

# Handling Physical Evidence Ethically

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# *U.S. v. Wade*, 388 U.S. 218 (1967)

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

- ▶ *Wade*, 388 U.S. at 256-58.

## Model Rule 4-3.4:

A lawyer shall not:

- (a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

## Comment to Rule 4-3.4:

- 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.

# Restatement (Third) of Law Governing Lawyers, Section 118:

- ▶ (1) A lawyer may not falsify documentary or other evidence.
- ▶ (2) A lawyer may not destroy or obstruct another party's access to documentary or other evidence when doing so would violate a court order or other legal requirements, or counsel or assist a client to do so.

# Restatement (Third) of Law Governing Lawyers, Section 119:

- *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 of turn the evidence over to them

# ABA Standard 4-4.7 Handling Physical Evidence With Incriminating Implications

- ▶ (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.

# ABA standard 4-4.7

- ▶ (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.



# ABA Standard 4-4.7

- ▶ (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.

# ABA STANDARD 4-4.7

- ▶ (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 re-testing 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.

# ABA STANDARD 4-4.7

- ▶ (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

## *Dean v. Dean*, 607 So. 2d 494 (Fla. Dist. Ct. App. 1992)

- ▶ 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.
  - *Dean*, 607 So. 2d at 499.

# Examples:

- ▶ *Henderson v. State*, 962 S.W.2d 544 (Tx. Ct. Crim. App. 1998).
- ▶ *In the Matter of Olson*, 222 P.3d 632 (Mont. 2009).
- ▶ *U.S. v. Russell*, 639 F.Supp.2d 226 (D. Conn. 2007).

# NAPD Formal Ethics Opinion 16-1

- ▶ **Question:** The Ethics Counselors of the National Association for Public Defense (NAPD) have been asked to address the following scenario:
- ▶ An investigator working for Defense Counsel obtained a copy of a DVD from an in-store surveillance system recording the scene of an alleged crime. This tape became the only existing copy of the DVD, as the store subsequently destroyed the original pursuant to a retention policy that provided for erasure and re-use of discs every 30 days. The Prosecution - having never attempted to obtain the DVD prior to the original's destruction - demanded that Defense Counsel turn over her copy of the DVD.
- ▶ Is Defense Counsel ethically obligated to turn over her copy of the DVD:
- ▶ 1) when she becomes aware that the original recording is unavailable to the prosecutor, regardless of whether the prosecution requests or demands it;
- ▶ 2) when an informal, direct request is made by the prosecutor; or
- ▶ 3) when a formal discovery request or lawful subpoena follows an informal request?

# Further Reading

- ▶ The Physical Evidence Dilemma: Does ABA Standard 4-4.6 Offer Appropriate Guidance?
- ▶ ‘What Do I Do with the Porn on My Computer?’: How a Lawyer Should Counsel Clients about Physical Evidence