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# Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules

Norman Lepstein

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# INCRIMINATING PHYSICAL EVIDENCE, THE DEFENSE ATTORNEY'S DILEMMA, AND THE NEED FOR RULES

NORMAN LEFSTEIN†

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*A criminal defense attorney who acquires possession of incriminating physical evidence is faced with vexing professional responsibility issues. No clear answer to the dilemma posed is provided by the American Bar Association's Model Code of Professional Responsibility, Model Rules of Professional Conduct, or by the Association's Criminal Justice Standards Relating to The Defense Function. Professor Lefstein argues for clearer rules to guide the criminal defense attorney who obtains incriminating physical evidence. He reviews and critiques the proposed set of standards approved in 1981 by the governing council of the American Bar Association Criminal Justice Section.*

## I. INTRODUCTION

Few problems are more vexing for the criminal defense attorney than decid-

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† Professor of Law, University of North Carolina School of Law. LL.B. 1961, University of Illinois College of Law; LL.M. 1964, Georgetown Law Center. Reporter, American Bar Association Standards for Criminal Justice Relating to The Prosecution and The Defense Function (2d ed. 1980); Chairperson, American Bar Association Criminal Justice Section, 1986-87.

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ing what to do with physical evidence that implicates a client in criminal conduct. For example, assume that you are an attorney and that a client suspected of murder by the police seeks your legal advice. The client admits to you that he shot the deceased but states that the shooting was an act of self-defense. The client then thrusts on your desk the gun that he claims to have used in the homicide. His fingerprints appear to be on the weapon, and he tells you that it is registered in his name.

What is your professional duty respecting the gun? Should you return it to the client? What advice should accompany its return? What if you believe the client is dangerous and might use the gun again? What if the client refuses to accept the gun's return? Should you retain the gun, locking it up somewhere in your law office? Should you turn it over to the police, despite your client's objection and the possibility that ballistics tests, fingerprint identification, and the gun's registration will lead to your client's arrest, indictment, and conviction?

This hypothetical situation illustrates only one of the ways in which defense attorneys actually acquire possession of incriminating physical evidence.<sup>1</sup> Sometimes an attorney receives evidence unsolicited from a third person;<sup>2</sup> at other times the attorney or the attorney's agent discovers incriminating evidence while investigating the client's case.<sup>3</sup> The type of evidence acquired by the defense attorney also varies considerably. Besides crime instrumentalities such as weapons, the incriminating evidence may consist of crime proceeds such as stolen money or other property,<sup>4</sup> contraband such as narcotics,<sup>5</sup> or incriminating documents.<sup>6</sup>

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1. See, e.g., *United States v. Authement*, 607 F.2d 1129, 1130 (5th Cir. 1979) (defendant gave attorney brass knuckles and nightstick used during assault); *People v. Investigation into a Certain Weapon*, 113 Misc. 2d 348, 349, 448 N.Y.S.2d 950, 951 (N.Y. Sup. Ct. 1982) (attorney received ammunition and clip from defendant charged with robbery and attempted murder); *State v. Harlton*, 669 P.2d 774, 775 (Okla. 1983) (client gave attorney shotgun used in commission of crime).

2. See, e.g., *Morrell v. State*, 575 P.2d 1200, 1206 (Alaska 1978) (defendant's friend gave counsel kidnapping plans sketched by defendant); *Dyas v. State*, 260 Ark. 303, 310, 539 S.W.2d 251, 254 (1976) (defendant's wife gave murder victim's rings to attorney); *People v. Lee*, 3 Cal. App. 3d 514, 519, 83 Cal. Rptr. 715, 717 (1970) (defendant's wife gave attorney blood-stained shoes); *State v. Dillon*, 93 Idaho 698, 704, 471 P.2d 553, 559 (1970) (defendant's mother and stepfather delivered stolen items found in defendant's room to attorney), *cert. denied*, 401 U.S. 492 (1971); *In re Vanderbilt* (Rosner-Hickey), 57 N.Y.2d 66, 71, 439 N.E.2d 378, 381, 453 N.Y.S.2d 662, 665 (1982) (client's wife gave attorney tape recordings made by client).

3. See, e.g., *People v. Meredith*, 29 Cal. 3d 682, 688, 631 P.2d 46, 49, 175 Cal. Rptr. 612, 615 (1981) (defense investigator found victim's wallet in trash can behind defendant's residence).

4. See, e.g., *United States v. Scruggs*, 549 F.2d 1097, 1099-1103 (6th Cir.) (client used stolen money to pay for attorneys' fees), *cert. denied*, 434 U.S. 824 (1977); *Genson v. United States*, 534 F.2d 719, 720 (7th Cir. 1976) (stolen money transferred to attorney); *In re Ryder*, 263 F. Supp. 360, 363 (E.D. Va.) (attorney transferred proceeds of bank robbery and sawed-off shotgun from client's safety deposit box to his own), *aff'd*, 381 F.2d 713 (4th Cir. 1967); *Anderson v. State*, 297 So. 2d 871, 871 (Fla. Dist. Ct. App. 1971) (stolen dictaphone and calculator delivered to attorney by client); *Hughes v. Meade*, 453 S.W.2d 538, 539 (Ky. Ct. App. 1970) (stolen typewriter deposited on attorney's porch).

5. This research effort has not discovered any cases litigating the attorney's receipt of contraband. However, I have spoken with a number of defense attorneys who have confirmed that their clients occasionally entrust various kinds of narcotics to them. The legal implications of an attorney possessing contraband are discussed *infra* note 138 and accompanying text.

6. See, e.g., *United States v. Porter*, 711 F.2d 1397, 1398 (7th Cir. 1983) (client gave tax records to attorney); *In re Arnold & McDowell*, 566 F. Supp. 752, 753 (D. Minn. 1983) (client sent documents to attorney); *United States v. Blackburn*, 538 F. Supp. 1376, 1378 (M.D. Fla. 1982)

Except perhaps when documents are involved,<sup>7</sup> defense attorneys are apt to be unsure about the appropriate course of conduct.<sup>8</sup> There are no specific provisions dealing with this issue either in the American Bar Association's (ABA's) formerly approved *Model Code of Professional Responsibility (Model Code)*<sup>9</sup> or in the ABA's *Model Rules of Professional Conduct (Model Rules)*.<sup>10</sup> Nor do the ABA's *Criminal Justice Standards Relating to The Defense Function* provide explicit guidance.<sup>11</sup> Although some appellate courts have said in dictum that

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(client gave tax records to attorney); *Morrell v. State*, 575 P.2d 1200, 1206 (Alaska 1978) (defendant's friend gave counsel kidnapping plans sketched by defendant); *People v. Gardner*, 106 Cal. App. 3d 882, 885, 165 Cal. Rptr. 415, 417 (1980) (letter containing confession sent by defendant to public defender).

7. See *infra* notes 109-12 and accompanying text.

8. Several commentators have discussed the attorney's dilemma in dealing with a client's incriminating physical evidence without explicitly proposing solutions. See Comment, *Fruits of the Attorney-Client Privilege: Incriminating Physical Evidence and Conflicting Duties*, 3 DUQ. L. REV. 239 (1965); Comment, *The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from His Client*, 38 U. CHI. L. REV. 211 (1970); Comment, *Professional Responsibility and In re Ryder: Can an Attorney Serve Two Masters?*, 54 VA. L. REV. 145 (1968); Comment, *An Attorney in Possession of Evidence Incriminating His Client*, 25 WASH. & LEE L. REV. 133 (1968). Articles containing specific suggestions for the handling of physical evidence include the following: Abramovsky, *Confidentiality: The Future Crime—Contraband Dilemmas*, 85 W. VA. L. REV. 929, 937-41 (1983) (defense attorneys should deposit physical evidence with the administrative judge of the court of jurisdiction); Bender, *Incriminating Evidence: What to do with a Hot Potato*, 11 COLO. LAW. 880, 892-93 (1982) (defense attorneys should voluntarily disclose physical evidence to the authorities, but should seek to protect the client's identity, statements, and linkage to the evidence); Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, 66 IOWA L. REV. 811, 828-41 (1981) (defense attorneys should be required to disclose physical evidence to the authorities, and the attorney-client privilege should not be available as a shield to protect the client as the source of the evidence); Comment, *The Problem of an Attorney in Possession of Evidence Incriminating His Client: The Need for a Predictable Standard*, 47 U. CIN. L. REV. 431, 441-43 (1978) (obligation of defense attorneys should depend on whether the information or evidence is protected by the attorney-client privilege); Note, *Ethics, Law, and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 STAN. L. REV. 977, 994 (1980) (defense attorney should have a limited privilege to retain incriminating physical evidence when unable to persuade transferor to keep it or take it back and when attorney makes no active concealment of the evidence) [hereinafter cited as Note, *Ethics, Law, and Loyalty*]; Note, *Disclosure of Incriminating Physical Evidence Received from a Client: The Defense Attorney's Dilemma*, 52 U. COLO. L. REV. 419, 463 (1981) (defense attorneys should accept physical evidence for a limited period of time only when it aids in the investigation and preparation of the case, following which it should be returned to the client) [hereinafter cited as Note, *Disclosure of Incriminating Physical Evidence*]. Additional law review articles concerning the defense attorney and the physical evidence dilemma are cited *infra* note 56. The subject is also discussed in Vilkin, *Evidence: The Ethical Quicksand*, Nat'l L. J., July 26, 1982, at 1.

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1980) [hereinafter cited as MODEL CODE] provides that "a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal." A lawyer is thus referred to substantive law to determine what is ethically required. However, based upon another provision of the MODEL CODE, it is at least arguable that defense attorneys have an ethical duty not to disclose incriminating physical evidence to law enforcement authorities voluntarily. See *infra* notes 114-19 and accompanying text. At one point, each of the 50 states, as well as Puerto Rico and the District of Columbia, had adopted a version of the MODEL CODE as its official code regulating attorney conduct. Lumbard, *Setting Standards: The Courts, the Bar and the Lawyer's Code of Conduct*, 30 CATH. U. L. REV. 249, 250 (1981).

10. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited as MODEL RULES] sets forth the attorney's basic ethical duty of confidentiality in Rule 1.6: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." The rule then enumerates several additional exceptions, none of which is applicable to the physical evidence problem. Similar to MODEL CODE DR 7-102(A)(3), discussed *supra* note 9, the Comment to MODEL RULES Rule 1.6 states that "a lawyer may be obligated or permitted by other provisions of law to give information about a client."

11. The sole provision in these standards dealing with physical evidence pertains to the intro-

defense attorneys should voluntarily disclose physical evidence to the authorities, some of these courts have overlooked significant legal aspects of the problem.<sup>12</sup>

Possession of physical evidence by attorneys differs from mere knowledge of its existence and location. If, for example, a client informs counsel where a murder weapon is buried, the attorney is required to preserve the client's confidence concerning its whereabouts, whether or not preservation of the confidence will enable the client to avoid arrest and conviction.<sup>13</sup> Absent client consent, attorneys normally may not reveal privileged oral or written communications of a client's past criminal activities.<sup>14</sup>

This Article argues that there should be clear rules concerning a defense attorney's responsibilities with respect to possession of incriminating physical evidence. Although the legal complexity of the problem defies simple solution, it is possible to provide better guidance than exists now. Due to the importance of this issue to defense attorneys, in 1981 the governing council of the ABA Criminal Justice Section approved a set of standards pertaining to physical evidence in criminal cases.<sup>15</sup> As explained in part IV of this Article, the Criminal Justice

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duction and display of "tangible evidence" during trials. See I STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-7.5 (2d ed. 1980). However, THE AMERICAN LAWYER'S CODE OF CONDUCT (Roscoe-Pound American Trial Lawyers Found. Revised Draft 1982) addresses the physical evidence dilemma in illustrative cases 3(a), (b), (c), and (d):

3(a) A lawyer represents the defendant in a bank robbery. The lawyer suggests that the client give the lawyer the gun used in the robbery and the stolen money, so that the lawyer can put them in a place less likely to be searched. The lawyer has committed a disciplinary violation.

3(b) A lawyer represents a client in a murder case. The client leaves the murder weapon with the lawyer. The lawyer fails to advise the client that the weapon might be more accessible to the prosecution in the lawyer's possession than in the client's, and that, if the lawyer retains the weapon, he will produce it if ordered to do so by a valid subpoena. The lawyer has committed a disciplinary violation by failing to fully advise the client.

3(c) The same facts as 3(b). The lawyer would not commit a disciplinary violation by returning the weapon to the client, unless the lawyer also encouraged the client to make it unavailable as evidence.

3(d) The same facts as 3(b). The lawyer would not commit a disciplinary violation by producing a gun in response to a subpoena, unless the lawyer failed first to make a good faith effort to test the validity of the subpoena.

12. See *infra* text accompanying notes 100-19.

13. See 81 AM. JUR. 2D *Witnesses* § 172, at 208 (1976) ("It is a long-established rule of common law that an attorney or counselor at law is not permitted, and cannot be compelled, to testify as to communications made to him in his professional character by his client."). For further discussion, see C. MCCORMICK, EVIDENCE § 87 (3d ed. 1984), and 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961). The attorney-client privilege includes communications concerning crimes previously committed by the client. See 3 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 558, at 78 (13th ed. 1973). In *State v. Sullivan*, 60 Wash. 2d 214, 218, 373 P.2d 474, 476 (1962), the defense counsel in a murder prosecution was not required to testify concerning statements his client made to him regarding the location of the victim's body. See also *State v. Douglass*, 20 W. Va. 770, 783 (1882) (reversible error for State to compel counsel to divulge what his client had told him about a pistol).

14. The rules of the legal profession make it unethical for attorneys to reveal privileged communications except in certain limited circumstances. See MODEL CODE DR 4-101; MODEL RULES Rule 1.6.

15. Minutes of ABA Criminal Justice Section Council Meeting, p.15, held in New Orleans, Louisiana, August 8-9, 1981 [hereinafter cited as ABA Minutes]. In a letter dated August 28, 1981, Judge Sylvia Bacon, then chairperson of the Criminal Justice Section, forwarded the standards to

Section (CJS) standards, with modifications, could be very helpful in resolving the defense attorney's physical evidence dilemma.<sup>16</sup>

To fully understand the import of the CJS's standards, it is first necessary to examine the court decisions pertaining to defense attorneys and physical evidence, as well as the ethical rules and criminal statutes that are arguably applicable. It is also crucial to separate the question whether a subpoena can compel production of physical evidence from the question whether attorneys have an ethical duty to make voluntary disclosures.

## II. MAY DEFENSE ATTORNEYS REFUSE TO COMPLY WITH SUBPOENAS FOR PHYSICAL EVIDENCE?

### A. Attorney-Client Privilege

The attorney-client privilege is an integral part of our adversary system.<sup>17</sup> The privilege empowers a client to prevent an attorney from disclosing information acquired during the attorney-client relationship. Its purpose is to encourage complete and candid communication so that the attorney will be fully informed of the client's situation and thus able to provide the best possible representation.<sup>18</sup> As the United States Supreme Court has explained, "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."<sup>19</sup> In criminal cases, the privilege enables clients to obtain the effective legal assistance guaranteed them by the sixth amendment.<sup>20</sup>

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Professor B.J. George, then chairperson of the ABA Standing Committee on Association Standards for Criminal Justice, which is responsible for updating the ABA's Defense Function Standards.

16. See *infra* text accompanying notes 146-205.

17. See M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975). Professor Freedman has commented:

It must be obvious . . . that the adversary system, within which the lawyer functions, contemplates that the lawyer frequently will learn from the client information that is highly incriminating and may even learn . . . that the client has in fact committed serious crimes. In such a case, if the attorney were required to divulge that information, the obligation of confidentiality would be destroyed, and with it, the adversary system itself.

*Id.* at 5.

18. The Supreme Court has noted:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); see also *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (discussion of attorney-client privilege); 81 AM. JUR. 2D *Witnesses* § 172 (1976) (discussion of general rule of attorney-client privilege).

19. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

20. U.S. CONST. amend. VI. Certain information is essential to an effective defense:

The client is usually the lawyer's primary source of information for an effective defense. An adequate defense cannot be framed if the lawyer does not know what is likely to de-

The appellate decisions concerning defense attorneys' possession of incriminating physical evidence invariably discuss the attorney-client privilege. One of the oldest and most often cited of the decisions is *State v. Orwell*,<sup>21</sup> which was decided by the Supreme Court of Washington in 1964. As a part of a coroner's inquest, Orwell, the defense attorney, was served with a subpoena *duces tecum*, requesting that he produce "all knives in . . . [his] possession relating to Harry LeRoy Gray."<sup>22</sup> On grounds of attorney-client privilege, Orwell declined to comply with the subpoena or to answer any questions respecting his possession of a knife. The court's opinion assumed that Orwell possessed a knife belonging to Gray and that Orwell "obtained [it] through a confidential communication from his client."<sup>23</sup> The court then held that "as an officer of the court,"<sup>24</sup> the attorney must divulge the knife upon proper request but that in any subsequent prosecution the State would be forbidden to disclose that the defense attorney had been the source of the knife. The court reasoned that this result would enable the prosecution to obtain the evidence while protecting the client's attorney-client privilege. Disclosure that the attorney was the source of the knife would be tantamount to the attorney's testifying, "My client came to me for legal advice and gave me this weapon." Obviously, if the jurors were to learn that the prosecution obtained the knife from defendant's attorney, they likely would conclude that defendant was the murderer, especially because the homicide was the result of a stabbing.<sup>25</sup>

The court in *Orwell* thus distinguished between the client's *conduct* in transmitting physical evidence to the defense attorney and the item of physical evidence itself. The source of the evidence—the attorney—was privileged information because it derived from the client's conduct, but the existence of the physical evidence did not derive from the client's conduct and therefore could be disclosed. Although the result may seem like a makeshift compromise, it is actually quite consistent with long-established attorney-client privilege principles.<sup>26</sup>

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velop at trial. The lawyer needs to know essential facts, including the events surrounding the act charged, information concerning the defendant's background, and the defendant's record of prior convictions, if any. In criminal litigation, as in other matters, information is the key guide to decisions and action. The lawyer who is ignorant of the facts of the case cannot serve the client effectively.

I STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION commentary to Standard 4-3.2 (2d ed. 1980). For the Supreme Court's most important decision on evaluating claims of ineffective assistance of counsel, see *Strickland v. Washington*, 466 U.S. 668 (1984).

21. 64 Wash. 2d 828, 394 P.2d 681 (1964).

22. *Id.* at 829, 394 P.2d at 682.

23. *Id.* at 831, 394 P.2d at 683.

24. *Id.* at 833, 394 P.2d at 684.

25. Defendant Gray and John Warren had been engaged in a fight that resulted in mortal knife wounds to Warren. While jailed after his arrest, Gray admitted to the stabbing. Although willing to cooperate in the investigation, he was not sure what had become of the knife he had used in the fight. *Id.* at 830, 394 P.2d at 682-83. Ironically, it was later discovered that a different knife than the one in evidence in the legal proceeding actually had been used in the fight. *Id.* at 830 n.1, 394 P.2d at 683 n.1.

26. The *Orwell* court apparently did not appreciate that its decision was consistent with attorney-client privilege concepts. At one point, the court stated that "*the attorney-client privilege is applicable to the knife held by the appellant, but [we] do not agree that the privilege warrants the*

The leading evidence treatises agree that a client's conduct can come within the attorney-client privilege. Wigmore explains:

[A]lmost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether in the circumstances of the case, it was intended to be done as such. The client, supposedly, may make a specimen of his handwriting for the attorney's information, or may exhibit an identifying scar, or may show a secret token. If any of these acts are done as part of a communication to the attorney, and if further the communication is intended to be confidential . . . , the privilege comes into play.<sup>27</sup>

Similarly, McCormick notes that "[a] confidential communication may be made by acts as well as by words, as if the client rolled up his sleeve to show the lawyer a hidden scar, or opened the drawer of his desk to show a revolver there."<sup>28</sup>

It follows that if a client actually gives evidence to an attorney while seeking legal advice, the attorney-client privilege should protect the information implicitly communicated by the client's act, namely, the fact that the client has possessed the evidence. The attorney should not be permitted to disclose the evidence to the authorities *if* disclosure would imply a statement, for example, that the client used the weapon or that the client was involved in the crime. The situation in which a client gives evidence to an attorney deserves the same treatment as does the one in which the client "opened the drawer of his desk to show a revolver there,"<sup>29</sup> and in fairness to the client, the matter should not be regarded differently from one in which the client tells the attorney where physical

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attorney, as an officer of the court, from withholding it after being properly requested to produce the same." *Id.* at 833, 394 P.2d at 684 (emphasis added). *Cf. infra* text accompanying notes 44-45 (the physical object itself should not be regarded as within the attorney-client privilege). The court's reasoning in *Olwell* has sometimes been criticized. *See, e.g.,* Note, *Disclosure of Incriminating Physical Evidence*, *supra* note 8, at 436 ("And the [*Olwell*] court made no attempt to explain why the source of the evidence remained privileged even though the evidence itself did not.").

27. 8 J. WIGMORE, *supra* note 13, § 2306, at 590.

28. C. MCCORMICK, EVIDENCE § 89, at 183 (1972) [hereinafter cited as C. MCCORMICK (1972 ed.)]. The newest edition of the same treatise expresses the identical viewpoint. *See* C. MCCORMICK, *supra* note 13, § 89, at 213. However, in contrast to the 1972 edition, the revised edition refers specifically to the physical evidence problem discussed in this Article:

Much more problematic are cases in which the client delivers tangible evidence such as stolen property to the attorney, or confides facts enabling the attorney to come into the possession of such evidence. Here the decisions are somewhat conflicting, reflecting the virtual impossibility of separating the act of confidence which may legitimately be within the privilege from the preexisting evidence which may not.

*Id.* All of the decisions cited in support of this statement are noted in this Article. *Genson v. United States*, 534 F.2d 719 (7th Cir. 1976), is discussed *infra* text accompanying notes 41-43, 88-91; *In re Ryder*, 263 F. Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967), is discussed *infra* text accompanying notes 38-40; *People v. Meredith*, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981), is discussed *infra* text accompanying notes 53-60; *Anderson v. State*, 297 So. 2d 871 (Fla. Dist. Ct. App. 1974), is discussed *infra* text accompanying notes 46-48; *Hughes v. Meade*, 453 S.W.2d 538 (Ky. Ct. App. 1970), is cited *supra* note 4 and is discussed *infra* note 48; *Olwell*, 64 Wash. 2d at 828, 394 P.2d at 681, is discussed *supra* text accompanying notes 21-25 and *infra* text accompanying notes 44-45, 59-62, 100-02; and *State v. Douglass*, 20 W. Va. 770 (1882), is discussed *supra* note 13.

29. C. MCCORMICK (1972 ed.), *supra* note 28, § 89, at 183.



evidence is located. In the latter two situations, the privilege clearly prevents the attorney from divulging the whereabouts of the evidence. Similarly, the attorney-client privilege was applied in the unusual case of *People v. Belge*,<sup>30</sup> in which the client told his attorney where he had buried dead bodies, and the attorney then personally inspected the bodies' condition. Because the attorney-client privilege was held to prevent the attorney from disclosing the bodies' location, the attorney could not be prosecuted for violating a New York statute that required a person with knowledge of a death to make a report to the proper authorities.<sup>31</sup> The attorney's revelation of the location of the bodies would have implied that the client told the attorney about the bodies.

In *Ollwell* the court assumed that the attorney had received the knife as part of a legitimate attorney-client communication.<sup>32</sup> The privilege, of course, does not apply unless the client seeks and receives legitimate professional advice from the attorney. If, for example, a client were to give a weapon to an attorney and seek advice on how best to dispose of it, the privilege would clearly not apply because the professional advice sought would not be legitimate.<sup>33</sup> Similarly, in *Clark v. State*,<sup>34</sup> in which the attorney told his client to "get rid of the weapon,"<sup>35</sup> the court held that the privilege did not apply because the attorney's advice was outside the scope of appropriate legal advice.<sup>36</sup>

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30. 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct.), *aff'd mem.*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), *aff'd per curiam*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

31. Belge was accused of having violated "§ 4200(1) of the Public Health Law, which, in essence, requires that a decent burial be accorded the dead, and § 4143 of the Public Health Law, which, in essence, requires anyone knowing of the death of a person without medical attendance, to report the same to the proper authorities." *Id.* at 187, 372 N.Y.S.2d at 799. Subsequent to the court's decision in *Belge*, an ethics decision based on the case held that a

[l]awyer was duty bound not to reveal to the authorities the location of the bodies. The lawyer's knowledge with respect to the location of the bodies was obtained solely from the client in confidence and in secret. . . . Thus, his personal knowledge is a link solidly welded to the chain of privileged communications and, without the client's express permission, must not be disclosed.

4 New York State Bar Ass'n Comm. on Professional Ethics, Op. 479 (1978). The *Belge* case differs from the other physical evidence decisions inasmuch as the attorney never actually possessed the evidence or changed its location.

32. The *Ollwell* court stated:

Although there is no evidence relating thereto, we think it reasonable to infer from the record that appellant did, in fact, obtain the evidence as the result of information received from his client during their conference. Therefore, . . . we assume that the evidence in appellant's possession was obtained through a confidential communication from his client.

*Ollwell*, 64 Wash. 2d at 831-32, 394 P.2d at 683.

33. The attorney-client privilege does not protect the client who seeks advice in furtherance of a criminal or fraudulent transaction. See C. McCORMICK, *supra* note 13, § 95; J. WIGMORE, *supra* note 13, § 2298; see also *United States v. Calvert*, 523 F.2d 895, 909 (8th Cir. 1975) (communications from client to attorney not privileged if made for purpose of obtaining aid in the commission of criminal acts), *cert. denied*, 424 U.S. 911 (1976); *United States v. Goldenstein*, 456 F.2d 1006, 1011 (8th Cir. 1972) (communication between attorney and client made for the purpose of concealing stolen money not privileged), *cert. denied*, 416 U.S. 943 (1974); *United States v. Bartlett*, 449 F.2d 700, 704 (8th Cir. 1971) (disclosure made by client to attorney in course of commission of crime or fraud not privileged), *cert. denied*, 405 U.S. 932 (1972).

34. 159 Tex. Crim. 187, 261 S.W.2d 339, *cert. denied*, 346 U.S. 855 (1953).

35. *Id.* at 190, 261 S.W.2d at 341.

36. The court noted:

There are several cases in which attorneys acquired physical evidence from clients, but the courts declined to give attorney-client privilege protection.<sup>37</sup> In the case of *In re Ryder*,<sup>38</sup> an attorney was disciplined for having transferred physical evidence of a bank robbery—stolen money and a sawed-off shotgun—from his client's safety deposit box to his own. Although the attorney learned the location of the evidence from his client, the court held that the attorney's conduct "went far beyond the receipt and retention of a confidential communication."<sup>39</sup> Had the attorney simply opened the client's safety deposit box, inspected its contents, and then closed it, the attorney-client privilege presumably would have been fully applicable, as it was in *Belge*. Because effective representation of the client did not require possession of the evidence, however, and because the court believed that the attorney's true intention was to conceal the evidence until after the trial, the attorney-client privilege did not apply.<sup>40</sup>

A second physical evidence case in which the attorney client privilege was ruled unavailable is *Genson v. United States*.<sup>41</sup> Attorney Genson received a grand jury subpoena seeking money "paid or delivered" to him, which was believed to be proceeds of a bank robbery.<sup>42</sup> In refusing to comply with the subpoena, Genson asserted the attorney-client privilege. The court held the privilege inapplicable, assuming that the money was either "a retainer or prepayment of fees" or "a bailment for purposes of safekeeping."<sup>43</sup> Legal fees are gen-

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The murder weapon was not found. The evidence indicates that appellant disposed of it as advised . . . . Such advice or counsel was not such as merits protection because given by an attorney. It was not in the legitimate course of professional employment in making or preparing a defense at law.

Nothing is found in the record to indicate that appellant sought any advice from . . . [the attorney] other than that given in the conversation . . . . We are not therefore dealing with a situation where the accused sought legitimate advice from his attorney in preparing his legal defense.

*Id.* at 200, 261 S.W.2d at 347.

37. Courts have also held the attorney-client privilege inapplicable in cases in which attorneys received incriminating evidence from nonclient third parties. *E.g.*, *Morrell v. State*, 575 P.2d 1211 n.17 (Alaska 1978); *Dyas v. State*, 260 Ark. 303, 310-311, 539 S.W.2d 251, 256, (1976); *People v. Lee*, 3 Cal. App. 3d 514, 527, 83 Cal. Rptr. 715, 723 (1970); *State v. Dillon*, 93 Idaho 698, 710, 471 P.2d 553, 565 (1970), *cert. denied*, 401 U.S. 942 (1971). *But see* *Matter of Vanderbilt* (Rosner-Hickey), 57 N.Y.2d 66, 80, 439 N.E.2d 378, 386, 453 N.Y.S.2d 662, 670 (1982) (attorney-client privilege applies if wife acted as husband's agent in transferring tape recording to attorney).

38. 263 F. Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967).

39. *Id.* at 365.

40. As the court explained:

Ryder could not lawfully receive the gun from . . . [his client] . . . . When Ryder discovered it in . . . [his client's] box, he took possession of it to hinder the government in the prosecution of its case, and he intended not to reveal it pending trial . . . .

. . . .

Ryder's testimony that he intended to have the court rule on the admissibility of the evidence and the extent of the lawyer-client privilege does not afford justification for his action. He intended to do this only if the government discovered the shotgun and stolen money in his lockbox. If the government did not discover it, he had no intention of submitting any legal question about it to the court. If there were no discovery, he would continue to conceal the shotgun and money for . . . [his client's] benefit pending trial.

*Id.* at 369.

41. 534 F.2d 719 (7th Cir. 1976).

42. *Id.* at 721.

43. *Id.* at 728. There is another possible explanation for the transfer of the money to defense

erally not privileged information, and an attorney's function is not to safeguard a client's stolen property.

As noted earlier, the *Olwell* court refused to extend attorney-client privilege protection to the knife itself. The defense attorney had to surrender the knife pursuant to the coroner's subpoena, but the prosecution was admonished to "take extreme precautions"<sup>44</sup> to avoid any mention at trial that defense counsel was the source of the knife. Thus, the prosecution obtained the weapon, but it still had to tie together the weapon, the homicide, and the defendant. The rejection of attorney-client privilege for the item of physical evidence finds support in Wigmore's discussion of the privilege as applied to documents:

Where the document already had an independent existence and the communication consists in bringing its contents to *the attorney's knowledge*, that *knowledge* is not to be disclosed by his testimony. . . . But the physical possession of the document is distinct from that knowledge, and to compel production of the document is not to compel disclosure of the communication. . . .

. . . .

The client's disclosure to the attorney of the contents of a pre-existing document will almost always be an act of communication. . . . Nor does it here make any difference that the client would have been compellable to produce the deed in chancery or otherwise, for he is also compellable to tell what he knows on other subjects, and yet his communications about them, made to the attorney, are privileged. The communication of the document is distinct from the document itself.<sup>45</sup>

Similarly, the *Olwell* court treated "communication" of the knife—the fact of its delivery to defense counsel—as being distinct from the knife itself. Although the court ordered production of the knife, it ordered the fact of the client's delivery of the knife to defense counsel to remain protected.

Several courts have approved *Olwell's* analysis and applied its reasoning. In *Anderson v. State*<sup>46</sup> defendant was charged with receiving stolen property, a dictaphone and a calculator. Defendant delivered the items to his attorney's receptionist, and the attorney turned them over to the police. The State thereupon subpoenaed the attorney and his receptionist to testify at defendant's trial.<sup>47</sup> The court, however, held that the attorney-client privilege protected the delivery of the evidence to the attorney's office; to preserve the privilege, neither the attorney nor the receptionist "[could] be required to divulge the source of

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counsel—one that the court in *Genson* did not consider. Conceivably, the clients gave the money to defense counsel as part of a legitimate effort to obtain legal advice. Assuming such a scenario, the situation would have been similar to "the client [who] rolled up his sleeve to show the lawyer a hidden scar, or opened the drawer of his desk to show a revolver there," C. MCCORMICK (1972 ed.), *supra* note 28, § 89, at 183, and the attorney-client privilege would have applied. See *supra* text accompanying notes 27-31.

44. *Olwell*, 64 Wash. 2d at 834, 394 P.2d at 685.

45. 8 J. WIGMORE, *supra* note 13, § 2307, at 594, § 2308, at 595-96.

46. 297 So. 2d 871 (Fla. Dist. Ct. App. 1974).

47. *Id.* at 871.

the stolen items, and . . . the state [could] not introduce evidence that they received the items from . . . [the attorney's] office."<sup>48</sup>

In *People v. Nash*<sup>49</sup> an attorney received a driver's license, a revolver with ammunition, and a holster, all of which implicated his client in a murder.<sup>50</sup> After the attorney notified the authorities that he had physical evidence relevant to the case, the prosecution obtained a search warrant for the attorney's law office and acquired the evidence. At trial, the State established that it obtained the evidence pursuant to a search of the defense attorney's office. Citing *Owll*, the appellate court held that it was error to permit the State to present such evidence; on retrial, to preserve the attorney-client privilege, the prosecution was told to make no "mention whatsoever that the evidence was formerly in the possession of defendant or her attorney."<sup>51</sup> As the court explained, "permitting the prosecutor to show that defendant's attorney had such evidence in his possession invites the jury to infer that defendant gave the evidence to her attorney."<sup>52</sup>

*People v. Meredith*<sup>53</sup> is an important case that partially departed from the *Owll* approach. Defendant, who was charged with first degree murder and robbery, informed his attorney that the victim's wallet was in a trash can behind defendant's house. The attorney immediately dispatched his investigator, who located the wallet and brought it to him. After examining its contents, the attorney delivered the wallet to the police. At trial, the prosecutor called the investigator as a witness to establish that the wallet had been found in a trash can behind defendant's house.<sup>54</sup> Although conceding that observations of attorneys and investigators derived from confidential communications are normally privileged, the *Meredith* court nonetheless sustained the prosecutor's conduct. The court reasoned that defense counsel had deprived the State of the opportunity to find the evidence and to prove its location:

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48. *Id.* at 875. The State urged that the attorney-client privilege did not apply because "delivery of the stolen items does not constitute a communication protected by the attorney-client privilege." *Id.* at 872. Rejecting this argument, the court noted that a confidential communication does not have to be verbal to be privileged. *Id.* But see *Hughes v. Meade*, 453 S.W.2d 538, 542 (Ky. Ct. App. 1970) (delivery of a stolen typewriter to an attorney for delivery to the police held not to be within the attorney-client privilege). *Anderson* is distinguishable from *Hughes* in that the attorney in *Hughes* was said not to have been retained in his legal capacity; he was merely a conduit for the delivery of the property, and his act was unrelated to legal representation. In *Anderson* the attorney delivered the stolen items after having been retained to defend his client against the charge of stealing them. The critical question, of course, is whether the client transmitted the evidence to counsel as part of a legitimate effort to obtain legal advice. See *supra* text accompanying notes 27-36.

49. 110 Mich. App. 428, 313 N.W.2d 307 (1981), *rev'd on other grounds, aff'd in part*, 418 Mich. 196, 341 N.W.2d 439 (1983).

50. Although there was no testimony concerning the source from which defense counsel received the evidence, the court treated the case as if the evidentiary items had been obtained during a confidential attorney-client communication. *Id.* at 442-43, 313 N.W.2d at 312.

51. *Id.* at 447, 313 N.W.2d at 314.

52. *Id.*

53. 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981).

54. Defendant's counsel at trial was not the attorney who had sent the investigator to find the wallet. At trial the prosecution subpoenaed both the investigator and defendant's first attorney. The first attorney testified that he had given the investigator instructions to search for the wallet immediately after having spoken with defendant. *Id.* at 689, 631 P.2d at 50, 175 Cal. Rptr. at 616.

[T]o bar admission of testimony concerning the original condition and location of the evidence in such a case permits the defense in effect to "destroy" critical information; it is as if . . . the wallet in this case bore a tag bearing the words "located in the trash can by . . . [defendant's] residence," and the defense, by taking the wallet, destroyed this tag.<sup>55</sup>

Accordingly, the court concluded that whenever the defense alters or removes items of physical evidence, the protection otherwise accorded by the attorney-client privilege must yield, and the prosecution must be permitted to prove "the original location or condition of the evidence in question."<sup>56</sup>

Thus, in *Meredith* the court permitted testimony concerning observations that were conceded to be within the attorney-client privilege. To this extent, *Meredith* went beyond anything sanctioned in *Olwell*, because the *Olwell* court had permitted no testimony concerning either privileged observations or communications.<sup>57</sup> The court in *Meredith*, however, did make clear that only testimony related to the location where the evidence was discovered should be permitted:

In offering the evidence, the prosecution should present the information in a manner which avoids revealing the content of attorney-client communications or the original source of the information. In the present case, for example, the prosecutor simply asked Frick where he found the wallet; he did not identify Frick as a defense investigator or trace the discovery of the wallet to an attorney-client communication.

In other circumstances, when it is not possible to elicit such testimony without identifying the witness as the defendant's attorney or investigator, the defendant may be willing to enter a stipulation which will simply inform the jury as to the relevant location or condition of the evidence in question. When such a stipulation is proffered, the prosecution should not be permitted to reject the stipulation in the hope that by requiring defense counsel personally to testify to such facts, the jury might infer that counsel learned those facts from defendant.<sup>58</sup>

The guidelines announced by the *Meredith* court resemble the approach adopted in *Olwell*, *Anderson*, and *Nash*. In these cases, the courts held that to show that evidence was obtained from the defense attorney would imply that the

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55. *Id.* at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

56. *Id.* at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620. The *Meredith* decision has attracted considerable law review comment. See Martin, *Incriminating Criminal Evidence: Practical Solutions*, 15 PAC. L.J. 807 (1984); Comment, *Extending the Attorney Client Privilege: A Constitutional Mandate*, 13 PAC. L.J. 437 (1982); Note, *People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights*, 70 CALIF. L. REV. 1048 (1982); Note, *The Attorney-Client Privilege: Hear No Evil, See No Evil, Speak No Evil?*, 20 HOUS. L. REV. 921 (1983).

57. In *Olwell* the subpoena served on defense counsel was defective because it sought, *inter alia*, to require the attorney to testify about conversations with his client. See *infra* note 193 and accompanying text.

58. *Meredith*, 29 Cal. 3d at 695 n.8, 631 P.2d at 54 n.8, 175 Cal. Rptr. at 620 n.8 (citations omitted). For a recent case that adheres to the approach adopted in *Meredith*, see *Clutchette v. Rushen*, 38 CRIM. L. REP. (BNA) 2029 (9th Cir. 1985).

defendant was the source of the evidence. It was the defendant's *act* or *conduct* in transferring the evidence to counsel that was being protected. In a case like *Meredith*, to prove that the defense investigator or defense counsel located the evidence would lead the jury to infer that defendant *told* counsel where to find the evidence. Thus, cases in which either the investigator or attorney finds the evidence pursuant to a confidential communication may appear to be different from cases in which the evidence is delivered to the defense attorney by the client, but the difference is superficial. In the latter situation, the concern is for protecting the defendant's confidential *act* in transmitting physical evidence to counsel, whereas the concern in the former is for protecting the defendant's *words*. Both the acts and words of the defendant are within the attorney-client privilege, assuming that the client seeks and receives legitimate legal advice.

The preceding discussion illustrates that the analysis in *Olwell* and subsequent cases, except for part of the *Meredith* decision, is consistent with well-established principles of attorney-client privilege.<sup>59</sup> Nevertheless, there are two very important and practical problems with *Olwell*, the first of which is suggested by the reasoning in *Meredith*. The *Meredith* court's overriding concern was that by removing or altering evidence, counsel could thwart police investigations under the cloak of attorney-client privilege. As the court remarked, "[t]o extend the attorney-client privilege to a case in which the defense removed evidence might encourage defense counsel to race the police to seize critical evidence."<sup>60</sup> But is this not precisely what *Olwell* does—encourage clients to deposit physical evidence with their attorneys so that the "source" of the evidence will be protected from disclosure?<sup>61</sup> If defense attorneys were aware of *Olwell* and confident that courts would always follow its approach, there might well be a revolution in the defense of criminal cases. Defense attorneys, in an effort to provide effective representation, would instruct their clients to bring them all incriminating items of physical evidence, comforted by the knowledge that even if a subpoena for the evidence were issued, the prosecution would be forbidden to show that counsel was the source of the evidence at trial. Such conduct would obviously do little either to enhance the image of defense attorneys or to assure the fairness of criminal trials. The possibility of such conduct does not necessarily mean that defense counsel should never be permitted to acquire physical evidence, but it does suggest that it ought not to be done routinely and that clear justifications for doing so should be present.

Ironically, the second difficulty with the *Olwell* rule is that it may provide insufficient attorney-client privilege protection. Suppose in *Olwell* that the knife the attorney was required to surrender had the defendant's fingerprints on it; consider also the hypothetical posed at the beginning of this Article, in which a

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59. See *supra* text accompanying notes 26-31.

60. *Meredith*, 29 Cal. 3d at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

61. The same concern is expressed in Saltzburg, *supra* note 8, at 838: "Only by having the lawyer transfer the evidence to the government for her is the client able to 'launder' the evidence—that is, remove it from her possession and place it in the hands of the government without having the government connect it with its source." However, the positions advanced in Saltzburg's article are quite different from those advocated in this Article. See *infra* note 139 and text accompanying notes 181-83.

pistol used in a homicide is registered in the client's name. In these cases, forbidding disclosure of the attorney as the source of the evidence may not fully protect the accused. Although the client will have relied on the attorney-client privilege in delivering the evidence to the attorney, the police will probably learn the client's identity from the evidence itself and will thus have an important link in the prosecution chain.<sup>62</sup>

### B. *Privilege Against Self-Incrimination*

The preceding discussion suggests that defense attorneys, on grounds of attorney-client privilege, cannot avoid compliance with subpoenas for physical evidence. Defense attorneys, however, may sometimes resist disclosure of physical evidence sought by subpoena on the basis of the client's privilege against self-incrimination. In *Fisher v. United States*<sup>63</sup> the Internal Revenue Service (IRS) sought to compel attorneys to comply with a summons for tax records prepared by client-taxpayers' accountants. After obtaining the records from their accountants, the taxpayers had transferred them to counsel to obtain legal advice. The United States Supreme Court indicated that the documents counsel possessed would be protected by the attorney-client privilege *if* they would have been privileged in the taxpayers' hands by virtue of the privilege against self-incrimination. Attorney-client privilege protection thus depended on whether the clients could have claimed fifth amendment protection for the documents prior to turning them over to counsel. The Supreme Court's reasoning in *Fisher* is consistent with traditional attorney-client privilege concepts,<sup>64</sup> and it also makes excellent sense from a policy standpoint. Clients should not have to surrender fifth amendment protection as the price for obtaining legal advice.

Nevertheless, the Supreme Court in *Fisher* held that the attorneys were required to comply with the IRS summons because the fifth amendment protects only incriminating *testimonial* communications, and the accountants' workpapers did not qualify as testimony.<sup>65</sup> The Court noted that the tax records were not prepared by the taxpayers and contained "no testimonial decla-

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62. For examples of cases in which the defense attorney possessed an evidentiary item that itself revealed the client's identity, see *People v. Gardner*, 106 Cal. App. 3d 882, 886, 165 Cal. Rptr. 415, 417 (1980) (defendant's handwritten confession contained in letter); *State v. Carlin*, 7 Kan. App. 2d 219, 222, 640 P.2d 324, 326 (1982) (taped phone conversation of defendant's threat to victim); *People v. Nash*, 110 Mich. App. 428, 452, 313 N.W.2d 307, 312 (1981) (defendant's fingerprint on bullet cartridge), *rev'd on other grounds, aff'd in part*, 418 Mich. 196, 341 N.W.2d 439 (1983); and *Matter of Vanderbilt (Rosner-Hickey)*, 57 N.Y.2d 66, 70, 439 N.E.2d 378, 380, 453 N.Y.S.2d 662, 665 (1982) (incriminating tape recording made by client).

63. 425 U.S. 391 (1976).

64. "[W]hen the client himself would be privileged from production of the document . . . as exempt from self-incrimination, the attorney having possession of the document is not bound to produce." 8 J. WIGMORE, *supra* note 13, § 2307, at 592.

65. In *Schmerber v. California*, 384 U.S. 757, 761 (1966), the Supreme Court held that the fifth amendment prohibits compelled evidence of a testimonial or communicative nature. The privilege against self-incrimination does not protect a person from becoming the source of real or physical evidence. *Id.* at 764. Thus, the Court has held that the privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *United States v. Wade*, 388 U.S. 218, 223 (1967) (quoting *Schmerber*, 384 U.S. at 764).

rations.”<sup>66</sup> The Court recognized, however, that in some circumstances compliance with a subpoena might involve “testimonial” or “communicative” aspects, entirely separate from the contents of the papers actually produced:

The act of producing evidence in response to a subpoena . . . has communicative aspects of its own. . . . Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. . . . The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both “testimonial” and “incriminating” for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof.<sup>67</sup>

Thus the Court noted two ways in which compliance with a subpoena may involve “testimony” or “communication”: Production of the documents acknowledges their “existence” and “possession” or “control” of them<sup>68</sup> by the taxpayer and “also . . . indicate[s] the taxpayer's belief that the papers are those described in the subpoena.”<sup>69</sup> Neither of these means of self-incrimination, however, was deemed to require fifth amendment protection for the tax records in *Fisher*. Because the IRS already knew of the records' existence and location, the Court reasoned that

the Government is in no way relying on the “truthtelling” of the taxpayer to prove the existence of or his access to the documents. . . . The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.<sup>70</sup>

The Court also did not find compliance with the subpoena an authentication of the accountants' work papers. Production of the papers in response to the government's subpoena “would express nothing more than the taxpayer's belief that the papers are those described in the subpoena. . . . The documents would not be admissible in evidence against the taxpayer without authenticating testimony.”<sup>71</sup>

Subsequent to *Fisher*, in *United States v. Doe*,<sup>72</sup> the Supreme Court held that the fifth amendment did excuse a sole proprietor from producing business records. Federal grand jury subpoenas in *Doe* covered twenty-eight categories, including items such as ledgers, vouchers, paid bills, invoices, cancelled checks,

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66. *Fisher*, 425 U.S. at 409.

67. *Id.* at 410.

68. *Id.*

69. *Id.* See generally Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683 (1982) (implicit authentication doctrine of fifth amendment prevents defendants from being compelled to verify the case against them).

70. *Fisher*, 425 U.S. at 411.

71. *Id.* at 412-13.

72. 465 U.S. 605 (1984).



payroll records, partnership tax returns, accounts payable and receivable, and telephone company statements. Although the Court held the content of these business records not privileged under the fifth amendment,<sup>73</sup> it agreed with the lower federal courts, which had ruled that the act of producing the documents would involve testimonial self-incrimination. In a footnote, the Supreme Court quoted with approval from the district court's opinion: " 'With few exceptions, enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are authentic.' " <sup>74</sup> The Court concluded that the documents were compellable only if respondent were given a statutory grant of use immunity preventing the government from using against respondent his act in producing the records.<sup>75</sup> Because respondent had received no such immunity, he did not have to produce the documents.

Even before the decision in *Doe*, numerous lower courts had applied the Supreme Court's analysis in *Fisher*, often granting fifth amendment protection for documents.<sup>76</sup> The decision in *United States v. Porter*<sup>77</sup> is illustrative. The taxpayer, under investigation by the IRS Criminal Investigation Division, was asked by an IRS agent to disclose financial records of personal and business transactions. At the time of the request, the records were in the hands of the taxpayer's accountant, but shortly afterwards, the taxpayer transferred the records to his attorney. The IRS thereupon issued a summons for the records, and the taxpayer's attorney objected, claiming that the items were protected by the attorney-client privilege because the taxpayer would have been privileged from disclosure under the fifth amendment if the records had remained in his hands. The court in *Porter* agreed with the taxpayer's counsel that certain cancelled checks and deposit slips need not be disclosed.<sup>78</sup> As in *Fisher*, the "existence" and "location" of the documents were not in dispute; however, the act of producing the documents would constitute an "implicit authentication."<sup>79</sup> The court assumed that the cancelled checks and deposit slips had been prepared by the taxpayer; therefore, their production in response to the IRS summons would have been an authoritative authentication.<sup>80</sup> Because the documents themselves

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73. *Id.* at 612. In light of *Doe* and *Fisher*, which both focus on the act of producing documents, it no longer is certain that any papers—even personal or private papers—receive fifth amendment protection by virtue of their content. See Third Annual Survey of White Collar Crime, *Fifth Amendment Limitations on Compelled Production of Evidence*, 22 AM. CRIM. L. REV. 559, 564-68 (1985).

74. *Doe*, 465 U.S. at 613 n.11 (1984) (quoting *In Re Grand Jury Empanelled March 19, 1980*, 541 F. Supp. 1, 3 (D.N.J. 1981)).

75. *Id.* at 614-15.

76. *E.g.*, *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 336 (3d Cir. 1982) (fifth amendment privilege can be invoked by sole proprietor in response to subpoena for business-related records), *modified*, 465 U.S. 605 (1984); *United States v. Beattie*, 541 F.2d 329, 331 (2d Cir. 1976) (taxpayer protected by privilege against self-incrimination from production of letters previously sent to accountant and later retrieved by taxpayer); *State v. Superior Court*, 128 Ariz. 253, 257, 625 P.2d 316, 320 (1981) (compulsory production of letters written by defendant to crime victim which defendant later retrieved and gave to defense attorney prohibited by fifth amendment).

77. 711 F.2d 1397 (7th Cir. 1983).

78. *Id.* at 1401.

79. "As in *Fisher*, the existence and location of the disputed documents is not in issue, and the respondents concede this in their brief. But here, unlike in *Fisher*, the 'implicit authentication' ensuing from the production of the documents is undeniable." *Id.*

80. *Id.*

were not intrinsically subject to fifth amendment protection,<sup>81</sup> however, the court in *Porter* suggested that it would order their production if (1) the government were to immunize the taxpayer "with respect to 'use' (before the grand jury, at trial, or in further investigation) of any authentication evidence stemming from the act of production,"<sup>82</sup> and (2) a "protective order [were entered] forbidding the government from referring in any way before the grand jury or at trial to the fact that . . . [the taxpayer] produced the documents."<sup>83</sup> Thus, the court distinguished between the documents themselves, which were not protected, and implied testimony derived from production of the documents, which was protected.

Although normally applied only to documents, the Supreme Court's analysis in *Fisher* may also be applied to other items of physical evidence. Indeed, there is even a case involving a pistol—*Commonwealth v. Hughes*<sup>84</sup>—in which the court held that the weapon was privileged. Unlike *Fisher*, *Porter*, and the physical evidence cases previously discussed, in *Hughes* the disputed evidence was never given to a defense attorney. Instead, defendant, charged with assault with a dangerous weapon and believed to have possession of the pistol, was served with a motion by the State for its production. Defendant objected, claiming that surrender of the pistol would be an implicit authentication of it and thus would violate his fifth amendment privilege.<sup>85</sup> Citing the Supreme Court's decision in *Fisher*, the court in *Hughes* denied the State's motion:

If the defendant should produce the revolver, he would be making implicitly a statement about its existence, location and control to which the Commonwealth says it would allude at trial to show he had possession and control at some point after the alleged crime. The implied statement would also function as an authentication.<sup>86</sup>

. . . .

Implicit statements as to existence, location, and control would nevertheless have been compelled and the information would have been delivered over to the Commonwealth. The Commonwealth could use such information, mediately, to secure other incriminating evidence to put before the jury, and it can be assumed that the testimonial statement as to the location of the gun would be used, mediately, to lead to ballistics tests and ballistics evidence and an opinion thereon.<sup>87</sup>

If defendant in *Hughes* had given the pistol to his attorney while seeking legal advice, and the State had served its motion for production on defense counsel, the result would presumably have been the same. Relying upon *Fisher*, the *Hughes* court almost surely would have held that the pistol's transfer was within the attorney-client privilege, and that the attorney could not be required to pro-

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81. See *supra* note 73.

82. *Porter*, 711 F.2d at 1402-03.

83. *Id.* at 1404.

84. 380 Mass. 583, 404 N.E.2d 1239, cert. denied, 449 U.S. 900 (1980).

85. *Id.* at 583-85, 404 N.E.2d at 1240.

86. *Id.* at 592, 404 N.E.2d at 1244.

87. *Id.* at 594, 404 N.E.2d at 1245-46.

duce the weapon because it was protected in the defendant's hands by the fifth amendment.

Conversely, the court in *Genson v. United States*,<sup>88</sup> in which clients gave an attorney money believed to be proceeds of a bank robbery, upheld the Government's subpoena for the money and specifically ruled that no fifth amendment issue was involved. *Genson* was decided about three weeks before the Supreme Court's decision in *Fisher* and hence without benefit of its analysis. Indeed, two members of the three judge panel in *Genson* believed "that even in the case of the suspects, compliance on their part with the subpoena would not possess sufficient aspects of testimonial character to activate the protective mantle of the Fifth Amendment."<sup>89</sup> In light of *Fisher*, this statement is open to serious question. Just as in the *Hughes* case, if defendants surrendered stolen money in response to a Government subpoena, they "would be making implicitly a statement about its existence, location and control"<sup>90</sup> to which the Government could—and undoubtedly would—allude during trial. The Government thus would be able to prove that defendants possessed the stolen money soon after the holdup, and that defendants, by surrendering money in response to the subpoena, believed that they possessed stolen money. The *Genson* case may also implicate the attorney-client privilege if the clients transferred the allegedly stolen money to defense counsel in a legitimate effort to obtain legal advice.<sup>91</sup>

Since the *Fisher* decision, the cases involving the transfer of *nondocumentary* physical evidence to attorneys have largely ignored the fifth amendment.<sup>92</sup> For example, in *People v. Investigation into a Certain Weapon*<sup>93</sup> defense counsel received a grand jury subpoena for production of "all tangible property relating to a certain .25 caliber automatic pistol, including ammunition and an ammuni-

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88. 534 F.2d 719 (7th Cir. 1976).

89. *Id.* at 723.

90. *Hughes*, 380 Mass. at 592, 404 N.E.2d at 1244.

91. The possibility that the money may have been given to counsel to obtain legal advice is discussed *supra* note 43. For a similar explanation of why *Genson* may have been decided incorrectly in view of the Supreme Court's decision in *Fisher*, see Seidelson, *The Attorney-Client Privilege and Client's Constitutional Rights*, 6 HOFSTRA L. REV. 693, 703-04, 724-26 (1978).

92. Few of the *nondocumentary* physical evidence cases decided after *Fisher* even mention the privilege against self-incrimination. *But see* *United States v. Authement*, 607 F.2d 1129 (5th Cir. 1979). Defendant in *Authement* was a policeman accused of having beaten a burglary suspect. Defendant gave his brass knuckles to his defense lawyer, who surrendered them to the Government in response to a subpoena *duces tecum*. The court of appeals rejected defendant's claim that the attorney's compliance with the subpoena violated defendant's privilege against self-incrimination:

We specifically reserve the question of whether the fifth amendment privilege against compelled self-incrimination would be violated in a situation in which the testimonial communication of authentication either was introduced before the jury or led to other evidence or injury to a defendant. This case does not present that issue. Likewise, we reserve the question whether, at the time of issuance of the subpoena, a substantial risk of self-incrimination would exist. Here we are able to say that there was no incrimination because, viewing the situation in retrospect, no incrimination actually occurred.

*Id.* at 1132 n.2. The Alaska Supreme Court mentioned the fifth amendment briefly in several footnotes in *Morrell v. State*, 575 P.2d 1200, 1209 n.13, 1210 n.15 (Alaska 1978). Defense counsel obtained the physical evidence in *Morrell*, however, from a third party, not from the defendant. Thus, protection for the evidence based upon the client's constitutional privilege was unavailable.

93. 113 Misc. 2d 348, 448 N.Y.S.2d 950 (N.Y. Sup. Ct. 1982).

tion clip.'"<sup>94</sup> The attorney's client was the suspect in an attempted killing of a police officer during a robbery. A gun, which was recovered by the police, was missing its clip and bullets, and the defense attorney was believed to have them. Although conceding that the client's delivery of the ammunition and clip to his attorney was within the attorney-client privilege, the court required the attorney to surrender the evidence on public policy grounds. Furthermore, the court noted that if attorneys could withhold "evidence of criminality, . . . instrumentalities and fruits of crime would be beyond the reach of the law by the mere fact that a defendant turned them over to an attorney."<sup>95</sup> Although the court did not mention the fifth amendment, arguably, just as in *Hughes*, production of the ammunition and clip would have been tantamount to a statement about their "existence, location, and control," and thus would have been entitled to constitutional protection.

The approaches in *Fisher* and *Olwell* lead to similar results. As noted previously, *Olwell* and its progeny held that physical evidence, received by counsel during the attorney-client relationship, must be produced in response to a subpoena, but the prosecution is forbidden at trial to disclose that the attorney was the source of the evidence.<sup>96</sup> Technically, pursuant to the holding in *Olwell*, if a gun were ordered disclosed, the prosecution would not be precluded from proving that it was registered in defendant's name or that defendant's fingerprints were on the weapon. But this issue was not addressed in either *Olwell* or in any subsequent cases following *Olwell*. *Olwell* protected the information that the attorney was the source of the evidence because of the need to protect the attorney-client privilege; therefore, it is at least conceivable that a court applying *Olwell* would hold that no prejudice to a defendant resulting from disclosure of the evidence is permissible, and thus neither proof of defendant's gun registration nor defendant's fingerprints would be admissible. Admittedly, such an approach may be unlikely, given the courts' tendency not to accord the attorney-client privilege any broader interpretation than necessary.<sup>97</sup> If *Fisher*'s fifth amendment approach is applicable, however, either the physical evidence will not be ordered produced at all<sup>98</sup> or, as suggested in *Doe* and *Porter*, production will be ordered, but defendant will be immunized "with respect to 'use' (before the grand jury, at trial, or in further investigation) of any authentication evidence stemming from the act of production."<sup>99</sup> Thus, the prosecution would apparently be forbidden from proving either that the gun was registered in defendant's name or that defendant's fingerprints were on the weapon.

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94. *Id.* at 349, 448 N.Y.S.2d at 951.

95. *Id.* at 352, 448 N.Y.S.2d at 953.

96. See *supra* text accompanying notes 25-26, 44-45.

97. See 81 AM. JUR. 2D *Witnesses* § 174, at 210 (1976).

98. See *supra* text accompanying notes 76-79.

99. *Porter*, 711 F.2d at 1402-03; see *supra* text accompanying notes 81-83.

### III. DO DEFENSE ATTORNEYS HAVE AN AFFIRMATIVE DUTY TO DISCLOSE PHYSICAL EVIDENCE?

#### A. General Duty of Disclosure

Until now, this discussion has focused on whether the attorney-client or fifth amendment privilege is a bar to compelled production of physical evidence. A separate but related question is whether an attorney must as a matter of ethical duty *voluntarily* disclose physical evidence that he or she possesses to the authorities. In *State v. Olwell*<sup>100</sup> the court suggested in dictum that there is such an ethical duty:

The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.), which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense of his client's case. Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. *It follows that the attorney, after a reasonable period, should as an officer of the court, on his own motion turn the same over to the prosecution.*<sup>101</sup>

The issue in *Olwell* was whether a defense attorney had to surrender a knife in his possession in response to a coroner's subpoena.<sup>102</sup> Hence, it was unnecessary for the court to discuss the attorney's affirmative duty to divulge the physical evidence. Moreover, the court never fully explained why physical evidence had to be disclosed and considered no alternatives to disclosure. Even if one generally agrees that an "attorney should not be a depository for criminal evidence,"<sup>103</sup> it does not necessarily follow that *all* such evidence should in *all* circumstances be disclosed after a "reasonable period."

Because other courts have frequently reiterated *Olwell*'s dictum that an attorney has a duty to disclose physical evidence, it is now sometimes referred to as a well-established rule. In *Morrell v. State*,<sup>104</sup> for example, the issue was whether a defense attorney rendered ineffective assistance of counsel, in violation of the sixth amendment, by aiding a third person in transferring incriminating documents written by the defendant to the police. The documents consisted of kidnapping plans, which the attorney had earlier received from a third person who had had them in his exclusive possession. After citing *Olwell* and other decisions, the *Morrell* court stated that "[f]rom the foregoing cases emerges the rule that a criminal defense attorney must turn over to the prosecution real evidence that the attorney obtains from the client."<sup>105</sup> To the same effect is *State v.*

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100. 64 Wash. 2d 828, 394 P.2d 681 (1964).

101. *Id.* at 833-34, 394 P.2d at 684-85 (emphasis added).

102. See *supra* notes 21-25 and accompanying text.

103. *Olwell*, 64 Wash. 2d at 833, 394 P.2d at 684.

104. 575 P.2d 1200 (Alaska 1978).

105. *Id.* at 1210. Actually, other than *Olwell*, only one other case cited in *Morrell*, *People v.*

*Carlin*,<sup>106</sup> in which a defense attorney was under a court order to surrender an incriminating tape recording made by his client. Citing *Olwell* and other cases, the appellate court reasoned that "[s]ince the appellant's attorney had a duty to turn over the evidence under the line of cases mentioned above,<sup>107</sup> there was no error in the court ordering him to do so."<sup>108</sup>

However, in the countless cases discussing possible application of the fifth amendment under *Fisher v. United States*,<sup>109</sup> no court has ever suggested that attorneys in possession of possibly incriminating evidence have a duty to make voluntary disclosure.<sup>110</sup> The kind of language quoted above from the *Carlin* decision is absent, and there is no claim that an order to produce evidence is proper because a voluntary disclosure duty exists anyway. The fifth amendment cases have primarily involved documents sought in tax evasion or white collar crime investigations,<sup>111</sup> whereas cases in which courts have found that attorneys have an affirmative duty to disclose physical evidence have involved less sophisticated crimes.<sup>112</sup> Yet, it is unclear why an attorney's duty to disclose physical evidence should depend on the type of item in question or on the kind of crime under investigation. If an attorney should not be a "depository for criminal evidence,"<sup>113</sup> the same rule seemingly should apply regardless of the type of evidence and alleged crime.

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Lee, 3 Cal. App. 3d 514, 526, 83 Cal. Rptr. 715, 722 (1970), contains dictum stating that a defense attorney has a duty to disclose physical evidence to the prosecution voluntarily.

106. 7 Kan. App. 2d 219, 640 P.2d 324 (1982).

107. The court cited *Morrell*; *People v. Meredith*, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981); and *People v. Lee*, 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (1970).

108. *Carlin*, 7 Kan. App. 2d at 224, 640 P.2d at 328.

109. 425 U.S. 391 (1976).

110. *E.g.*, *United States v. Porter*, 711 F.2d 1397 (7th Cir. 1983); *In re Arnold & McDowell*, 566 F. Supp. 752 (D. Minn. 1983); *United States v. Willis*, 565 F. Supp. 1186 (S.D. Iowa 1983); *United States v. Blackburn*, 538 F. Supp. 1376 (M.D. Fla. 1982); *In re Vanderbilt (Rosner-Hickey)*, 57 N.Y.2d 66, 439 N.E.2d 378, 453 N.Y.S.2d 662 (1982); *In re Bekins Storage Co.*, 118 Misc. 2d 173, 460 N.Y.S.2d 684 (N.Y. Sup. Ct. 1983).

111. *E.g.*, *United States v. Porter*, 711 F.2d 1397, 1398 (7th Cir. 1983) (documents sought by IRS in a tax investigation); *In re Arnold & McDowell*, 566 F. Supp. 752, 753 (D. Minn. 1983) (documents sought in criminal investigation of real estate transaction); *United States v. Willis*, 565 F. Supp. 1186, 1189 (S.D. Iowa 1983) (documents sought by IRS in a tax investigation); *United States v. Blackburn*, 538 F. Supp. 1376, 1376-77 (M.D. Fla. 1982) (documents sought by IRS in tax investigation); *In re Bekins Storage*, 118 Misc. 2d 173, 173, 460 N.Y.S.2d 684, 687 (N.Y. Sup. Ct. 1983) (documents sought in criminal investigation of multimillion dollar loans). A contrary result was reached in *State v. Superior Court*, 128 Ariz. 253, 625 P.2d 316 (1981), in which documents in an attorney's possession were held to be protected by the client's privilege against self-incrimination, although white collar crime was not involved. Defendant was charged with sexual conduct with a minor, and the documents were letters that defendant had written to the minor. Subsequently, the defendant retrieved the letters and turned them over to his attorney "in furtherance of his legal representation." *Id.* at 254, 625 P.2d at 317. The State's subpoena for the letters was denied because compliance would have served to authenticate the letters. *Id.* at 256, 625 P.2d at 319.

112. *E.g.*, *Morrell*, 575 P.2d at 1202 (kidnapping, assault, multiple counts of rape); *People v. Meredith*, 29 Cal. 3d 682, 685-86, 631 P.2d 46, 48, 175 Cal. Rptr. 612, 614 (1981) (first degree murder and first degree robbery); *People v. Lee*, 3 Cal. App. 3d 514, 518, 83 Cal. Rptr. 715, 716 (1970) (attempted murder); *Anderson v. State*, 297 So. 2d 871, 871 (Fla. Dist. Ct. App. 1974) (theft); *State v. Carlin*, 7 Kan. App. 2d 219, 220, 640 P.2d 324, 325 (1982) (terroristic threat); *People v. Nash*, 110 Mich. App. 428, 450, 313 N.W.2d 307, 309 (1981) (second degree murder), *rev'd on other grounds, aff'd in part*, 418 Mich. 196, 341 N.W.2d 439 (1983). The *Olwell* case involved a homicide in which a knife was used. *Olwell*, 64 Wash. 2d at 830, 394 P.2d at 682.

113. *Olwell*, 64 Wash. 2d at 833, 394 P.2d at 684.

Few of the courts finding that attorneys have an ethical duty to disclose physical evidence have discussed the ethical rules that govern attorneys. When *Owll* was decided in 1964, the *Canons of Professional Ethics* declared that an attorney was obligated "not to divulge . . . [a client's] secrets or confidences."<sup>114</sup> Similarly, the ABA's *Model Code* admonishes attorneys to preserve "confidences" and "secrets";<sup>115</sup> confidences include information protected by the attorney-client privilege, and secrets consist of "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."<sup>116</sup> The Code's ethical considerations explain that the duty to preserve "secrets" is broader than the evidentiary attorney-client privilege and that it "exists without regard to the nature or source of information or the fact that others share the knowledge."<sup>117</sup> Thus, physical evidence is arguably a "secret," regardless of whether it is acquired from the defendant directly or from third persons. In addition, the conduct of the defendant implied from disclosure of the evidence is also arguably "secret" information.<sup>118</sup> Indeed, there are two cases in which an attorney's possession of physical evidence was implicitly recognized as a client's secret, but the courts found that disclosure was nevertheless required.<sup>119</sup> Of course, no privilege attaches to secrets. Attorneys are admonished to preserve secrets as part of their ethical duties, but courts are free, for policy reasons, to override this professional obligation.

## B. Criminal Statutes

The prior discussion of the privilege against self-incrimination suggests that a defense attorney sometimes may not be required to divulge physical evidence, especially absent a grant of immunity.<sup>120</sup> If production of the evidence proves its "existence" or its "possession" or "control" by the defendant, or serves as an implicit authentication,<sup>121</sup> counsel should be allowed to treat the evidence as a "secret," and thereby ignore dictum to the effect that physical evidence must be disclosed voluntarily.<sup>122</sup> Surely there cannot be a duty to reveal voluntarily evidence that is constitutionally privileged or evidence that, if ordered produced,

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114. CANONS OF PROFESSIONAL ETHICS Canon 6 (1908) (emphasis added). This canon represented the standard of ethics for Washington attorneys when *Owll* was decided: "The code of ethics of the American Bar Association shall be the standard of ethics for the members of the bar of this state." WASH. REV. CODE ANN. § 2.48.230 (1961).

115. MODEL CODE DR 4-101(A).

116. *Id.*

117. *Id.* at EC 4-4 (emphasis added); see also ABA Comm. on Ethics & Professional Responsibility, Op. 341 (1975) (ethical duty not to reveal confidences and secrets learned in the professional relationship). The MODEL RULES abandon the distinction between "confidence" and "secret." However, the duty not to reveal client matters embodied in the MODEL RULES is, if anything, broader than that in the MODEL CODE, because the MODEL RULES provide that "[a] lawyer shall not reveal information relating to representation of a client." MODEL RULES Rule 1.6.

118. See *supra* text accompanying notes 26-31.

119. *Genson v. United States*, 534 F.2d 719, 728 (7th Cir. 1976); *Morrell*, 575 P.2d at 1211.

120. See *supra* text accompanying notes 63-65, 76-87.

121. See *supra* text accompanying notes 65-71, 84-87, 92-94.

122. See *supra* text accompanying notes 100-08.

must be the subject of an immunity order. To require voluntary disclosure of privileged physical evidence is to tell an attorney that a client's confidential and incriminating communications must be disclosed voluntarily but that the attorney should be certain to assert the attorney-client privilege if summoned to court to testify about the conversations.

Yet, if a defense attorney retains physical evidence or returns it to the defendant or other person from whom it was received, there is a risk of criminal prosecution if the attorney's conduct is discovered. The 1982 trial in the case of *Commonwealth v. Schaffner*<sup>123</sup> is instructive. Schaffner, a member of the Kentucky bar, was charged with violating the State's tampering with physical evidence statute, which makes it a felony for a person to conceal or remove physical evidence "with intent to impair its verity or availability in . . . [an] official proceeding."<sup>124</sup> The critical facts in the case were undisputed. Following a conversation with his client, a suspect in a homicide investigation, Schaffner dispatched a person to a city park in an effort to locate a knife. The envoy located the knife with the help of a metal detector and delivered it to Schaffner. Soon afterwards the client informed Schaffner that he was obtaining a new attorney. Schaffner thereupon gave the knife to defendant's brother for delivery to the new attorney, but the new attorney never received it. In its bill of particulars, the State charged Schaffner with "[h]aving in his possession a knife recovered from the location where . . . [his client] threw a knife, [and] fail[ing] to deliver the knife to the appropriate law enforcement authorities or prosecutorial authorities or to make known to them its existence."<sup>125</sup> Schaffner defended on the ground, *inter alia*, that he lacked the requisite intent required by the statute because he never intended to impair the knife's "verity or availability in . . . [an] official proceeding."<sup>126</sup> The jury acquitted.

The jury's verdict in the *Schaffner* case is small comfort for criminal defense attorneys inclined not to divulge immediately all physical evidence to police or to the prosecution. Many states have statutes similar to Kentucky's tampering with physical evidence law.<sup>127</sup> Like Kentucky's law, these statutes

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123. No. 81-CR-371 (Kenton County Cir. Ct. Ky. 1982). This case is unreported, and a transcript of the trial has never been prepared. My knowledge of the case derives from having testified on behalf of the defense concerning the uncertainty of a defense attorney's ethical duties in handling physical evidence.

124. KY. REV. STAT. ANN. § 524.100(1)(a) (Baldwin 1985).

125. Bill of Particulars, *Schaffner*.

126. KY. REV. STAT. ANN. § 524.100(1)(a) (Baldwin 1985).

127. *E.g.*, ALASKA STAT. § 11.56.610 (1983) ("A person commits the crime of tampering with physical evidence if the person . . . destroys, mutilates, alters, suppresses, conceals, or removes physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation."); COLO. REV. STAT. § 18.8.610 (1978) ("A person commits tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he . . . [d]estroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its verity or availability in the pending or prospective official proceeding."); MONT. CODE ANN. § 45.7.207 (1985) ("A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, he . . . alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or availability in such proceeding or investigation."); N.Y. PENAL LAW § 215.40 (McKinney 1975) ("A person is guilty of tampering with physical evidence when . . . [b]elieving that certain physical evidence is about to be produced or used in an official proceeding or



are patterned after the American Law Institute's *Model Penal Code* section 241.7:

A person commits a misdemeanor if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation; or

(2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such proceeding or investigation.<sup>128</sup>

There is nothing to suggest that the drafters of this model statute had criminal defense attorneys in mind, as the statute's brief commentary does not even mention them.<sup>129</sup> Yet the statute's language is broad enough to encompass most conduct respecting physical evidence that might come into a defense attorney's possession. Thus, if an attorney received physical evidence from a client and returned it, with advice that it be preserved, the attorney could still be accused of "concealing" or "removing" evidence in violation of the statute. As in *Schaffner*, the attorney could claim a lack of specific intent to "impair" the "verity or availability" of the evidence in an "official proceeding or investigation."<sup>130</sup>

Apparently only one appellate decision has considered whether a statute similar to *Model Penal Code* section 241.7 applies to defense attorneys in their handling of physical evidence. In *Morrell v. State*<sup>131</sup> a defense attorney acquired evidence from a third person incriminating his client in a kidnapping and rape, and later assisted that third person in disclosing the evidence to the authorities. Considering the issue whether the attorney had provided ineffective assistance of counsel by aiding the disclosure, the court in dictum commented on whether Alaska's version of section 241.7 required that the attorney divulge the evidence:

It also appears to us that Cline [the defense attorney] could have reasonably concluded that AS 11.30.315 required him to reveal the existence of the physical evidence. . . . While statutes which address the concealing of evidence are generally construed to require an affirmative act of concealment in addition to the failure to disclose information to the authorities, taking possession of evidence from a non-client third party and holding the evidence in a place not accessible to investigating authorities would seem to fall within the statute's ambit.<sup>132</sup>

There are also other criminal statutes that may concern defense attorneys

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a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment, alteration, or destruction, or by employing force, intimidation or deception against any person."); TEX. PENAL CODE ANN. § 37.09 (Vernon 1974) ("A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he . . . alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding.").

128. MODEL PENAL CODE § 241.7 (Official Draft 1962).

129. *Id.* commentary at 175.

130. *Id.* § 241.7.

131. 575 P.2d 1200 (Alaska 1978). *Morrell* is discussed *supra* text accompanying notes 104-05.

132. *Morrell*, 575 P.2d at 1211.

who acquire physical evidence, as illustrated in a 1981 ethics committee opinion of the New York State Bar Association.<sup>133</sup> The committee was asked to give an opinion on the duty of a defense attorney who receives from his client documentary evidence that was "surreptitiously removed" from a police station. Although stating that the attorney's ethical duty turns on whether there is a legal duty to disclose the physical evidence, the committee noted that "a body of law which may determine the lawyer's duty . . . consists of statutes governing larceny . . . , suppression of evidence . . . , [and] receipt of stolen property."<sup>134</sup> Indeed, defense attorneys have occasionally been convicted of crimes because of their handling of physical evidence.<sup>135</sup> Recently, national attention focused on two brothers, both members of the Pennsylvania bar, who retained possession of a rifle butt that was relevant in a case being prosecuted.<sup>136</sup> Besides tampering with physical evidence, the attorneys were convicted of hindering prosecution of a crime, solicitation, and conspiracy.<sup>137</sup> Although defense attorneys charged with such crimes can defend by claiming a lack of the requisite criminal intent, even this option may be unavailable if prosecution is for possession of contraband.<sup>138</sup>

#### IV. RECOMMENDATIONS

The discussion in parts II and III shows the dimension of the defense attorney's dilemma in deciding how to deal with physical evidence. Consider again the hypothetical posed at the beginning of this Article, in which a defense attorney receives a pistol from a client seeking legal advice. The client admits that he

133. N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 530, 53 N.Y. ST. B.J. 326 (1981).

134. *Id.* at 327. Assuming that there is a legal duty to disclose physical evidence, the opinion suggests that it be accomplished "in a manner least prejudicial to the client." *Id.* Some opinions of state bar ethics committees have adopted the view that attorneys clearly have a duty to disclose physical evidence to the prosecution. *E.g.*, Ariz. State Bar Comm. on Professional Ethics, Op. 85-4; Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1984-76; *cf.* ABA Standing Comm. on Professional Ethics, Informal Op. 1057 (1968) (attorneys have duty not to violate laws prohibiting suppression of evidence).

135. In *United States v. Scruggs*, 549 F.2d 1097 (6th Cir. 1977), defendant attorneys were convicted of possessing, concealing, and disposing of money stolen from a bank. Unlike the attorneys in *Genson v. United States*, 534 F.2d 719 (7th Cir. 1976), *see supra* text accompanying notes 41-43, the attorneys in *Scruggs* accepted the money as a fee for legal services, lied to the authorities about when they obtained it, and admitted burning it in their fireplace. *Scruggs*, 549 F.2d at 1103.

136. *See Stewart, How Two Lawyers Fell Into an Ethical Thicket Defending a Murderer*, Wall St. J., Feb. 27, 1985, at 1, col. 1; Stone, *Caught in the Ethical Vise*, 7 PA. LAW. 9 (Apr. 1985).

137. Stone, *supra* note 136, at 9.

138. The requirements for conviction of possession of controlled substances are often quite modest. In California, for example, possession of any controlled substance without a medical prescription is a crime. CAL. HEALTH & SAFETY CODE § 11377 (West 1975 & Supp. 1986); *see* *People v. Garringer*, 48 Cal. App. 3d 827, 835, 121 Cal. Rptr. 922, 927 (Cal. Ct. App. 1975) ("A person who intends to possess a controlled substance, believes he possesses a controlled substance, and in fact possesses a controlled substance is guilty of violating Section 11377."). In Minnesota it is "unlawful for any person . . . to . . . [p]ossess a controlled substance, except when the possession is for his own use and it is authorized by law." MINN. STAT. ANN. § 152.09 (West Supp. 1986); *see* *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975) ("[I]n order to convict a defendant of unlawful possession of a controlled substance, the state must prove that defendant consciously possessed, either physically or constructively, the substance and that defendant had actual knowledge of the nature of the substance."). *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 25, at 182 (1972) (discussion of possession of narcotics).

killed a person with the pistol; it is registered in his name, and his fingerprints appear to be on it. The defense attorney's research will lead to the following analysis:

1. The attorney-client privilege extends to the "information" communicated in the attorney's receipt of the weapon. This information includes not only what the client and attorney said to one another, but also the attorney's knowledge that the client possessed the weapon. However, the weapon itself, as distinct from this knowledge, is not protected by the attorney-client privilege. Hence, in the event of a subpoena *duces tecum*, the attorney cannot resist production of the pistol on this basis, but to protect the attorney's information respecting the client's possession of the weapon, the prevailing view forbids the prosecution from disclosing that the attorney was the source of the evidence. Yet this result will not protect the client because the gun's registration and fingerprints will likely result in his prompt identification. Defense counsel therefore will want to argue that, in addition to protecting the information that the defense attorney was the source of the evidence, the attorney-client privilege should prohibit disclosure of the registration and fingerprint evidence.<sup>139</sup>

2. In the event of a subpoena *duces tecum*, defense counsel may argue that he or she need not produce the pistol at all, relying on the Supreme Court's decision in *Fisher v. United States*.<sup>140</sup> If the pistol is privileged from production in the client's hands by the fifth amendment, it is similarly privileged when possessed by the attorney, assuming that the attorney received it from a client seeking legitimate legal advice. Pursuant to the fifth amendment, defense counsel may argue that the client would not have to respond to a subpoena for the pistol because to do so would be either to make a testimonial declaration respecting the pistol's "existence," "location," or "control," or implicitly to authenticate the pistol. If one of these arguments prevails, the Government may obtain the evidence only if defendant is given immunity.<sup>141</sup>

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139. See *supra* text accompanying notes 21-52. Contrary to current law, see *supra* text accompanying notes 26-31, it has been argued that the attorney-client privilege should not be construed to include physical evidence that the client "communicates" to the lawyer, and that a lawyer should be compellable as a witness to testify about the evidence:

At bottom, the reason to refuse to extend the privilege to cover the sharing of evidence is that the policy of the law is to discourage in every way possible the destruction or loss of evidence that exists independently of the attorney-client relationship. Recognition of an expanded privilege allows clients to retain an advantage from sharing evidence with their lawyers if they later "lose" the evidence. Refusing to recognize the privilege takes this advantage away.

Saltzburg, *supra* note 8, at 835. As might be expected, Saltzburg also approves of court decisions that require attorneys to disclose physical evidence to the Government and argues that the prosecution should be allowed to prove the "link" between counsel, client, and the evidence. *Id.* at 837-39.

140. 425 U.S. 391 (1976); see *supra* notes 63-71 and accompanying text (discussion of *Fisher*).

141. See *supra* text accompanying notes 63-87. Counsel may also claim that surrender of physical evidence to the State violates the client's sixth amendment right to effective assistance of counsel. The courts, however, have been unsympathetic to this contention. See, e.g., *Genson v. United States*, 534 F.2d 719, 729-30 (7th Cir. 1976); *Morrell v. State*, 575 P.2d 1200, 1211 (Alaska 1978). See generally Note, *Disclosure of Incriminating Physical Evidence*, *supra* note 8, at 443-49 (discussing decisions on sixth amendment claims).

3. On the other hand, a number of courts have said in dicta that defense counsel, as officers of the court, have an ethical duty to disclose physical evidence to the authorities *voluntarily*.<sup>142</sup> Hence, irrespective of a subpoena, an attorney may be obliged to surrender the pistol.<sup>143</sup> Yet, the conclusion that voluntary disclosure is required would appear to be in direct conflict with the principle that an item of physical evidence cannot be subpoenaed by the prosecution, as suggested in paragraph two. Moreover, under state codes of professional responsibility, the pistol is arguably a secret that counsel is duty bound to preserve. The ABA *Model Code* requires counsel, as an ethical matter, to safeguard information "without regard to [its] nature or source."<sup>144</sup>

4. However, there are criminal statutes under which counsel might be prosecuted unless the pistol is disclosed promptly to the authorities. These statutes prohibit the "removing" or "concealing" of evidence with intent to obstruct its availability in subsequent court proceedings. By returning the pistol to the client or by retaining it counsel arguably engages in the act of "removing" or "concealing" evidence.<sup>145</sup>

As noted earlier, there are no explicit ethical rules governing the conduct of defense attorneys with respect to physical evidence.<sup>146</sup> To remedy this void, during 1980 and 1981 the ABA's Criminal Justice Section Committee on Ethical Considerations in Criminal Cases undertook to develop rules on the subject. The effort culminated in the preparation of standards during a three day committee meeting in June 1981, attended by twelve lawyers, including judges, prosecutors, defense attorneys, and law professors. The governing council of the CJS subsequently approved the standards.<sup>147</sup>

Overall, the CJS standards are the most thoughtful, comprehensive approach yet developed for counsel's handling of physical evidence. The standards, however, are far from perfect; they do not cover some issues, and certain standards can be improved. The ensuing pages set forth the CJS standards, followed by a discussion of each section in light of the analysis of the physical evidence problem presented earlier in this Article. At the end of the discussion the Article summarizes recommended changes in the standards.

#### A. *The CJS Standards*

The CJS standards<sup>148</sup> are embodied in five paragraphs:

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142. See *supra* text accompanying notes 100-09.

143. *Id.*

144. MODEL CODE EC 4-4; see *supra* text accompanying notes 114-19.

145. See *supra* text accompanying notes 123-30.

146. See *supra* text accompanying notes 7-12.

147. See ABA Minutes, *supra* note 15, at 15. The standards reproduced in this Article were first published in 29 CRIM. L. REP. (BNA) 2465-66 (Aug. 26, 1981), and they are summarized in Martin, *supra* note 56, at 869-72. One appellate decision quotes and endorses the standards: *Hitch v. Superior Court*, 146 Ariz. 588, 593-94, 708 P.2d 72, 77 (1985) (en banc). *Hitch* is discussed *infra* at note 174.

148. As previously indicated, see *supra* note 15, the Criminal Justice Section forwarded the standards to the ABA Standing Committee on Association Standards for Criminal Justice, apparently in the hope that the standards eventually would be incorporated into the ABA's Defense Function Standards. This incorporation, however, has not occurred. The Defense Function Standards

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

(b) Unless required to disclose, the lawyer shall return the item to the source from whom the lawyer receives it, except as provided in paragraphs (c) and (d). In returning the item to the source, the lawyer shall advise the source of the legal consequences pertaining to possession or destruction of the item.

(c) A lawyer may receive the item for a period of time during which the lawyer: (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 the lawyer's representation of the client; or (5) cannot return it to the source. If the lawyer retains the item, the lawyer shall do so in a manner that does not impede the lawful ability of law enforcement to obtain the item.

(d) If the item received is contraband or if in the lawyer's judgment the lawyer cannot retain the item in a way that does not pose an unreasonable risk of physical harm to anyone, the lawyer shall disclose the location of or shall deliver the item to law enforcement authorities.

(e) If the lawyer discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), the lawyer shall do so in the way best designed to protect the client's interests.<sup>149</sup>

Each of these paragraphs is discussed and analyzed below.

#### *Paragraph (a)*

The standards properly begin by informing defense attorneys that their duty is to "disclose" the location of or to "deliver" physical evidence to law enforcement "if such is required by law or court order." The ABA *Model Code* conveys a similar message: "In his representation of a client, a lawyer shall not . . . [c]onceal or knowingly fail to disclose that which he is required by law to reveal."<sup>150</sup> Paragraph (a)(1) does not, however, affect an attorney's ability to oppose lawfully the enforcement of a subpoena or a statute; an attorney should be able to object to a court order that he or she disclose physical evidence by invoking the attorney-client privilege and the fifth amendment. This action is

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often refer to activity by a lawyer as "unprofessional conduct," meaning that the conduct "is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility." Where the term "unprofessional conduct" is not used, "the standard is intended as a guide to honorable professional conduct and performance."

*Introduction to I STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION* (2d ed. 1980). Unlike most states, which simply treat The Defense Function Standards as advisory, Massachusetts has made certain proscribed conduct, listed as "unprofessional" in the first edition of The Defense Function Standards, a basis for discipline. MASS. R. CT. R. 3:08, DF 1 to DF 15 (1986).

149. ABA Minutes, *supra* note 15, at 15.

150. MODEL CODE DR 7-102(A)(3); see also ABA Comm. on Ethics & Professional Responsibility, Informal Op. 1057 (1968) (Attorneys must operate "within the bounds of the law"; therefore, they must obey statutes on suppression of evidence.).

precisely what defense attorneys have frequently done.<sup>151</sup> Such objections by defense attorneys postpone the application of paragraph (a).

The first question for defense attorneys, however, is not how to respond to a subpoena but whether *voluntary* disclosure of physical evidence always "is required by law" within the meaning of paragraph (a). If attorneys conclude that the law always requires disclosure of physical evidence, it is obviously unnecessary even to consider the alternatives of returning the evidence to its "source" or retaining it, as specified in paragraphs (b) and (c). Similarly, if attorneys conclude that disclosure is always mandatory, they need not be concerned about resisting court orders for production of physical evidence. It is clear, however, that if the attorney receives physical evidence from the client as part of the client's effort to obtain legitimate legal advice and if the evidence would have been privileged in the client's hands by virtue of the privilege against self-incrimination, counsel cannot have an ethical duty of disclosure.<sup>152</sup> The physical evidence deserves the same treatment given the client's oral statements to counsel concerning prior criminal activity.<sup>153</sup> In light of tampering with physical evidence statutes and laws relating to crimes such as larceny and receiving stolen property, however, defense attorneys may believe that, except for documents, they must *always* disclose physical evidence to the authorities, even when doing so would arguably violate their clients' privilege. Even if they lack the criminal intent required by such statutes, attorneys nevertheless may fear criminal prosecution if they fail to disclose the evidence. Accordingly, to make certain that defense attorneys do not waive their clients' privilege against self-incrimination, as well as for the policy reasons discussed below, states should adopt statutes that expressly provide that attorneys are excused from disclosing physical evidence.<sup>154</sup> A statute might provide that "no attorney is required to disclose to law enforcement authorities physical evidence acquired in representing a client."<sup>155</sup> Such a statute would make clear that attorneys must exercise discretion in deciding the appropriate course in handling physical evidence. Absent such legislation, defense attorneys who receive physical evidence from clients are

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151. See, e.g., *United States v. Authement*, 607 F.2d 1129 (5th Cir. 1979); *Genson v. United States*, 534 F.2d 719 (7th Cir. 1976); *In re Bekins Storage Co.*, 118 Misc. 2d 173, 460 N.Y.S.2d 684 (N.Y. Sup. Ct. 1983); *People v. Investigation into a Certain Weapon*, 113 Misc. 2d 348, 448 N.Y.S.2d 950, (N.Y. Sup. Ct. 1982); *State v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964).

152. See *supra* text accompanying notes 63-87.

153. Clearly, these statements are privileged. See *supra* notes 13-14 and accompanying text.

154. One commentator argues that there should be a privilege pursuant to which defense counsel could not disclose incriminating physical evidence without client consent. Note, *Ethics, Law, and Loyalty*, *supra* note 8, at 994-98. The purpose of such a privilege would be to "protect the duty of loyalty and . . . [to] discourage attorneys from betraying their clients for fear of professional reprimand or criminal punishment." *Id.* at 994.

155. The Texas statute on tampering with physical evidence provides that it "shall not apply if the record, document, or thing concealed is privileged." TEX. PENAL CODE ANN. § 37.09(b) (Vernon 1974). Although an attorney who believes that the physical evidence is protected because of the client's privilege against self-incrimination presumably can rely upon this language, the statute affords less protection than would a provision excusing an attorney from disclosing physical evidence acquired during representation of the client. If a court operating under the Texas statute should rule that a claim of privilege is unavailable, the attorney conceivably could be prosecuted for having failed to disclose the evidence. No other state law on tampering with physical evidence appears to contain language similar to that in the Texas statute.

faced with the dilemma of deciding whether to surrender the evidence or preserve the client's arguable fifth amendment privilege. The former course undoubtedly avoids any risk of counsel's criminal prosecution and satisfies dicta in some appellate decisions, whereas the latter may waive the client's constitutional right and make the attorney vulnerable to a charge of malpractice.<sup>156</sup>

Important policy considerations militate in favor of not requiring that defense counsel automatically disclose physical evidence.<sup>157</sup> These considerations are applicable regardless of how the evidence is acquired by counsel—even when it is not acquired directly from the client. Admittedly, there would be some advantage to a well-publicized, bright line rule requiring prompt disclosure of all physical evidence. Attorneys would know exactly what was expected of them, thus removing all of the current uncertainty. There would be considerable disadvantages as well, however, because clients would soon learn of their attorneys' duty and refrain from giving them any physical evidence. Further, it is unclear how a rule requiring the prompt, voluntary disclosure of physical evidence would apply to incriminating documents. Would an attorney defending a white collar crime prosecution involving hundreds of documents have to make a determination in each instance whether disclosure was required? In *United States v. Doe*,<sup>158</sup> for example, the grand jury's five subpoenas sought twenty-eight different types of documents and records covering the client's business transactions for more than four years. A firm rule requiring voluntary disclosure in cases of this kind would be wholly undesirable because attorneys either would refuse to examine their clients' records for fear of discovering incriminating physical evidence or simply would ignore the disclosure duty. Logically, however, a rule of disclosure should not distinguish between either the kind of evidence or the type of crime to which it relates, even though this type of differentiation has been the pattern of court decisions.<sup>159</sup> If there is a duty to disclose a pistol in a homicide, there also should be a duty to disclose documents that are evidence of criminal conduct.

Ultimately, a well-established rule requiring the prompt disclosure of all physical evidence would mean that defense attorneys would normally receive such evidence only from clients unaware of counsel's disclosure duty. If the physical evidence were incriminating and were revealed by defense counsel, as required, the client would suffer a special hardship because of his or her ignorance. Thus, from the unwitting client's standpoint, there would be little differ-

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156. See Martin, *supra* note 56, at 844-46.

157. See *infra* notes 158-64 and accompanying text.

158. 465 U.S. 605 (1984); see *supra* text accompanying notes 72-74 (discussion of *Doe*).

159. See *supra* text accompanying notes 104-13. The apparent distinction in treatment that has developed between documents and other types of physical evidence is due perhaps to the ease of understanding why an attorney might need to examine documents as distinguished from pistols and other evidence of violent crimes. In addition, it may be that documents are less apt than other types of physical evidence to be given to defense attorneys for purposes of concealment or destruction, although obviously there are no empirical data on the subject. Nevertheless, all kinds of physical evidence are sometimes given to or acquired by attorneys from clients seeking legitimate legal advice, and it thus seems altogether unreasonable to make the measure of client protection depend upon the kind of evidence involved. For specific examples illustrating why defense attorneys might want to examine pistols and knives, see *infra* note 176 and text accompanying notes 177-80.

ence between giving an item of evidence to the defense attorney and confessing to the police.

Finally, an explicit rule requiring prompt disclosure of all physical evidence may well have a much larger impact because of its tendency to undermine the trust so essential between defense attorney and client.<sup>160</sup> Some clients may therefore be inhibited from communicating other information to their attorneys, resulting in even greater risks for effective defense representation.

The foregoing discussion explains the reasons, from a policy viewpoint, that attorneys should not be required to disclose physical evidence obtained from clients. Moreover, such evidence frequently will be protected from compulsory production because of the client's privilege against self-incrimination.<sup>161</sup> If the evidence is obtained not from the client but from a third party, or is acquired through investigation by the defense investigator or attorney, the client's privilege against self-incrimination may not require safeguarding of the evidence. Nonetheless, even in these cases, there are two important reasons why evidence should not have to be promptly disclosed. First, if attorneys are clearly aware that all physical evidence must be promptly disclosed they will refrain both from receiving the evidence and from searching for it, regardless of whether there is a chance that it will help the client. The mere risk that the evidence may be incriminating will be sufficient to induce attorneys to follow a policy of calculated ignorance. Although this policy may make good tactical sense for a defense attorney, such conduct cannot easily be reconciled with the admonition in the ABA's *Criminal Justice Standards* that attorneys have a "duty . . . to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case."<sup>162</sup>

The second reason for not requiring disclosure when physical evidence is acquired from sources other than the client is related to the adversary system and the attorney-client relationship. The client should be able to trust the defense attorney, and the attorney should be a zealous advocate—one who will stand up against the State.<sup>163</sup> It is doubtful whether a client would continue to trust a defense attorney who disclosed incriminating physical evidence to the State, regardless of whether the evidence was obtained from the client or another source. The client is apt to find unimpressive fine distinctions respecting the limits of the attorney-client privilege. A client who understands that he or she has been betrayed to enhance the prosecution's case is apt to be far less likely to

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160. "Defense counsel should seek to establish a relationship of trust and confidence with the accused." I STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-3.1(a) (2d ed. 1980).

161. See *Fisher v. United States*, 425 U.S. 391 (1976); *supra* text accompanying notes 63-87.

162. I STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-4.1 (2d ed. 1980).

163. This view is strongly expressed in A. DERSHOWITZ, *THE BEST DEFENSE* 415 (1982):

The zealous defense attorney is the last bastion of liberty—the final barrier between an overreaching government and its citizens. The job of the defense attorney is to challenge the government; to make those in power justify their conduct in relation to the powerless; to articulate and defend the right of those who lack the ability or resources to defend themselves. (Even the rich are relatively powerless—less so, of course, than the poor—when confronting the resources of a government prosecutor.).



confide in any defense attorney in the future—and certainly not in the one who supposedly has been providing zealous representation in his or her behalf. Indeed, for an attorney to disclose physical evidence to law enforcement authorities is so inconsistent with future representation of the client that a declaration of a conflict of interest and withdrawal from representation may be essential.<sup>164</sup>

*Paragraphs (b) and (c)*

If defense attorneys are not to routinely deliver evidence to the police, the question of what to do with the evidence remains. Paragraphs (b) and (c) deal with the two major alternatives: return of the evidence to the client or retention of it by defense counsel. The general rule is stated in paragraph (b): a lawyer who receives physical evidence should return the item to its "source."

The use of law offices as routine depositories for physical evidence is rejected by paragraph (b), just as such use has been rejected repeatedly in court decisions.<sup>165</sup> Undoubtedly, a general rule permitting the storage of incriminating evidence by defense counsel would be misunderstood by laypersons and would further contribute to public suspicion of the legal profession.<sup>166</sup> In addition, if defense counsel routinely stored physical evidence, the police almost certainly would endeavor to discover sufficient justification to support search warrants for law offices. Besides generating enormous suspicion of defense counsel, thus complicating day-to-day relationships, the execution of search warrants directed against law offices would also jeopardize the secrecy of information pertaining to other clients.<sup>167</sup>

The more substantial reason for the general rule of paragraph (b) is the need to preserve the status quo, thereby avoiding the possibility that defense counsel's conduct will make the task of law enforcement more difficult. If the

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164. MODEL CODE DR 7-101(A)(3) states that "[a] lawyer shall not intentionally . . . [p]rejudice or damage his client during the course of the professional relationship." Arguably, the disclosure of incriminating physical evidence to law enforcement authorities is a violation of this provision. *Id.* DR 2-110(B)(2) requires that a lawyer withdraw from representation if "[h]e knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule."

165. See *supra* notes 100-08 and accompanying text.

166. On the other hand, because defense attorneys already are permitted to defend persons they know to be guilty and to cross-examine vigorously witnesses known to be telling the truth, see I STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-7.6(b) (2d ed. 1980), collecting physical evidence from clients or third persons seems an almost trivial additional "sin."

167. As stated in *O'Connor v. Johnson*, 287 N.W. 2d 400, 404 (Minn. 1979) (en banc):

Even though the warrant in the instant case describes the things to be seized with particularity and the location of the [law] office in which they may be found, a search of that office for the items specified of necessity involves a general and exploratory search of all of the attorney's files.

See also *Deukmejian v. Superior Court*, 103 Cal. App. 3d 253, 162 Cal. Rptr. 857 (1980) (court recognized that warranted search of attorney's office may be unreasonable, but that California statutory law governs); Bloom, *The Law Office Search: An Emerging Problem and Some Suggested Solutions*, 69 GEO. L.J. 1 (1980) (officials executing warrant "rummage" through variety of documents, endangering attorney-client privilege); Winebrenner, *Search and Seizure of Attorneys' Offices As Violative Of Attorney-Client Privilege*, 3 CRIM. JUST. J. 359, 378-81 (1980) (execution of search warrants at attorneys' offices permits general search; nature of many documents requires examination before relevance can be determined, thereby violating confidentiality); Note, *The Assault on the Citadel of Privilege Proceeds Apace: The Unreasonableness of Law Office Searches*, 49 FORDHAM L. REV. 708, 719 (1981) (law office search violates attorney-client privilege with respect to all clients, not just client under investigation).

evidence is returned to its "source," conceivably the police could later obtain it through a lawful search.<sup>168</sup> A return to the source, moreover, means that the receipt of evidence is treated no differently from the situation in which the attorney is merely informed of its location. If a client tells counsel where physical evidence is hidden, the attorney generally only takes note of the information and perhaps advises the client of the legal consequences of destruction.<sup>169</sup>

In returning incriminating physical evidence to the "source," lawyers should avoid conduct that could be interpreted as counseling the "alteration," "destruction," or "concealment" of the evidence.<sup>170</sup> Accordingly, paragraph (b) recommends that attorneys "advise the source of the legal consequences pertaining to possession or destruction of the item." This language presumably means that the attorney should advise the "source" to retain the evidence intact and not to engage in the type of conduct that might be construed as a violation of criminal statutes. To protect counsel from subsequent charges that he or she encouraged destruction, concealment, or alteration of the physical evidence, paragraph (b) should be amended to require that the "source" of the evidence sign a "notice form" containing counsel's legal advice and that counsel retain a copy of the form.<sup>171</sup>

Paragraph (c) lists five circumstances that justify an attorney's taking possession of physical evidence; paragraph (c) is thus an exception to the general rule of paragraph (b). The determination whether any of the circumstances listed in paragraph (c) are present is necessarily vested in the sound discretion of defense counsel. Each attorney must decide, for example, whether the facts and circumstances justify refusing to return the evidence to the source because of fear that it will be destroyed or used to inflict harm on another.

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168. See *Andresen v. Maryland*, 427 U.S. 463 (1976), in which the Supreme Court held that evidence unavailable to the Government by virtue of the fifth amendment may be obtained through a lawful search under the fourth amendment:

Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information, see *Fisher v. United States* . . . a seizure of the same materials by law enforcement officers differs in a crucial respect—the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.

*Id.* at 473-74.

169. See *supra* notes 13-14 and 30-31 and accompanying text.

170. See MODEL PENAL CODE § 241.7(1) (Official Draft 1962). For language of the Code, see *supra* text accompanying note 128.

171. The first edition of the ABA's *Standards Relating to the Prosecution Function and the Defense Function* proposed an analogous procedure to be followed when a defendant insists on presenting testimony that defense counsel believes to be false:

Because the lawyer may later have his conduct called into question when his client testifies against the advice of counsel, it is desirable that a record be made of the fact. However, if the trial judge is informed of the situation, the defendant may be unduly prejudiced, especially at sentencing, and the lawyer may feel that he is caught in a dilemma between protecting himself by making such a record and prejudicing his client's case by making it with the court. The dilemma can be avoided in most instances by making the record in some other appropriate manner, for example, by having the defendant subscribe to a file notation, witnessed, if possible, by another lawyer.

STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 7.7 commentary at 276-77 (1st ed. 1971).

There are certain dangers inherent in paragraph (c). First, because the determination whether an exception is applicable depends on each attorney's assessment, different attorneys may treat similar situations differently. Although some attorneys may be willing to accept a client's promise not to destroy evidence, other attorneys may insist on retaining the evidence regardless of the client's representations.<sup>172</sup> Even more importantly, the number of exceptions and the frequency of their use may have the effect of swallowing the general rule so that in practice defense attorneys would rarely return physical evidence to the source. Thus, the disadvantages of having attorneys routinely store physical evidence would come to pass. Nevertheless, the exceptions listed in paragraph (c), whatever their drawbacks, are unavoidable. Absent the exceptions, the standards would advise counsel always to return the physical evidence to the source, as specified in paragraph (b). Yet sometimes, as paragraph (c) recognizes, returning the evidence to the source may not be feasible or sensible.

Paragraph (c), however, fails to answer several important questions. Suppose, for example, the attorney takes possession of evidence to "test" and "examine" it, pursuant to paragraph (c)(4). If the attorney completes the examination and testing prior to trial and no longer needs the evidence, should he or she return the evidence to the defendant? Should an attorney who fears that returning evidence to the client will result in its destruction or harm to another retain the evidence indefinitely pursuant to paragraphs (c)(2) or (c)(3), even after defendant's case is complete? Is there ever a time when an attorney may properly destroy physical evidence retained pursuant to paragraph (c)? Obviously, attorneys should not destroy physical evidence if there is any chance that it might be needed in a subsequent court proceeding or if there is any possibility that its destruction could be a violation of law. Evidence that is tested or examined pursuant to paragraph (c)(4) should be returned to the source from whom it was received unless there is fear that the evidence will be destroyed or will harm another, in which case counsel should retain the evidence. The CJS standards could be improved by specifically answering these questions.

The last sentence of paragraph (c)—that an attorney who retains physical evidence "shall do so in a manner that does not impede the lawful ability of law enforcement to attain the item"—is not entirely clear. Given this admonition, would it be proper for counsel to lock the evidence in a desk for safekeeping? Under what circumstances, if any, would it be appropriate to remove the evidence from counsel's law office or to take it there if the office were not the place of its receipt? Presumably, the intent of the last sentence of paragraph (c) is to make clear that attorneys should not secrete evidence in ways that would be tantamount to destroying it. Perhaps the most sensible rule would be to require

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172. It is worth remembering, however, that attorneys commonly retain considerable discretion in selecting among ethical alternatives. See, e.g., MODEL RULES Rule 1.6(b)(2), which permits "[a] lawyer . . . [to] reveal . . . information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm"; MODEL CODE DR 4-101(C)(3), which states that "[a] lawyer may reveal [t]he intention of his client to commit a crime and the information necessary to prevent the crime."

attorneys in possession of physical evidence to keep it at their law offices to be certain that it will neither be lost nor unavailable in the event of a legally sufficient search warrant or subpoena. Client files are maintained in a law office, and physical evidence seemingly should be kept there as well. An attorney who takes or stores evidence elsewhere may increase the possibility that he or she will be prosecuted for obstruction of justice.<sup>173</sup> The CJS standards thus could be improved by explaining how an attorney should retain evidence "in a manner that does not impede the lawful ability of law enforcement to obtain the item."

A more important deficiency in the standards is their failure to deal explicitly with the issue raised in *People v. Meredith*,<sup>174</sup> in which defense counsel dispatched an investigator to locate a murder victim's wallet and subsequently delivered the wallet to the police. Paragraph (a)'s reference to an attorney "who receives a physical item" does not cover an attorney who personally locates physical evidence or who acquires such evidence through an investigator. Thus, the standards fail to address the policy issue whether counsel should strive to acquire such evidence.

To assure effective representation, defense attorneys must be encouraged to acquire physical evidence *if they believe the client's defense genuinely requires it*.<sup>175</sup> Accordingly, the standards should advise attorneys and their agents to take possession of physical evidence that they have located when there are rea-

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173. Typically, accessory to crime and obstruction of justice statutes prohibit persons from suppressing or concealing physical evidence if suppression will aid persons wanted for criminal conduct. See, e.g., COLO. REV. STAT. § 18-8-105(2)(e) (1978); MONT. CODE ANN. § 45-7-303(2)(e) (1985). Arguably, evidence retained outside of the law office is less likely to be recovered by the police; thus, retention of evidence outside the law office furnishes greater assistance to the suspect.

174. 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981); see *supra* notes 53-58 and accompanying text (discussion of *Meredith*).

However, in *Hitch v. Superior Court*, 146 Ariz. 588, 708 P.2d 72 (1985) (en banc), the court purported to apply the CJS standards to a situation quite similar to *Meredith*. In *Hitch*, an attorney sent his investigator to retrieve from defendant's girlfriend a wristwatch that she had discovered in defendant's suit jacket and that had once belonged to the murder victim. *Id.* at 590, 708 P.2d at 74. The attorney sought possession of the watch because "he was afraid that she [the girlfriend] might destroy or conceal the evidence." *Id.* Once the watch was acquired, counsel informed the police that he had it, and the trial court ordered that it be given to the State. In affirming the trial court's order, the Arizona Supreme Court explained:

We, therefore, adopt essentially the ethical standard proposed by the Ethics Committee of the Section on Criminal Justice of the American Bar Association with regards to inculpatory evidence delivered to the attorney by a third party. Our holding is as follows: first, if the attorney reasonably believes that evidence will not be destroyed, he may return it to the source, explaining the laws on concealment and destruction. Second, if the attorney has reasonable grounds to believe that the evidence might be destroyed, or if his client consents, he may turn the physical evidence over to the prosecution. Applying this test to the instant facts, the trial court was correct in ordering the wristwatch to be turned over to the state.

*Id.* at 594, 708 P.2d at 78. As noted in the dissent of two of the court's five justices, the majority misapplied the CJS standards, inasmuch as "[n]o provision is made for delivery of inculpatory evidence to the prosecution simply because defense counsel fears that it may be destroyed if given back to its source." *Id.* at 597, 708 P.2d at 81 (Feldman, J., dissenting). This observation is clearly correct; the only authority under the CJS standards for disclosure to law enforcement officials is in paragraph (a), when required by law or court order, and in paragraph (d), which requires disclosure when the evidence is contraband or is an item that cannot be retained without posing "an unreasonable risk of physical harm."

175. The necessity of defense counsel's learning about the client's case is well recognized: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to

sonable prospects that either the evidence itself or its test results will aid in the client's defense.<sup>176</sup> If there are no such prospects, attorneys and their agents should not remove or otherwise disturb evidence, thus avoiding interference with the opportunity of law enforcement personnel to discover it. This approach is consistent with the thrust of paragraphs (b) and (c), which are aimed at avoiding counsel's possession of physical evidence unless compelling reasons for such possession are present. In *Meredith*, it is difficult to understand how possession of the murder victim's wallet could have aided the client's defense; thus, counsel probably should not have sought to recover the wallet.<sup>177</sup> In contrast, in *Commonwealth v. Schaffner*,<sup>178</sup> in which defense counsel sent an investigator to locate the knife allegedly thrown away by his client, it is possible to discern a legitimate reason for locating the knife.<sup>179</sup> The size of the knife may have been highly relevant to the client's mental state; a small knife would have suggested an absence of the requisite intent.<sup>180</sup> In addition, defense counsel in *Schaffner*

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explore all avenues leading to facts relevant to the merits of the case." I STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION Standard 4-4.1 (2d ed. 1980).

176. Other writers have expressed similar views. See, e.g., Martin, *supra* note 56, at 872: "The cardinal rule for defense attorneys who must make a decision about implicating evidence is to avoid taking possession unless testing or analysis of the evidence will most likely result in a decision by the prosecution either not to file charges or to dismiss the charges." This statement, however, seems to set forth too stringent a test for defense counsel acquiring physical evidence. Often it will be exceedingly difficult to gauge in advance whether examination of particular evidence will help the defense. For example, I recently received a phone call from a public defender, who informed me that her client was charged with an aggravated battery with a pistol. At the time of the alleged battery, there was evidence that two persons fired shots, the public defender's client and another person who was never arrested. The client admitted to his attorney that he had fired a shot but expressed doubt that the victim was hit by his weapon. The client also admitted that he still had the pistol and was prepared to give it to defense counsel. Thus, the public defender had to decide whether to take possession of the weapon and have it subjected to a ballistics test. Although the attorney thought there was some chance that the test might help the client, she did not believe that it would "most likely result in a decision by the prosecutor either not to file charges or to dismiss the charges."

177. One of the defendants in *Meredith* told defense counsel that the victim's wallet had been taken, that the robbers had divided the money among themselves, and that the wallet had been partially burned and put in a trash can. Defense counsel then dispatched an investigator to retrieve the victim's wallet. *Meredith*, 29 Cal. 3d at 686, 631 P.2d at 48, 175 Cal. Rptr. at 614. The California Supreme Court conceded

that in some cases an examination of evidence may reveal information critical to the defense of a client accused of crime. If the usefulness of the evidence cannot be gauged without taking possession of it, as, for example, when a ballistics or fingerprint test is required, the attorney may properly take it for a reasonable time before turning it over to the prosecution. . . . Similarly, in the present case the defense counsel could not be certain the burnt wallet belonged in fact to the victim. . . .

*Id.* at 693 n.7, 631 P.2d at 53 n.7, 175 Cal. Rptr. at 619 n.7. However, the last sentence quoted does not provide justification for counsel's actions in *Meredith*. A burnt wallet in a trash can is not exculpatory of a robbery simply because it belongs to someone else. Moreover, one of the defendants had told defense counsel that the wallet belonged to the victim, and there was no apparent basis for counsel to believe this statement was a lie.

178. 81-CR-371 (Kenton County Cir. Ct. Ky. 1982); see *supra* notes 123-26 and accompanying text (discussion of *Schaffner*).

179. For the facts of *Schaffner*, see *supra* text accompanying notes 123-26.

180. Similarly, the frequency with which a knife is carried by the defendant may be highly relevant if self-defense is claimed. Professor Freedman, in his article *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1479-80 (1966), noted: "It is entirely appropriate to inform . . . [the client] that his carrying the knife only on this occasion, or infrequently, supports an inference of premeditation, while if he carried the knife constantly, or frequently, the inference of premeditation would be negated." At the time of the *Schaffner* case, Kentucky law provided that "[a] person is guilty of murder when [he or she acts] [w]ith

might have been interested in having the knife subjected to chemical analysis to determine the presence of blood, if any, and its type.

An important question remains if defense attorneys are required to search for physical evidence that may be necessary to the client's defense: What should counsel do with the evidence after testing or examining it? Paragraphs (b) and (c) of the standards seemingly provide the answer: if there is no concern that the evidence will cause destruction or harm to another, the attorney should, if feasible, return the evidence to the source. Otherwise, retention of the evidence by counsel is unavoidable.

Regrettably, from a law enforcement standpoint, there is a significant danger in the approach suggested in paragraph (c) and in the recommendations in this Article: counsel's acquisition and possible retention of physical evidence may mean that the police will not obtain it. But the problem must be kept in perspective. First, the basic rule of the CJS standards is that attorneys should not take possession of physical evidence. Normally, according to paragraph (b), counsel should return physical evidence to the source. In addition, attorneys should not seek to acquire physical evidence as part of their investigation unless the evidence is deemed likely to be important in the client's defense. Thus, retention of physical evidence by counsel should be the exceptional case, not an everyday event. Moreover, even if counsel does keep the evidence, there remains a chance that the prosecution will acquire it through either a subpoena or a search warrant.<sup>181</sup>

Despite the foregoing arguments, some undoubtedly will regard as unthinkable the possibility of a defense attorney's ever retaining physical evidence. Although such conduct has not heretofore formally been sanctioned, it does not differ fundamentally from a variety of actions that are routinely regarded as professionally proper in the defense of criminal cases. For example, a defense attorney communicating with a client before the police can do so invariably tells the client not to speak to any police officers. Evidence that the police might have obtained from the client's lips is thus placed out of police reach. Similarly, the criminal justice system sanctions the permanent exclusion of probative evidence from trial when the police have violated constitutional requirements<sup>182</sup> and thus recognizes that occasionally the search for truth is subordinate to other very important values.<sup>183</sup>

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intent to cause the death of another person." KY. REV. STAT. § 507.020 (1985). Many states still require proof of premeditation for first degree murder. *See, e.g.*, CAL. PENAL CODE § 189 (West 1970); N.C. GEN. STAT. § 14-17 (1981 & Supp. 1985); TENN. CODE ANN. § 39-2-202(a) (1982); VA. CODE § 18.2-32 (1982).

181. *See supra* note 168 and accompanying text.

182. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

183. Consider the following analysis of defense counsel's responsibilities:

[A]bsent a voluntary plea of guilty, we . . . insist that [defense counsel] 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

*Paragraph (d)*

Paragraph (d) sets forth two circumstances in which an attorney, even in the absence of a court order or statute, must disclose an item of evidence to law enforcement authorities. If, in an attorney's judgment, retention of the evidence may "pose an unreasonable risk of harm to anyone," the attorney should surrender it. Hence, if a client were to leave an explosive device on counsel's desk, counsel would act appropriately by calling the police and asking that they promptly dispatch their bomb squad. Although such an occurrence is not an everyday event for even the busiest of defense attorneys, paragraph (d) apparently includes this disclosure duty to make the standards as complete as possible, even if the provision is somewhat fanciful.

According to paragraph (d), there is also a duty to disclose to law enforcement authorities all contraband received by an attorney. Although they are unlikely ever to receive explosives, defense attorneys do sometimes receive contraband, usually narcotics.<sup>184</sup> Paragraph (d) undoubtedly requires the attorney to disclose contraband to law enforcement officials because such evidence cannot lawfully be retained.<sup>185</sup> If an attorney were to send a client still in possession of narcotics away from the office, the client would continue to violate the law, assisted by the attorney's conduct.<sup>186</sup> Paragraph (d) implicitly rejects the alternative of having counsel destroy the contraband, apparently in the belief that to do so would be a criminal offense. However, some state statutes make it a crime to destroy evidence only when it is related to an official investigation or proceeding<sup>187</sup> or when there is a belief that an investigation or proceeding is about to be instituted.<sup>188</sup> Similarly, under federal law, it is not illegal to destroy

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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 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.*

United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part) (emphasis added).

184. This research effort has discovered no cases in which defense counsel are alleged to have received narcotics from their clients. As explained *supra* note 5, however, I have spoken to a number of defense attorneys who have reported that it does occasionally happen. The extent of the practice obviously cannot be quantified.

185. See *supra* note 138 and accompanying text.

186. Conceivably, the attorney could be criminally prosecuted as an accessory. See, e.g., MODEL PENAL CODE § 2.06(3)(a)(ii) (Official Draft 1962). The suggestion in this Article that attorneys be excused from having to disclose physical evidence, see *supra* text accompanying notes 154-56, could extend to the possession of contraband. Law enforcement officers, for example, are sometimes exempted from criminal prosecution for conduct that otherwise would be criminal. For example, the comment to N.Y. PENAL LAW § 35.05 (McKinney 1975) explains: "The provision . . . is aimed at conduct such as possession of narcotics, policy slips and tear gas, all of which is criminal in general but which obviously should not be so regarded in the case of a police officer performing official functions of criminal investigation or maintaining public order."

187. See, e.g., IND. CODE ANN. § 35-44-3-4 (Burns 1985); TEX. PENAL CODE ANN. § 37.09 (Vernon 1974).

188. See, e.g., COLO. REV. STAT. § 18-8-610 (1978); CONN. GEN. STAT. ANN. § 53a-155 (West 1985); MONT. CODE ANN. § 45-7-207 (1983); N.Y. PENAL LAW § 215.40 (McKinney 1975);

an item unless it pertains to a criminal investigation or is the subject of a subpoena.<sup>189</sup> Thus, if a client who is not the subject of a narcotics investigation or charge deposits cocaine on the defense attorney's desk and asks for help, it would be foolish for the attorney to try to make the client a criminal defendant by calling the police. Indeed, the attorney's conduct would no doubt breach the attorney-client<sup>190</sup> and self-incrimination privileges.<sup>191</sup> The more appropriate course would be for counsel to dispose of the narcotics immediately. Counsel would not have committed a criminal offense and would have fulfilled the criminal law's purpose in prohibiting contraband. Paragraph (d) is thus deficient in not recognizing that some contraband may properly be destroyed by counsel without violation of criminal statutes.

#### *Paragraph (e)*

According to the CJS standards, an attorney may surrender an item of physical evidence to the authorities because he or she is required to do so "by law or court order," as stated in paragraph (a), because of a desire "to return it to the owner," as stated in paragraph (c)(1), or because it is "contraband," as stated in paragraph (d). Regardless of the reason, paragraph (e) admonishes counsel to make disclosure "in the way best designed to protect the client's interests." This statement requires elaboration; although the objective is unassailable, without more detail counsel is likely to be uncertain how to proceed.

First, counsel must be mindful of the distinction, based on the attorney-client privilege, between the item of physical evidence and the client's conduct. The latter may well be privileged, and, if so, counsel may not reveal, absent client consent, the client's actions or words leading either to discovery of the

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MODEL PENAL CODE § 241.7 (Official Draft 1962) (quoted *supra* text accompanying note 128). Theoretically, an attorney who destroys contraband may be guilty of violating obstruction of justice statutes or laws that prohibit the hindering of prosecution of offenders, but it is extremely difficult to imagine that an attorney could ever be prosecuted for these offenses. The evidence would no longer exist and thus could not be used against either the attorney or the client. From a policy standpoint, moreover, the attorney who destroys contraband should not be prosecuted, because his or her action will have divested the client of the contraband and thus deprived the client of its use or the possibility of sale or gift to another. Typical state statutes include the following: ALA. CODE § 13A-10-42 (1982) (a person renders "criminal assistance" to another in destroying "physical evidence that might aid in the discovery or apprehension of such person"); COLO. REV. STAT. § 18-8-105 (1978) ("A person is an accessory to crime if, with intent to . . . prevent the . . . apprehension . . . of another for the commission of a crime," he or she destroys physical evidence that might have aided in the person's apprehension.); CONN. GEN. STAT. ANN. § 53a-165 (West 1985) (A person "renders criminal assistance" to another when he or she knows a felony has been committed and destroys "any physical evidence that might aid in the discovery or apprehension of such person."); MONT. CODE ANN. § 45-7-303 (1985) (A person obstructs justice if he or she destroys "any physical evidence that might aid in the discovery or apprehension of an offender," meaning "a person who . . . is liable to be arrested, charged, convicted or punished for a public offense.").

189. See 18 U.S.C. §§ 1503, 1505 (1982); Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1671 (1979). Section 1503, which prohibits obstruction of "the due administration of justice," imposes liability only if a judicial proceeding is pending at the time the evidence is destroyed. See *United States v. Vesich*, 724 F.2d 451, 454 (5th Cir. 1984); *United States v. Beatty*, 587 F. Supp. 1325, 1330 (E.D.N.Y. 1984). Although 18 U.S.C. § 1512(a)(2)(B) (1982) prohibits the concealment or destruction of evidence that may be useful in an official proceeding, only those persons who induce others to engage in the proscribed conduct by way of physical force, intimidation, or threats are subject to punishment.

190. See *supra* text accompanying notes 26-28.

191. See *supra* text accompanying notes 63-87.



evidence or to its surrender to counsel.<sup>192</sup> Thus, subpoenas that seek both the item of evidence and counsel's testimony may be ruled overbroad.<sup>193</sup> Furthermore, assuming that the nature of the evidence does not reveal the client's identity—it is not, for example, a pistol registered in the client's name—counsel should argue that the prosecution may not mention in any subsequent proceeding that counsel was the source of the surrendered evidence.<sup>194</sup> Counsel may also wish to argue that the client's identity is privileged<sup>195</sup> or, by analogy to criminal procedure doctrines, that the prosecution may make no use of the surrendered evidence unless it would have been acquired through an "independent source" or "inevitably would have been discovered."<sup>196</sup>

There may be times when counsel could best protect a client by anonymously delivering an item to law enforcement. The language of paragraph (e) seemingly invites such conduct, and the accompanying commentary prepared by the ABA CJS committee that drafted the standards states that "some returns or disclosures may be made anonymously."<sup>197</sup> Although paragraph (e), as noted, sanctions disclosure only in limited circumstances, anonymous delivery may appeal to defense attorneys as the perfect, routine solution in all cases involving physical evidence. For example, assume that a client delivers a typewriter to counsel. The client explains that he stole it several weeks earlier, but now wishes it returned to the owner. The client's fingerprints are not on the typewriter, and the attorney thereupon arranges for it to be deposited in an abandoned building, following which the attorney informs the police, in an anonymous phone call, where the typewriter may be found. Counsel's conduct will obviously protect the "client's interests" because the police will likely be unable ever to prove the client's relationship to the stolen property. Nevertheless, such conduct by coun-

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192. See *supra* text accompanying notes 13-14, 26-28, 44-45.

193. See, e.g., *People v. Investigation into a Certain Weapon*, 113 Misc. 2d 348, 354-55, 448 N.Y.S.2d 950, 954-55 (N.Y. Sup. Ct. 1982); *State v. Howell*, 64 Wash. 2d 828, 833, 394 P.2d 681, 684 (1964).

194. See *supra* text accompanying notes 44-52.

195. Generally, however, the client's name or identity is not protected by the attorney-client privilege. Annot., 16 A.L.R.3d 1047, 1050 (1967); see also *Anderson v. State*, 297 So. 2d 871, 874 (Fla. Dist. Ct. App. 1974) ("Ordinarily, the attorney-client privilege does not extend to withholding the identity of a client."); *Hughes v. Meade*, 453 S.W.2d 538, 540-41 (Ky. Ct. App. 1970) ("[I]t is generally held that the identity of a client is not a privileged communication."). On the other hand, a privilege for the client's identity is sometimes recognized "in unusual situations, particularly where so much is already known of the attorney-client relationship that to disclose a client's name will betray a confidential communication." 16 A.L.R.3d at 1053.

196. See, e.g., *Nix v. Williams*, 467 U.S. 431, 448 (1984) (evidence of discovery and condition of victim's body admissible despite constitutional violation because the body inevitably would have been discovered); *United States v. Wade*, 388 U.S. 218, 241 (1967) (in-court identification of suspect is admissible if based upon out-of-court observations that are independent of tainted pretrial identification held without counsel). In at least one physical evidence case, defense counsel sought unsuccessfully to invoke the inevitable discovery doctrine:

Counsel argued . . . that the attorney-client privilege should protect observations of evidence, despite subsequent defense removal, unless the prosecution could prove that the police probably would have eventually discovered the evidence in the original site.

We have seriously considered counsel's proposal, but have concluded that a test based upon the probability of eventual discovery is unworkably speculative.

*People v. Meredith*, 29 Cal. 3d 682, 694, 631 P.2d 46, 53, 175 Cal. Rptr. 612, 619 (1981).

197. Commentary to proposed ABA CJS Standards. The commentary is available from the ABA Criminal Justice Section, 1800 M Street, N.W., Washington, D.C. 20036-5886.

sel ought not to be permitted, in view of its potential to frustrate law enforcement personnel in proving the client's involvement in the crime. Just as attorneys may not assist clients in destroying evidence, there ought to be no license for aiding clients in so completely escaping detection. It should be for courts to decide whether, for example, to protect the identity of a client or an attorney as the "source" of stolen merchandise.<sup>198</sup> If the court determines that defense counsel received the evidence in a legitimate attorney-client communication, the defendant's words and conduct should be protected.<sup>199</sup>

#### B. *Summary of Suggested Changes in Proposed CJS Standards*

The foregoing discussion contains six suggested improvements in the proposed ethical standards of the CJS:

1. An attorney returning incriminating physical evidence pursuant to paragraph (b) should require the source to sign a form acknowledging that counsel advised the source not to destroy or alter the evidence. Counsel should retain a copy of this executed form and give the source a copy.<sup>200</sup>
2. After testing or examining physical evidence pursuant to paragraph (c)(4), defense counsel should return it to the person from whom it was ob-

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198. The hypothetical concerning the stolen typewriter is similar to the facts of *Hughes v. Meade*, 453 S.W.2d 538 (Ky. Ct. App. 1970). In *Hughes* a client employed an attorney for the sole purpose of arranging for the delivery of a stolen typewriter to the police. After the delivery was completed, the attorney was cited for contempt in a judicial proceeding for refusing to identify his client. Rejecting the attorney's appeal, the court ruled that "the delivery of stolen property to the police department was not an act in the professional capacity of petitioner nor was it the rendition of a legal service." *Id.* at 542.

199. See *supra* text accompanying notes 13-14, 17-20, 26-36. At least one jurisdiction—the District of Columbia—has developed an informal procedure that is tantamount to anonymous disclosure of physical evidence:

In my capacity as Bar Counsel for the District of Columbia from 1973 to 1983, there were three or four occasions when attorneys sought advice concerning what they should do with items turned over to them by clients. The items were considered to be contraband or evidence in pending criminal investigations or proceedings. The attorneys did not want the government to know their identity but wanted to be rid of the items in their possession.

For want of a better procedure I decided that the Office of Bar Counsel would act as a conduit for transmission of the items to law enforcement authorities. The attorneys were advised not to alter the items in any way, package them, and deliver them to Bar Counsel. Bar Counsel agreed not to divulge the source of the items and delivered them to either the F.B.I., the Metropolitan Police Department, or the U.S. Attorney's Office. The procedure was *ad hoc* and had no formal approval from any established authority.

Bar Counsel was never called before a grand jury, but some have insisted that, if called, no basis existed for not disclosing who delivered the item to Bar Counsel. In those cases wherein the person calling did not identify himself, I did not seek to determine the caller's identity. I suggest that, if a procedure is established in your jurisdiction, the person initially holding the contraband preserve his anonymity to avoid problems Bar Counsel might encounter before a grand jury.

Since my departure from the Office of Bar Counsel I know of at least one occasion where a pistol was turned over to the U.S. Attorney's Office by Bar Counsel. No attempt was made to determine who delivered the pistol, and it was turned over to the firearms identification division of the Metropolitan Police Department.

Letter from Fred Grabowsky to Lawrence Fleischman (Mar. 28, 1985), appended as Exhibit "C" to Petition for Special Action, *Hitch v. Pima County Superior Court*, No. 18080-SA (Ariz. S. Ct. filed Apr. 4, 1985).

200. See *supra* text accompanying note 171.

tained, unless there is reason to believe that the evidence might be destroyed or used to harm another.<sup>201</sup>

3. Physical evidence retained by defense counsel, as provided in paragraph (c)(4), should be kept in the attorney's law office.<sup>202</sup>

4. Defense attorneys should be encouraged to search for physical evidence, either personally or through their investigators, only when there is a genuine belief that the evidence is likely to be helpful to the client's defense. Upon completing an examination or testing of such evidence, counsel should return it to the person from whom it was received unless there is reason to believe that the evidence might be destroyed or used to harm another, or return is otherwise not possible.<sup>203</sup>

5. Paragraph (d) should provide that defense attorneys may destroy contraband whenever it is clear that destruction will not violate any criminal statute.<sup>204</sup>

6. Anonymous disclosure of physical evidence to law enforcement authorities should be expressly prohibited.<sup>205</sup>

## V. CONCLUSION

The defense of criminal cases is not easy. For the conscientious attorney, the hours are long, the pressures considerable, and the rewards uncertain. To ask an attorney to provide such representation without furnishing sufficient standards to guide performance is unfair, especially if the attorney's actions can lead to significant adverse effects, such as malpractice suits, disbarment, or criminal prosecution. Yet, these are among the risks that confront the defense attorney in handling incriminating physical evidence.

The CJS standards represent the first comprehensive effort to provide specific guidance to defense attorneys. Even more importantly, the standards recognize what the courts have not: there is no single answer to the physical evidence dilemma that is appropriate for all situations. It is too simplistic to say that defense attorneys must disclose all incriminating evidence to the authorities to prevent attorneys from acting as "depositories." Of course, it is important to ensure the preservation of relevant physical evidence and conviction of the guilty. There also, however, are important client interests involved—interests that have long been embodied in the attorney-client privilege and the privilege against self-incrimination. Ultimately, these competing interests are best accommodated if discretion is vested in defense counsel to decide the appropriate course of action when he or she comes into possession of incriminating physical evidence. Conversely, the interest of clients and the attorney's duty of loyalty will be sacrificed if counsel is *always* required to surrender physical evidence.

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201. See *supra* text following note 172.

202. See *supra* text accompanying note 173.

203. See *supra* text following note 180.

204. See *supra* text accompanying notes 184-91.

205. See *supra* text following note 196.

This Article sets forth several suggestions for strengthening the CJS standards. The standards, however, amended or otherwise, have limited value unless statutes are enacted that excuse defense attorneys from disclosing physical evidence.<sup>206</sup> Absent such legislation, attorneys may simply *always* decide to disclose physical evidence, thus *always* avoiding any risk of criminal prosecution.<sup>207</sup> This result will serve neither the interests of clients nor the adversary system of criminal justice.

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206. See *supra* text accompanying notes 154-56.

207. *Id.*

