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As I See It

The Challenge of Handling Pornography and Other Incriminating Evidence in Wisconsin

Possession of some types of incriminating evidence poses challenges not only for defendants but also for their lawyers. Child pornography is a prominent example. There are differing views as to how lawyers should deal with such evidence if they are aware of its existence or if they have been given the evidence or a device that contains the evidence.

In an article in the June 2025 *Wisconsin Lawyer*,[1] Sean Harrington offered advice to Wisconsin lawyers on their ethical obligations when they inadvertently come into possession of child pornography. ("Child pornography" refers to images or recordings "of a child engaged in sexually explicit conduct" as defined by Wis. Stat. section 948.12.) He is right to warn criminal defense lawyers that they may face criminal prosecution or professional discipline if they knowingly possess child pornography. Thus, we agree that criminal defense lawyers generally should avoid taking possession of child pornography and instruct those working in their office to avoid doing so as well. While we applaud Mr. Harrington for alerting Wisconsin lawyers to the dangers of mishandling child pornography, our article dives deeper in providing lawyers the guidance they need when wrestling with the complex challenges of handling contraband and other incriminating physical evidence.

As discussed in this article, a lawyer's options with respect to child pornography may be more limited than when handling other incriminating physical evidence. Nonetheless, lawyers are not always required to turn suspected contraband over to law enforcement as Harrington asserts. Rather, lawyers have other legitimate options to consider. Indeed, a lawyer is professionally obligated to explore those options before taking any action that potentially incriminates a client.[2]

Scholars' and Courts' Views on Handling of Incriminating Evidence

The topic of the challenges for criminal defense lawyers in handling incriminating physical evidence, including contraband, has received considerable attention from legal scholars and commentators since *In re Ryder* in 1967.[3] The infamous *Ryder* case is discussed in most professional responsibility textbooks and often used to warn law students that even though a defense lawyer has a constitutional duty to provide effective representation to a client, that duty does not permit a lawyer to conceal instrumentalities or evidence of a crime in one's law office. Although counsel may, while properly defending a client, take action that will frustrate the prosecutor's ability to win a conviction,[4] lawyers must not alter, conceal, or destroy relevant evidence.

In the past 60 years, a few courts around the United States have grappled with different aspects of the dilemma facing a criminal defense lawyer who has taken possession of physical evidence. Most, but not all, courts that have addressed the issue have held that a lawyer who comes into possession of incriminating evidence and turns that evidence over to authorities contrary to the best interest of their client has not acted unethically or provided ineffective assistance of counsel.[5] Because taking possession might trigger a requirement to disclose and turn over incriminating evidence to the authorities to the client's detriment, commentators uniformly caution criminal defense lawyers not to take possession of contraband or evidence of a crime, except in very limited circumstances, such as when evidence may aid in the client's defense or its evidentiary value is ambiguous without further examination or testing.[6]

A criminal defense lawyer should never take possession of physical evidence that is clearly incriminating unless it might be relevant to a viable defense. Certainly, the defense lawyer in *People v. Meredith*[7] failed to heed that advice. In that case, the lawyer learned from a client who was accused of murder that the client had thrown a wallet belonging to the victim into a burn barrel behind his house. Without consulting the client, the lawyer instructed an investigator who worked with the lawyer to retrieve the wallet. The investigator found the wallet and gave it to the lawyer, who promptly turned it over to the investigating detective.

No conscientious criminal defense lawyer committed to providing a client zealous representation should ever act in such a manner. Criminal defense lawyers are under no legal or ethical obligation to collect or preserve incriminating evidence not in their possession or control.[8] Rather, as we explain, clearly incriminating evidence, including child pornography, should be left alone unless there is no doubt that the client will benefit from counsel taking possession.

In rare instances, conscientious defense counsel might feel the need to take possession of contraband, to properly prepare a defense for a client. In 2014, Kenneth Olsen, an experienced public defender representing a client, took possession of items of suspected child pornography material, believing that the items were critical to his theory of defense of the client.[9] When Olsen left the office to take another job, the public defender who took over the client's case delivered the items to the prosecuting authorities.

The Montana Office of Disciplinary Counsel eventually charged Olsen with violating Montana Rules of Professional Conduct 3.4 and 8.4(b), (c) and (d). Both the Montana Commission and the Montana Supreme Court found no misconduct on Olsen's part. The Montana Supreme Court agreed with the Montana Commission that Olsen neither violated the rules of professional conduct nor Montana's statute on tampering with physical evidence despite keeping the child pornography in his law office and not immediately turning it over to the authorities. The court also noted that the Montana Commission properly relied on the ABA Criminal Justice Standards for guidance in analyzing the issue.[10]

Must Incriminating Evidence Be Turned Over to Authorities?

One practical problem criminal defense lawyers face when investigating or preparing a defense is that it is not always obvious whether an item of physical evidence they or their investigators encounter is incriminating or potentially exculpatory evidence. Only after the physical evidence is collected – and sometimes only after discussing the item of evidence with the client or after the evidence has been tested – may the lawyer come to recognize that the evidence is indeed incriminating and will not be helpful to the client's case. What then must the lawyer do with the incriminating physical evidence? Most courts that have addressed the issue mandate that criminal defense lawyers who have taken possession of incriminating evidence must notify prosecuting authorities or turn over that evidence to the authorities.[11] Some case law recognizes another option – permitting lawyers to avoid turning over incriminating evidence to the authorities by returning evidence to the source.[12]

Citing to one authoritative source, the Restatement (Third) of the Law Governing Lawyers section 119, Harrington argued that lawyers or their agents who take possession of child pornography must turn over that evidence to law enforcement. Indeed, Restatement section 119, while recognizing the necessity of defense lawyers taking possession of evidence to examine or test items of physical evidence in preparation of a defense, mandates that counsel, after a reasonable time, notify the authorities or deliver the evidence to them.

Harrington's analysis may have overlooked comment b to section 119, which states that comment b to section 119 states that "[a] lawyer has the same privilege as prosecutors to possess and examine such material for the lawful purpose of assisting in the trial of criminal cases. Such an examination may include scientific tests, so long as they do not alter or destroy the value of the evidence for possible use by the prosecution. So long as the lawyer's possession is for that purpose, criminal laws that generally prohibit possession of contraband or other evidence of crimes are inapplicable to the lawyer."

Additionally, 18 U.S.C. § 1515(c) provides lawyers a safe harbor from a federal obstructing-justice charge if they are providing bona fide legal services to a client. Prominent ethics scholar Greg Sisk argued persuasively that 18 U.S.C. § 1515(c) protects a lawyer even when advising a client to destroy contraband such as child pornography if the lawyer has no reason to believe the items are relevant to a pending proceeding or investigation that at least may be reasonably anticipated.[13]

One of the nation's leading legal scholars, Stephen Gillers, not only disagrees with Restatement section 119 but also has argued that the prevailing precedent holding that lawyers must turn over physical evidence to the

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prosecution is wrong.[14] Sisk agrees with Gillers that most courts have gotten it wrong, arguing that the mandatory turnover rule compromises the criminal defendant's right to have counsel investigate and examine real evidence because most lawyers will halt doing such an investigation if the lawyer knows that exercising that right will redound to the client's detriment when the evidence afterward must be laid at the doorstep of the prosecution.[15] We agree with Gillers and Sisk.

Many other legal scholars agree that lawyers are not required to turn over all incriminating evidence to the prosecution.[16] In their treatise on ethics, *The Lawyer's Deskbook on Professional Responsibility*, Morgan and Rotunda stated:

"A lawyer, when necessary, may take possession of physical evidence and retain it for a reasonable amount of time in order to examine it, but this examination must not alter or destroy the evidence. After that time, the lawyer must either return the evidence to the site from which it was obtained (if it can be done without destroying the evidentiary value) or notify the prosecuting authorities that the lawyer has possession of the evidence."[17]

Neither the ABA Model Rules of Professional Conduct nor Wisconsin SCR 20:3.4 provides a clear answer to the question of what a lawyer must do after taking possession of incriminating physical evidence. Comment [2] of SCR 20:3.4 states that "[a]pplicable 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."

In the absence of any Wisconsin case law directly on point spelling out a lawyer's obligation once in possession of incriminating physical evidence, therefore, we encourage criminal defense lawyers to look to ABA Criminal Justice Standard 4-4.7.[18] Warren Burger, chair of the ABA Standards project until his appointment as Chief Justice of the U.S. Supreme Court in 1969, described the project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history" and recommended that "[e]veryone connected with criminal justice … become totally familiar with [the Standards'] substantive content."[19] Since their adoption, the ABA Standards have been cited thousands of times by courts across the United States, including the U.S. Supreme Court. As the Supreme Court noted in *Strickland v. Washington*, the ABA Standards provide reliable guidance as to the "prevailing norms of practice" and "guides to determining what is reasonable" criminal defense attorney performance.[20]

ABA Guidance: Standard Defense Function 4-4.7

ABA Standard Defense Function 4-4.7, "Handling Physical Evidence with Incriminating Implications," provides authoritative guidance to criminal defense lawyers. [See sidebar.] ABA Standard 4-4.7 reflects a more nuanced approach to the ethical dilemma criminal defense lawyers face than a mandatory disclosure rule. The standard recognizes that defense lawyers at times face an exceptionally difficult challenge if, while preparing a client's defense, they come into possession of an item of physical evidence that is incriminating. Few defense lawyers want to take any action that might contribute to a client's conviction. ABA Standard 4-4.7 acknowledges this difficulty and allows counsel to return evidentiary items to the source, thereby encouraging counsel to conduct a rigorous investigation. Demanding the delivery

ABA Guidance: Standard Defense Function 4-4.7

ABA Standard Defense Function 4-4.7, "Handling Physical Evidence with Incriminating Implications," provides authoritative guidance to criminal defense lawyers. Standard 4-4.7 states:

(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 counsel knows is unlawful, and should not knowingly and unlawfully impede efforts of law enforcement authorities to obtain evidence.

(c) *Confidentiality:* Defense counsel should act in accordance with applicable confidentiality laws and rules. In some circumstances, applicable law or rules may permit or require defense counsel to disclose the existence of, or the client's possession or disposition of, such physical evidence.

(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:

(i) when counsel reasonably believes the client intends to unlawfully destroy or conceal such evidence;

(ii) when counsel reasonably believes that taking possession is necessary to prevent physical harm to someone;

(iii) when counsel takes possession in order to produce such evidence, with the client's informed consent, to its lawful owner or to law enforcement authorities;

(iv) when such evidence is contraband and counsel may lawfully take possession of it in order to destroy it; and

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

(e) *Compliance with legal obligations to produce physical evidence:* If defense counsel receives physical evidence that might implicate a client in criminal conduct, counsel should determine whether there is a legal obligation to return the evidence to its source or owner, or to deliver it to law enforcement or a court, and comply with any such legal obligations. A lawyer who is legally obligated to turn over such physical evidence should do so in a lawful manner that will minimize prejudice to the client.

(f) *Retention of producible item for examination.* Unless defense counsel has a legal obligation to disclose, produce, or dispose of such physical evidence, defense counsel may retain such physical evidence for a reasonable time for a legitimate purpose. Legitimate purposes for temporarily obtaining or retaining physical evidence may include: preventing its destruction; arranging for its production to relevant authorities; arranging for its return to the source or owner; preventing its use to harm others; and examining or testing the evidence in order to effectively represent the client.

(g) *Testing physical evidence.* If defense counsel determines that effective representation of the client requires that such physical evidence be submitted for forensic examination and testing, counsel should observe the following practices:

(i) The item should be properly handled, packaged, labeled and stored, in a manner designed to document its identity and ensure its integrity.

(ii) Any testing or examination should avoid, when possible, consumption of the item, and a portion of the item should be preserved and retained to permit further testing or examination.

(iii) Any person conducting such testing or examination should not, without prior approval of defense counsel, conduct testing or examination in any manner that will consume the item or otherwise destroy the ability for independent retesting or examination by the prosecution.

(iv) Before approving a test or examination that will entirely consume the item or destroy the prosecution's opportunity and ability to re-test the item, defense counsel should provide the prosecution with notice and an opportunity to object and seek an appropriate court order.

(v) If a motion objecting to consumptive testing or examination is filed, the court should consider ordering procedures that will permit independent evaluation of the defense's analysis, including but not limited to:

(A) permitting a prosecution expert to be present during preparation and testing of the evidence;

(B) video recording the preparation and testing of the evidence;

(C) still photography of the preparation and testing of evidence; and

(D) access to all raw data, notes and other documentation relating to the defense preparation and testing of the evidence.

(h) *Client consent to accept a physical item.* Before voluntarily taking possession from the client of physical evidence that defense counsel may have a legal obligation to disclose, defense counsel should advise the client of potential legal implications of the proposed conduct and possible lawful

alternatives, and obtain the client's informed consent.

(i) *Retention or return of item when law permits.* If defense counsel reasonably determines that there is no legal obligation to disclose physical evidence in counsel's possession to law enforcement authorities or others, the lawyer should deal with the physical evidence consistently with ethical and other rules and law. If defense counsel retains the evidence for use in the client's representation, the lawyer should comply with applicable law and rules, including rules on safekeeping property, which may require notification to third parties with an interest in the property. Counsel should maintain the evidence separately from privileged materials of other clients and preserve it in a manner that will not impair its evidentiary value. Alternatively, counsel may deliver the evidence to a third-party lawyer who is also representing the client and will be obligated to maintain the confidences of the client as well as defense counsel.

(j) *Adoption of judicial and legislated procedures for handling physical evidence.* Courts and legislatures, as appropriate, should adopt procedures regarding defense handling of such physical evidence, as follows:

(i) When defense counsel notifies the prosecution of the possession of such evidence or produces such evidence to the prosecution, the prosecution should be prohibited from presenting testimony or argument identifying or implying the defense as the source of the evidence, except as provided in Standard 3-3.6;

(ii) When defense counsel reasonably believes that contraband does not relate to a pending criminal investigation or prosecution, counsel may take possession of the contraband and destroy it. **WL**

of all such evidence to law enforcement would chill defense investigation. Zealous defense lawyers would be extremely reluctant to ever take possession of evidentiary items, if doing so always would require disclosure to the authorities.[21]

Thus, as the ABA Standards, some case law, and leading authorities advise, lawyers should not fear taking possession of physical evidence if counsel has a legitimate reason to do so. "If the lawyer takes the item to test it, she should have a reasonable basis to believe that the test will yield relevant information. Where the item is a document and its meaning is not immediately apparent, as with the workpapers in *Fisher*, taking possession will be necessary to understand its meaning. Absent an independent reason to retain the item or document, it should then be returned to its source."[22]

Specific Concerns for Contraband Evidence

Unquestionably, handling contraband such as child pornography, which is illegal to possess for the client or the lawyer, is even more challenging than handling other items of physical evidence.

What Not to Do. The case of *United States v. Russell* highlights the serious consequences lawyers might experience if they take possession of contraband and do not handle it properly.[23] In *Russell*, church leaders discovered child pornography on a laptop that belonged to a long-time choirmaster. The church leaders took the laptop to a lawyer, Philip Russell, for his advice. After confronting the choirmaster, who confirmed that he had downloaded the inappropriate images, Russell advised the church leaders that they could not continue to possess the laptop because possession of child pornography was unlawful. Russell then took possession of the laptop and destroyed the hard drive. The choirmaster eventually was arrested, found in possession of other child pornography, and agreed to cooperate with prosecutors in a case against Russell. Russell was then charged with two counts of obstruction of justice for destroying the laptop.

Russell ultimately agreed to plead guilty to a single count of misprision of felony and was sentenced to six months' home confinement and ordered to pay a $25,000 fine. The federal misprision-of-felony offense 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. In *Russell*, the prosecution could show that Russell knew or should have known that there was a pending investigation into the choirmaster's behavior such that Russell's destruction of the laptop under the circumstances constituted a violation of the misprision-of-felony statute.[24] Russell was not obligated to take possession of the laptop nor was he required to notify the authorities that the church leaders had a laptop with pornography on it. Indeed, such a disclosure would have violated his duty to preserve his clients' confidences.

Russell's crime was destroying evidence knowing there was an ongoing investigation. Greg Sisk made a compelling argument that if there was not a pending case or investigation, a lawyer could lawfully take possession of child pornography for the purpose of destroying the evidence.[25] ABA Standard 4-4.7(ii) agrees.

Authors' Suggested Approach. We would have handled the situation much differently than Russell did. We discussed how we would have counseled the client in such a situation in our article "'What Do I Do with the Porn on my Computer?': How a Lawyer Should Counsel Clients about Physical Evidence."[26] After examining the images, we would have told the church leaders we would not take possession of the laptop unless they wished us to do so for the purpose of turning it over to the authorities. If we could not persuade them to allow us to turn in the laptop, we would decline to take possession,

explain why, and then warn the church leaders about the relative risks involved in both continuing to possess illegal images and destroying the laptop. This would be consistent with our obligations under SCR 20:1.2(d), which instructs that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client."[27]

Nor would we take possession of a laptop containing child pornography if a parent came into our office requesting our advice as to whether certain images on his child's laptop constituted child pornography. Merely looking at the images in order to provide our client a legal opinion does not constitute taking possession of that laptop.[28]

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 that evidence indicated that it was contraband or incriminating. Such a broad definition of possession would eviscerate a client's right to access legal advice because the client's showing 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.

Nor is it taking possession if a client asked us to review certain text exchanges on the client's phone and we see images that appeared to be child pornography on the phone. In both instances, we would explain to the client why we would not take possession of the laptop or phone and counsel the client on the risk the client faces by continuing to possess child pornography, again consistent with our ethical obligations under SCR 20:1.2(d).[29]

Consider a more complicated situation, in which a client drops off the client's phone at our law office and we examine the phone to review text messages between the client and a complaining witness that the client thinks could be helpful in the client's case. In examining the phone, we see images that we believe are child pornography. We confront the client, who claims that he did not know the images were child pornography. What should a lawyer do in such a situation?

A client should not have to sacrifice the Fifth Amendment right against self-incrimination because the client consulted with counsel who took possession of the client's phone while attempting to provide representation consistent with the defendant's Sixth Amendment right.

Harrington asserted that a lawyer knowing that the lawyer possesses child pornography must turn in the phone to law enforcement. If we are confident that the authorities are not looking for the phone, that the phone is not relevant to the pending case, and that an investigation for child pornography is not imminent, ABA Standard 4-4.7(ii) would allow us to advise the client that we were going to destroy the phone.

In discussing how he would have handled the laptop in the *Russell* case, Sisk suggested that the best alternative might have been to advise the choirmaster to obtain legal counsel "while passively allowing him to retain and remove his own possessions, including the offending laptop."[30] Both Sisk and Gillers made clear that they do not believe that defense counsel should act as a state agent and turn in a client when defense counsel has inadvertently come into possession of a laptop containing child pornography that the state is unaware of and when there is no anticipated investigation.[31] Sisk opined that defense counsel should be able to ethically and lawfully assist the client in destroying the laptop containing child pornography under such circumstances.[32] Norm Lefstein agrees, noting that, "some state statutes make it a crime to destroy evidence only when it is related to an official investigation or proceeding or when there is a belief that an investigation or proceeding is about to be instituted. Similarly, under federal law, it is not illegal to destroy an item unless it pertains to a criminal investigation or is the subject of a subpoena."[33]

A client should not have to sacrifice the Fifth Amendment right against self-incrimination because the client consulted with counsel who took possession of the client's phone while attempting to provide representation consistent with the defendant's Sixth Amendment right. Gillers' criticism of Restatement section 119 and the mandatory turnover rule strongly suggests that he would advise a defense lawyer who inadvertently saw child pornography on the phone in the above hypothetical not to give the phone to the authorities but would allow the client to leave with the phone after warning the client of the dangers of continued possession.

Fisher v. United States and its progeny and 18 U.S.C. § 1515 (c) generally would appear to protect the lawyer under these circumstances.[34] Neither we nor the client would be seeking to use the law office as a repository for evidence or to conceal the phone from an ongoing search or investigation when we saw the child pornography on the phone. The situation would change, however, if we were aware that law enforcement officers were looking for the client's phone because the complaining witness had alerted the officers to the presence of child pornography on the phone. Under those circumstances, we could not legally or ethically destroy the phone or give it back to the client.

A lawyer in Wisconsin faces one additional hurdle. In *State v. Jones*,[35] the

Wisconsin Court of Appeals determined that the offense of harboring or aiding a felon could be established even if the perpetrator has not been convicted or even identified.[36] The rationale in that case possibly could be applied to a lawyer who destroyed a phone or returned it to the client in the circumstances described above, even though the authorities were completely unaware of the underlying crime.

It is unclear whether the Wisconsin Supreme Court or disciplinary authorities would penalize a lawyer who acted pursuant to ABA Standard 4-4.7 and destroyed the phone or returned it to the client when the contents of the phone were not the subject of any investigation or charged offense. The court could find, as in *Olsen*, that the lawyer was acting in good faith to resolve an ethical dilemma without a clear answer. Or it could find that a mandatory "turn over" requirement when lawyers inadvertently possess child pornography under the circumstances described above is constitutionally offensive because it directly links the client to a crime that might otherwise never be discovered.

Admittedly, in resolving the dilemmas posed above, because of *Jones* a Wisconsin lawyer faces more risk than lawyers in most other jurisdictions. A conscientious lawyer would have to decide whether to betray the client and subject the client to a criminal prosecution the client otherwise likely never would have faced or run the risk of being prosecuted, subjected to disciplinary proceedings, or both.

Conclusion

Except for the lawyer in *Olsen*, none of the lawyers who took possession of incriminating physical evidence in the cases cited in this article did so with a strategically valid, good reason for doing so. Rather, most of them erroneously thought they had an ethical obligation to take possession of incriminating evidence. Wisconsin lawyers must be extremely careful about taking possession of incriminating physical evidence and instruct their staff, including investigators and paralegals, never to take possession of such evidence without first consulting with the lawyer. Doing so likely will minimize the instances of inadvertent possession of contraband or clearly incriminating physical evidence. But lawyers should not be so afraid of navigating messy ethical dilemmas such that they compromise a client's right to a zealous defense by never taking possession of potential evidence even though it might be exculpatory.

Lawyers who find themselves in possession of incriminating physical evidence should consult with knowledgeable criminal defense lawyers or ethics counsel before taking any action. In some instances, they may be able to return that physical evidence to the source. In other cases, especially dealing with contraband like child pornography, that option might be foreclosed.

If counsel has no recourse except to disclose the evidence to the authorities, we recommend that rather than simply turning the contraband over to law enforcement, counsel notify the prosecuting authorities and then, like the lawyers in *In the Matter of a Grand Jury Investigation*,[37] insist that prosecutors seek a court order before relinquishing the contraband. Conscientious criminal defense lawyers always should take action that "minimizes prejudice to the client."[38] Such lawyering is consistent with defense counsel's overarching duty to zealously advance the client's undivided interest, not the interest of the state.[39] **WL**

ENDNOTES

[1]Sean Harrington, *Attorneys' Legal Obligations When Coming into Inadvertent Possession of or Access to Child Pornography*, 98 Wis. Law. 28 (June 2025), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=98&Issue=6&ArticleID=31073.

[2]Obligations to the client under two Wisconsin Supreme Court Rules require this. First, SCR 20:1.4, the communication duty, states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Second, SCR 10:1.6, the duty of confidentiality, prohibits a lawyer from "reveal[ing] information relating to the representation of a client unless the client gives informed consent" or revealing the information meets one of the very limited discretionary exceptions to protecting client information.

[3]263 F. Supp. 360, 361-62 (E.D. Va. 1967), *aff'd per curiam*, 381 F.2d 715 (4th Cir. 1967). *See, e.g.,* 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 a 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 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 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*].

[4]*See United States v. Wade*, 388 U. S. 218, 256 -58 (1967) (White, J., dissenting in part and concurring in part) (articulating the proper role for defense counsel in the adversary system, which includes not furnishing information that helps the prosecution's case).

[5]*Clutchette v. Rushen*, 770 F.2d 1469 (9th Cir. 1985); *In re Jan. 1976 Grand Jury*, 534 F.2d 719 (7th Cir. 1976); *Gipson v. State*, 609 P.2d 1038 (Alaska 1980); *Morrell v. State*, 575 P.2d 1200 (Alaska 1978); *Magill v. Superior Ct.*, 103 Cal. Rptr. 2d 355 (Ct. App. 2001) (ordered unpublished), as modified on denial of reh'g (Jan. 29, 2001); *People v. Superior Ct.*, 237 Cal. Rptr. 158 (Ct. App. 1987); *In re Navarro*, 155 Cal.

Rptr. 522 (Ct. App. 1979); *People v. Lee*, 83 Cal. Rptr. 715 (Ct. App. 1970); *Anderson v. State*, 297 So. 2d 871 (Fla. Dist. Ct. App. 1974); *State v. Carlin*, 640 P.2d 324 (Kan. Ct. App. 1982); *State v. Green*, 493 So. 2d 1178 (La. 1986); *Commonwealth v. Stenhach*, 514 A.2d 114 (Pa. Super. Ct. 1986); *State ex rel. Sowers v. Olwell*, 394 P.2d 681 (Wash. 1964); *cf. Quinones v. State*, 766 So. 2d 1165 (Fla. Dist. Ct. App. 2000); *State v. Dillon*, 471 P.2d 553, 565 (Idaho 1970); *Rubin v. State*, 602 A.2d 677 (Md. 1992); *People v. Nash*, 313 N.W.2d 307, 314 (Mich. Ct. App. 1981), *aff'd in relevant part*, 341 N.W. 2d 439 (Mich. 1983); *In re Original Grand Jury Investigation* (Helmick), No. L-98-1146, 1999 WL 518837, at *1 (Ohio Ct. App. July 23, 1999) (unpublished), *aff'd*, 733 N.E.2d 1135 (Ohio 2000).

[6]For a detailed examination of the authority permitting lawyers to take possession of physical evidence and providing examples of when doing so is appropriate to render effective representation, see Uphoff, *Physical Evidence Dilemma, supra* note 3, at 1191-98.

[7]639 P.2d 46, 51-53 (Cal. 1981).

[8]*See, e.g.*, *Commonwealth v. Tate*, 490 Mass. 501, 192 N.E.2d. 1034 (2022) (holding that defense counsel had no ethical obligation to disclose to prosecution location of incriminating evidence and breached duty to client by doing so); *Wedmark v. State*, 602 N.W.2d 810, 817 (Iowa 1999) (holding that defense lawyer had no legal obligation to disclose information about the location of an instrument of a crime when possession of the instrument is not taken); *Clutchette v. Rushen*, 770 F.2d 1469, 1473 (9th Cir. 1985) (noting that defense lawyer would have discharged his duties had he left evidence where it was located).

[9]222 P.3d 632 (Mont. 2009).

[10]*Id.* at 638. The court and the Montana Commission were looking at ABA Criminal Justice Standard § 4-4.6, which was an earlier version of section 4-4.7.

[11]*See* cases cited in note 3, *supra*.

[12]Several cases explicitly recognize the right of a lawyer to return an item of incriminating physical evidence to the source. *See, e.g.*, *Hitch v. Pima Cnty. Superior Ct.*, 708 P.2d 72, 78 (Ariz. 1985) (stating that if counsel reasonably believed that evidence would not be destroyed, he could return it to the source); *Commonwealth v. Stenhach*, 514 A.2d 114, 123 (Pa. Super. Ct. 1986) (stating that counsel can return physical evidence to the source under certain circumstances); *Dean v. Dean*, 607 So. 2d 494, 499 (Fla. Dist. Ct. App. 1992) (allowing lawyer to return stolen property to rightful owner rather than authorities). For a compelling defense of the need for lawyers to be able to return incriminating items to the source to properly defend their clients, see Sisk, *supra* note 3, at 862-27.

[13]*See* Sisk, *supra* note 3, at 839-42.

[14]Gillers, *supra* note 3, at 846-48.

[15]Sisk, *supra* note 3, at 881.

[16]*See, e.g.*, Lefstein, *supra* note 3, at 926-30,937-38; Reitz, *supra* note 3, at 584-613.

[17]Ronald D. Rotunda & Thomas D. Morgan, *The Lawyer's Deskbook on Professional Responsibilities* § 3.4-2 (2025-26 ed.); *see also* John M. Burkoff, *Criminal Defense Ethics* § 5.22 (March 2025 update, 2d ed).

[18]ABA, Criminal Justice Standards for the Defense Function, Standard 4-4.7 (4th ed. 2017) (hereinafter ABA Standard 4-4.7).

[19]Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974).)

[20]*Strickland v. Washington*, 466 U.S. 668, 688 (1984).

[21]The commentary to the prior version of ABA Standard 4-4.7 (Standard 4-4.6) concluded a mandatory turnover rule would discourage candid lawyer-client communications, compromise full defense investigation and undermine client trust in counsel. Gillers agreed, noting that a footnote in *Clutchette v. Rushen* acknowledged that counsel may face a constitutional dilemma if evidence must be possessed to determine its evidentiary significance and then turned over to authorities if incriminating. Gillers, *supra* note 3, at 841-42. For a detailed discussion of the ways a mandatory return regime undermines a defendant's right to effective representation, see Sisk, *supra* note 3, at 862-72, and Uphoff, *supra* note 3, at 1193-95, 1198-1203.

[22]Gillers, *supra* note 3, at 857.

[23]639 F. Supp. 2d 226 (D. Conn. 2007).

[24]Sisk explained that the destruction of contraband under federal law and most state law turns on whether the lawyer knows or had reason to know that a case is pending or an investigation is to be reasonably anticipated. Sisk, *supra* note 3, at 852, 857-61, 878-81.

[25]Wis. Stat. section 946.47(1)(b) makes it a crime for a person with "intent to prevent the apprehension, prosecution or conviction of a felon" to destroy, alter, hide, or disguise physical evidence. Both the Model Penal Code § 241.6 (Am. Law Inst. 1985) and the Restatement (Third) of the Law Governing Lawyers § 118 comment c state that obstruction of justice and similar statutes generally only apply when an official proceeding or investigation is ongoing or imminent. In considering an Iowa statute with language similar to Wisconsin's, Sisk opined that "classifying such conduct as criminal obstruction of justice when done with intent to prevent 'apprehension,' as well as when designed to obstruct prosecution or defense of a person, this statute effectively integrates the anticipation of a future criminal investigation or proceeding into the mens rea for the crime. Sisk, *supra* note 3, at 829. *But see infra* notes 33-34 & accompanying text.

[26]Peter A. Joy & Rodney J. Uphoff, *'What Do I Do With the Porn on My Computer?' How a Lawyer Should Counsel Clients about Physical Evidence*, 54 Amer. Crim. L. Rev. 751 (2017).

[27]For an extended discussion of the advice that counsel can ethically and legally give to a client when declining to take possession of contraband, see Joy & Uphoff, *supra* note 26, at 761-81.

[28]*See* Geoffrey Hazard Jr. et al., *The Law of Lawyering* § 10:46 (last updated June 2025) (acknowledging that if a client is proffering physical evidence to the lawyer, the client has the right to be told what the lawyer will do with the evidence and can demand it back, even though the client may then hide the evidence). As the U.S. Supreme Court made clear, documents turned over to a lawyer or an accountant by a person (for example, a taxpayer) can be considered no longer in the possession of the taxpayer and, as such, might not be privileged and might be able to be subpoenaed from the taxpayer's lawyer. *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 if possessed by the taxpayer. *Couch*, 409 U.S. 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. If 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,* § 10.46.

[29]For a detailed discussion of the advice we would give in this situation, see Joy & Uphoff, *supra* note 26, at 767-72.

[30]Sisk, *supra* note 3, at 855.

[31]Sisk, citing Gillers, referred to this as an "unacceptable solution." Sisk, *supra* note 3, at 857.

[32]Sisk, *supra* note 3, at 857-59; *see also* Lefstein, *supra* note 3, at 934-35.

[33]Lefstein, *supra* note 3, at 934-35. In *Matter of Ash*, 211 A.D.3d 56 (N.Y. App. 2022), Sylvia Ash was disbarred after being convicted of conspiracy to obstruct justice, obstruction of justice, and making a false statement to federal officers after deleting text messages and emails and wiping data from a phone, some of which had been the subject of federal grand jury subpoenas, and then making false and misleading statements in connection with the federal investigation. Both criminal and professional liability attached because Ash knew of the investigation and destroyed evidence sought by the subpoenas.

[34]425 U.S. 391, 409-10 (1976) (stressing importance of protecting client's right to obtain fully informed legal advice).

[35]98 Wis. 2d 679, 681, 298 N.W.2d 100 (Ct. App. 1980).

[36]*See also State v. Schmidt*, 221 Wis. 2d 189, 585 N.W.2d 186 (Ct. App. 1998) (holding that Wis. Stat. section 946.47(1)(b) did not require showing that Joros was wanted for a felony when police officers were seeking to apprehend him, only that defendant knew Joros was a felon, aided him, and did so to prevent his apprehension).

[37]470 Mass. 399 (2015).

[38]ABA Standard 4-4.7(e).

[39]As Justice Powell observed, "a defense lawyer best serves the public, not acting on behalf of the state or in concert with it, but rather by advancing 'the undivided interest of his client.'" *Polk Cnty. v. Dodson* 454 U.S. 312, 318-319 (1981) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)). **WL**