Handling Physical Evidence

Guidance Found in ABA Standard 4-4.6

BY RODNEY J. UPHOFF

In 1966, Richard Ryder, an experienced criminal defense lawyer, learned that one of his clients was a suspect in a bank robbery. Ryder’s client admitted to him that he placed some money in a safe deposit box. Worried that his client might try to dispose of the money, but also concerned that the FBI would soon locate the stolen money, Ryder consulted with a well-regarded lawyer about his predicament. Following their discussion, Ryder gained access to his client’s safe deposit box where he found the stolen money and a sawed-off shotgun. Ryder transferred both the money and the shotgun to his own safe deposit box.

Unfortunately for Ryder, the FBI obtained a search warrant for his safe deposit box. The money and the weapon were seized and Ryder was charged with professional misconduct for knowingly taking possession of and secreting the instrumentalities and fruits of a crime.
Flatly rejecting his defense that his ethical duties and the attorney-client privilege legitimized his actions, the court held that no statute or ethical canon authorized Ryder to knowingly conceal the items in this manner. (In Re Ryder, 263 F. Supp. 360, 362 (E.D. Va. 1967).) Although the court accepted Ryder’s claim that he eventually intended to return the money to the rightful owners, the court opined that no attorney should ever place himself or herself in such a position of taking possession of the fruits or instrumentalities of a crime to purposefully hinder the government’s prosecution of his or her client. Accordingly, the court suspended Ryder from practice in federal court for 18 months. (Id.)

The dilemma that Richard Ryder mishandled in 1966 continues to bedevil criminal practitioners in 2011. Unlike Ryder, however, today’s criminal defense lawyers who seek guidance on how to handle physical evidence with the potential to incriminate a client have ABA Criminal Justice Standard 4-4.6 as a resource. Nevertheless, this dilemma often arises in circumstances that do not allow for careful reflection and meaningful consultation. A criminal practitioner facing this quandary for the first time will find no clear guidance in either the Model Rules of Professional Conduct or any state variation. Although some state courts have rendered decisions that address how the lawyers in that jurisdiction should respond to a physical evidence dilemma, many state courts have not. It is not surprising, therefore, that conscientious criminal defense lawyers will still struggle in the face of conflicting authority to ascertain how to properly deal with the conundrum.

This article presents three scenarios that depict common variations of the physical evidence dilemma, briefly reviews the conflicting guidance lawyers must wade through before deciding how to respond to such a dilemma, and discusses the fact that a defense lawyer’s options are significantly limited in some jurisdictions because courts in those jurisdictions unequivocally obligate a defense counsel who takes possession of any incriminating physical evidence to turn that evidence over sua sponte to the authorities. (See, e.g., People v. Superior Court (Fairbank), 192 Cal. App. 3d 237 (1970).)

In many jurisdictions, however, a criminal defense lawyer possessing such an item will have to decide whether there is an obligation to deliver that evidence to law enforcement authorities as demanded by most courts, bar ethics committees, and section 119 of Restatement (Third) of the Law Governing Lawyers, or whether the attorney is allowed to take other action, as recommended by ABA Standard 4-4.6, some courts (Hitch v. Pima County Superior Court, 708 P.2d 72 (Ariz. 1985)), and some commentators. (Norm Leftstein, Incriminating Physical Evidence, the Defense Attorney’s Dilemma, and the Need for Rules, 64 N.C. L. Rev. 897 (1986).) In light of this conflicting guidance, then, how ought a criminal defense lawyer respond when facing a variation of the quandary that confounded Richard Ryder? Does Standard 4-4.6 properly balance defense counsel’s role as a client’s champion with the lawyer’s duties as an officer of the court? Does the return to the source option articulated in Standard 4-4.6 allow counsel the flexibility needed to effectively assist clients without becoming agents for the prosecution or does it serve to undermine the fair administration of justice?

The article first analyzes how the lawyers should have responded in the three scenarios outlined below and then examines the defense lawyer’s conduct in one of the most recent physical evidence case, In the Matter of Olson. Like the Montana Commission on Practice and the Montana Supreme Court, I believe that Olson handled the ethical dilemma he faced in a professionally appropriate manner and that he did not unlawfully obstruct justice or conceal evidence. I also agree with the court that Standard 4-4.6 offers appropriate guidance for a lawyer confronting such a conundrum.

The current version of ABA Standard 4-4.6, however, does not provide a complete set of answers to all of the questions that may arise. Indeed, given the variations in state law regarding obstructing or hindering justice and tampering or concealing evidence, this standard cannot provide criminal defense lawyers a safe harbor immunizing them from criminal prosecution or disciplinary action, no matter how it is revised. Nevertheless, Standard 4-4.6 strikes a more appropriate balance than that struck by section 119 of the Restatement or many of the courts that have confronted this troublesome issue.

**The Physical Evidence Dilemma: Three Common Scenarios**

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

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

The Damaged Car with the Bloody Smear. Art Wall comes to see attorney Sue Jones for legal advice. Wall tells Jones that he had gone to a party the night before and gotten very intoxicated. He recalls starting to drive home but has no memory of anything else until waking up in his bed with a massive hangover. As he was lying in bed, he heard on the radio that the police were looking for a white car involved in a hit-and-run accident with a pedestrian on Western Boulevard. The victim, a little girl, was in critical condition. Wall said he drove a white Honda but didn’t think anything more of the story until he went to his garage and noticed damage to the right front side of his car. He was positive that this damage had not been there before the party. He also noticed what appeared to be a bloody smear. Wall said he panicked at that point because, given the location of the party, he may well have been on Western and involved in the accident. When asked where the car was right now, Wall replied that it was still in his garage. He had taken the bus to Jones’s office.

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

Conflicting Ethical Norms and Case Law

Ethical Rules. Like all lawyers, criminal defense lawyers owe clients the duty of competence, confidentiality, and loyalty. No one questions that defense counsel must serve the best interests of clients despite the clients’ unpopularity or the heinous nature of the defendants’ alleged crimes. Zealous representation by a loyal advocate is critical to an adversarial system.

Defense counsel’s zealous advocacy is not, however, unbounded. As the preamble to the Model Rules of Professional Conduct stresses, a lawyer must act “within the bounds of the law” in carrying out the duty to “zealously” protect and pursue a client’s “legitimate interests.” (Model Rules of Professional Conduct, Preamble at [9] (2009).) Unquestionably, a lawyer cannot assist a client by acting outside the law or by pursuing illegitimate interests. The bounds of law, however, are not always easily determined. As the preamble acknowledges, a lawyer’s conflicting responsibilities to client and to the legal system raise “difficult issues requiring the exercise of sensitive professional and moral judgment.” (Id.) Indeed, in some instances, a lawyer “has duties to the tribunal, to the public, and even to adversaries that can create tension with and even trump the same advocate’s duties to advance his client’s cause.” (Geoffrey C. Hazard & William C. Hodes, The Law of Lawyer ing 30-3 (3d 2001).)

Unfortunately, the Model Rules offer little constructive guidance in resolving the scenarios presented above. Model Rule 8.4 commands that a lawyer not commit a criminal act, engage in dishonest or deceitful conduct, or engage in conduct prejudicial to the administration of justice. This provision standing alone cannot reasonably be read to forbid a lawyer from taking temporary possession of an item of physical evidence absent some intent on the part of the lawyer to alter, destroy, or conceal the item from the authorities. Moreover, Model Rule 3.4(a) states only that a lawyer shall not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value” nor counsel or assist another person to do any of these forbidden acts. The rule’s use of the word “unlawfully” is significant, clearly indicating that not all conduct that obstructs, alters, destroys, or conceals evidence violates Rule 3.4. (Annotated Model Rules of Professional Conduct 325 (6th ed., 2007).) The comment to Rule 3.4 observes that “applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.” Such advice alerts criminal practitioners of the need to examine state law on the subject, but it provides little guidance to lawyers who ultimately must decide how to respond ethically to a particular physical evidence dilemma.
The Model Rules clearly require that a lawyer follow the law when taking or retaining possession of any physical evidence. Thus, to understand the lawyer’s legal obligations with respect to the possession of physical evidence, counsel must determine whether possession of the evidence will run afoul of the jurisdiction's laws dealing with obstruction of justice, tampering with evidence, or any other offense related to the alteration, concealment, or destruction of evidence. That determination is seldom straightforward. Rather, “the criminal law relating to obstruction of justice is complicated, ambiguous, and subject to considerable jurisdictional variations.” (Peter A. Joy and Kevin C. McMunigal, *Incriminating Evidence—Too Hot to Handle*, CRIM. JUST. 42 (Summer 2009).) In some jurisdictions, lawyers are specifically excluded from the reach of certain criminal statutes. Generally, however, state statutes do not provide an exemption for a lawyer whose handling of physical evidence may constitute altering, concealing, or destroying evidence. Some courts have construed their obstructing justice or tampering with evidence statutes to block defense lawyers from criminal convictions or disciplinary action if counsel was acting in a good faith belief that the conduct was professionally required. (Com. v. Stenhach, 514 A.2d 114 (1986).) That may be little solace to lawyers forced to defend themselves in a criminal prosecution or disciplinary matter. Indeed, the mere threat of criminal prosecution or disciplinary sanctions may well chill some defense lawyers from taking action that a zealous advocate ought to be willing to take in defending a client. Although it may be good policy not to prosecute criminal defense lawyers whose conduct is consistent with that seemingly demanded by professional norms, a defense lawyer with a contentious relationship with local prosecutors undoubtedly is at some risk.

**Case Law.** Since the *Ryder* decision, there have been a smattering of cases around the country that have discussed the duty of defense counsel with respect to physical evidence given to counsel or their investigators by clients, or by a third person. In most of these cases, courts have rejected the notion that the principle of confidentiality or the attorney-client privilege shields evidence from seizure by the state simply because a client gives an evidentiary item to an attorney or to a member of the attorney’s staff. Indeed, courts have consistently held that law offices could not become depositories for a client’s illicit property or for incriminating items connected to that client’s possible criminal conduct. Courts do not want to encourage clients to attempt to hide evidentiary items with their lawyers, or empower lawyers to unfairly hinder law enforcement efforts to gain access to evidence. Fearful that a defense lawyer’s retention of evidence might frustrate the search for truth, many courts have held that if defense lawyers or their investigators take physical possession of an item of physical evidence, they are ethically required on their own, even without a court order or subpoena, to turn over such item to the authorities. *(See, e.g., In re Original Grand Jury Investigation, 733 N.E.2d 1135 (Ohio 2000).)* In some states, therefore, case law clearly limits what defense counsel or counsel’s investigators may do if they take possession of incriminating physical evidence.

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

> With respect to physical evidence of a client crime, a lawyer:
> (1) may, when reasonably necessary for purposes of the representation, take possession of the evidence and retain it for the time reasonably necessary to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence; but
> (2) following possession under Subsection (1), the lawyer must notify prosecuting authorities of the lawyer’s possession of the evidence or turn the evidence over to them.

Although an earlier draft of section 119 allowed lawyers to return evidence to the source if that could be accomplished without destroying or altering material characteristics of the evidence, the final version rejected such an approach. Comment C to section 119 acknowledges that some decisions have “alluded to an addition option—returning the evidence to the site from which it was taken, when that can be accomplished without destroying or altering material characteristics of the evidence.” *(RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §119, Comment C (2000).)* Comment C concludes, however, that this option “will often be impossible.” Moreover, comment C notes that such an option would be unavailable if counsel reasonably should know that the client or another person will intentionally alter or destroy the evidence. Nonetheless, neither comment C nor the reporter’s note to section 119 explains why this option ought not be available in those circumstances where the item can, in fact, be promptly returned to the source and counsel has no reason to believe that the item will be altered or destroyed.

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

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

Thus, Standard 4-4.6 contemplates that normally defense counsel will not keep possession of incriminating evidence but will return the item of physical evidence to the location or person from whom counsel received it. Standard 4-4.6 recognizes, however, that at times defense counsel may have to temporarily retain possession of physical evidence. Standard 4-4.6(c) expressly allows defense lawyers to temporarily possess physical evidence, including contraband, for a limited period of time before returning the item to the source. That provision reads:

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

The commentary to Standard 4-4.6 provides the rationale for the standard’s markedly different approach from that of Restatement §119 and that demanded by some state courts. Noting that other ABA Standards trumpet the importance of encouraging frank communication between lawyer and client, the commentary stresses that protecting client confidences is critical if lawyers are to establish and maintain a good attorney-client relationship. Without such a relationship, it would be difficult for counsel to provide effective representation. The commentary to Standard 4-4.6 concludes, therefore, that mandating that defense counsel turn over all physical evidence to the police or prosecutor will discourage candid client-lawyer communication, compromise a full defense investigation, and, ultimately, undermine trust between client and defense counsel.

Certainly some in the academic community question the need for strong confidentiality rules. (See, e.g., Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351 (1989).) These critics point out that there are already a number of recognized exceptions both to the attorney-client privilege and the ethical duty of confidentiality as articulated in Model Rule 1.6. In their view, there is little evidence to suggest that the existence of such exceptions has undermined attorney-client relationships or the ability of criminal defense lawyers to effectively represent their clients. Thus, they argue, requiring lawyers to warn clients about an additional exception whereby counsel might be obligated to disclose or turn over incriminating physical evidence will not significantly affect the client’s willingness to trust his or her lawyer. Nor will such a warning adversely affect the client’s willingness to fully disclose all relevant facts to counsel.

I strongly disagree. A sound attorney-client relationship is based on trust and absent that trust, few criminal defendants will fully disclose all relevant facts to counsel. In the first scenario, for example, Smith’s ability to gain Brown’s trust depends largely on her willingness to look her client in the eye and pledge her loyalty, including her firm commitment to maintain the confidentiality of their communications. Convincing an indigent client to trust the defense lawyer provided and paid for by the state is never easy. If an indigent defender offers a weak pledge of confidentiality detailing a long list of exceptions that permit or require counsel to disclose a client’s confidences, then it becomes virtually impossible to secure the client’s trust. In practice, conscientious indigent defenders understand this reality and generally give an absolute pledge because they believe it is the only viable way to gain the trust of most mistrustful indigent defendants. Having given that pledge and gained the client’s confidence, most criminal defense lawyers are loathe to betray their clients unless they have no other choice.

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

Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution’s case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State’s case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

(388 U.S. 218 (1967) (White, J. dissenting in part and concurring in part).)

Standard 4-4.6 reflects Justice White’s view of defense counsel’s role in the adversary system. Although counsel may not unfairly or illegally obstruct access to evidence, a defense lawyer certainly ought not be in the business of knowingly aiding the prosecutor to secure evidence that implicates the client. Accordingly, in the course of properly defending one’s client, a criminal defense lawyer may properly take action that will frustrate the truth and the prosecutor’s ability to win a conviction. Defense lawyers may also refuse to divulge the location of physical evidence even though they know that their refusal may well prevent law enforcement authorities from ever obtaining this evidence. Such a refusal does not constitute hindering or obstructing justice even though defense counsel’s deliberate failure to cooperate with law enforcement may enable a guilty client to escape conviction.

Unpacking the Physical Evidence Scenarios
The Murder Weapon. In the Brown scenario noted earlier, neither Sally Smith nor her investigator should go to the dumpster to try to retrieve the weapon. Nothing in the facts of the scenario suggests that any exculpatory evidence might be preserved by securing the knife. Thus, there is no legitimate reason for Smith to take possession of the knife and doing so only puts her in a complicated dilemma that may end badly for her or her client. As will be discussed in more detail later, sometimes circumstances make it extremely difficult for defense counsel or counsel’s investigators to recognize whether an item has evidentiary value or whether it may, in fact, be exculpatory as opposed to incriminating. In the Brown scenario, however, there is not any reasonably foreseeable possibility that taking possession of the evidence is necessary to aid in any way in counsel’s defense efforts. Consequently, Brown has nothing to gain but much to lose if Smith takes possession of the weapon.

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

If, during their discussion, the young woman says that she has changed her mind and does not want the shoes delivered to the store for fear she will be linked to the shoes despite counsel’s effort, then what are Black’s options? He need not confiscate the shoes merely because he brought them into his office. Even if she left them in his office for a period of time while she went to plug her meter, Black’s temporary possession of the shoes ought not trigger a duty to retain them and then deliver them to the authorities. Indeed, if a lawyer’s brief examination of an item of physical evidence constitutes possession...
triggering a duty to retain and to deliver the item to the authorities, then the ability of clients to obtain effective legal advice and counsel would be unduly restricted. (See Hazard & Hodes, supra, at 9–12.) Consistent with Standard 4-4.6(c), Black should be permitted to let the woman leave with the shoes absent some reasonable basis to believe she intends to destroy them. The mere possibility that she may dispose of them is not enough to warrant Black's seizure of the shoes because that possibility exists in every case and such a low threshold would effectively eviscerate the "return to the source" option.

One objection to Black's returning the shoes to the store is that doing so may interfere with the prosecution's ability to find the shoes in a location that connects the client with the stolen shoes. Thus, counsel's intervention may make it more difficult, or perhaps even impossible, to secure the conviction of a guilty person thereby undermining the fair administration of justice. Additionally, opponents worry that the "return to the source" alternative will allow evidence to be routinely destroyed.

Admittedly, both concerns are legitimate. Black's goal in returning the stolen shoes is not only to mitigate the consequences of the client's offense, but also to complicate the ability of the authorities to connect his client to a crime. Yet, defense counsel's role generally is to force the prosecution to shoulder the burden of proof, not to make that burden easier. The defendant's decision to consult with an attorney ought not put him or her in a worse position by compelling counsel to hand over to the prosecution the evidence it needs to secure a conviction. As the court noted in Miranda v. Arizona, 384 U.S. 436, 460 (1966):

Our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.

Counsel ought to be able to deliver evidence to the authorities in a manner that requires them to labor to make the requisite connection to the client rather than demanding that counsel turn over an item in a manner that essentially acknowledges the client's involvement in a crime.

Criminal defendants ought not be required to sacrifice their Fifth Amendment right as a cost of consulting with counsel or seeking counsel's assistance in defending against criminal charges. Not only does a mandatory disclosure rule run counter to the tradition of client loyalty, it may enable the government to obtain from defense counsel voluntarily what it cannot constitutionally obtain from a defendant by use of a subpoena. (Hyder v. Superior Court of Maricopa County, 625 P.2d 316 (1981); Commonwealth v. Hughes, 404 N.E. 2d 1239, cert. denied, 449 U.S. 900 (1980).) Courts and commentators certainly disagree as to the precise interplay between the Fifth and Sixth Amendments and the attorney-client privilege when dealing with physical evidence, especially documents and writings, given to defense counsel by the client. Yet, even if one accepts the constitutionality of the "turn over" doctrine, defense counsel ultimately ought not be required both to disclose incriminating evidence and then to be compelled to lay the foundation linking the evidence to the client. (Hazard & Hodes, supra, at 30–15.)

Although counsel's action in returning the shoes may frustrate the state's ability to proceed with a criminal prosecution, counsel's intervention will have ensured that stolen property has been promptly returned to the rightful owner limiting the damage done to the victim. It may well be that the lawyer's ability to forge a relationship of trust with the client caused the client to seek counsel's advice. Absent such a relationship, the client may have simply thrown the shoes away, making it very unlikely that the evidence would have been available for use against the defendant anyway. Thus, without counsel's intervention, law enforcement may well have never recovered the stolen shoes and the store would have permanently lost its property. Moreover, regardless of counsel's efforts to make it more difficult for the authorities to connect the shoes to Black, the police may still be able to link the returned evidence to the defendant and still successfully prosecute her. On balance, therefore, the potential costs identified by the opponents of the "return to the source" rule may well be exaggerated and they are clearly outweighed by the damage done to the attorney-client relationship and to legitimate defense investigation by a mandatory "turn over" rule.

Indeed, in Dean v. Dean, 607 So. 2d 494 (1992), Florida's Fourth District Court of Appeal recognized that it promoted public policy to permit a lawyer to return stolen property to the police without being compelled to identify the client. Defense counsel successfully argued that under the circumstances of the case, the attorney-client privilege should extend to cover his client's identity even though counsel was hired specifically to facilitate the return of the stolen property. As the Dean court noted:

Surely there is a public purpose served by getting stolen property in the hands of the police authorities even if the identity of the thief is not thereby revealed. Here the consultation resulted in exactly that. Krischer advised his client to turn over the property to the state attorney or the police. A lawyer's advice can be expected to result in the return of the property if the confidentiality of the consultation is insured.
As for the claim that returning an item to the source will routinely lead to the destruction of evidence, that risk also exists whenever defense counsel fails to take possession of evidence. No one suggests that defense counsel has an affirmative obligation to seek out and gain possession of incriminating physical evidence to preserve it for the prosecution. Such an obligation would turn defense counsel into an agent of the state acting against the best interests of the client. Instead, defense counsel is usually cautioned not to take possession of incriminating physical evidence and to warn a client of the consequences if counsel is to take possession—that the item will be turned over to the prosecution. Properly warned, few clients are likely to give such evidence to counsel or counsel’s investigator and may choose to hide or destroy the evidence. So the “return to the source” rule merely puts the defendant in the same position the client would have been had counsel not taken possession of evidence because of counsel’s inexperience, inadequate communication with her staff, or the possible exculpatory nature of the item.

In the majority of cases discussing defense counsel’s responsibilities in handling items of incriminating physical evidence, the lawyers who took possession of the evidence had absolutely no strategic or legitimate reason to do so. Unquestionably, in cases in which defense counsel inexplicably took possession of incriminating evidence and then turned that evidence over to the authorities, the defendant would have been much better off had he or she never consulted counsel. As opposed to the worrisome image of defense counsel racing to the scene of a crime to grab evidence to keep it from the prosecution, counsel’s intervention ensured that damning evidence was delivered to the authorities even though the evidence may well have never found its way into the prosecutor’s hands but for counsel or the investigator’s actions. The best interests of these defendants were unwittingly compromised by lawyers who apparently did not appreciate their role or fully understand their ethical responsibilities.

The Damaged Car Scenario. Given the story that Wall related to Jones, Jones would be remiss in not going to Wall’s garage or at least sending an investigator to look at Wall’s car. ABA Standard 4-4.1 encourages defense counsel to do a prompt investigation, and here the circumstances demand that Jones or her investigator at Wall’s car or at least sending an investigator to look at Wall’s car. ABA Standard 4-4.1 encourages defense counsel to do a prompt investigation, and here the circumstances demand that Jones or her investigator at Wall’s car. ABA Standard 4-4.1 encourages defense counsel to do a prompt investigation, and here the circumstances demand that Jones or her investigator at Wall’s car. ABA Standard 4-4.1 encourages defense counsel to do a prompt investigation, and here the circumstances demand that Jones or her investigator at Wall’s car. 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ought to be his. (See Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant’s Tactical Choices*, 68 U. Cin. L. Rev. 763 (2000).) After discussing Wall’s concerns and interests, Jones should give Wall her best advice as to how to proceed given the range of potential options. Unquestionably, Jones’s advice must include how she will respond if the testing reveals human blood. One option to consider is preserving a sample of the substance and only having it tested if the situation later warrants it. In the end, Jones should act based on Wall’s choice.

It is very likely that Wall will ask what he can do with the car if he does not want to take the risk of testing the substance or, in the interim, while they are waiting to have the substance tested. In either instance, Jones should warn Wall of the dangers of altering the condition of the car, especially since a test of the bloody smear might exculpate him. Jones should also caution Wall that altering, concealing, or destroying evidence is a crime. Even though Wall may push for more guidance in what he can do with the car, any advice that Jones gives is potentially problematic. Clearly she cannot suggest Wall get the damage repaired or that he wash the car. She cannot suggest that he take the car out of the jurisdiction, even advising Wall to stop driving the car and to keep it in the garage could be construed as encouraging him to conceal evidence. In short, Jones may not be able to offer much advice regarding the car other than to repeat the admonition that altering or destroying evidence may lead to additional charges.

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

As this scenario highlights, defense lawyers at times face an exceptionally difficult challenge in deciding whether to take possession of or test an uncertain item of physical evidence. Few defense lawyers want to take action that might contribute to their clients’ conviction. Standard 4-4.6 rightfully acknowledges this difficulty and allows counsel to return evidentiary items to the source thereby encouraging counsel to conduct a vigorous investigation. Restatement § 119, on the other hand, while recognizing the necessity of defense lawyers taking possession of evidence to examine or test the items in preparing a defense, still insists that counsel, after a reasonable time, notify the authorities or deliver the evidence to them. Demanding the delivery of all such evidence to law enforcement will chill defense investigations. Zealous defense lawyers will be extremely reluctant to ever take possession of evidentiary items, if doing so always demands disclosure to the authorities.

If the adversary system is to function properly, defense lawyers must be able to conduct an investigation without fear their investigation will unearth—or cre-
lawyers face in trying to zealously but ethically represent a criminal defendant. Hall unwittingly created the evidence that led to his client’s demise. Undoubtedly Hall believed that the map that he had his client draw was a confidential, privileged communication that could not be seized by the authorities. Section 119 of the Restatement certainly supports such a belief. Once created, however, Hall did not know whether his client’s other lawyers—or the courts—would share his view of the protected nature of the map. Thus, Hall inadvertently exposed his client to the real risk that a subsequent lawyer might feel obligated to disclose such an incriminating item to the authorities. In the end defense counsel’s efforts to aid his client drastically backfired.

**In the Matter of Olson: Handling Contraband.** The recent case of *In the Matter of Olson*, 222 P.3d 632 (Mont. 2009), highlights the difficulty that the physical evidence dilemma presents to the conscientious criminal defense lawyer when dealing with contraband. Olson, an experienced lawyer, was the chief public defender in Cascade County when he took on the representation of Kelly Mortenson, who, along with her husband, was charged with 38 counts of sexual abuse of children following a search of their apartment in which various items of possible child pornography were seized. After interviewing his client, Olson hired investigator Dan Kohm to assist him and began exploring the viability of a compulsion defense.

Within two weeks of undertaking his representation of Mortenson, Olson was contacted by Mortenson’s mother who suggested that there were items in her daughter’s apartment that Olson should view. Olson and Kohm promptly went to the apartment and collected various items that they believed “would be potentially helpful in formulating a defense,” including 13 photographs. These photographs had apparently been downloaded from the Internet and each depicted young girls posing erotically. Olson had Kohm tag, seal the items, and take them to Kohm’s office where they were securely stored. Prior to removing the items, Olson and Kohm were aware both that an eviction notice had been issued to the Mortensons and that the Great Falls Police Department had searched and released the apartment.

Although neither Olson nor Kohm believed that the items were child pornography, they recognized that others might conclude differently. Given that possibility, Kohm questioned if they could be subject to prosecution for possessing the items. Consequently, Olson conferred with Tony Gallagher, the chief federal defender in Montana, who had extensive experience defending child pornography cases. Gallagher opined that the items were not pornographic, but he encouraged Olson, nevertheless, to seek an ex parte protective order in case someone might conclude otherwise. Gallagher clearly did not believe that Olson had acted unethically or unprofessionally in taking possession of the items. As he would subsequently testify, Gallagher believed that Olson had an obligation to gather such items in preparing his client’s defense and he did not have a duty to turn over that information at that point.

Olson acted on Gallagher’s advice and obtained a protective order. He also hired a forensic psychologist to evaluate Mortenson and advise him regarding his theory of defense. The psychologist not only agreed with Olson’s compulsion theory, but also concurred that the photos were not pornographic.

Within 10 days of removing the items from his client’s apartment, Olson received an e-mail from the state prosecutor informing Olson that the case would likely be handled by federal authorities and the state charges dismissed. Later that month, Olson was hired to be training coordinator for the Office of the Montana State Public Defender. As a result of the prosecutor’s e-mail and his new job, Olson did not go forward with his defense of Mortenson.

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

The Montana Office of Disciplinary Counsel (ODC) eventually charged Olson with violating Montana’s version of Rule 3.4, arguing that he unlawfully obstructed another party’s access to evidence and/or concealed documents or other material having potential evidentiary value. The ODC also complained that Olson violated Rule 8.4(b) because he tampered with or fabricated physical evidence, contrary to section 45-7-207, MCA. Finally, the ODC alleged that Olson violated Rule 8.4(c) by virtue of his “dishonest and deceitful conduct” and Rule 8.4(d) because his conduct was “prejudicial to the administration of justice.”

The Montana Commission on Practice did not find any misconduct on Olson’s part. Rather, the commission rightfully concluded that “his conduct was a ‘text book example’ of the type of functioning expected of defense counsel.” *(Id. at 637.)* The commission emphasized that Olson had a clear duty to conduct a diligent investigation and found that, as part of that investigation, it may be necessary for defense counsel to take possession of evidentiary material in order to make a judgment about its possible utility in defending the client. It also stressed that Olson had a “good faith belief” that the items taken from the apartment needed to be examined because they possibly supported a defense, included privileged ma-
terial, and were not child pornography or contraband. In addition, the commission found that because Olson preserved the evidence in a safe manner and sought a protective order, there was no evidence that he intended to commit the offense of tampering with evidence.

The Montana Supreme Court adopted the recommendations of the commission and found that the ODC failed to prove that Olson violated Rule 3.4 or 8.4. It dismissed the complaint against Olson despite disagreeing with the commission’s conclusion that the disputed photographs were not examples of child pornography. In the court's view, however, the nature of the seized evidence was not dispositive, thereby implicitly recognizing, as did the commission, that defense lawyers in the course of carrying out their duty to prepare a defense for their clients may need to temporarily take possession of an incriminating item even if it is contraband. Nor did the court find that defense counsel was required to immediately deliver the item to the authorities, but said that “Olson was not, at that point in the proceedings, obligated to turn the items over to the police or prosecutor by virtue of a statute or court order.” (Id. at 638.) The majority did not indicate whether Olson would have been obligated to turn over the evidence sua sponte at some point even without a court order. The court did note, however, that the commission properly relied on the ABA Criminal Justice Standards for guidance in analyzing this issue.

The Montana court also quickly disposed of the Rule 8.4 allegations finding neither evidence of Olson’s intent to tamper with physical evidence nor sufficient evidence to find “that he was dishonest or deceitful or that his conduct was prejudicial to the administration of justice.” (Id. at 639.) In so holding, the majority clearly rejected the dissent’s position that Olson both violated Rule 3.4 and was guilty of concealing evidence in violation of section 45-7-207. In the end, the court’s decision affirmed the legitimacy of Olson’s conduct in responding to the dilemma he confronted.

Both the commission and the Montana court seemed to appreciate the difficulty of the predicament that Olson faced. Olson was intent on providing his client with a vigorous defense. He conducted a lengthy client interview, retained an investigator and forensic expert, and began a prompt investigation to develop a viable defense theory. When alerted that possible evidence may be at his client’s apartment, he promptly went there with his investigator. Given the nature of his possible defense and the uncertain status of the photographs, his decision to collect the evidence was professionally reasonable. His decision was clearly not designed to thwart the prosecution’s access to evidence or conceal evidence. After all, the authorities already had full access to this evidence and, for whatever reason, decided not to take possession of the items. Indeed, Olson knew that the police had already searched the apartment and released it. He had no reason to think that the police had any intention of returning to the apartment to conduct any additional searches.

Just as courts are properly concerned that law offices do not become depositories for physical evidence, courts also do not want lawyers and their investigators to race the police to a possible crime scene to grab evidence and thereby interfere with the ability of law enforcement officials to investigate crimes and to successfully prosecute criminals. Geoffrey Hazard and William Hodes argue that while the voluntary turn-over runs counter to the tradition of client loyalty, “any other rule inevitably degenerates into a race between the police and a suspect’s lawyer to be first to take possession of evidence.” (Hazard & Hodes, supra, at 9–121.) Certainly in some instances, the timing of defense counsel’s actions, the nature of the items collected, the crime involved, and counsel’s intent may warrant a finding that counsel violated a state’s analogue of Rule 3.4 or a criminal tampering statute. In the vast majority of criminal cases, however, the concerns about lawyers racing the police to the scene are completely unfounded. The vast majority of criminal defendants in this country are indigent. As in Olson, rarely are public defenders or appointed counsel involved in a case until charges have been issued and the police investigation already concluded. Moreover, too few indigent defense lawyers even have access to investigators and many lack the time to conduct any investigation. Those defense lawyers who undertake an appropriate investigation as called for by ABA Standard 4-4.1 are almost always trying to find evidence long after the events related to their clients’ charges occurred.

Undoubtedly, there are cases in which defense counsel ought not to disturb evidence that is clearly both incriminating and unrelated to any possible defense. Such a decision may well mean that such evidence never gets to the authorities. In Olson, had he not collected the items in the apartment, they would have been thrown out with the trash, retained by the apartment owner, or possibly, turned over to the police. It is highly unlikely that the police were actually going to return to the apartment to continue to search for evidence. What is clear, however, is that had Olson decided to leave the items in the apartment, he may well have forfeited his ability to use the evidence should he have later determined that the evidence might have helped in the client’s defense.

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

To his credit, Olson was motivated to provide his client an effective defense. The dissent, however, paints a very different picture of Olson, claiming that he mislead District Court Judge McKittrick to secure the protective order. (Id. at 641–42.) Yet, Judge McKittrick testified on Olson’s behalf at that disciplinary hearing, saying that he was an aggressive lawyer just trying to investigate his client’s case and that the use of tampering charge to criminalize Olson’s investigative efforts would have a chilling effect on defense lawyers.

**Standard 4-4.6: Unanswered Questions**

As a number of commentators have observed, the courts and the bar have a different vision of the importance of client confidentiality. For the bar, confidentiality must be jealously protected because it is critical to fostering the trust that is the hallmark of the attorney-client relationship. Even though the courts acknowledge the importance of confidentiality, judges are often quite willing to find exceptions to the attorney-client privilege, to construe the privilege narrowly, or to find that the privilege has been waived in a particular case in order to minimize the negative impact of the privilege on the search for truth.

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

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

The commentary concludes, therefore, that “to assure effective representation, defense counsel must be encouraged to acquire physical evidence if he or she believes the client’s defense might genuinely be enhanced thereby.” Nonetheless, Standard 4-4.6 is not designed to provide a safe harbor for unscrupulous lawyers nor a vehicle to enable clients to safely hide incriminating evidence with their lawyers. Rather, Standard 4-4.6 represents a thoughtful approach that seeks to balance defense counsel’s conflicting duties to the client and with counsel’s duties as an officer of the court. By rejecting the more rigid mandatory disclosure or “turn over” approach, Standard 4-4.6 offers a more nuanced framework for lawyers seeking to reconcile their conflicting duties in a manner that does not harm their clients. Moreover, as the Olson case demonstrates, the standard can influence courts to resolve tough cases in a way that does not punish counsel for acting in a professionally proper manner or a client for confiding in his or her lawyer.

Despite the merits of Standard 4-4.6, however, it is not without flaws. The commentary to Standard 4-4.6 warns defense counsel not to alter, conceal, or destroy relevant items of physical evidence. Yet, neither the standard nor the commentary sufficiently cautions defense counsel and their investigators to refrain from taking possession of items that are clearly incriminating. Taking possession of an item always runs the risk that evidence will be altered and also ensures that the police—at least temporarily—will have a reduced opportunity to discover the item in a relevant location. By encouraging defense counsel only to take possession of an item that might genuinely enhance the client’s defense, the commentary implicitly recognizes that it can be difficult at times to determine the potential exculpatory nature of some evidentiary items. In those instances where the incriminating nature of an item is obvious, however, defense counsel is not justified in removing the item from its location or running the risk that temporarily possessing the item will alter it in some fashion—by smudging

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**In the majority of criminal cases, the concerns about lawyers racing the police to the scene are completely unfounded.**

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incriminating fingerprints, for example.

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

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

Or consider a lawyer whose client wants to know if a tape found in a son’s closet is child pornography. Does the mere fact that counsel views the tape and deems it pornographic mean that counsel’s temporary possession of it is criminal? May counsel destroy the tape or return it to his or her client or must it be turned over to law enforcement authorities? Standard 4-4.6 correctly provides counsel the breathing space needed to review documents, tapes, and any other physical evidence so that clients can safely consult with counsel and secure proper legal representation. Clients must be able to show documents or evidence to counsel without fear that counsel’s examination and temporary possession will automatically result in counsel turning that evidence over to law enforcement authorities. Moreover, counsel must be free to temporarily possess such evidence without fear of criminal prosecution or discipline for doing nothing more than attempting to render appropriate legal assistance. Although the Criminal Justice Standards cannot guarantee defense lawyers an absolute safe harbor, Standard 4-4.6 needs to be a powerful voice urging prosecutors, disciplinary authorities, and courts to give defense lawyers the latitude to properly represent their clients.

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

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

Standard 4-4.6’s failure to limit how long defense counsel can retain contraband is puzzling. The commentary to 4-4.6 rightfully warns that defense counsel might be “loathe” to return contraband to the source. Absent a pending case or contrary legal authority in counsel’s jurisdiction, the commentary urges counsel to destroy the contraband. The commentary indicates that contraband that cannot be lawfully destroyed or an item whose return to the source poses an unreasonable risk of physical harm must be disclosed or delivered to law enforcement authorities. The commentary implies, therefore, that other items that cannot be returned to the source but need not be turned over to the authorities, may be held indefinitely.

That is problematic. Standard 4-4.6 ought not permit defense lawyers to hold onto items permanently, especially contraband, but rather should require such items to be delivered to the authorities in the same manner as evidence that poses an unreasonable risk of physical harm if returned to the source. Standard 4-4.6(c) directs defense counsel to disclose or deliver items in a way “best designed to protect the client’s interests.” Generally, the delivery should be made anonymously. That provides law enforcement an opportunity to use the evidence should they be able to connect it to the defendant and it prevents counsel’s law office from being a repository for an incriminating item. Ideally, more jurisdictions would follow the lead of the District of Columbia Bar Association, which has been accepting incriminating items from lawyers for
delivery to the police since 1983. (See Mark Hansen, *Hand It Over*, A.B.A. J. 30 (Dec 2005).)

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

**Conclusion**

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

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

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

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

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