least favored of all the criminal offenses being considered here."<sup>76</sup> Nevertheless, while the brother faces virtually no risk of being successfully prosecuted, his sister and the parent face some risk should the sister destroy the pornography or the parent destroy the cocaine.

Other federal and state laws also prohibit tampering with, destroying, altering, or concealing evidence.<sup>77</sup> There is a great deal of variation in what these laws prohibit,<sup>78</sup> but most statutes follow the Model Penal Code and require the Government to prove that one has destroyed, altered, or concealed material while "believing that an official proceeding or investigation is pending or about to be instituted."<sup>79</sup> So, in our hypotheticals, neither the parent, nor the law student, nor the brother would likely be subject to tampering or destruction-of-evidence

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74. See 18 U.S.C. § 4. The Sixth Circuit has held that this requires proving four elements beyond a reasonable doubt: "(1) the principal committed and completed the felony alleged; (2) the defendant had knowledge of the fact; (3) the defendant failed to notify the authorities; and (4) the defendant took affirmative steps to conceal the crime of the principal." *United States v. Goldberg*, 862 F.2d 101, 104 (6th Cir. 1988). "Mere knowledge of the commission of the felony or failure to report the felony, standing alone, is insufficient to support a conviction for a misprision of a felony." *Id.* Unquestionably, a lawyer who learns from a client about that client's commission of a crime has no duty report such crime to the authorities. To the contrary, that information is protected by the attorney-client privilege and the lawyer's ethical duty to maintain a client's confidences. Only when a lawyer takes affirmative steps to conceal the client's crime may counsel be subject to prosecution for misprision of felony.

75. Green, *supra* note 72, at 23–24 (footnotes omitted).

76. *Id.* at 24.

77. See Joy & McMunigal, *supra* note 2, at 43.

78. See *id.*

79. MODEL PENAL CODE § 241.6 (AM. LAW INST. 1985); see RESTATEMENT, *supra* note 3, § 118 cmt. c ("Obstruction of justice and similar statutes generally apply only when an official proceeding is ongoing or imminent.").

statutes, unless the prosecution could prove they knew that there was a pending investigation or that an investigation, into either the daughter's cocaine possession or the brother's possession of child pornography, was likely.<sup>80</sup> Given the great variation in the statutes, though, it is extremely important for a lawyer to be familiar with all the applicable laws in the jurisdiction in which the advice is given.

2. *Is Advising a Client of the Law, Penalties, and Risk of Enforcement in Destroying Contraband "Counseling a Client to Engage in Unlawful Conduct"?*

A leading ethics treatise, *The Law of Lawyering*, states that the dividing line between permissible and impermissible counseling of clients in Model Rule 1.2(d) is this: "while a lawyer may discuss, explain, and predict the consequences of proposed conduct that would constitute crime or fraud, a lawyer may not counsel or assist in such conduct."<sup>81</sup> As the treatise notes, it is difficult to apply this standard or to answer the question: "At what point does conveying accurate information about legal matters turn into encouragement or facilitation?"<sup>82</sup>

Although we agree that the standard is not easy to apply, there are some critical distinctions that can be drawn. The most significant factor is what the lawyer tells the client. If the lawyer encourages or instructs the client to destroy the evidence when doing so would be a crime, then the lawyer has clearly crossed the line and has violated Rule 1.2.

Another key factor is the lawyer's intent. Is the lawyer providing an analysis of a gray area of the law, explaining where the line between legal and illegal conduct is drawn so that the client can make an informed choice how to proceed? Or is the lawyer providing advice to a client while knowing that the client intends to put that advice to improper use? The first lawyer has not violated Model Rule 1.2(d), but the second lawyer has.

Another distinction is the nature of the advice. Is the lawyer providing advice about the law in order to facilitate, command, or assist the client in some possible future crime? Or is the lawyer providing advice to help the client understand options concerning a possible past or continuing crime? If the client is seeking advice about a future crime, such as how best to engage surreptitiously in money laundering, then a lawyer should be very wary of providing information that may assist the client with intended criminal activity. Doing so may well turn the lawyer into an accomplice.<sup>83</sup> If the lawyer is providing advice about a past or continuing crime, such as illegal possession of drugs or pornography, as in our hypotheticals,

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80. For a more detailed discussion of the potentially applicable laws, see *infra* Part III.

81. GEOFFREY C. HAZARD, JR., ET AL., *THE LAW OF LAWYERING* § 6.22 (4th ed. 2014) (hereinafter *THE LAW OF LAWYERING*).

82. *Id.*

83. In a landmark decision, Judge Learned Hand explained that the doctrine of complicity developed in common law so that one who "procured, counselled, commanded or abetted" a felony may be held liable for the

then the lawyer has a legitimate counseling function to perform, even if there is no official proceeding and no investigation is pending or imminent. In such a situation, *The Law of Lawyering* provides that the “lawyer may discuss, explain, and predict the consequences of proposed conduct that would constitute crime or fraud,” provided the lawyer does “not counsel or assist in such conduct.”<sup>84</sup> In addition, Model Rule 2.1 requires a lawyer to “render candid advice” in counseling a client,<sup>85</sup> which, a comment to the rule explains, should include the lawyer’s honest assessment of the client’s situation.<sup>86</sup>

*The Law of Lawyering* poses a hypothetical concerning a lawyer who is advising a mother whose son has been charged with murder about what to do with a bloody shirt that she believes her son was wearing on the night of the crime.<sup>87</sup> The treatise states that the lawyer “must walk the fine line between describing the criminal law accurately and implicitly urging its violation.”<sup>88</sup> The treatise continues that the lawyer “should state what [the mother’s] duty is, but then go on to give his opinion of the risks of noncompliance. The ultimate decision whether to comply or risk discovery and prosecution would then remain with [the mother].”<sup>89</sup>

Another comment to Rule 1.2 provides some insight into what constitutes “assisting” a client, with the example of the lawyer’s “drafting or delivering documents that the lawyer knows are fraudulent or . . . suggesting how the wrongdoing might be concealed.”<sup>90</sup> The plain language of this comment appears to require an affirmative act to further the client’s course of action, or the creation of a plan to conceal the client’s wrongdoing. Exactly what “suggesting” means is unclear, though it is coupled with the example of the lawyer’s taking some concrete action, so it appears to require more than a lawyer’s advising a client of risks of various courses of action. The primary dictionary definitions for “suggest” include “to mention or imply as a possibility,” “to propose as desirable or fitting,” and “to offer for consideration or as a hypothesis.”<sup>91</sup>

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felony. *United States v. Peoni*, 100 F.2d 401, 402 (2d. Cir. 1938); *see infra* note 153 (discussing the Model Penal Code definition of accomplice and the federal law defining an accessory to a crime).

84. *THE LAW OF LAWYERING*, *supra* note 81, § 6.22.

85. *MODEL RULES*, *supra* note 1, r. 2.1.

86. “A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.” *Id.* r. 2.1 cmt. 1.

87. *THE LAW OF LAWYERING*, *supra* note 81, § 33.17. In the hypothetical, the lawyer is representing the son when the mother comes to see the lawyer with the shirt. The authors note that, before giving the mother any advice, the lawyer would have to obtain informed consent of both the son and the mother. *Id.*

88. *Id.*

89. *Id.*

90. *MODEL RULES*, *supra* note 1, r. 1.2 cmt. 10.

91. *Suggest*, *MERRIAM-WEBSTER*, <https://perma.cc/2FGS-N9S7> (last visited Feb. 1, 2017).

Joel Newman characterizes Model Rule 1.2(d) as “a rule of syntax”<sup>92</sup> and states that, in applying the rule, “everything turns upon the exact words used.”<sup>93</sup> He explains:

If the lawyer uses the command form of the verb, then the lawyer is “counseling or assisting a criminal act” and should be disciplined. On the other hand, if the lawyer merely answers the client’s questions, then she is “discussing the consequences of a proposed course of conduct” and should not be disciplined.<sup>94</sup>

Our review of disciplinary cases considering alleged violations of state versions of Model Rule 1.2(d) found eighty-seven cases over approximately twenty years, and the vast majority of those cases deal with lawyers who assisted clients in violating the law or committing fraud.<sup>95</sup> Examples include assisting a former client in breaking into his spouse’s home during pending divorce litigation,<sup>96</sup> soliciting a potential client to engage in sex in exchange for legal services,<sup>97</sup> representing a client in court proceedings when the lawyer knew the client was using a false identity,<sup>98</sup> preparing bogus checks for a client to endorse for deposit into the lawyer’s account as payment for attorney fees,<sup>99</sup> facilitating the forgery of estate documents by a child of a client who was not competent to execute the documents,<sup>100</sup> and having a client sign fraudulent promissory notes and false certifications during divorce proceedings that the lawyer then filed with the court.<sup>101</sup>

In the few cases dealing with advising or counseling clients, disciplinary authorities have found violations of state versions of Model Rule 1.2(d) only when the lawyer directs or recommends that the client violate the law or commit fraud. Examples include counseling clients on how to unlawfully avoid tax consequences of interest earned from settlement monies,<sup>102</sup> asking a client to obtain cocaine for the lawyer,<sup>103</sup> counseling a client to offer real estate to witnesses in exchange for false testimony,<sup>104</sup> advising a client to disclose confidential court records in violation of a state statute,<sup>105</sup> advising a client to commit credit-card fraud to pay

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92. Joel S. Newman, *Legal Advice Toward Illegal Ends*, 28 U. RICH. L. REV. 287, 290 (1994).

93. *Id.* at 297.

94. *Id.* at 290–91.

95. Using Westlaw, we found eighty-seven professional-discipline cases involving allegations of a violation of the states’ versions of Model Rule 1.2(d) between July 8, 1986, and February 2, 2016.

96. *See* Attorney Grievance Comm’n of Maryland v. Protokowicz, 619 A.2d 100, 102 (Md. 1993).

97. *See In re Hollander*, 27 N.E.3d 278, 279 (Ind. 2015) (stating that an undercover police officer posed as a potential client when the respondent solicited her for sex in exchange for legal services).

98. *See In re Laterzo*, 908 N.E.2d 610, 610 (Ind. 2009).

99. *See In re Feeley*, 581 S.E.2d 487, 487–88 (S.C. 2003).

100. *See* Attorney Grievance Comm’n of Maryland v. Coppola, 19 A.3d 431, 438–39 (Md. 2011).

101. *See In re Lowell*, 14 A.D.3d 41, 45 (N.Y. App. Div. 2004).

102. *See* Bd. of Prof’l Responsibility v. Fulton, 133 P.3d 514, 517–18 (Wyo. 2006).

103. *See In re Discipline of Wolff*, No. 59565, 2012 WL 5989283, at \*2 (Nev. Nov. 28, 2012).

104. *See* People v. Gifford, 76 P.3d 519, 519–20, 522 (Colo. O.P.D.J. 2003).

105. *See In re Werme’s Case*, 839 A.2d 1, 2 (N.H. 2003).

attorney fees,<sup>106</sup> and counseling clients to engage in prostitution to earn money to pay attorney fees.<sup>107</sup> In each of these disciplinary cases, the lawyer specifically directed or expressly recommended that the client violate the law or commit fraud.

Our advice to lawyers counseling clients about evidence of crimes is consistent with the ethics rules and the way disciplinary authorities have interpreted and applied the rules: never recommend that a client violate the law or commit fraud. Thus, under the ethics rules and the way disciplinary authorities have applied state versions of Model Rule 1.2(d), a lawyer may advise the parent of the law and the risks involved in destroying the child's drugs. The same holds true in advising the law student and her brother concerning destroying all traces of the child pornography on her brother's laptop.

In ethically counseling clients about the evidence of crimes, the lawyer is also permitted to give an honest opinion about the actual consequences that are likely to result.<sup>108</sup> If either or both clients use the lawyer's advice to destroy the drugs or the child pornography, and if that destruction is later determined to be criminal, then giving the advice does not itself make the lawyer a party to any possible crime.<sup>109</sup> Model Rule 1.2(d) draws the line at counseling a client to engage "in conduct that the lawyer knows is criminal or fraudulent."<sup>110</sup>

In short, unless the lawyer is certain that the destruction of either the cocaine or the images of child pornography will not violate any state or federal law, then the lawyer must not direct or counsel a client to destroy evidence or contraband. Rather, defense counsel should limit advice to an analysis of applicable laws and the lawyer's "honest opinion about the actual consequences that appear likely to result from a client's conduct."<sup>111</sup> This is the precise advice that we provided for the hypotheticals in Part I.

### B. Criminal Justice Standards

The American Bar Association promulgated the Criminal Justice Standards to provide guidance for prosecutors and defense lawyers.<sup>112</sup> Courts across the

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106. See Attorney Grievance Comm'n of Maryland v. Culver, 849 A.2d 423, 434 (Md. 2004).

107. See *In re* Discipline of Olkon, 795 F.2d 1379, 1384 (8th Cir. 1986). This was an appeal of the Minnesota federal district court's denial of the lawyer's application for readmission to the federal bar. See *In re* Petition of Olkon, 605 F. Supp. 784 (D. Minn. 1985). The underlying conduct of counseling clients to engage in prostitution took place in 1980, and the district court analyzed Olkon's conduct under both Disciplinary Rule 7-102(A)(7) of the ABA Code of Professional Responsibility, which prohibited a lawyer from counseling a client to engage in criminal conduct, and Model Rule 1.2(d). See *id.* at 789-90.

108. See MODEL RULES, *supra* note 1, r. 1.2 cmt. 9.

109. See *id.*; see also Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1548 (1995) ("There are no reported cases of civil or criminal liability on the part of the lawyer, or of professional discipline, clearly based only upon providing the client with accurate legal information.").

110. See MODEL RULES, *supra* note 1, r. 1.2(d).

111. *Id.* r. 1.2 cmt. 9.

112. See ABA CRIMINAL JUSTICE STANDARDS, *supra* note 3.

country, including the Supreme Court, have looked to the Standards in assessing the propriety of a criminal defense lawyer's conduct, and courts consider the Standards as expressing the norms for criminal defense practice.<sup>113</sup> Prosecutors and defense lawyers also look to the Standards "in guiding their own conduct, and in training and mentoring colleagues."<sup>114</sup> Defense Function 4-5.1 provides some guidance when advising a client generally, but does not address how to advise a client who asks about contraband or other physical evidence of a crime.<sup>115</sup>

Prior to February 2015, Defense Function 4-4.6, entitled "Physical Evidence," provided guidance to defense lawyers on handling physical evidence.<sup>116</sup> In the latest edition of the Standards, Defense Function 4-4 replaced that provision and is now entitled "Handling Physical Evidence with Incriminating Implications." The new provision offers lawyers considerably more assistance in structuring their discussion of how to handle incriminating evidence. Defense Function 4-4.7 states, in relevant part:

(a) *Counseling the client:* If defense counsel knows that the client possesses physical evidence that the client may not legally possess (such as contraband or stolen property) or evidence that might be used to incriminate the client, counsel should examine and comply with the law and rules of the jurisdiction on topics such as obstruction of justice, tampering with evidence, and protection for the client's confidentiality and against self-incrimination. *Counsel should then competently advise the client about lawful options and obligations.*

(b) *Permissible actions of the client:* If requested or legally required, defense counsel may assist the client in lawfully disclosing such physical evidence to law enforcement authorities. *Counsel may advise destruction of a physical item if its destruction would not obstruct justice or otherwise violate the law or ethical obligations. Counsel may not assist the client in conduct that*

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113. As one scholar has stated:

Courts at various state and federal levels have relied upon—or at least cited to—various Criminal Justice Standards well over 3200 times. Significantly, in *Strickland v. Washington*, the U.S. Supreme Court noted that the Standards provide reliable guidance as to "prevailing norms of practice" and "guides to determining what is reasonable criminal defense attorney performance."

Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1113 (2011) (footnotes omitted).

114. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 12 (2009).

115. Defense Function 4-5.1, Advising the Client, states:

(d) In rendering advice to the client, counsel should consider the client's desires and views, and may refer not only to law but also to other considerations such as moral, economic, social or political factors that may be relevant to the client's situation. Counsel should attempt to distinguish for the client between legal advice and advice based on such other considerations.

ABA CRIMINAL JUSTICE STANDARDS, *supra* note 3, Defense Function 4-5.1.

116. See ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Defense Function 4-4.6 (3d ed. 1993).



*counsel knows is unlawful*, and should not knowingly and unlawfully impede efforts of law enforcement authorities to obtain evidence.<sup>117</sup>

Thus, the Criminal Justice Standards contemplate a lawyer's providing competent advice about lawful options and obligations to a client seeking advice about contraband. When destruction of the contraband is not a crime—for example, when there is neither a pending investigation nor a reasonable expectation of an imminent investigation, and the destruction of the drugs would not constitute misprision of felony—the Standards indicate that a lawyer may advise the client to destroy the drugs.<sup>118</sup> This would be true if the crime involved were a misdemeanor, such as possession of a small amount of marijuana under federal law and most states' laws.<sup>119</sup> A lawyer may not assist a client, however, in taking unlawful action, such as destroying contraband or advising the client to destroy contraband where the destruction of the contraband is a crime.<sup>120</sup> Thus, the Standards would not allow the lawyer in either of our hypotheticals to counsel the parent to destroy the cocaine or to urge the sister to delete the child pornography. Nevertheless, like the Model Rules, the Standards do permit the lawyer to give the parent and sister advice about the law, their options, and likely consequences. And, assuming that the lawyer does not know or reasonably believe that an investigation is pending, imminent, or likely, the lawyer could counsel the brother to destroy the hard drive or delete the images on his laptop.<sup>121</sup>

### C. *Restatement of the Law Governing Lawyers*

Another source of guidance for lawyers is the *Restatement of the Law Governing Lawyers*. While the *Restatement* is not binding or primary authority, it is persuasive secondary authority.<sup>122</sup> As Stephen Gillers points out, however, the

117. ABA CRIMINAL JUSTICE STANDARDS, *supra* note 3, Defense Function 4-4.7(a)–(b) (emphasis added).

118. Indeed, Standard 4-4.7(j)(ii) says that, when counsel reasonably believes that the contraband does not relate to a pending investigation, counsel may take the contraband from the client and destroy it. *Id.* Defense Function 4-4.7(j)(ii).

119. Federal law “punishes possession [of marijuana] for personal use as a misdemeanor subject to up to one year in federal prison.” Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 109 (2015). Several states make possession of small amounts of marijuana punishable only by a fine, and many other states punish possession of marijuana more leniently than the federal law. *Id.* “Since 1996 twenty-three states have legalized marijuana for medical purposes and in November 2013 Colorado and Washington State went even further, legalizing marijuana for adult recreational use.” *Id.* at 77.

120. See MODEL RULES, *supra* note 1, r. 1.2(d).

121. See *supra* notes 36–38 and accompanying text.

122. Restatements are influential with the courts but are not as authoritative as statutes or judicial precedent. See THE LAW OF LAWYERING, *supra* note 81, § 1.22. Some Restatements such as “Restatements in the subjects of Property, Torts, Contracts, and Conflicts of Law have been very influential in the courts and have made their way into the law reports and then into law school casebooks.” *Id.* It is unclear how persuasive the *Restatement of the Law Governing Lawyers* will be, but some authorities believe it will be substantial. See *id.*

*Restatement* “is spare and unhelpful” when it comes to offering guidance to lawyers on handling evidence of a client crime.<sup>123</sup> Only one provision discusses physical evidence of a client crime, and it addresses only taking possession of the evidence “to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence.”<sup>124</sup> If the lawyer takes possession, then “the lawyer must notify prosecuting authorities of the lawyer’s possession of the evidence or turn the evidence over to them.”<sup>125</sup>

In our hypotheticals, there is no need for the lawyer to test the cocaine and therefore no need to take possession of it. As for looking at the images on the computer, we reject the notion that looking at an item of evidence on the computer constitutes taking possession of it. If that were the law, then lawyers in a host of situations, by merely examining documents, emails, or texts on a cellphone, would be obligated to turn over that evidence to state or federal authorities if counsel’s review of the document indicated that it was evidence that might support a criminal charge against the client.<sup>126</sup> Such a broad definition of possession would eviscerate a client’s right to access to legal advice because the client’s handing over any item of evidence to a lawyer for even a brief inspection or cursory examination would necessitate the lawyer’s turning that evidence over to the authorities if the lawyer believed the evidence was in some manner incriminating.<sup>127</sup>

Another provision of the *Restatement* addresses a lawyer’s general obligations in advising a client. Section 94 states, in pertinent part: “For purposes of professional discipline, a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal or fraudulent or in violation of a court order with

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123. Gillers, *supra* note 2, at 848.

124. *RESTATEMENT*, *supra* note 3, § 119(1).

125. *Id.* § 119(2).

126. *See id.* § 119 cmt. a (stating that evidence under this section covers documents and material in electronically retrievable form). As *Couch v. United States* makes clear, documents turned over to a lawyer or an accountant can be considered no longer in the possession of the taxpayer and, as such, may be unprivileged and able to be subpoenaed from the taxpayer’s lawyer. *See Couch v. United States*, 409 U.S. 322, 328–31 (1973). Such documents are not protected by the attorney-client privilege unless they would still be protected in the hands of the taxpayer. *See id.* at 335–36. Nonetheless, the Court in *Couch* observed that “situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.” *Id.* at 333. As long as the lawyer does not “actively participate in hiding an item” or “take possession of it in such a way that its discovery by the authorities becomes less likely,” the duties of confidentiality and loyalty to the client prevent the lawyer from turning over potential physical, electronic, or documentary evidence to authorities. *THE LAW OF LAWYERING*, *supra* note 81, § 10.46. This distinction underlies the famous “buried bodies case,” in which defense counsel viewed the dead bodies of their client’s murder victims and moved them slightly to take pictures but did not make them harder to discover. *Id.* § 10.46 n.178 (citing *People v. Belge*, 372 N.Y.S.2d 798 (Cnty. Ct. 1975)).

127. In his discussion of the *Russell* case, Gillers describes one of Russell’s safe options as leaving the computer with the church leaders. Gillers, *supra* note 2, at 835–36. If Russell’s act of viewing the images on the computer constituted his taking possession of it, then this option would not be available. For a fuller discussion of the position that a lawyer’s brief examination of physical evidence does not constitute accepting possession of it, see Uphoff, *Physical Evidence Dilemma*, *supra* note 2, at 1199.

the intent of facilitating or encouraging the conduct . . . .”<sup>128</sup> One comment defines “counseling” as “providing advice to the client about the legality of contemplated activities with the intent of facilitating or encouraging the client’s action.”<sup>129</sup> A second comment addresses advising a client “about activity of doubtful legality”:

A lawyer who proceeds reasonably to advise a client with the intent of providing the client with legal advice on how to comply with the law does not act wrongfully, even if the client employs that advice for wrongful purposes or even if a tribunal later determines that the lawyer’s advice was incorrect.<sup>130</sup>

These two comments could be read to suggest that a lawyer could be disciplined for giving the type of advice in our hypotheticals, but only if the circumstances show that the lawyer’s intent was to encourage illegal activity.

A third comment to section 94 of the *Restatement* states that a lawyer may not advise “a client about the degree of risk that a law violation will be detected or prosecuted” if “the circumstances indicate that the lawyer thereby intended to counsel or assist the client’s crime, fraud, or violation of a court order.”<sup>131</sup> This comment is the most problematic for the lawyer rendering the advice in our hypotheticals. It is critical that the criminal defense lawyer make it perfectly clear that she is not directing or encouraging the client to destroy evidence. Nonetheless, although the lawyer does not advise the clients to destroy the contraband, but rather expressly states that is not what she is advising the client to do, some bar disciplinary authorities might look to this language in the *Restatement* and find that such advice was, in fact, designed to encourage the client to destroy the cocaine or the pornographic images. Indeed, some reading this Article may believe that our proffered advice crosses the line and is not permissible, and that the *Restatement* supports their position.

We believe, however, that the *Restatement* does not contemplate the type of situation in our hypotheticals. In our hypotheticals, the continued possession of either the drugs or the child pornography is a crime. In both instances, turning over the contraband would provide a sufficient basis for charges to be brought against a loved one. It is exactly these types of situations where the Model Rules demand that a lawyer give a client competent advice so that the client can make informed choices. A lawyer must be able to advise a client of the legality of possible courses of action, as well as the likely results of taking different courses of action, without fear of criminal prosecution or disciplinary action; otherwise, the client’s right to access to sound legal advice would be seriously undermined.<sup>132</sup>

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128. RESTATEMENT, *supra* note 3, § 94(2).

129. *Id.* § 94 cmt. a.

130. *Id.* § 94 cmt. c.

131. *Id.* § 94 cmt. f.

132. See Pepper, *supra* note 109, at 1587–89. In a series of cases dating to *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), the Supreme Court has trumpeted the importance of ensuring a client’s right to obtain sound legal

In our view, the lawyer giving and the client seeking advice in our hypotheticals face a more difficult dilemma than a lawyer confronts when advising a client about enforcement policy in the type of situation the *Restatement* comment addresses. In our hypotheticals, the lawyer is giving advice to clients who must choose either to violate the law or to subject a loved one to near-certain criminal prosecution. In contrast, in both of the *Restatement's* illustrations dealing with advising a client about enforcement policies, each client has an option that does not force the client to make a Hobson's choice. The first illustration involves advising a client about enforcement policies of a gambling statute for card playing for money in a client's home,<sup>133</sup> and the second illustration involves advising a client about tax-audit likelihood for a client's possible false charitable deduction.<sup>134</sup> In both illustrations, the client can easily opt to pursue a lawful alternative and does not risk being involved in a continuing criminal violation such as possession of contraband like drugs or child pornography. Thus, the *Restatement's* illustrations are so markedly different from the situations posed by our hypotheticals that it is unlikely that the *Restatement's* comment was intended to apply to the dilemmas faced by the lawyer and clients in our hypotheticals.

The *Restatement's* only reference to the type of situations set forth in our hypotheticals appears in a Reporter's Note.<sup>135</sup> In that note, it characterizes ABA Criminal Justice Standard 4-4.6(d) as "problematical" when it "'suggest[s] that the client destroy' contraband, such as illegal drugs, that the lawyer has received in the course of a legal representation."<sup>136</sup> It states: "Contraband is both property that may be illegal to possess and evidence that may be illegal to destroy. As discussed in this Section, applicable law may require that contraband be turned over to authorities."<sup>137</sup>

The key distinction between what the *Restatement* contemplates in its analysis and our hypotheticals is that the *Restatement* assumes that the lawyer has taken possession of the contraband, and we do not. When the client is the one possessing the contraband, the Fifth Amendment right against self-incrimination means that the client, even if a suspect in an investigation, "cannot be required to produce potentially incriminating documents, tape recordings, or even a weapon allegedly used in the offense."<sup>138</sup> A logical extension of this Fifth Amendment right is that a

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advice by protecting the attorney-client relationship, which depends on full and frank communication between lawyer and client and which in turn promotes the public's interest in the fair administration of justice. *See also* *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating that the purpose of attorney-client privilege "is to encourage full and frank communication between attorneys and their clients").

133. *See* RESTATEMENT, *supra* note 3, § 94 cmt. f illus. 1.

134. *See id.* § 94 cmt. f illus. 2.

135. *Id.* § 119 reporter's note.

136. *Id.*

137. *Id.*

138. Reitz, *supra* note 2, at 578 (footnotes omitted). In *Fisher v. United States*, 425 U.S. 391, 409–11 (1976), the Court stated that taxpayers under investigation for possible civil or criminal liability under federal income-tax

competent lawyer advising such a client must be allowed to tell the client that the client has no duty to turn over the incriminating evidence to the authorities, even though counsel cannot store or conceal the evidence at counsel's office and would be required to turn over the evidence if the lawyer accepted possession of it.

If, contrary to our advice, the lawyer has taken possession of contraband such as child pornography, Sisk makes a compelling argument that destruction of the contraband is consistent with legislative intent that outlawing possession of such material will "encourage the possessors of such material to rid themselves of or destroy the material."<sup>139</sup> Sisk continues: "Given that the continued existence of the contraband is the greater evil, preventing ongoing possession of the contraband by the client and removing the items from circulation through destruction is the commonsense solution."<sup>140</sup> Similarly, destruction of contraband may be preferable to continued possession in our hypotheticals involving drugs and child pornography. If either client decides to destroy contraband after learning of the risks of continuing to possess it—and learning of the lawyer's refusal to take possession of the contraband or direct its destruction—then destruction may very well appear to a client to be the lesser evil as compared to continued possession.

An additional policy reason that supports providing a client with information concerning the risks of continuing to possess contraband or other potentially inculpatory evidence is a client's right to a full understanding of the privilege against self-incrimination.<sup>141</sup> The Government cannot compel a person to testify,<sup>142</sup> nor can it compel a sole proprietor to produce documentary evidence "if the

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laws could be compelled to produce accountants' work papers without violating the Fifth Amendment. The Court compared this production to a criminal defendant's being compelled to give a handwriting exemplar without violating the Fifth Amendment. *Id.* at 411–12. The Court acknowledged, however, that whether the compelled act of producing evidence is also "both 'testimonial' and 'incriminating' for purposes of applying the Fifth Amendment . . . may instead depend on the facts and circumstances of particular cases or classes thereof." *Id.* at 410. After *Fisher*, the Fifth Amendment privilege against self-incrimination "rarely provides a constitutional privilege to withhold documentary evidence and never provides a constitutional right to destroy evidence." JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE §1.18 (2016).

139. Sisk, *supra* note 2, at 841 (quoting Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(1)(12), 110 Stat. 3009, 3009–27 (1996)). Sisk explains more fully that

while penalizing the possession of child pornography, findings enacted as part of a federal criminal statute set out Congress's reasoning that "prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children."

*Id.* (quoting Child Pornography Prevention Act § 121(1)(12)).

140. *Id.* at 841–42 (footnotes omitted); see also ABA CRIMINAL JUSTICE STANDARDS, *supra* note 3, Defense Function 4-4.7.

141. This policy reason is briefly discussed, in the context of destruction of evidence relevant to potential civil litigation, in the leading treatise concerning destruction of evidence. See GORELICK ET AL., *supra* note 138, § 1.14.

142. The Fifth Amendment provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

act of production itself would be incriminating.”<sup>143</sup> Although courts have determined that the right against self-incrimination does not equate to a constitutional right to destroy evidence,<sup>144</sup> a citizen should not be required to sacrifice his or her Fifth Amendment right as a consequence of consulting with counsel and showing counsel a baggie of cocaine or computer images. Nor should a client be deprived of information about the law and counsel’s competent advice simply because the client may ultimately use the advice to destroy or conceal evidence.<sup>145</sup>

In the final analysis, when it comes to a lawyer’s advice to a client, disciplinary authorities have found violations of state equivalents to Model Rule 1.2(d) only when the lawyer has directed or encouraged a client to violate the law or to engage in fraudulent conduct.<sup>146</sup> Thus, the proper interpretation of Model Rule 1.2(d) and its comments clearly allows a lawyer to give a client full and candid advice of the legal predicament that the client finds herself in, so the client can make an informed choice as to how to proceed. Given the language in Model Rule 1.2(d), the legislative history of the rule,<sup>147</sup> and bar authorities’ approach in applying the rule,<sup>148</sup> the comments in the *Restatement* should not be read to bar a lawyer from giving the advice that is clearly permitted by Model Rule 1.2.

Moreover, as noted earlier, the *Restatement* is not binding or primary authority, but rather secondary authority.<sup>149</sup> That said, the *Restatement* is persuasive authority,<sup>150</sup> and a lawyer asked to give advice in a situation similar to one of the hypotheticals in this Article should be aware that there is some risk of disciplinary action if he or she advises a client about the degree of risk of being prosecuted for destruction of contraband should his or her advice become known. Despite that minimal risk, we believe that such advice is justified in situations where continued possession of contraband is itself a crime, and often a more serious crime than destruction of the contraband. In other words, the client deserves to know the likely consequences of different actions, especially if destruction of the contraband is a less serious offense than continued possession, and turning the contraband over to authorities would likely result in a prosecution for the more serious offense.

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143. GORELICK ET AL., *supra* note 138, § 1.18 (citing *United States v. Doe*, 465 U.S. 605, 612–14 (1984)).

144. *See, e.g., Segura v. United States*, 468 U.S. 796, 816 (1984) (stating that there is no constitutional right to destroy evidence). Jamie Gorelick and her co-authors provide a good analysis of why courts have rejected arguments that there is a right to destroy evidence. *See GORELICK ET AL., supra* note 138, § 1.18.

145. *See Pepper, supra* note 109, at 1578.

146. *See supra* notes 95–107 and accompanying text.

147. For an analysis of the rule, see *supra* Section II.A.

148. For an analysis of disciplinary cases, see *supra* Section II.A.2.

149. *See supra* note 122 and accompanying text.

150. *See THE LAW OF LAWYERING, supra* note 81, § 1.22.

### III. THE LAW OF ADVISING CLIENTS ABOUT CONTRABAND AND OTHER EVIDENCE OF CRIMES

Criminal statutes prohibiting the destruction of evidence are strictly construed and usually require the Government to prove “that the defendant subjectively knew that destroyed evidence was relevant to an official proceeding and specifically intended to obstruct the proceeding.”<sup>151</sup> In addition, other statutes may be implicated, such as federal and state statutes prohibiting the misprision of felony. As we discussed previously, the Government faces additional hurdles in proving misprision of felony.<sup>152</sup>

Although the Government faces various hurdles in proving that destruction of contraband or possible evidence is a criminal offense, a lawyer advising a client about the legality of destroying contraband or evidence of crime must be sensitive to her own possible criminal liability and bar discipline. For example, a lawyer who urges a client to destroy evidence could face prosecution as an aider or abettor,<sup>153</sup> or could be charged with conspiracy to obstruct justice.<sup>154</sup> In addition, counseling a client to violate the law is contrary to the ethics rules,<sup>155</sup> and violations of the ethics rules can give rise to bar disciplinary actions.<sup>156</sup>

But is providing a client with an assessment of the risks and possible legal consequences of destroying the contraband a violation of the law or the ethics rules? It is not.

To violate a law such as tampering with evidence or obstruction of justice requires affirmatively aiding in such destruction.<sup>157</sup> At a minimum, this would require a lawyer to advise a client to destroy the contraband. In terms of potential bar discipline, we have already demonstrated, in Part II, that providing advice to a client that includes an assessment of the risks and possible legal consequences of destroying contraband is consistent with a lawyer’s ethical obligations.

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151. GORELICK ET AL., *supra* note 138, § 5.1.

152. *See supra* Section II.A.1.

153. For example, federal law regarding accessories to crimes provides: “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” 18 U.S.C. § 2(a) (2012). The Model Penal Code provides, in pertinent part:

(3) A person is an accomplice of another person in the commission of an offense if:  
 (a) with the purpose of promoting or facilitating the commission of the offense, he  
 (i) solicits such other person to commit it, or  
 (ii) aids or agrees or attempts to aid such other person in planning or committing it . . . .

MODEL PENAL CODE § 2.06(3) (AM. LAW INST., Proposed Official Draft 1962). As both federal law and the Model Penal Code provide, to be an accessory or accomplice, a lawyer must at least urge or counsel a client to commit a crime. *See, e.g.*, Clark v. State, 261 S.W.2d 339 (Tex. Crim. App. 1953), *cert denied*, 346 U.S. 855 (1953) (finding lawyer guilty of being an accessory where lawyer told client, over the phone, to throw away murder weapon).

154. *See* GORELICK ET AL., *supra* note 138, § 17.13.

155. *See supra* note 59 and accompanying text.

156. *See supra* note 95 and accompanying text.

157. *See supra* notes 77–79 and accompanying text.

As long as a lawyer does not direct or recommend that a client destroy contraband or evidence of a crime when such destruction would either be a crime itself or facilitate the underlying crime, there should not be any criminal culpability for the lawyer. The advice that we suggest in our hypotheticals falls short of counseling destruction, though in both instances the clients may decide to destroy the contraband. As Stephen Pepper concluded more than twenty years ago, both the relevant laws and Model Rule 1.2(d) permit counseling a client about the law and about enforcement of the law, even if the client subsequently decides to break the law.<sup>158</sup>

#### IV. REVISITING THE CHOIRMASTER'S LAPTOP AND EVIDENCE OF CRIMES ON ELECTRONIC DEVICES

##### A. *Our Advice to the Church Leaders*

So, how should Philip Russell have advised church leaders regarding the choirmaster and the computer containing the images of child pornography? It is not particularly surprising that these church leaders were reluctant to go to the police. That reluctance may have been grounded in a desire to avoid a scandal and unwanted publicity for the church; in a sense of compassion for and loyalty to a longtime, valued employee; or in a judgment that the choirmaster's termination was sufficient punishment for his misdeeds. Whatever the reason or reasons, counsel should have fully explored the church leaders' motivations before rendering any advice as to what to do in the situation they faced. In addition, we believe that a lawyer in Russell's position should have questioned the church officials on the number of persons who knew about the pornographic images and on the nature of any conversations with such persons about the choirmaster and the pornography.

After the lawyer gathered information about the church leaders' motivations and other circumstances surrounding the discovery of the pornography, the conversation would proceed much like the conversations in the hypotheticals at the outset of this Article.<sup>159</sup> The advice would include a discussion of the quandary they were in—that it would be illegal to continue to possess the laptop with the images, to conceal it, or, if an investigation were under way, to destroy or tamper with it or the images.<sup>160</sup> The advice would also include a discussion of the possibility of a misprision-of-felony charge if they destroyed the images, even if no investigation were under way.<sup>161</sup>

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158. See Pepper, *supra* note 109, at 1588–89.

159. For advice to a parent who finds his or her child's cocaine, see *supra* Section I.A, and for advice to a sister concerning child pornography on her brother's computer, see *supra* Section I.B.

160. See *supra* notes 77–79 and accompanying text.

161. See *supra* notes 37–38 and accompanying text. Connecticut does not have a statute for misprision of felony, nor do the state's courts recognize it as a common-law offense. See Ciociola, *supra* note 38, at 710–32.



The advice to the church leaders would raise some additional issues, though. First, the advice would acknowledge that the church leaders are likely to be held to a higher level of scrutiny and that they should consider special moral, social, and political factors.<sup>162</sup> Such advice would likely go into greater detail than we offer with the sample advice that follows:

Folks, you find yourselves in a very dicey situation. From what you have shared with me, I understand why you do not wish to go to the police, and your concerns and fears are very reasonable. On the other hand, I know you are all aware of the criticism leveled against the authorities in the Catholic Church and other churches that have covered up the criminal activities of priests and ministers. If the choirmaster's criminal activities are leaked to the police at some point and it is discovered that you not only were not forthcoming with information but actively concealed the computer, then you are likely to face harsh criticism. Moreover, along with public condemnation, you may face criminal charges and possible civil liability if the choirmaster sexually assaulted or exploited any children in your congregation. Your discovery of what the choirmaster has done also raises serious moral and social issues about your obligations as church leaders to the children in the photos, to your congregation, and to the general public.

Second, the lawyer should explain why he or she cannot take possession of the computer:

You should also know, as I advised you at the beginning of our discussion—everything you have told me is confidential. I am obligated to keep confidential the fact that the choirmaster committed a crime and that you are now in possession of a computer containing pornographic images. I have no duty to report any of this to the police. To the contrary, I have an ethical duty to protect your confidential communications. My duty would get very complicated, however, if I were to take possession of the computer. It would be relatively simple if you gave it to me because you want me to give it to the police or prosecutor. I can certainly do that, but it is very likely that the choirmaster will be arrested and charged with a crime. I cannot take the computer and store it in my office because I would then be in possession of child pornography and so guilty of a crime. Moreover, your act of giving the computer to me knowing it contained images of child pornography but asking me that I not turn the evidence over to the police may make you guilty of delivering child pornography, a more serious crime than either possessing the pornography or destroying it. The bottom line is that I will not take possession of the computer unless you decide you want me to turn it over to the authorities.

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162. Rule 2.1 of the ABA Model Rules states: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES, *supra* note 1, r. 2.1. In our opinion, advising the church leaders in the situation they faced would entail raising such issues, which we do not explore fully for the purposes of our sample advice.

Third, the lawyer should explain that the church leaders do not know whether the choirmaster has communicated with others about the pornography on the computer, and that if the police learn about the computer they may come and ask for it should the church leaders decide to retain it. That advice could go like this:

Finally, in deciding what to do in this situation, you should take into consideration the possibility that the choirmaster may have communicated with others about the fact that there are pornographic images on the computer. So, despite your desire to see this messy business end with his departure, never to be seen or heard from again, it may well not end so neatly. If the police learn in some fashion about his activities and come to the church seeking access to the computer, then their investigation may uncover either the images on the computer or that the images have been erased or destroyed. If the police do come asking about the computer, I would encourage you to decline to answer any questions about the choirmaster or the computer and ask instead that your lawyer be called immediately. In any event, I do not think we can safely assume that the matter will just go away quietly.

It is very likely that the church leaders may ask for counsel's recommendation or what counsel would do if facing such a predicament. Once again, a lawyer may answer, "I don't feel comfortable giving you a recommendation in this situation. I am not in your position, so I really cannot say how I would proceed in your situation." We would take a different approach in this situation, however, and we would proffer more specific advice due to the different risks that the church leaders face in this situation. Our additional advice would go something like this:

I am not in your position, and what might be the best choice for me might not be the best for you given that we may not share the same backgrounds, perspectives, and capacities for risk. Nonetheless, I would not want to possess or have the church possess a computer with pornographic images. I certainly would consider just deleting the images and hoping that the police never come to the church in the next year. Then I might replace the computer in a year and destroy this one. If the police have not started an investigation in that time, then I think I could safely assume that the computer could be destroyed without any negative consequences. On the other hand, I would be very concerned, even in the short run, about concealing the computer at the church. I would be more inclined to tell the choirmaster, upon advice of counsel, that I was turning the computer over to the police. I would tell the choirmaster to seek advice of counsel immediately so that his lawyer could contact my lawyer and arrange to go to the police jointly. Such an approach would allow me to avoid committing any crime, avoid the church's being involved in a cover up, improve the likelihood of the choirmaster's getting favorable treatment, and ultimately pursue the best long-term interest of the church. Also, if there were any chance that the choirmaster has been producing child pornography or abusing any children, then getting law enforcement involved would stop the choirmaster. Involving law enforcement also seems to me to be the best way to take into

consideration special moral, social, and political factors that I would have as a church leader. This would seem to be in the best interests of the children whose images are trafficked, of the general public, and of promoting the values of the church and congregation.

This would be our recommended advice were our clients confronted with the situation that the church leaders faced. While some clients in a similar position may believe that it would be in the church's best interest to destroy the pornographic images or the hard drive, the risk to the church and the church leaders is too great to do so. While they may think that they would be destroying all the choirmaster's pornography, they could not be sure. They also could not be sure that others in the church had not already discussed seeing the pornography on the computer with others.<sup>163</sup> There is also the risk that the choirmaster may have sexually exploited members of the congregation, and they have a greater duty to report the choirmaster's crime than a parent or sibling, as in our hypotheticals.

In the lawyer's role as advisor, the lawyer may raise moral, economic, and other considerations relevant to a client's situation in addition to legal implications.<sup>164</sup> Given the predicament of the church leaders, a lawyer would be acting ethically if the lawyer raised both the moral and reputational dimensions with his or her clients, even if the clients did not ask the lawyer about those possible issues. In the end, however, if the clients decided not to heed the lawyer's advice and decided instead to destroy the computer, then the lawyer would be obligated to accept the clients' decision and maintain client confidentiality.<sup>165</sup>

### *B. Advice to Clients About Evidence on Electronic Devices*

Increasingly, clients who have potential evidence on their cellphones or smartphones are consulting lawyers. In reviewing texts on a client's phone, defense counsel may confront the question of what advice she can give a client about deleting texts on the phone. Assume, for example, that your nineteen-year-old client is charged with having sex with a sixteen-year-old. The alleged victim contends that your client forced her against her will to have sex. Your client says that the sixteen-year-old willingly had sex and had in fact been aggressively pursuing him for some time.

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163. Sisk similarly believes that a lawyer in Russell's situation should not have taken possession of the laptop and that he should have advised the church leaders to turn it over to law enforcement immediately. Sisk, *supra* note 2, at 854–55.

164. See MODEL RULES, *supra* note 1, r. 2.1; see also *supra* text accompanying notes 63–64.

165. Most states follow Model Rule 1.6, which defines a lawyer's duty of confidentiality. See MODEL RULES, *supra* note 1, r. 1.6. The rule requires that a lawyer keep confidential any information relating to the representation of a client, subject to very limited, discretionary exceptions. See *id.* The exception for future crimes is limited to situations where disclosure is necessary either "to prevent reasonably certain death or substantial bodily harm," *id.* r. 1.6(b)(1), or "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services," *id.* r. 1.6(b)(2).

Upon reviewing the texts on your client's iPhone, you see several texts from the complaining witness that support your client's story that she had been sending him provocative photos with messages clearly indicating she wanted to have sex with him. On the other hand, while the texts support your client and would enable defense counsel to impeach the sixteen-year-old about several matters, the saved texts also confirm that your client was to meet up with the alleged victim on the night of the alleged rape and that your client had sex with her. Given that, under state law, your client is guilty of a crime even if the sex was consensual,<sup>166</sup> what obligation does defense counsel have now that she has reviewed the cellphone and sees that it contains both exculpatory and incriminating evidence?

If the client is still at the lawyer's office, then defense counsel should tell him that counsel will not take possession of the iPhone.<sup>167</sup> Counsel should explain that she cannot take possession of the phone because, if she does, then under ethics rules and case law she may be obligated to turn the phone over to the police or prosecuting authorities. Counsel cannot conceal physical evidence of a crime in her office, destroy such evidence, or assist another in the destruction of it. The texts on the iPhone constitute incriminating evidence because they would help to prove that the client had sex with the alleged victim. Counsel is duty-bound to defend her client zealously, so she does not want to have to turn over incriminating information that might assist in her client's prosecution.

The client would undoubtedly ask what he should do with the iPhone. Counsel could respond as follows:

It is possible that the prosecutor will seek to obtain a warrant to seize and search your iPhone. The prosecutor would need probable cause to believe evidence of a crime existed on your iPhone. I do not know if the prosecutor would be able to obtain a warrant, but that depends on what the complaining witness has said about your texts and what, if any, messages exist on her phone. Since your phone contains potential incriminating evidence, I cannot ethically or legally advise you to delete or erase those messages. Indeed, since you have a case pending against you, I could be criminally charged for encouraging you to destroy evidence.

Moreover, if you do delete messages on your phone, then you might face an additional criminal charge of tampering with evidence or obstruction of justice.<sup>168</sup> I do not want to see you be charged with any additional crimes or to

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166. Every state has laws prohibiting sexual activity with someone under a certain age. Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 313 (2003). The age of consent for sexual intercourse varies by state and ranges from twelve to eighteen. *Id.* at 314.

167. See *supra* note 3 and accompanying text.

168. State laws for tampering with evidence, which includes deleting images or text with evidentiary value, vary greatly. For an analysis of tampering-with-evidence laws, see *supra* Section II.A.1. Even if a state had a misprision-of-felony statute, such charges would usually require covering up another person's crime. See *supra* notes 37–38.

find myself accused of encouraging you to destroy evidence. So, I am warning you not to erase the messages on your iPhone. You have a right to know, however, that the penalties for tampering with or destroying evidence are significantly less than the penalties you could receive for the crime you now face.<sup>169</sup> Unlike me, you are not obligated to turn over potential incriminating evidence to the police voluntarily. You have a constitutional right against self-incrimination. So, if the police contact you and attempt to question you, then you should refuse to answer any questions or to show them your iPhone. Rather, you should tell them you are invoking your Fifth Amendment right and do not want to say anything until I am present.

The situation is more complicated if the client has dropped off the iPhone and left the office. Is defense counsel now obligated to turn the phone with potential incriminating evidence over to law-enforcement authorities, or may she return the iPhone to the client? Unquestionably, there is case law that would demand that counsel in this situation turn the phone over to the police even absent any demand by the prosecution.<sup>170</sup> The *Restatement* also insists that a defense lawyer turn over physical incriminating evidence in counsel's possession.<sup>171</sup> We previously have argued in support of the principle that defense counsel in such a situation may return an evidentiary item, such as this iPhone, to the source—in this case, the client.<sup>172</sup> The law in some jurisdictions forecloses this option, which is why counsel should be wary of ever accepting possession of incriminating physical evidence.<sup>173</sup>

Assume instead that the sixteen-year-old's stepmother comes to your office and hands you her stepdaughter's iPhone. The stepmother says her stepdaughter is on her phone plan and she pays for the phone. She has come to defense counsel because she is upset that her stepdaughter has been sending nude photos of herself to your client and has made false allegations against him. She tells you that the iPhone messages will show that her stepdaughter is lying.

If the stepmother brought the iPhone to the office, and the defense lawyer reviewed it in the presence of the stepmother and found that it contained incriminating as well as exculpatory texts, then counsel should proceed as suggested earlier. That is, counsel should not take possession of the iPhone. Counsel may decide to have a paralegal, investigator, or law clerk look at—and take a photo of—the exculpatory messages so that the person could be called to

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169. Although penalties for sexual assault vary throughout the United States, the penalties for tampering with evidence or obstructing justice will very likely be less serious.

170. *See, e.g., Clutchette v. Rushen*, 770 F.2d 1469, 1472 (9th Cir. 1985) (finding that a lawyer who takes possession of an item with evidentiary value must turn it over to the prosecution once removed from its location).

171. *See* RESTATEMENT, *supra* note 3, § 119.

172. Uphoff, *Physical Evidence Dilemma*, *supra* note 2, at 1198–1203; *see also* Sisk, *supra* note 2, at 867–72.

173. Both case law and court rule in Alaska require that defense counsel who takes possession of physical evidence immediately notify the prosecutor and arrange to turn over the evidence to the prosecutor within a reasonable time. ALASKA R. CRIM. P. 16(c)(6).

impeach the stepdaughter should she deny sending such photos or messages to the client. Counsel should explain that, while she appreciates the stepmother's willingness to help, and the messages on the phone do help prove that her stepdaughter is a liar, some of the messages also are unhelpful. Thus, counsel should tell the stepmother that she will not take possession of the phone because she would then be obligated to turn the phone over to the police or prosecuting authorities. Counsel also has a duty to zealously defend her client, so she does not want to be in a position to have to turn over unhelpful information to the authorities that might assist in her client's prosecution.

The stepmother will undoubtedly ask what she should do with the phone. Counsel should tell her that, because she is not a client, counsel cannot provide her with any legal advice.<sup>174</sup> Because it is her stepdaughter's phone, it is probably best for the stepmother simply to return it to her. Counsel may inform the stepmother that, if the case later proceeds to trial, and the stepdaughter denies sending photos to the client and aggressively pursuing him, then the lawyer might call the stepmother as a witness to impeach the stepdaughter. The stepmother may be permitted to testify about the photos she saw on the phone even if she returns the phone to the stepdaughter, who might in turn erase the images on the phone.

Whenever a case is pending, a lawyer must be clear not to advise a client or anyone else to delete material that could be evidence in that case, such as text messages or emails. Advising a client to destroy such material would constitute counseling the destruction of evidence, which is a criminal act and may also violate other laws. Such advice would make the lawyer an accomplice<sup>175</sup> and would also subject the lawyer to possible professional discipline.

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174. The ethics rules provide that, in dealing with an unrepresented person, a lawyer "shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." MODEL RULES, *supra* note 1, r. 4.3. A lawyer may be disciplined for violating this ethics rule. *See, e.g., In re Tun*, 26 A.3d 313 (D.C. 2011) (disciplining lawyer for giving legal advice to non-client in murder case). Some authority also states that if a lawyer gives advice to a person, who then relies upon that advice to his or her detriment, then the lawyer has created an attorney-client relationship that could be the basis for a malpractice claim. *See, e.g., Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980) (holding that an attorney's giving legal advice to a person creates an attorney-client relationship, even if the lawyer does not enter into an agreement to represent the person). For these reasons, a lawyer should not give legal advice to any non-client, particularly where that non-client's interests may be or become in conflict with a client's interests, unless the lawyer wants to be potentially liable for giving negligent advice.

175. Mary Jill Donovan, a criminal defense lawyer in Cincinnati, was indicted on federal charges of conspiracy to obstruct justice for advising a client facing drug charges to destroy the SIM card in his cellphone. Amber Hunt, *Lawyer Awaits Jury's Verdict in Obstruction Case*, CINCINNATI ENQUIRER (Oct. 10, 2014, 11:33 PM), <https://perma.cc/LR8V-TXR3>. The Government contended that Donovan likely knew that a federal investigation of her client was under way; she replied, in defense, that she wanted her client to destroy privileged communication in the form of text messages between her and her client. *Id.* A jury found her not guilty. Amber Hunt, *Defense Lawyer Not Guilty of Conspiracy*, CINCINNATI ENQUIRER (Oct. 15, 2014, 12:00 AM), <https://perma.cc/CUA9-HREX>.

If, however, a client seeks advice regarding potential incriminating texts or photos on his or her phone, and the client does not have a pending case—nor is one imminent or reasonably foreseeable—then the lawyer is in a very different situation. In such an instance, the lawyer may ask the client regarding his or her general practice of storing texts and photos. Counsel may alert the client to the potential danger of routinely keeping potentially incriminating items on his or her phone. Counsel may also explain that, if at some point an investigation is launched, then it may be a crime at that point to delete such material. But, since there is no pending investigation or reasonable expectation of one being started, it would not be criminal for the client to delete material from the phone.<sup>176</sup> The counseling session may then proceed as in the hypotheticals discussed above.

### CONCLUSION

Undoubtedly, many law-abiding persons finding contraband, such as drugs or child pornography, possessed by a family member will confront the family member and then either destroy the contraband or watch the family member destroy it and hope that ends the matter. Some, however, will choose to consult a lawyer. So, too, employers, such as the church leaders in *Russell*, and other individuals who find contraband or other evidence of a crime are particularly likely to consult a lawyer.

In every type of situation, effective, ethical advice involves informing clients about the law and providing an honest assessment of the consequences they face if they take any of various courses of action. In some instances, such as that of the church leaders in the *Russell* case, a lawyer giving advice should raise not only the greater legal risks of not going to law enforcement but also the special moral, social, and political considerations for the clients. In other instances, such as those in our hypotheticals, considerations for family members who may have committed crimes should also be discussed.

Clients confronting dilemmas like those that the parent and sister faced in our two hypotheticals deserve the effective assistance of counsel. They should not be put in a worse legal predicament because they sought that assistance. Put simply, the law and ethics rules should not be structured or interpreted to prohibit a lawyer from explaining the law and predicting the likely consequences of various courses of action. We believe that we have made the case that a lawyer may give such advice. To construe the ethics rules and law differently would, in essence, punish clients who seek legal assistance and would threaten the public interest in the fair administration of justice.<sup>177</sup>

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176. The position of most courts and at least one ethics opinion “is that destruction of evidence is unethical . . . when the evidence is relevant to a reasonably foreseeable or pending legal proceeding.” GORELICK ET AL., *supra* note 138, § 7.1.

177. As the Court observed in *Upjohn*, the rationale for the attorney-client privilege is “founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and

Rather, clients should be advised about the law related to the tricky legal situations in which they are entangled and should receive an honest assessment of the consequences they face. Clients deserve straightforward advice, not vague pronouncements that leave them uncertain of what will happen to them should they choose to act in a particular way. No client can make a truly informed choice about what to do with physical evidence or contraband without access to competent legal advice. And no lawyer should face criminal or ethics charges merely for providing clients with good-faith advice designed to give them a full and honest appraisal of their options.

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skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).



