

10-1-2014

The Legal Ethics of Real Evidence: Of Child Porn on the Choirmaster's Computer and Bloody Knives under the Stairs

Gregory C. Sisk

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Evidence Commons](#)

Recommended Citation

Gregory C. Sisk, *The Legal Ethics of Real Evidence: Of Child Porn on the Choirmaster's Computer and Bloody Knives under the Stairs*, 89 Wash. L. Rev. 819 (2014).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol89/iss3/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

THE LEGAL ETHICS OF REAL EVIDENCE: OF CHILD PORN ON THE CHOIRMASTER'S COMPUTER AND BLOODY KNIVES UNDER THE STAIRS

Gregory C. Sisk*

Abstract: With little guidance from the Model Rules of Professional Conduct and continuing confusion on professional obligations, questions about engagement with real evidence continue to bedevil criminal defense lawyers, incite prosecutors, generate disputes, and attract judicial attention.

Where should we draw that line between what is demanded by the professional duties of zealous advocacy and client confidentiality and what constitutes obstruction of justice? When may a document or object that could conceivably be relevant in some future investigation or proceeding be destroyed, altered, or removed? May a criminal defense lawyer take possession of evidence of a crime for purposes of analysis, even if forensic characteristics are altered? What should the lawyer do with real evidence afterward? May the lawyer ever retain real evidence without being accused of impeding access? May the lawyer return evidence to where it was found or to the person who delivered it? What advice should the lawyer give to the possessor? And what of the problem of material that may not merely be evidence but also may constitute contraband?

This Article critically examines the law of real evidence under the search light of professional responsibility, attorney-client confidentiality, and the constitutional rights of criminal defendants.

INTRODUCTION.....	821
I. THE LAWYER'S GENERAL ETHICAL DUTY WITH RESPECT TO ACCESS TO EVIDENCE	826
II. WHEN DOES AN ITEM BECOME REAL EVIDENCE? THE LAW ON THE DUTY TO PRESERVE	828
A. A Summary of State Laws on Obstruction of Justice.....	828
B. The Traditional Federal Approach to Obstruction of Justice: §§ 1503 and 1512	830
C. Anticipatory Obstruction: Sarbanes-Oxley § 1519	832
1. Removing the Direct Link to a Proceeding or	

* Laghi Distinguished Chair in Law, University of St. Thomas School of Law (Minnesota). I thank Elizabeth Malay of the Class of 2013, for her research assistance on obstruction of justice caselaw. For thoughtful comments and generous words about an earlier version of this paper and other contributions, I am indebted to Greta Fails, Mary Fan, Stephen Gillers, Bruce Green, Neil Hamilton, Stewart Jay, Peter Joy, Rory Little, Lisa Marshall Manheim, Jacqueline McMurtrie, Kaarin Nelson, Mark Osler, Douglas Peterson, Rodney Uphoff, and the many participants at faculty colloquia where this paper was presented at the University of Washington School of Law and the University of St. Thomas School of Law.

Investigation in § 1519	832
2. Reasonable Anticipation Integrated into Mens Rea for § 1519	833
3. Recent Decisions on Anticipation of an Investigation Under § 1519	835
D. Safe Harbor for Legal Representation: Encouraging Zealous Representation	839
E. Destroying Contraband That Is Not Evidence to a Reasonably Anticipated Investigation or Official Proceeding	840
III. WHEN DOES AN ITEM BECOME REAL EVIDENCE? A CASE ILLUSTRATION	842
A. The Case of the Child Porn on the Choirmaster's Computer (United States v. Russell)	842
1. The Choirmaster at Christ Church and Suspected Child Pornography on His Computer	842
2. The Church Dismisses the Choirmaster, and the Church Lawyer Destroys the Computer Hard-Drive....	844
3. The FBI Investigation and Prosecution of the Choirmaster	846
4. The Indictment of the Church Lawyer and the Motions to Dismiss.....	847
5. The Court's Ruling on the Motions to Dismiss	849
6. The Church Lawyer Pleads Guilty to a Lesser Offense	850
B. Lessons Learned?	851
1. Does the Identity of the Destroyer Matter?	851
2. Special Rule for Child Pornography?	853
3. Poor Professional Judgment?.....	854
4. An Alternative Hypothetical: The Remorseful Client..	857
5. Encouraging Zealous Advocacy and Discouraging Prosecutorial Overreach	859
IV. HOW MAY THE LAWYER ENGAGE WITH REAL EVIDENCE? THE LAW ON OBSERVATION AND EXAMINATION	861
A. Defense Lawyer Observing Evidence Without Taking Possession.....	861
B. Defense Lawyer Taking Possession of Evidence for Examination.....	862
1. Defense Lawyer's Right to Examine Evidence	862
2. Disposition of Evidence by Defense Lawyer After Examination.....	867
3. Preserving Confidentiality if Defense Lawyer Delivers Evidence to Law Enforcement	872
C. Evidence Delivered to Defense Lawyer	874
D. The Tricky Problem of Contraband.....	878

E. Defense Lawyer’s Retention of Evidence with Contingent Notice to Law Enforcement (and the Gillers Proposal for a Registry for Real Potential Evidence).....	881
V. HOW MAY THE LAWYER ENGAGE WITH REAL EVIDENCE? A CASE ILLUSTRATION	886
A. The Case of the Bloody Knife Under the Stairs (Wemark v. State).....	886
1. The Death of Melissa Wemark and the Arrest of Robert Wemark.....	886
2. The Search of Robert Wemark’s Residence.....	888
3. Robert Wemark Tells His Lawyers the Location of the Knife and Is Advised to Disclose the Location	888
4. The Murder Trial and Guilty Verdict	890
5. The Iowa Supreme Court’s Ruling on the Application for Post-Conviction Relief	892
B. Lessons Learned?	893
1. Preserving Confidentiality of Location of Evidence	893
2. Doubts About the Lawyer’s Duties Regarding Disposition of Real Evidence After Examination	895
3. The Danger to Effective Assistance of Counsel Posed by Uncertainty on the Ethics and Law of Real Evidence	897
CONCLUSION	898

INTRODUCTION

“*Do the right thing.*” As a directive to a person who knowingly walks off the straight and narrow path, the aphorism may well serve as encouragement to get back on course. By reminding the actor of the highest ideals, she may recover the moral strength to steer away from selfish and base pursuits. When a person’s mind is clouded—not by uncertainty as to what constitutes “the right” but by temptations of the wrong or fear of the temporal consequences for bravely pursuing the path of righteousness—this simple adage may clear away the cobwebs.

But when a person is struggling to map out the just and upright course, simply instructing him to “do the right thing” is more likely to frustrate than to inspire. When what is “right” is the preeminent question, falling back on the lazy platitude to do what is “right” amounts to avoidance rather than guidance. Indeed, when the moral path is covered by dense undergrowth, telling a person to “do the right thing” is about as helpful as answering a driver’s request for directions with Yogi

Berra's tongue-in-cheek advice: "When you come to a fork in the road, take it."¹

And so it is with Rule 3.4(a) of the Model Rules of Professional Conduct. Rule 3.4(a) forbids a lawyer to "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."² The key word here is "unlawfully," which appears twice in the sentence. As Stephen Gillers observes, this rule "offer[s] no help" and simply "yields to the law. If it's legal, it's ethical. If not, not."³

The criminal defense lawyer must be a zealous advocate, protect the client's right against self-incrimination, and maintain confidentiality in representing a client.⁴ Accordingly, the lawyer is entitled—nay, professionally mandated—to prevent others from gaining access to or information about the location of documents, objects, or other materials that are or were in the possession of the client—unless such efforts would amount to "unlawfully obstruct[ing] another party's access to evidence."

Moreover, a lawyer may properly counsel a client to dispossess herself from documents, objects, or materials that are associated with wrongful behavior or that in themselves are wrongfully possessed (contraband). But, again, the lawyer's forward duties to shield the client's affairs from prying eyes and to advise the client regarding disposal of effects come to a screeching halt if the conduct would be "unlawful."

So where then is that legal line with respect to "real evidence"?⁵ That of course remains the crucial query. The Model Rules of Professional Conduct buck that question by referring the professional to the substantive law of the applicable sovereign, federal or state. And the law of evidentiary preservation, especially in the context of federal criminal

1. YOGI BERRA, *WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT!: INSPIRATION AND WISDOM FROM ONE OF BASEBALL'S GREATEST HEROES* (2001).

2. MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2012), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel.html.

3. Stephen Gillers, *Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence*, 63 STAN. L. REV. 813, 818 (2011).

4. A lawyer's ethical duties with respect to preservation of and allowing access to evidence applies in the civil context as well, through the law of spoliation of evidence and pertinent rules of civil procedure. The civil side of the question will be addressed in a separate article tentatively titled, "*The Not Short and Sweet Story of Zubulake and the Ethics of Spoliation of Evidence.*"

5. On the definition of "real evidence," see *infra* notes 25 to 29 and accompanying text.

law, is opaque.⁶ Congress has responded to corporate scandals by imposing stricter duties to preserve potential evidence and by undermining the traditional defense that an actor behaved wrongfully only if he deliberately destroyed evidence while aware that it was relevant to likely proceedings.⁷ And, while some general themes can be drawn from judicial opinions, the case law does not address every situation and is not readily accessible to the lawyer who must decide what to do with potential real evidence under exigent circumstances.⁸

The risk-averse lawyer understandably might sail for the safe harbor of advising the client to save everything forever and to generously reveal everything once an investigation is underway.⁹ But that lawyer then would be deceived. The lawyer's duties of zealous advocacy and confidentiality cannot be so readily surrendered, even if the alternatives provoke anxiety.¹⁰ Indeed, in an era of growing awareness that law enforcement crime labs may lack competent training and rigorous scientific standards, criminal defense lawyers may have a duty to conduct or arrange for independent forensic testing of real evidence.¹¹ In sum, trimming sails and dropping anchor at the dock of law enforcement may deprive the client of effective assistance of counsel.

Two contrasting tales about lawyers responding to what was unrecovered evidence in one criminal case and what proved to be evidence in a then-unknown criminal investigation in another case confirm the dangerous ambiguity in this field of professional ethics. In one case, the lawyers opted for revelation when they should not have. In the other case, the lawyer opted for destruction with a reasonable basis to doubt a criminal investigation would follow, only to be indicted for obstruction of justice.

In *The Case of the Child Porn on the Choirmaster's Computer*,

6. See *infra* Parts II and III.

7. See *infra* Part II.

8. Gillers, *supra* note 3, at 816 (saying that "it is impossible to make sense of those authorities," because court "[r]ulings are confusing and inconsistent, ignore constitutional or other rights, impede return of stolen property, and endanger the public").

9. See Greta Fails, *The Boundary Between Zealous Advocacy and Obstruction of Justice After Sarbanes-Oxley*, 68 N.Y.U. ANN. SURV. AM. L. 397, 421 (2012) (warning that the "over-criminalization of previously innocent conduct" creates "an incentive structure that pits lawyers' interests in self-preservation against their clients' interests"); Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 366 (1998) (noting that "a cautious lawyer might derive the lesson that his own interests, if not those of the client, may be best served by avoiding conduct that, although lawful, could be misconstrued as an attempt to conceal or destroy incriminating material").

10. See *infra* Part II.D and IV.B.1.

11. See *infra* Part IV.B.1.

leaders in a church parish discovered child pornography on a laptop belonging to the longtime choirmaster.¹² Having no reason to believe that the choirmaster had abused any person at the parish, church leaders wanted to avoid any further embarrassment by quietly dismissing him. Before taking that step, they sought the advice of legal counsel. Because possession of child pornography is illegal, the lawyer advised that the hard-drive be destroyed to remove the child pornography. Indeed, the lawyer was willing to perform that task for them. Unbeknownst to the lawyer and the church leaders, the now-dismissed choirmaster was under investigation by federal law enforcement for distribution of child pornography (and, indeed, a host of other crimes). When federal authorities discovered that the lawyer had destroyed the computer hard-drive, he was indicted for obstruction of justice. In *United States v. Russell*,¹³ facing a jail term of 20 years, the lawyer agreed to plead guilty to a lesser offense and be placed on probation, rather than maintain a defense that he had acted appropriately.¹⁴

In *The Case of the Bloody Knife Under the Stairs*, a criminal defendant charged with murdering his estranged wife revealed to his lawyers that he had hidden the knife underneath the basement steps in his house.¹⁵ In *Wemark v. State*,¹⁶ the police had conducted an extensive search of the house, but had not discovered the weapon. After consulting a judge and experienced lawyers, the defendant's counsel concluded they were ethically required to reveal the location of the knife by one means or another to law enforcement or the prosecution.¹⁷ While the lawyers convinced themselves that such a disclosure might have other strategic advantages for the defendant, their analysis was founded on the "faulty premise" that their knowledge of the knife's location was not privileged and they were compelled to reveal it.¹⁸ After convincing the defendant to tell a prosecution expert where he had hidden the knife, law enforcement re-searched the house and found the knife. The knife became a prominent exhibit at trial and was used dramatically during the prosecutor's closing argument, after which the jury convicted the defendant of first degree murder.

In one of these cases, the lawyers got the answer wrong—dead

12. For further discussion of this case, see *infra* Part III.

13. 639 F. Supp. 2d 226 (D. Conn. 2007).

14. See *infra* Part III.A.6.

15. See *infra* Part V.

16. 602 N.W.2d 810 (Iowa 1999).

17. For further discussion of the *Wemark* case, see *infra* Part V.

18. *Wemark*, 602 N.W.2d at 813–17.

wrong.¹⁹ In the other case, the lawyer acted within what I believe was a permissible range of professional discretion even if unwise—but was indicted for his troubles.²⁰ In neither case were the lawyers involved novices or substandard practitioners; they were well-respected and highly successful criminal defense lawyers of the first rank. And yet uncertainties about the boundaries of professional conduct persisted.

The themes advanced and conclusions submitted in this Article are three-fold:

First, the lawyer's professional duty to the client may require her to learn of, examine, and perhaps take possession of real evidence, while striving to remain zealously loyal to the client and maintain confidentiality in the face of uncertain legal demands.²¹ In other words, the professionally responsible and effective lawyer may not be able to avoid engagement with real evidence and the ethical dilemma that may attach with that engagement. When making these difficult decisions in the present environment of legal uncertainty, criminal defense lawyers acting in good faith should be given ample breathing room, without facing the prospect of criminal prosecution or disciplinary charges.

Second, the criminal defense lawyer's ethical obligation to preserve or disclose evidence is not triggered unless a criminal investigation or another proceeding is reasonably anticipated in the foreseeable future.²² That a document or object conceivably may be relevant to a possible dispute that could arise at some point in the future should not impose a duty to preserve that item or result in the destruction being characterized as obstruction of justice or evidence tampering. In advising a client on the duty to preserve or the right to destroy, the criminal defense lawyer's professional judgment about whether an investigation or proceeding may be reasonably anticipated should ordinarily be respected.²³

Third, while the lawyer (and client) may be prohibited from taking certain actions that make discovery of evidence by law enforcement substantially more difficult, neither is the lawyer (or client) obliged to make such revelation any easier. A lawyer's engagement with real

19. See *infra* Part V.B (discussing *Wemark*).

20. See *infra* Part III.B.3 (discussing *Russell*).

21. See *infra* Part IV.B.1.

22. See JAMIE S. GORELICK, STEPHEN MARZEN, LAWRENCE SOLUM & ARTHUR BEST, DESTRUCTION OF EVIDENCE § 7.1 (2014) ("The better view . . . is that destruction of evidence is unethical and in violation of the prohibition of conduct prejudicial to the administration of justice when the evidence is relevant to a reasonably foreseeable or pending legal proceeding, even if the destruction does not violate a criminal law.").

23. See *infra* Part III.B.5.

evidence does not become wrongful just because law enforcement subsequently fails to find that evidence in a criminal investigation. In particular, a criminal defense lawyer's right and duty to examine real evidence should not be transmuted into a general obligation to then deliver it to law enforcement when returning evidence to its original location or possessor is possible.²⁴

I. THE LAWYER'S GENERAL ETHICAL DUTY WITH RESPECT TO ACCESS TO EVIDENCE

The focus of attention in this Article is on what may be described as "real evidence," that is, things or objects. Stephen Gillers uses "the term 'real evidence' interchangeably with 'object' and 'item' to refer to the thing a lawyer may come to possess or learn about."²⁵ The term "real evidence" dates back at least to the classification in Jeremy Bentham's nineteenth century common-law evidence treatise.²⁶ For Bentham, "real evidence" was that immediately arising from the nature of things, as contrasted with "personal evidence" that is based on the communications of human beings.²⁷ Thus, as Sidney Phipson wrote in the *Yale Law Journal* in 1920, Bentham treated the following items as "real evidence" in a criminal proceeding:

Subject-matter of the offense (the person killed or hurt—the thing damaged or destroyed—the document or coin fabricated); (2) the fruits of the crime (the goods stolen—the money or profit obtained); (3) instruments used in committing the crime; (4) materials designed to assist in its perpetration; (5) place of deposit of the object of the crime; (6) neighboring bodies suffering change in consequence of the crime (places spotted with blood).²⁸

To Bentham's list, we add for present purposes traditionally "personal evidence," such as written records and electronically stored information. Importantly, beyond indicating a physical item or document, Gillers emphasizes that the word "evidence" "presumes a legal proceeding in which the item may be offered as proof."²⁹

24. See *infra* Parts IV.B, C, & D.

25. Gillers, *supra* note 3, at 823.

26. 3 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 26 (1827).

27. *Id.* at 34.

28. Sidney L. Phipson, "Real" Evidence, 29 YALE L.J. 705, 707 (1920).

29. Gillers, *supra* note 3, at 823. On when something may be evidence that must be preserved, see *infra* Part II.

Rule 3.4(a) of the Model Rules of Professional Conduct forbids a lawyer to “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”³⁰ The paragraph further provides that “[a] lawyer shall not counsel or assist another person to do any such act.”³¹

Comments 1 and 2 to Rule 3.4 explain these proscriptions as necessary to ensure “[f]air competition in the adversary system” and to uphold the important procedural “right of an opposing party, including the government, to obtain evidence through discovery or subpoena.”³² Accordingly, when law enforcement or prosecutorial authorities investigating or prosecuting an alleged violation of the law present a lawful claim of access to evidence, the lawyer for a client is obliged to properly respond to that request and not to unlawfully obstruct access to, alter, destroy, or conceal that evidence.

As a diligent and zealous advocate, the lawyer may and should raise plausible objections to requests for discovery and assert non-frivolous grounds for quashing a subpoena from law enforcement. The lawyer may be justified in raising objections based on the attorney-client privilege; the privilege against self-incrimination; constitutional limitations on law enforcement intrusion into the attorney-client relationship; and court rules, holdings, or other standards limiting the issuance of prosecutorial subpoenas to criminal defense lawyers.³³ When a colorable objection can be made to a request or demand for confidential information, the lawyer should raise and competently advocate it.³⁴

But if legal resistance by a lawyer to a request or demand for documents or other evidence proves unsuccessful, the lawyer must

30. MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2013), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel.html.

31. *Id.*

32. MODEL RULES OF PROF'L CONDUCT R. 3.4(a) cmts. 1 & 2 (2013), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel.html.

33. On government subpoenas to criminal defense counsel, see 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 9.37, at 9-157 to 9-160 (3d ed. 2013).

34. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 13 (2013), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html (“Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that [an order to disclose] is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.”).

comply with such lawful requests and may not inappropriately impede access to the evidence.

The crucial modifier in paragraph (a) of Rule 3.4, which appears twice in the first sentence, is that the lawyer may not act “unlawfully.” Thus, the ethical propriety of the lawyer’s conduct depends largely on the lawyer’s identification of and faithful adherence to the underlying requirements of the law regarding access to, possession of, and preservation of evidence.

By itself, paragraph (a) of Rule 3.4, even when read in light of the accompanying comments, provides little guidance to the lawyer. As elucidated below, the underlying legal restrictions on possessing, concealing, or destroying actual or potential real evidence are not always well-known or fully understood, even by experienced attorneys. Many elements of this area of law remain less than crystal clear in application.

II. WHEN DOES AN ITEM BECOME REAL EVIDENCE? THE LAW ON THE DUTY TO PRESERVE

A. *A Summary of State Laws on Obstruction of Justice*³⁵

There is considerable variation among the states on obstruction of justice or tampering with evidence.³⁶ Nonetheless, as discussed below, the conscious contemplation of an official proceeding or investigation—and not merely the remote possibility of such—appears to be a nearly universal expectation before a person’s destruction or alteration of what might have been evidence is regarded as criminal.

In most states, the prospect of a proceeding or investigation is placed at the forefront of the criminal evaluation by focusing on the person’s knowledge or belief about the existence or likelihood of an official proceeding or investigation.³⁷ For example, state statutes may refer to an

35. Read literally, obstruction of justice and evidence tampering statutes do not distinguish between civil and criminal proceedings. STEPHEN GILLERS, *REGULATION OF THE LAW PROFESSION* 243 (2009). Thus, deliberate destruction of that which would be evidence in a civil lawsuit theoretically could bring criminal charges. As a practical matter, however, destruction of evidence in civil litigation tends to be addressed in terms of spoliation and litigation consequences, *see supra* note 4, rather than by criminal prosecution. However, a civil matter may evolve into a criminal matter, especially in the white collar context, where a civil administrative proceeding later gives rise to a criminal investigation.

36. On state obstruction of justice statutes, *see generally* GORELICK, MARZEN, SOLUM & BEST, *supra* note 22, §§ 5.6 to 5.10.

37. Peter A. Joy & Kevin C. McMunigal, *Incriminating Evidence—Too Hot to Handle?*, *CRIM. JUST.*, Summer 2009, at 42, 43 (explaining that most states follow the Model Penal Code approach by requiring the person charged with tampering of evidence to have believed an official proceeding

official proceeding or investigation as “pending or . . . about to be instituted”;³⁸ or as “pending or in progress”;³⁹ or may prohibit destruction of something that “is about to be produced in evidence upon any trial, inquiry, or investigation.”⁴⁰ Indeed, the Model Penal Code prohibits tampering with evidence, which is defined as “alter[ing], destroy[ing], conceal[ing] or remov[ing] any record, document or thing with purpose to impair its verity or availability” in “an official proceeding or investigation” that the person believes “is pending or about to be instituted.”⁴¹ In these states, then, intentional destruction or alteration of evidence is criminal conduct if there is an actual or imminent proceeding or at least one that “‘could readily have been contemplated’ under the circumstances of the case.”⁴²

Other state criminal statutes demand proof that the person who destroyed or altered evidence acted with the specific intent to impede a proceeding or investigation, without referring directly to pendency or imminence. For example, an Iowa statute prohibits destroying, altering, or concealing evidence that would be admissible in a criminal trial, if done “with intent to prevent the apprehension or obstruct the prosecution or defense of any person.”⁴³ By classifying such conduct as criminal obstruction of justice when done with intent to prevent “apprehension,” as well as when designed to obstruct prosecution or defense of a person, this statute effectively integrates the anticipation of a future criminal investigation or proceeding into the *mens rea* for the crime.

A handful of states simply and generally prohibit obstruction of justice.⁴⁴ For example, Maryland states that “[a] person may not, by . . . corrupt means, obstruct, impede, or try to obstruct or impede the administration of justice in a court of the State.”⁴⁵ Because this statute prohibits acting by “corrupt means,” which the federal courts interpret to mean conscious knowledge that one is engaging in wrongdoing,⁴⁶ these

was pending or about to be instituted).

38. See, e.g., FLA. STAT. § 918.13(1) (2014).

39. See, e.g., TEX. PENAL CODE ANN. § 37.09(a) (West 2011).

40. CAL. PENAL CODE § 135 (West 2014).

41. MODEL PENAL CODE § 241.7(1) (1962). More than a dozen states have statutes directly based on the Model Penal Code. GORELICK, MARZEN, SOLUM & BEST, *supra* note 22, § 5.8.

42. *People v. Mercedes*, 756 N.Y.S.2d 735, 738 (N.Y. Crim. Ct. 2003).

43. IOWA CODE § 719.3 (2014).

44. GORELICK, MARZEN, SOLUM & BEST, *supra* note 22, § 5.7.

45. MD. CODE ANN. CRIM. LAW § 9-306 (West 2014).

46. See GORELICK, MARZEN, SOLUM & BEST, *supra* note 22, § 5.7 (predicting these state statutes will be interpreted consistently with traditional federal obstruction of justice statutes). On judicial interpretation of “corrupt” to mean conscious knowledge of wrongdoing, see *infra* Part III.B.

statutes place a heavy burden of proof on the prosecution. When there is no reasonable prospect of a criminal prosecution at the point in time that a document or item is destroyed, proof of “corrupt” motivation becomes impossible. Moreover, when construing parallel language in a federal statute,⁴⁷ the courts have held that “administration of justice” means that the destruction of evidence must relate to a pending judicial proceeding.⁴⁸

*B. The Traditional Federal Approach to Obstruction of Justice:
§§ 1503 and 1512*

Federal criminal law regarding preservation of evidence traditionally adhered to the expectation that a proceeding must be pending or imminent before a duty would arise to preserve physical items or documents. The original federal obstruction of justice statute, 18 U.S.C. § 1503, sometimes called the Omnibus Clause, generally prohibits “corrupt[] . . . endeavors to influence, obstruct, or impede, the due administration of justice.”⁴⁹

This criminal statute has long been interpreted by the Supreme Court to apply only when some judicial proceeding, such as a grand jury, is actually pending and the defendant had notice of that proceeding; the mere existence of a law enforcement investigation or the possibility of a future proceeding is insufficient to characterize an individual’s conduct as an obstruction of justice under § 1503.⁵⁰ For a criminal conviction under § 1503, “the act must have a relationship in time, causation, or logic with the judicial proceedings” and “the endeavor must have the ‘natural and probable effect’ of interfering with the due administration of justice.”⁵¹

47. 18 U.S.C. § 1503 (2012) (prohibiting a person from “corruptly” “obstruct[ing], or imped[ing]” “the due administration of justice”).

48. GORELICK, MARZEN, SOLUM & BEST, *supra* note 22, § 5.3.

49. 18 U.S.C. § 1503(a). On the Omnibus Clause, see generally Justin Alexander Kasprisin, *Obstruction of Justice*, 47 AM. CRIM. L. REV. 847, 849–65 (2010); Kimberley A. Schaefer & John S. Schowengerdt, *Obstruction of Justice*, 43 AM. CRIM. L. REV. 763, 765–80 (2006); Kyle R. Taylor, Note, *The Obstruction of Justice Nexus Requirement After Arthur Andersen and Sarbanes-Oxley*, 93 CORNELL L. REV. 401, 406–09 (2008).

50. *United States v. Aguilar*, 515 U.S. 593, 598–99 (1995); *Pettibone v. United States*, 148 U.S. 197, 206–07 (1893).

51. *Aguilar*, 515 U.S. at 599. At least one commentator criticizes the second part of this test, worrying that obstruction of justice could be proven under § 1503 when the person acted with specific intent to engage in the conduct but only negligently with respect to the obstructive effect. Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 688–89 (2006). By “[s]ubstituting a negligence (‘reasonably foreseeable’) standard for a specific intent to obstruct requirement does not make

Somewhat more broadly, although ultimately limited by judicial construction, another federal obstruction of justice statute, 18 U.S.C. § 1512(b), prohibits “corruptly persuad[ing] another person, or attempt[ing] to do so,” “with intent to . . . alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding.”⁵² Section 1512 further specifies that “an official proceeding need not be pending or about to be instituted at the time of the offense.”⁵³ Subsequently, subsection (c) was added to § 1512 to clarify that an actor obstructs justice if he or she directly performs the obstructive activity rather than encouraging others to do so.⁵⁴ The provision thus extends obstruction of justice to when a person “corruptly . . . alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding.”⁵⁵

In *Arthur Andersen LLP v. United States*,⁵⁶ the Supreme Court reversed the § 1512 conviction of an accounting firm for having directed employees to destroy documents, holding that the statutory requirement that the defendant has acted “knowingly” and “corruptly” demanded “proof of consciousness of wrongdoing.”⁵⁷ The Court further rejected the government’s argument that the statute required no showing that the actor’s encouragement to destroy documents was motivated by the anticipation of a proceeding:

It is . . . one thing to say that a proceeding “need not be pending or about to be instituted at the time of the offense,” and quite another to say a proceeding need not even be foreseen. A “knowingly . . . corrup[t] persuade[r]” cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular

sense,” she says, “[s]uch a reading permits the criminal sanction to be applied to all kinds of nonculpable conduct.” *Id.* at 689. The concern is well-taken but should be ameliorated by the Supreme Court’s interpretation of “corrupt” in obstruction of justice statutes to require proof of wrongdoing. *See infra* notes 56–58 and accompanying text. Either directly or indirectly by nexus and proof of conscious wrongdoing requirements, Julie O’Sullivan is quite right that “specific intent” for obstruction of justice statutes should be read to mean “that the defendant’s *purpose* was to obstruct justice—that was his special motive for acting.” *Id.* at 688 (emphasis in original).

52. 18 U.S.C. § 1512(b)(2)(B) (2012). *See generally* Kasprisin, *supra* note 49, at 877–79; Schaefer & Schowengerdt, *supra* note 49, at 780–92.

53. 18 U.S.C. § 1512(f)(1).

54. Taylor, *supra* note 49, at 423.

55. 18 U.S.C. § 1512(c)(1).

56. 544 U.S. 696 (2005).

57. *Id.* at 704–07.

official proceeding in which those documents might be material.⁵⁸

C. *Anticipatory Obstruction: Sarbanes-Oxley § 1519*

1. *Removing the Direct Link to a Proceeding or Investigation in § 1519*

As part of the Corporate and Criminal Fraud Accountability Act of 2002, commonly known as the Sarbanes-Oxley Act,⁵⁹ Congress enacted a new criminal statute demanding preservation of documents and items relevant to a federal matter and removing the requirement of a direct connection to an actual pending or imminent investigation or judicial proceeding:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11 [bankruptcy], or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.⁶⁰

Section 1519 was enacted in the aftermath of corporate financial and accounting scandals and designed to make corporate fraud easier to detect by preventing destruction of documents and electronic records.⁶¹ To this point, the courts have uniformly turned away the argument that § 1519 is limited to corporate fraud cases, to entities with a pre-existing duty to retain records, or only to documents and record-keeping.⁶² After

58. *Id.* at 707–08; *see also* O’Sullivan, *supra* note 51, at 706 (lauding the Supreme Court’s “insist[ence] that there be consciousness of wrongdoing before a defendant can be convicted” for obstruction of justice under § 1512, but pointedly commenting that the fact this “should even have been an issue, let alone one that had to be litigated all the way to the Supreme Court, speaks volumes about the deficiencies of the federal [criminal] ‘code’”).

59. Pub. L. No. 107-204, 116 Stat. 800 (2002) (codified at 18 U.S.C. § 1519 (2012)).

60. 18 U.S.C. § 1519 (2012); *see generally* Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721, 741–43 (2003); Donald K. Joseph, *Stop the Shredding: Document Retention After U.S. v. Andersen*, PROF. LAW., 2006 Symposium Issue, at 13; Kasprisin, *supra* note 49, at 883–87; Michael A. Perino, *Enron’s Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN’S L. REV. 671, 680 (2002); Dana E. Hill, Note, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 CORNELL L. REV. 1519 (2004).

61. *See* Fails, *supra* note 9, at 402.

62. *United States v. Kernell*, 667 F.3d 746, 755–56 (6th Cir. 2012); *United States v. Hunt*, 526

this Article was originally written, the Supreme Court granted certiorari in *Yates v. United States*,⁶³ a case involving a commercial fisherman who was convicted under § 1519 for throwing overboard undersized grouper fish as obstructing an investigation into catching fish under the legal size limit.⁶⁴ The Supreme Court granted review on the question whether § 1519 covers only the destruction of documents and “tangible objects” related to record-keeping.⁶⁵

For our present purposes in addressing the duty to preserve evidence, the most important feature of § 1519 is that it does not directly link the forbidden conduct of altering or destroying evidence to the actual pendency of an investigation, much less the imminence of an actual judicial proceeding. The Senate Report accompanying the 2002 legislation clarified that § 1519 was designed to eliminate “any technical requirement” that “tie[d] . . . obstructive conduct to a pending or imminent proceeding or matter.”⁶⁶

As Dana Hill has described it, § 1519 prohibits “anticipatory obstruction of justice,”⁶⁷ that is, conduct that occurs before the actors know of a specific investigation or proceeding but nonetheless undertaken with an intent to obstruct. For that reason, some courts have held that a nexus to a specific federal investigation is not a predicate to the charge,⁶⁸ much less that the person destroying or altering evidence believed that the actions were likely to succeed in obstructing an investigation.⁶⁹ Nonetheless, to have acted with the specific intent to impede or obstruct, “the defendant must have been aware of the pending or contemplated matter or investigation.”⁷⁰

2. *Reasonable Anticipation Integrated into Mens Rea for § 1519*

While “a link between a defendant’s conduct and an imminent or

F.3d 739, 743 (11th Cir. 2008); *United States v. Kofoed*, No. 8:09CR142, 2009 WL 2781967, at *2 (D. Neb. Aug. 26, 2009).

63. 733 F.3d 1059 (11th Cir. 2013), *cert. granted*, 134 S. Ct. 1935 (2014) (No. 13-7451).

64. Petition for Writ of Certiorari at 3–4, *Yates v. United States*, 134 S. Ct. 1935 (2014) (No. 13-7451), 2013 WL 8350082, at *3–4.

65. *Yates*, 134 S. Ct. 1935 (2014). When this Article was completed, the *Yates* case was scheduled for oral argument before the Supreme Court on November 5, 2014.

66. S. REP. NO. 107-146, at 14–15 (2002).

67. Hill, *supra* note 60, at 1523.

68. *United States v. Kernell*, 667 F.3d 746, 753 (6th Cir. 2012).

69. *United States v. Yielding*, 657 F.3d 688, 712 (8th Cir. 2011); *United States v. Gray*, 642 F.3d 371, 377 (3d Cir. 2011).

70. *United States v. Perraud*, 672 F. Supp. 2d 1328, 1350 (S.D. Fla. 2009).

pending official proceeding” may not be a predicate fact that must be proven under § 1519,⁷¹ reasonable anticipation of an investigation presumably has been integrated into the *mens rea* element. As the Fifth Circuit noted, a “plausible” construction that “gives effect to the statute’s language as a whole” is to “read[] intent into every clause.”⁷² Indeed, the legislative history emphasizes that “the intent required is the intent to obstruct, not some level of knowledge.”⁷³

One cannot intend to obstruct an investigation or act in “contemplation”⁷⁴ of an investigation unless one anticipates an investigation. The mere fact that the destruction of a document or object has the collateral effect of obstructing a federal investigation or administration is not sufficient; the statute expressly requires proving that the charged party had the specific intent of causing such obstruction. When a criminal investigation is only conceivable but remains entirely speculative, destruction of documents or objects that provide evidence of criminal wrongdoing should not implicate § 1519.⁷⁵

Lest innocent conduct be subject to prosecution, Greta Fails argues that § 1519 “should be construed to contain a nexus requirement,” by which “[d]efendants need to have foreseen a potential future proceeding that their conduct could possibly obstruct to have violated the obstruction statutes.”⁷⁶ Further, construing § 1519 to require proof of corrupt intent by the charged defendant will “prevent overcriminalization” of conduct that may serve multiple purposes, only one of which is the forbidden intent to obstruct an investigation or matter.⁷⁷

In *United States v. Yielding*,⁷⁸ the Eighth Circuit explained that § 1519 would apply not only when the “defendant acts directly” with

71. *Gray*, 642 F.3d at 377.

72. *United States v. McRae*, 702 F.3d 806, 837 (5th Cir. 2012).

73. 148 CONG. REC. S7,418–19 (daily ed. July 26, 2002) (statement of Sen. Leahy).

74. 18 U.S.C. § 1519 (2012).

75. *Cf.* S. REP. NO. 107-146, at 27 (2002) (“[Section 1519] should not cover the destruction of documents in the ordinary course of business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy.”).

76. Fails, *supra* note 9, at 433; Taylor, *supra* note 49, at 432 (arguing that the courts should continue “the trend toward a broadly applicable nexus requirement”).

77. *United States v. Kernell*, 667 F.3d 746, 754 (6th Cir. 2012) (stating that the intent to obstruct language in § 1519 “subsumes the [corrupt intent] requirement”); *McRae*, 702 F.3d at 838 (referring to *Kernell*’s suggestion “that there is ‘no dispute’ that criminal liability under § 1519 requires some corrupt intent”).

78. 657 F.3d 688 (8th Cir. 2011).

respect to “a pending matter,” but when a defendant acts “with intent to obstruct a foreseeable investigation of a matter within the jurisdiction of a federal agency [that] has not yet commenced.”⁷⁹ As the court explained, without a sharp focus on the specific intent to obstruct an investigation, § 1519 would reach plainly innocent conduct, such as routine destruction of documents.⁸⁰ In other words, § 1519 does not criminalize behavior that purportedly “obstructs” a remotely possible investigation.⁸¹ Thus, as the Eighth Circuit well stated it, § 1519 by applying to acts “in contemplation” of an investigation “refer[s] to a matter that was not yet pending but which the defendant envisioned or anticipated.”⁸²

Moreover, § 1519 likely would be unconstitutionally vague, unless “construed as requiring proof that defendant acted with specific, wrongful intent.”⁸³ Although interpreting a different obstruction of justice statute, the Supreme Court’s observation in *Arthur Andersen* that a person cannot intend to obstruct a proceeding that would “not even be foreseen”⁸⁴ remains enlightening in this respect.⁸⁵ By confining the operation of § 1519 to circumstances where the wrongful nature of the acts is obvious, and thus where conscious knowledge of wrongdoing by the defendant is established directly or indirectly, concerns about overbreadth in § 1519 diminish.

3. *Recent Decisions on Anticipation of an Investigation Under § 1519*

In nearly all of the cases decided to date by the federal courts under

79. *Id.* at 711.

80. *Id.* (stating that without requiring specific intent to obstruct an investigation, “then the statute would forbid innocent conduct such as routine destruction of documents that a person consciously and in good faith determines are irrelevant to a foreseeable federal matter”).

81. *See McRae*, 702 F.3d at 837 (saying the court was “receptive to [defendant’s] well-presented argument” that § 1519 might be vague if applied where “[t]he connection between the defendant’s conduct and an investigation might be so remote . . . that the statute punishes innocent conduct,” but finding it unnecessary to decide where the defendant was on notice that his plainly unlawful conduct was criminal).

82. *Yielding*, 657 F.3d at 714.

83. *United States v. Stevens*, 771 F. Supp. 2d 556, 562 (D. Md. 2011).

84. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707–08 (2005).

85. *United States v. Fumo*, Crim. No. 06–31, 2009 WL 1688482, at *54 (E.D. Pa. June 17, 2009) (“While section 1519 was authored after the Supreme Court’s decision in *Arthur Andersen*, that case serves as a touchstone for measuring the appropriateness of this Court’s jury instructions regarding obstruction claims based upon other statutes.”). *But see Yielding*, 657 F.3d at 712 (declining to extend this reasoning because “the language of § 1519 is materially different” from the statutes addressed in earlier Supreme Court cases); *United States v. Moyer*, 674 F.3d 192, 209 (3d Cir. 2012) (same).

§ 1519, an investigation either was ongoing or was obviously anticipated:

First, in many cases, the person charged with obstruction under § 1519 knew of an investigation when the evidence was destroyed, thus leaving nothing to the imagination about the intent to obstruct the investigation.⁸⁶

For example, in *United States v. Wortman*,⁸⁷ after being interviewed by FBI agents about her boyfriend's interest in child pornography and hearing them warn her boyfriend not to tamper with or destroy any compact discs that he had loaned to another, the defendant went to the location, took a disc containing child pornography downloaded by her boyfriend, and broke it.⁸⁸ The Seventh Circuit majority affirmed the guilty verdict, readily rejecting her argument that she could not have formed the requisite intent to obstruct the FBI investigation because the focus was on her boyfriend and he took the lead in planning to destroy it.⁸⁹ Even so, a dissenting judge argued that the defendant could not be convicted on the evidence presented, which showed that she acted "in the heat of the moment" rather than to impede an FBI investigation and was merely used by her boyfriend, "in much the same way as he might have used a hammer" to achieve his goal of destroying evidence.⁹⁰ More pointedly, and persuasively, the dissent describes the case as "a poor exercise of [the government's] vast prosecutorial discretion,"⁹¹ a characterization that also applies to the illustrative case discussed in Part III.⁹²

Second, in other cases, a party falsified required reports about an incident, plainly wishing others to rely on a false story.⁹³ When a party

86. *See, e.g.*, *United States v. Johnson*, 655 F.3d 594, 599, 602 (7th Cir. 2011) (upholding conviction under § 1519 and other statutes where defendant responded to federal agents attempting to execute a warrant to search for illegal drugs by locking the door to the house during which agents heard toilets flushing and saw defendant at the kitchen sink washing dishes); *United States v. Hicks*, 438 F. App'x 216, 217–18 (4th Cir. 2011) (upholding conviction where defendant, after learning federal agents wanted to speak to him about child pornography, destroyed his computer hard-drive).

87. 488 F.3d 752 (7th Cir. 2007).

88. *Id.* at 753–54.

89. *Id.* at 754–55.

90. *Id.* at 755–56.

91. *Id.* at 755.

92. *See infra* Part III.B.5.

93. *See, e.g.*, *United States v. McQueen*, 727 F.3d 1144, 1151 (11th Cir. 2013) (upholding conviction of corrections officer for preparing false reports hiding acts of violence involving inmates, often incited by the corrections officers); *United States v. Yielding*, 657 F.3d 688, 716 (8th Cir. 2011) (describing evidence that defendant knew about the hospital's investigation into irregular payments for medical devices and feared that the inquiry would lead to an investigation by law

goes beyond not retaining evidence to formulating a fictional account, the conduct speaks for itself. The affirmative creation of false reports strongly suggests anticipation of an investigation and intent to impede it.

For example, in *United States v. Moyer*,⁹⁴ a chief of police was convicted under § 1519 after falsifying police reports about a racially-motivated assault resulting in the death of the victim, where the assailant was the teenage son of a woman who was both a friend of the chief and romantically involved with one of his officers.⁹⁵ While the Third Circuit ruled that proof was not required of a nexus between the conduct and “a specific federal investigation,”⁹⁶ the court emphasized that the statute would not reach innocent conduct because “by the express language of the statute, no liability will be imposed for knowingly falsifying documents *without* an ‘intent to impede, obstruct, or influence a matter.’”⁹⁷ In response to any suggestion that the statute failed to give fair warning, the court remarked that “[a]ny person of ordinary intelligence—let alone a chief of police—would comprehend that this statute prohibits a police officer from knowingly writing a false report with the intent to impede an ongoing, or future, investigation.”⁹⁸

Third, in still other cases, the conduct involved so plainly will provoke an investigation that the person’s destructive conduct is impossible to accept other than in such a light. For example, in *United States v. McRae*,⁹⁹ a police officer was convicted under § 1519 for burning the body of a man who had been shot during the chaos in New Orleans in the immediate aftermath of Hurricane Katrina.¹⁰⁰ Challenging § 1519 as unconstitutionally vague, the defendant argued that, by failing to require a relationship between the conduct and a pending or imminent investigation, the statute “might criminalize conduct with a highly tenuous connection to any investigation at all.”¹⁰¹ While saying the court was “receptive to [the defendant’s] well-presented argument on this

enforcement or regulators when creating a false promissory note for a loan to disguise kick-back payments).

94. 674 F.3d 192 (3d Cir. 2012).

95. *Id.* at 199–201.

96. *Id.* at 209–10.

97. *Id.* at 212 (emphasis in original) (quoting 18 U.S.C. § 1519 (2012)).

98. *Id.* at 211; *see also* *United States v. Hunt*, 526 F.3d 739, 742–45 (11th Cir. 2008) (upholding conviction where police officer made false statements in a police report, knowing that claims of excessive force in an arrest would be investigated by the FBI).

99. 702 F.3d 806 (5th Cir. 2012).

100. *Id.* at 833–34.

101. *Id.* at 837.

point,”¹⁰² the Fifth Circuit observed that this defendant “knowingly burned the body of a homicide victim and must have realized that an investigation into that homicide would follow.”¹⁰³

To be sure, stray comments in a couple of cases could be read to divorce § 1519 from any link to a foreseeable investigation. In *United States v. Gray*,¹⁰⁴ the Third Circuit said that § 1519 “does not require the existence or likelihood of a federal investigation.”¹⁰⁵ In *United States v. Kernell*,¹⁰⁶ the Sixth Circuit claimed that “[c]ourts considering the question have consistently held that the belief that a federal investigation directed at the defendant’s conduct might begin at some point in the future satisfies the ‘in contemplation’ prong.”¹⁰⁷ Still, neither court proposed that conduct has been criminalized under § 1519 whenever it might impede a speculative future investigation.

And it goes much too far to ignore the objective “likelihood of a federal investigation” when judging whether an individual intended to obstruct justice.¹⁰⁸ Nor should we countenance the prospect that a person interfering with a document or object becomes a felon based merely on awareness that an investigation “might begin at some point in the future.”¹⁰⁹ Applied so broadly, § 1519 would exceed all bounds of fair notice and sweep within its criminal designation a host of perfectly legitimate acts.¹¹⁰ To criminally convict a person when he or she could

102. *Id.* at 838.

103. *Id.*

104. 642 F.3d 371 (3d Cir. 2011).

105. *Id.* at 379.

106. 667 F.3d 746 (6th Cir. 2012).

107. *Id.* at 755.

108. *See Gray*, 642 F.3d at 379. In *Gray*, after a corrections officer in a privately owned federal prison stripped and beat an inmate for calling a female officer “baby,” witnessing officers prepared false reports denying that any force had been used against the inmate. *Id.* at 373–74. The court observed that the government had presented ample evidence that these officers had been trained to “write a truthful report when force is used, and cooperate in any investigation,” and that they “were aware of the [Department of Justice’s] policy of investigating allegations of excessive force” at the prison.” *Id.* at 379.

109. *See Kernell*, 667 F.3d at 755. In *Kernell*, an individual who had hacked into a vice presidential candidate’s private email and then deleted information from his computer had been warned online that his activities had been reported to the FBI, knew that the matter had been reported to the staff of the candidate, and was contacted by the FBI within two days. *Id.* at 748–49. Thus, for the court to conclude that the defendant “believed a federal investigation was at least the possible outcome of his actions,” was an understatement. *Id.* at 756.

110. *See* BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. & NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010), available at http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf (describing the growing problem of criminal offenses created without an

not reasonably have contemplated that an action would obstruct an objectively foreseeable investigation or proceeding is the essence of strict criminal liability. As Herbert Wechsler wrote sixty years ago, “[t]o condemn when fault is absent is barbaric.”¹¹¹

D. Safe Harbor for Legal Representation: Encouraging Zealous Representation

The criminal law may influence lawyers’ understanding of the bounds of legitimate advocacy not only by clearly proscribing certain conduct, but also by its ambiguity.¹¹²

The duty of zealous advocacy was enshrined as one of the nine canons of professional ethics in the American Bar Association’s Code of Professional Responsibility: “Canon 7: A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.”¹¹³ The succeeding Model Rules of Professional Conduct do not include an explicit statement of this duty in the text of a rule, but the concept is preserved in the first comment to Rule 1.3: “A lawyer must also act with commitment and dedication to the interests of the client and with *zeal in advocacy* upon the client’s behalf.”¹¹⁴

Rodney Uphoff rightly observes that “the mere threat of criminal prosecution or disciplinary sanctions may well chill some defense lawyers from taking action that a zealous advocate ought to be willing to take in defending a client.”¹¹⁵

For that reason, presumably, the chapter in Title 18 of the United States Code containing the obstruction of justice statutes contains an affirmative defense peculiar to lawyers. Section 1515(c) provides: “This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.”¹¹⁶ This “rather opaque defense to the crime,”¹¹⁷

adequate *mens rea* requirement); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 (2012) (quoting *United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (writing that the growth of regulatory crimes—including many offenses that are “wrongful only because [they are] illegal”—threatens to “allow punishment where ‘consciousness of wrongdoing be totally wanting’”)).

111. Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 528 (1955).

112. Green, *supra* note 9, at 362.

113. MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980).

114. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2012) (emphasis added).

115. Rodney J. Uphoff, *The Physical Evidence Dilemma: Does ABA Standard 4-4.6 Offer Appropriate Guidance?*, 62 HASTINGS L.J. 1177, 1188 (2011).

116. 18 U.S.C. § 1515(c) (1996).

offers no further elucidation on what constitutes “lawful, bona fide” legal representation. As long as the lawyer does not know that the client’s objectives are unlawful, he or she should not be chilled from zealous representation of a client, including advice regarding the destruction of documents or items which the lawyer has no reason to believe are relevant to a proceeding or investigation that at least may be reasonably anticipated.

When a lawyer is the target of a prosecution for obstruction of justice, the jury should be instructed that bona fide legal representation without an improper purpose is a complete defense.¹¹⁸ The jury should be told that a lawyer’s “purpose to zealously represent his client is fully protected by the law.”¹¹⁹ And, as the Ninth Circuit held in *United States v. Kellington*,¹²⁰ a lawyer defending himself against a charge of obstruction of justice for assisting a client in destroying items is entitled to present “expert testimony on the lawyer’s ethical obligations [as] relevant to establish the lawyer’s intent and state of mind.”¹²¹

In sum, § 1515(c) provides a safe harbor for lawyers, requiring the government to disprove the lawful and bona fide nature of the lawyer’s representation beyond a reasonable doubt.¹²² When a lawyer has advised or acted to destroy that which was evidence, but under circumstances where an investigation was not reasonably anticipated, then the court should presume that lawful purposes were in mind. The court should demand that the government present concrete evidence that the lawyer should have anticipated an investigation and was acting with an improper purpose.

E. Destroying Contraband That Is Not Evidence to a Reasonably Anticipated Investigation or Official Proceeding

When a thing is illegal to even possess—that is, *contraband*—the lawyer’s conflicting obligations become more poignant and exquisitely complicated.

117. Gillers, *supra* note 3, at 830; *see also* O’Sullivan, *supra* note 51, at 717 (fearing that the courts are unlikely to “require proof that the defendant [lawyer] acted with a specific intent or a consciousness of wrongdoing”).

118. *See* *United States v. Mintmire*, 507 F.3d 1273, 1277, 1293–94 (11th Cir. 2007) (approvingly quoting jury instructions).

119. *Id.*

120. 217 F.3d 1084 (9th Cir. 2000).

121. *Id.* at 1098; *see also* *United States v. Kloess*, 251 F.3d 941, 949 (11th Cir. 2001) (approving expert testimony on legal ethics in obstruction case against lawyer).

122. *Mintmire*, 507 F.3d at 1294.

When a lawyer receives from a client an item that is contraband, and “where there is no pending case or investigation relating to this evidence,” the American Bar Association advises through its *Standards for Criminal Justice* that “counsel may suggest that the client destroy it,” as long as “such destruction is clearly not in violation of any criminal statute.”¹²³ Thus, the lawyer should consult appropriate criminal codes to determine whether contraband that is not evidence in a pending or imminent criminal proceeding or investigation may be destroyed lawfully. Proposed revisions to the *Standards for Criminal Justice* circulated in 2014 likewise encourage courts and legislatures to allow destruction of contraband, “[w]hen defense counsel reasonably believes that contraband does not relate to a pending criminal investigation or prosecution.”¹²⁴

By contrast, the Reporter’s Notes to the American Law Institute’s *Restatement of the Law Governing Lawyers*, characterize the ABA’s position as “problematical,” because “[c]ontraband is both property that may be illegal to possess and evidence that may be illegal to destroy.”¹²⁵ The American Law Institute’s reporter suggests that a lawyer should “read the ABA’s standard with caution.”¹²⁶

Consistent with the ABA *Standards*, Norman Lefstein opined that “[f]rom a policy standpoint . . . 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.”¹²⁷ For example, while penalizing the possession of child pornography, findings enacted as part of a federal criminal statute set out Congress’s reasoning that “prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children.”¹²⁸ Given that the continued existence of the contraband is the greater evil,

123. STANDARDS FOR CRIM. JUST. § 4-4.6(d) (1993).

124. ABA STANDARDS FOR CRIMINAL JUSTICE § 4-4.7(j)(ii) (Draft of Proposed Revision, Approved by Council of Criminal Justice Section, 2014) [hereinafter Proposed Revision to Standard] (on file with the author and *Washington Law Review*).

125. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 reporter’s note (2000).

126. *Id.*

127. Norman Lefstein, *Incriminating Physical Evidence, the Defense Attorney’s Dilemma, and the Need for Rules*, 64 N.C. L. REV. 897, 935 n.188 (1986).

128. Child Pornography Prevention Act, Pub. L. No. 104-208, § 121(1)(12), 110 Stat. 3009, 3009-27 (1996).

preventing ongoing possession of the contraband by the client¹²⁹ and removing the items from circulation through destruction is the common-sense solution.¹³⁰

Contraband that is or could be evidence in a pending, imminent, or reasonably anticipated criminal investigation or official proceeding may not be destroyed, just as other evidence of a crime may not properly be destroyed. As a rough guideline, the greater the quantity of the contraband material and the less amenable it is to easy destruction, the more likely it may be that the contraband material is relevant as evidence (or that return to the client is ill-advised for other reasons). Thus, the lawyer probably should not return illegal weapons or large quantities of illegal narcotics to a client with instructions to destroy them. Such items pose heightened public safety concerns and proper disposal of such items will be difficult. Moreover, the nature or quantity of these objects are more likely to indicate a connection to a criminal enterprise that has come to the attention of the authorities and may be the subject of an ongoing criminal investigation.

III. WHEN DOES AN ITEM BECOME REAL EVIDENCE? A CASE ILLUSTRATION

A. *The Case of the Child Porn on the Choirmaster's Computer* (United States v. Russell)

1. *The Choirmaster at Christ Church and Suspected Child Pornography on His Computer*

Christ Church of Greenwich, Connecticut traces its history as a congregation back nearly three centuries¹³¹ to the Horse Neck chapel which was completed in 1749.¹³² The current church complex was

129. See *United States v. Angle*, 234 F.3d 326, 339–40 & n.15 (7th Cir. 2000) (describing as interesting the defendant's argument that his deletion of child pornography computer files meant that he did not knowingly continue to possess them, but noting also the government's response that the files were still retrievable because the disk had not been reformatted, although finding it unnecessary to decide the question because not all of the files had been deleted).

130. STANDARDS FOR CRIM. JUST. § 4-4.6 cmt. (1993) ("The social benefit accomplished by the destruction and discontinued circulation of such items outweighs any hypothetical social costs stemming from the fact that these items have been rendered unavailable to serve as evidence in future criminal investigations or prosecutions.").

131. *History of Christ Church*, CHRIST CHURCH GREENWICH (2010), <http://christchurchgreenwich.org/about/history-christ-church/> (last visited Sept. 15, 2014).

132. *History*, HORSENECK FOUNDATION, <http://www.horseneckfoundation.org/index.php?ID=2633&XID=2633:0:0:0&PID=0> (last visited Sept. 15, 2014).

constructed on land donated by revolutionary war era founder Isaac Knapp.¹³³ The Christ Church campus is across the street from where a tavern was owned by Knapp and from which Continental Army General Israel Putnam jumped to his horse and barely escaped capture by British redcoats in 1779.¹³⁴ Over the years, more than one of the rectors at Christ Church has been consecrated as a bishop in the Episcopal Church,¹³⁵ and notable worshippers in the prominent congregation included President George H.W. Bush when he was growing up.¹³⁶

By 2006, Robert F. Tate, 65, had served as the choirmaster and organist at Christ Church for nearly his entire adult life, going back more than three decades.¹³⁷ By all accounts, Tate was beloved by the parishioners.¹³⁸ One prominent member of the congregation later described Tate as “a wonderful, wonderful choir director,” and “the most extraordinarily talented and spiritual person.”¹³⁹ Under Tate’s direction, the Christ Church Choir (including many children) had traveled throughout Europe¹⁴⁰ and produced several albums of music.¹⁴¹

On October 7, 2006, a church employee borrowed a laptop computer belonging to Tate for use in designing a website for an upcoming choir event.¹⁴² When gathering images from the computer for use on the website, the employee discovered numerous pictures of naked boys.¹⁴³ Although it does not appear that these images depicted minors engaged in actual sexual activity, a prosecutor later reported that this employee described the images with the words “lascivious exhibition of the

133. *Id.*

134. *Id.*; Carl White, *All “Downhill” for General Israel Putnam (Literally and Figuratively)*, HISTORICALLY SPEAKING (Aug. 25, 2010, 12:49 PM), http://www.greenwichlibrary.org/blog/historically_speaking/2010/08/all-downhill-for-general-israel-putnam-literally-and-figuratively.html.

135. *History of Christ Church*, *supra* note 131.

136. Matthew J. Malone, *Lawyer Accused of Destroying Evidence in Connecticut Pornography Case*, N.Y. TIMES (Feb. 17, 2007), http://www.nytimes.com/2007/02/17/nyregion/17pom.html?_r=1&.

137. Superseding Indictment at 1, United States v. Russell, No. 3:07-cr-00031-AHN (D. Conn. July 18, 2007).

138. Malone, *supra* note 136.

139. Sean Alfano, *Ex-Church Official Jailed for Child Porn*, CBS NEWS (Jan. 22, 2007, 2:36 PM), <http://www.cbsnews.com/news/ex-church-official-jailed-for-child-porn/>.

140. *Ex-Music Director at Connecticut Church Pleads Guilty to Possessing Child Porn*, FOX NEWS (Jan. 22, 2007), <http://www.foxnews.com/story/2007/01/22/ex-music-director-at-connecticut-church-pleads-guilty-to-possessing-child-porn>.

141. *See, e.g.*, Christ Church Choir, *Sweet Aroma of Praise* (August 3, 2014), <https://itunes.apple.com/us/artist/christ-church-choir/id22716918>.

142. Change of Plea Hearing at 30, United States v. Russell, No. 3:07-cr-00031-AHN (D. Conn. June 2, 2008).

143. Malone, *supra* note 136.

genitals of young boys.”¹⁴⁴ Given that these terms are rarely used by ordinary people, and that the phrase is a direct quotation from a federal child pornography statute,¹⁴⁵ it is unlikely this description was uttered spontaneously by the witness employee but instead was elicited by law enforcement-directed inquiries.

On October 8, the following day, the rector of Christ Church was informed of the employee’s discovery on Tate’s computer. The rector sealed up the laptop and immediately sought legal counsel.¹⁴⁶

2. *The Church Dismisses the Choirmaster, and the Church Lawyer Destroys the Computer Hard-Drive*

Philip D. Russell, age 48, graduated from law school in 1984 and became board-certified in “Criminal Trial Advocacy” by the National Board of Trial Advocacy in 1994.¹⁴⁷ After working as a criminal prosecutor in the Bronx, Russell eventually established his own firm in Greenwich, Connecticut, focusing on civil and criminal litigation.¹⁴⁸ He had served as president of the local bar association.¹⁴⁹

Russell’s family worshipped at Christ Church, and the rector knew of his reputation as a criminal defense lawyer.¹⁵⁰ After the discovery of inappropriate images on Tate’s computer, Russell was quickly contacted and retained by the church.¹⁵¹

On October 9, the very next day after the rector learned of the matter, Russell and two church leaders confronted Tate.¹⁵² Tate acknowledged that the computer was his, that he had downloaded the images, and that the images were inappropriate.¹⁵³ Russell told Tate this was a serious

144. Change of Plea Hearing, *supra* note 142, at 30.

145. See 18 U.S.C. § 2256(2)(B)(iii) (2008) (defining “sexually explicit conduct” for purposes of child pornography to include “lascivious exhibition of the genitals”).

146. Change of Plea Hearing, *supra* note 142, at 31. Prosecutors charged in the indictment that the sealing of the laptop amounted to “treating it as evidence.” Superseding Indictment, *supra* note 137, at 2. This may be true in a colloquial sense as the church viewed the laptop as confirmation that the choirmaster had acted inappropriately. But church officials cannot be assumed to have taken any action with an appreciation of the legal definition of “evidence.”

147. *Attorney Profiles, Philip Russell, Esq.*, PHILLIP RUSSELL, LLC (2014), <http://greenwichlegal.com/attorney-profiles/>.

148. *See id.*

149. *See id.*

150. See Alison Leigh Cowan, *Lawyer in Pornography Case is Spared Jail*, N.Y. TIMES (Dec. 18, 2007), <http://www.nytimes.com/2007/12/18/nyregion/18porn.html?pagewanted=print>.

151. *See id.*

152. Change of Plea Hearing, *supra* note 142, at 31.

153. *Id.*

matter and that possession of child pornography is a federal crime. A lawyer is ethically required to clarify his role when a layperson might misunderstand.¹⁵⁴ Russell properly explained that he represented the church and not Tate, advised Tate to get a lawyer, and gave him the name of a criminal defense lawyer.¹⁵⁵

Tate was a longstanding employee who was at or near retirement age. Without knowledge of any other wrongdoing by Tate, church leaders apparently wanted to allow him the dignity of quietly retiring. Moreover, the church undoubtedly wanted to avoid embarrassment or harm to the strong national and international reputation of the choir.

After he agreed to resign as choirmaster, Tate packed his possessions and vacated the church apartment in which he had been living.¹⁵⁶ With assistance from church officials and a bevy of supporters in the parish, Tate left Connecticut and traveled to California.¹⁵⁷

In sum, the church exercised the lawful (if morally and prudentially dubious) choice not to report Tate to the police.¹⁵⁸ And yet Russell advised church leaders that they could not remain in possession of child pornography, which was not a lawful option.¹⁵⁹

Russell returned to his law office with Tate's laptop. As Russell later explained, he did not foresee any law enforcement involvement with the matter.¹⁶⁰ Knowing that possession of child pornography was unlawful, Russell immediately disassembled the computer and pulverized the hard-drive.¹⁶¹ Less than one hour had elapsed from the time that Russell took possession of the computer during the confrontation by church officials with Tate to the time that he destroyed it to eliminate any contraband.¹⁶²

154. MODEL RULES OF PROF'L CONDUCT R. 4.3 (1983) ("The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.").

155. Change of Plea Hearing, *supra* note 142, at 32.

156. Indictment at 2-3, *United States v. Russell*, No. 3:07-cr-00031-AHN (D. Conn. July 7, 2007).

157. *Id.* at 2.

158. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 434-36 (9th ed. 2012). Given that there was no evidence or knowledge about specific children being abused by Tate, or even that he had distributed child pornography, a mandatory reporting duty for church officials apparently did not apply.

159. *Id.* at 435.

160. Change of Plea Hearing, *supra* note 142, at 37.

161. *Id.* at 33; Cowan, *supra* note 150; Fails, *supra* note 9, at 423 n.123.

162. Defendant Russell's Application for Downward Departure Consideration and/or a Non-Guidelines Sentence at 2, *United States v. Russell*, No. 3:07-cr-00031-AHN (D. Conn. Dec. 12, 2007).

3. *The FBI Investigation and Prosecution of the Choirmaster*

The day before the church employee discovered the questionable images on Tate's laptop and two days before the church accepted Tate's resignation and Russell destroyed the laptop hard-drive, the Federal Bureau of Investigation (FBI) started a criminal investigation into Tate's possession of child pornography and exploitation of children.¹⁶³ There is no reason to believe that Russell or church officials knew anything about the FBI investigation which had just been initiated independently of the discovery at Christ Church.¹⁶⁴

Shortly thereafter, a federal prosecutor contacted Russell to ask about the location of Tate's laptop computer.¹⁶⁵ Russell unhesitatingly and truthfully responded that he had destroyed it.¹⁶⁶

Tate eventually was arrested in Los Angeles.¹⁶⁷ Despite the destruction of the laptop, federal investigators found other child pornography in Tate's possession, including sado-masochistic images of boys.¹⁶⁸ The government found that Tate had possessed child pornography for many years and sexually exploited children.¹⁶⁹ Prosecutors said that Tate had brought child prostitutes back to the church premises and had traveled overseas to have sex with children.¹⁷⁰ The judge who later accepted the church lawyer's plea of guilty to misprision of a felony¹⁷¹ described Tate's history of sexual abuse of children as "turn[ing] your stomach."¹⁷²

Tate eventually pleaded guilty to possession of child pornography and was sentenced to prison in 2008.¹⁷³ Despite his long history of sexual exploitation of minors, Tate was sentenced to only five-and-a-half years in prison.¹⁷⁴ Indeed, Tate was given credit for cooperating with

163. Indictment, *supra* note 156, at 2.

164. See Memorandum in Support of Motion to Dismiss Count One at 4, *United States v. Russell*, No. 3:07-cr-00031-AHN (D. Conn. Apr. 19, 2007).

165. Change of Plea Hearing, *supra* note 142, at 38.

166. *Id.*

167. Malone, *supra* note 136.

168. Cowan, *supra* note 150.

169. Change of Plea Hearing, *supra* note 142, at 29.

170. Martin B. Cassidy, *Choir Director Sexually Abused Minors, His Lawyer Says*, STAMFORD ADVOCATE, Dec. 22, 2007, at A1; Cowan, *supra* note 150.

171. See *infra* Part III.A.6.

172. Cowan, *supra* note 150.

173. Change of Plea Hearing, *supra* note 142, at 29; see also Malone, *supra* note 136.

174. Lisa B. Hamilton, *Connecticut: Former Music Director Sentenced on Child Pornography Charge*, EPISCOPAL NEWS SERV. (Feb. 25, 2008), <http://archive.episcopalchurch.org/>

prosecutors in the case against Russell.¹⁷⁵ Tate was released from prison only four years after sentencing.¹⁷⁶

4. *The Indictment of the Church Lawyer and the Motions to Dismiss*

On February 15, 2007, a federal grand jury returned an indictment against Philip Russell, charging him with obstruction of justice under 18 U.S.C. §§ 1512(c)(1) and 1519.¹⁷⁷ Russell appears to have been the first lawyer indicted under the new Sarbanes-Oxley obstruction of justice statute.¹⁷⁸

For the § 1512(c)(1) count, the indictment contended, inter alia, that Russell altered, destroyed, mutilated, and concealed the laptop containing child pornography with the intent to impair its availability for use in an official proceeding.¹⁷⁹ For the § 1519 count, the indictment contended that Russell unlawfully, willfully, and knowingly altered, destroyed, mutilated, concealed, or covered-up a tangible object, that is, the laptop, with the intent to impede, obstruct, or influence the investigation and administration of a matter, namely the FBI investigation of Tate's possession of child pornography and exploitation of children.¹⁸⁰

Russell moved to dismiss both counts of the indictment. In moving to dismiss the § 1512(c)(1) obstruction of justice count, Russell observed that the indictment "fails to allege any nexus between the defendant's conduct and any federal proceeding which was reasonably foreseeable to Russell" and argued that "a person cannot . . . obstruct a hypothetical future federal proceeding that he does not, and cannot, know about."¹⁸¹ "Although the government no longer needs to show a pending proceeding," Russell submitted, "it must still prove that Russell intended to obstruct a specific and identifiable official proceeding—which is

81803_95180_ENG_HTM.htm.

175. *Id.*

176. Martin B. Cassidy, *Out of Prison, Tate Moves to New Canaan*, NEW CANAAN TIMES (Sept. 20, 2012), <http://www.newcanaannews.com/news/article/Out-of-prison-Tate-moves-to-New-Canaan-3875556.php>.

177. Indictment, *supra* note 156, at 3–4.

178. See John Christoffersen, *Sarbanes-Oxley Charges in Conn. Case Worry Corporate Defense Lawyers*, INSURANCE J. (Mar. 6, 2007), available at <http://www.insurancejournal.com/news/east/2007/03/06/77462.htm> (last visited Sept. 15, 2014); see generally *supra* Part I.I.C (discussing standards for obstruction of justice under 18 U.S.C. § 1519 (2012)).

179. Indictment, *supra* note 156, at 3.

180. *Id.* at 3–4.

181. Motion to Dismiss Count One at 1, United States v. Russell, Crim. No. 3:07-cr-00031-AHN (D. Conn. Apr. 19, 2007).

virtually impossible when no such proceeding has begun or was reasonably likely to be instituted in the future.”¹⁸² Section 1512(c)(1) requires proof of a corrupt purpose and intent to obstruct an official proceeding, such as a court or grand jury proceeding.¹⁸³

In moving to dismiss the § 1519 count, Russell similarly argued that the indictment “fails to allege any nexus between the defendant’s conduct and any federal proceeding which was reasonably foreseeable to Russell.”¹⁸⁴ Russell argued that when he destroyed a computer believed to contain contraband “no official proceedings were pending, envisioned, or even imagined.”¹⁸⁵ He simply did not, he argued, have “any reason to suspect that a police investigation was afoot or that the matter would in any way generate police interest.”¹⁸⁶

The Connecticut Criminal Defense Lawyers Association filed an amicus curiae brief in support of the motion to dismiss the indictment.¹⁸⁷ The amicus contended that without a requirement that the government prove a nexus between the obstructive conduct and an official matter, “it is impossible under these statutes to decipher the line between conduct that is lawfully undertaken in representation of a client, and conduct that is undertaken solely for unlawful purposes.”¹⁸⁸

Noting that Russell “was undoubtedly sensitive to his clients’ criminal liability” if they kept possession of the computer with child pornography, the amicus contended that Russell acted legitimately in the case to destroy the computer rather than report the matter to law enforcement.¹⁸⁹ The indictment, amicus complained, “presents an unequivocal position: in order to avoid prosecution, Mr. Russell was required to breach the attorney-client privilege and compel his client to incriminate itself (specifically Church officials), by turning the computer/contraband over to law enforcement.”¹⁹⁰ Under difficult circumstances, Russell tried to “make the most appropriate legal

182. Memorandum in Support of Motion to Dismiss Count One, *supra* note 164, at 2.

183. See *supra* Part II.B (discussing standards for obstruction of justice under 18 U.S.C. § 1512).

184. Motion to Dismiss Count Two at 1, *United States v. Russell*, No. 3:07-cr-00031-AHN (D. Conn. Mar. 22, 2007).

185. Memorandum in Support of Motion to Dismiss Count Two at 1, *United States v. Russell*, No. 3:07-cr-00031-AHN (D. Conn. Mar. 22, 2007).

186. *Id.* at 15.

187. Brief for Connecticut Criminal Defense Lawyers Ass’n, as Amicus Curiae Supporting Defendant’s Motions to Dismiss the Indictment, *United States v. Russell*, No. 3:07-cr-00031-AHN (D. Conn. July 2, 2007) [hereinafter Brief of Amicus Curiae].

188. *Id.* at 1.

189. *Id.* at 3.

190. *Id.* at 8.

judgment,” an effort that should not be criminalized.¹⁹¹

In response, the government “without conceding the point,” assumed that there is a nexus requirement under § 1512(c)(1) and that the government had to prove that Russell knew his actions were likely to affect a proceeding.¹⁹² While insisting that § 1519 was “intended to be broader than existing obstruction provisions”—by applying to investigations, by not requiring that the matter be pending, and by not requiring corrupt intent—the government did not directly contest the requirement of some nexus between the defendant’s action and an anticipated investigation.¹⁹³

Pointing out that this was a motion to dismiss an indictment, not a sufficiency of the evidence appeal after conviction,¹⁹⁴ the government argued the indictment sufficiently alleged facts from which the required nexus could be proved.¹⁹⁵ Because Russell specialized in criminal law and recognized the criminal implications of the child pornography, even going so far as to give Tate the name of a criminal defense lawyer, the government inferred Russell knew that destruction of the laptop would obstruct a criminal investigation and proceeding.¹⁹⁶ In sum, the government contended, “there are ample allegations in the Indictment that demonstrate that the defendant destroyed the computer, the tangible object, with at least the expectation that a future criminal proceeding was going to happen.”¹⁹⁷

5. *The Court’s Ruling on the Motions to Dismiss*

In a published decision, the District Court denied both motions to dismiss the counts in the indictment.¹⁹⁸

The court summarized Russell’s argument as that “he cannot be prosecuted for obstructing a hypothetical future federal proceeding that he did not, and could not have known about.”¹⁹⁹ In response to Russell’s contention that a conviction required a nexus between his obstructive

191. *Id.* at 11.

192. Government’s Omnibus Response to the Defendant’s Motions to Dismiss Counts One and Two of the Indictment at 7, *United States v. Russell*, No. 3:07-cr-00031-AHN (D. Conn. May 25, 2007).

193. *See id.* at 14–15.

194. *Id.* at 7.

195. *Id.* at 9.

196. *Id.* at 9–10, 11–12.

197. *Id.* at 21.

198. *United States v. Russell*, 639 F. Supp. 2d 226, 230 (D. Conn. 2007).

199. *Id.*

conduct and a reasonably foreseeable proceeding or investigation, the court accepted that statement of the law of obstruction of justice.²⁰⁰ In the court's view, "there appears to be little doubt that the nexus requirement applies to prosecutions under both obstruction of justice statutes at issue in this case."²⁰¹ (Subsequently, the Second Circuit in another case disapproved of the *Russell* court's nexus ruling, but only to the extent it suggested that an official proceeding must actually be pending for § 1519 to apply.²⁰²)

But accepting Russell's statement of the legal requirements for conviction did not translate into the court's acceptance of his arguments for dismissal of the indictment. The court explained that "[t]he validity of an indictment is tested by its allegations, not by whether the government can prove its case."²⁰³ Thus, Russell conflated the claim of what must be alleged in the indictment with what must be proven to obtain a conviction.²⁰⁴ In the court's view, the indictment adequately stated facts sufficient to allege the required nexus, by adverting to the discovery of child pornography on the computer by a church employee, Russell's specialization in criminal law, and that Russell advised Tate to contact a criminal defense attorney.²⁰⁵

In the key holding of the decision, the court stated:

Essentially, Russell's motion impermissibly asks the court to dismiss the indictment on a factual determination that the government cannot prove a nexus between his obstructive act and an official proceeding or investigation. But it is the jury, not the court, that must determine whether, at the time he destroyed Tate's Computer, an official proceeding as alleged in count one, or the FBI investigation as alleged in count two, were foreseeable to or anticipated by Russell.²⁰⁶

6. *The Church Lawyer Pleads Guilty to a Lesser Offense*

Facing a twenty-year prison term if convicted of obstruction of justice, Russell agreed to plead to the lesser offense of misprision of a

200. *See id.* at 234.

201. *Id.*

202. *See* United States v. Gray, 642 F.3d 371, 378 n.5 (2d Cir. 2011) ("By its plain terms, however, § 1519 does not require the existence of an 'official proceeding.'").

203. *Russell*, 639 F. Supp. 2d at 231.

204. *Id.* at 235.

205. *Id.* at 236.

206. *Id.* at 235.

felony,²⁰⁷ a little known catch-all criminal statute that is rarely prosecuted.²⁰⁸ Although this federal statute says broadly that a person who “conceals and does not as soon as possible make known” the commission of a felony that he knows another has committed is guilty of misprision,²⁰⁹ the courts interpret the statute to require “some affirmative act” of concealment, not merely the “passive failure to report a crime.”²¹⁰

At the hearing where he entered a guilty plea, Russell took full responsibility and said that he was “truly sorry” to the prosecution, the court, the people at Christ Church, and the community.²¹¹

Russell was sentenced to home confinement for six months and levied a \$25,000 fine.²¹² Although pleading to a lesser offense, misprision is still a felony, which carried with it not only the probationary period and fine but loss of the right to vote, to hold public office, to serve on a jury, and to possess a firearm.²¹³ In addition, Russell was suspended from the practice of law for six months.²¹⁴ He has since been reinstated and returned to his successful career as an attorney in Greenwich.²¹⁵

B. *Lessons Learned?*

1. *Does the Identity of the Destroyer Matter?*

The primary lesson that Stephen Gillers draws from this episode is that, “even when a lawyer honestly believes that destruction of potential evidence is lawful, the lawyer should not be the one to do it.”²¹⁶ In other

207. GILLERS, *supra* note 158, at 435.

208. Stuart Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 24 (2005).

209. 18 U.S.C. § 4 (2012).

210. Green, *supra* note 208, at 23.

211. Change of Plea Hearing, *supra* note 142, at 28.

212. Cowan, *supra* note 150; Molly McDonough, *Lawyer Who Destroyed Evidence Spared Jail Time*, ABA J., (Dec. 17, 2007, 5:27 PM), http://www.abajournal.com/news/article/lawyer_who_destroyed_evidence_spared_jail_time/.

213. Change of Plea Hearing, *supra* note 142, at 11.

214. GILLERS, *supra* note 158, at 435.

215. *Attorney Profiles, Philip Russell, Esq.*, PHILLIP RUSSELL, LLC (2014), <http://greenwichlegal.com/attorney-profiles/>.

216. Gillers, *supra* note 3, at 816. *But see* Proposed Revision to Standard 4-4.7(j)(ii), *supra* note 124 (encouraging adoption of procedures whereby “counsel may take possession of the contraband and destroy it” when counsel “reasonably believes that contraband does not relate to a pending criminal investigation or prosecution”). As discussed further below, see *infra* Part III.D, Gillers would address the dilemma faced by the lawyer in *Russell* by creating a new option, by which a lawyer could retain evidence while registering continued possession without thereby concealing or wrongfully possessing it. Gillers, *supra* note 3, at 867.

words, the lawyer might counsel the client to destroy the material but the lawyer should not undertake to do it herself.

For several reasons, this is good advice:

First, if the lawyer advises the client that destruction is legitimate but leaves action to the client, the lawyer's counsel may remain confidential. Indeed, because destroying an item is not something that falls within the typical understanding of legal services, the lawyer is well advised to confine her participation to providing legally informed advice to the client about whether the item constitutes evidence and whether it may be destroyed.

Second, if the client subsequently should be charged with criminal wrongdoing for destroying the item, the lawyer could be called as a witness for the defense, outlining the legal advice given and thus strengthening the argument that the destruction of the evidence was not undertaken by the client with the wrongful intent to obstruct justice.

Third, the lawyer's direct participation in destroying an item connected to the client's felonious wrongdoing does open the door to a charge of misprision of a felony.²¹⁷ Even if there is no reason to anticipate any criminal investigation or proceeding, thus precluding a legitimate accusation of an intent to obstruct justice, destroying proof of another's commission of a felony might be seen as literally falling under the misprision statute.²¹⁸

And, fourth, law enforcement attention may be less likely to be drawn to the lawyer who merely advises but does not act.

To be sure, the question remains whether the destruction of the item is lawful, whether performed by the lawyer or client, and thus whether an investigation or proceeding is reasonably foreseeable. Rule 3.4(a) admonishes a lawyer not to "unlawfully alter, destroy or conceal a document or other material having potential evidentiary value," but further states that "[a] lawyer shall not counsel or assist another person to do any such act."²¹⁹ If it is illegal to destroy an item because it constitutes real evidence, it is illegal for the lawyer to be complicit in the destruction by instructing the client to do it.²²⁰

217. See *supra* notes 207–210 and accompanying text.

218. See 18 U.S.C. § 4 (2012) (prohibiting one who has "knowledge of the actual commission of a [federal] felony" from concealing and failing to "make known" the felony to appropriate authorities).

219. MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2013).

220. See Evan A. Jenness, *Ethics and Advocacy Dilemmas—Possessing Evidence of a Client's Crime*, CHAMPION, Dec. 2010, at 16, 18 (arguing that suggesting that a client destroy evidence is an "even worse" choice).

At least one federal court of appeals, in an unpublished decision, goes to the furthest extreme by decrying any destruction of what could possibly be evidence as obstruction of justice: “It is beyond dispute that ordering the erasure of a hard drive containing child pornography, the very possession of which violates federal law, falls within the intended reach of § 1519.”²²¹ Except, of course, that it is anything but “beyond dispute” that destruction of child pornography is illegal when the prospect of a criminal investigation is low and thus the destruction cannot reasonably be characterized as intended to obstruct justice.

2. *Special Rule for Child Pornography?*

Another practical lesson from *Russell* may be that a lawyer should shun any engagement with those who have downloaded child pornography, given the peculiar disgust provoked by the abuse and exploitation of innocence.²²² (Elsewhere in this Article, the tricky problem of contraband evidence is addressed more directly.²²³) When images of sexual abuse of children are involved, the societal response has not only been severe but arguably has exceeded bounds of proportionality in many cases.²²⁴ Federal prosecutions increasingly are focused on those charged with passive possession of child pornography rather than those who have engaged in sexual abuse of children to produce child pornography.²²⁵ Moreover, “modern [sentencing] practices have resulted in some defendants who possess child pornography receiving longer sentences than defendants who sexually abuse children.”²²⁶ One study found that a person convicted of possession of

221. *United States v. Atkinson*, 532 F. App’x 873, 875 (11th Cir. 2013).

222. Cf. Christina M. Copley, *How Many Is “Any”? Interpreting § 2252A’s Unit of Prosecution for Child Pornography Possession*, 62 AM. U. L. REV. 1675, 1682 (2013) (commenting that some may support any level of enhancement of criminal sentences for offenders given “[t]he repulsive nature of child pornography”).

223. See *supra* Part II.E; *infra* Part IV.D.

224. Carol S. Steiker, *Lessons From Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 LAW & CONTEMP. PROBS. 27, 37, 41 (2013) (reporting that “[i]n the span of a single decade (from 1997 to 2007), the mean sentence of child pornography offenders increased from 20.59-months to 91.30-months confinement—an increase of 443%,” resulting in increased resistance to the severity of sentences in the courts).

225. Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1692 (2012) (reporting the increase in the number of federal prosecutions of passive child pornography cases, which involved no direct child contact, such that in 2010, “the number of defendants sentenced for nonproduction child pornography crimes was nearly five times the number of defendants sentenced for child sexual abuse offenses”).

226. Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH.

child pornography is likely to receive a significantly longer sentence in federal court than a person convicted of repeated sexual penetration of a twelve-year-old girl.²²⁷

Thus, when criminal investigators discover that a lawyer had either destroyed or counseled destruction of child pornography which proves to be relevant to an ongoing investigation, they may target the lawyer out of a sense of righteous indignation that would not be present had the destroyed item been a financial document relevant to a securities crime investigation or even narcotics relevant to a drug crime investigation.

But, again, while a lawyer may be wise to tread very softly when child pornography is at issue, that practical guideline is not a genuine legal answer to the problem. The client who has an encounter with child pornography remains entitled to professional counsel and zealous advocacy by the lawyer, whether the problem is of the client's own making (when the client is the immediate offender) or not (when the client encounters the obscenity downloaded by another, as did the church in this case). Thus, an unduly risk-averse lawyer, overly concerned with protecting herself, could become impaired by a personal conflict and be unable to offer the advice that best protects the interests of the client.

3. *Poor Professional Judgment?*

When a lawyer is representing a client in an exigent circumstance and makes a difficult choice in good faith, he should be afforded a wide range of professional discretion. To second-guess the lawyer's judgment after the fact, in either scholarly deliberation or by a criminal indictment, may well be unfair. With that caveat in mind, circumstances present in the *Russell* case suggest that the lawyer's decision to destroy the evidence may have been poor professional judgment:

First, the computer involved did not belong to the client church non-offender but to the choirmaster culprit. The lawyer's duty was only to

U. L. REV. 853, 860 (2011).

227. TROY STABENOW, FED. PUB. DEFENDER OFFICE, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES, 26–29 (rev. ed. 2009), available at <http://www.fd.org/docs/Select-Topics---sentencing/child-porn-july-revision.pdf>; see also *United States v. Dorvee*, 616 F.3d 174, 187 (2d Cir. 2010) (observing that, had defendant “actually engaged in sexual conduct with a minor,” his guidelines range sentence could have been considerably lower than for his child pornography conviction without any contact with an actual minor); *United States v. Henderson*, 649 F.3d 955, 965 (9th Cir. 2011) (Berzon, J., concurring) (observing that the federal sentencing guideline “often recommends longer sentences for those who receive or distribute images of minors than the applicable Guidelines recommend for those who actually engage in sexual conduct with minors”).

the church and thus reporting the choirmaster for possession of contraband would not have placed the lawyer in the position of betraying a client to law enforcement. Moreover, by taking possession of that computer, the church and its employees had taken possession of contraband—innocently to be sure. To avoid any later accusation of illegal possession of that contraband by the church employees, and to strengthen the defense of innocent and temporary possession, the lawyer should have advised the church to disassociate itself from the contraband by turning it over immediately to law enforcement.

Second, and for similar reasons, one may question the wisdom of a lawyer assuming possession of a non-client's property, especially for the purpose of destroying it (even assuming that third party's consent). Indeed, once the decision had been made not to report the matter to the police (itself a dubious course of action), the best alternative probably was to advise Tate to obtain legal counsel while passively allowing him to retain and remove his own possessions, including the offending laptop.

Had Tate taken and destroyed his own computer hard-drive—even if he later told federal authorities that Russell had been aware of his possession of child pornography but not prevented him from removing his own possessions from the premises—a federal prosecution of Russell is hard to imagine. Indeed, at Russell's plea hearing, the federal prosecutor went so far as to suggest that perhaps Tate would have a right to restitution from Russell for the destruction of Tate's computer,²²⁸ which only confirms that even the prosecutors in this case did not see Russell as having a possessory right or affirmative duty with respect to handling of the computer.

Third, the wisdom and morality of the decision of Russell and church leaders not to report Tate to the authorities can be questioned as well. Given the great damage that has been done to more than one religious institution when church officials failed to take immediate steps to thoroughly separate themselves from illegal behavior by ministers and other church employees relating to children, including reports to law enforcement, it is difficult to be sympathetic to the church's fear of embarrassment. At Russell's sentencing, the judge admonished Russell for acceding to the church's hope that the whole matter would just “go away.”²²⁹

228. Change of Plea Hearing, *supra* note 142, at 16 (“The government's understanding is that Mr. Russell destroyed a computer. Granted, it had child porn on it. It may be that Mr. Tate would ask the Court for restitution.”).

229. Cowan, *supra* note 150.

Moreover, at such an early stage, church leaders may not have all of the information to be sure that an employee's misconduct in one respect was not accompanied by other misconduct in similar respects. That of course was true with a powerful emphasis in this case. While even now, years later, there appears to be no indication that anyone belonging to the church was abused directly by Tate, prosecutors did claim that Tate hired and retained another employee who abused a child in the choir without reporting it to police.²³⁰

Fourth, although neither Russell nor others in the church were aware of this at the time, choirmaster Tate's misconduct was far worse and more extensive than a handful of questionable images found on his computer. As the later investigation established, mostly from Tate's own confessions, Tate had preyed on children sexually in the past, including traveling abroad to have sexual contact with minors and even bringing child prostitutes to his apartment at the church.²³¹ Had Russell known the full scope of Tate's sordid behavior, he would have been much more likely to foresee a criminal investigation.

But he did not. The fact remains that Russell and church leaders knew only that a longtime choirmaster, beloved by many parishioners, had downloaded several images of naked children.²³² Even had Russell and church leaders conducted a further investigation, there is little reason to suppose that they would have learned anything more. There is no indication that Tate ever abused a child in the parish or allowed anyone else in the parish to learn about his ongoing misconduct. While the judge at sentencing excoriated Russell for his bad judgment, focusing on Tate's sickening behavior, the judge did not suggest that Russell was aware of these matters or even that he would have uncovered them by further investigation. Even at his sentencing, when he confessed to wrongdoing, Russell continued to insist that he "did not foresee that there was gonna be law enforcement involvement."²³³

And it is very easy to find fault in Russell's choices when sitting comfortably in a faculty office (or, I would be so bold to say, sitting behind a bench). The church did not want the matter to become public.

230. *Church Choir Director Hired a Pedophile, Prosecutors Say*, N.Y. TIMES (Feb. 20, 2008), <http://www.nytimes.com/2008/02/20/nyregion/20molest.html>.

231. Cassidy, *supra* note 170; Cowan, *supra* note 150.

232. As Russell later argued in a motion in limine to exclude evidence about Tate's sexual history with minors, there is no evidence that Russell or anyone at Christ Church knew about Tate's other behavior. Motion in Limine at 1, *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn. 2007) (Crim. No. 3:07-CR-31).

233. Change of Plea Hearing, *supra* note 142, at 37.

Whether one is sympathetic to the fear of reputational harm, the client's objective remains central to any lawyer's decision. And given that the laptop contained contraband, Russell could not simply store it away somewhere without risking criminal sanction for unlawful possession of child pornography. Russell later described his decision as "impulsive, lacking in any forethought or deliberation," coming within an hour after ending up with the computer in his hands.²³⁴ Russell had to make a call on the fly, without the luxury of time and contemplation.²³⁵

4. *An Alternative Hypothetical: The Remorseful Client*

Many of us at some point in our lives engaged in moral misconduct that often constituted criminal misconduct, but reached a turning point and determined to leave that past behind. Once making that decision, abandonment or destruction of the accouterments of a criminal lifestyle may be undertaken, not to conceal evidence in anticipation of a criminal investigation, but to avoid embarrassment and make a clean break.

Consider a variation on the *Russell* scenario which may help to separate out the threads of inquiry. Suppose that, instead of being approached by the church leaders, a lawyer had been engaged by the choirmaster himself who desired to extricate himself from an addiction to pedophilic material. Imagine that this hypothetical choirmaster came to our hypothetical lawyer, bringing with him the laptop containing the child pornography. The choirmaster admits that he has a problem and that he has been downloading child pornography but insists that he has not himself abused any child or created any of the obscene material. Based on the choirmaster's narrative, the lawyer has no reason to believe that a criminal investigation has targeted him.²³⁶ The choir director then explains that he has begun psychological counseling and now wishes to separate himself entirely from the child pornography by removing his cache of such files, just as an alcoholic would rid himself of any alcohol in his house.

Certainly the lawyer in such a hypothetical circumstance must not betray the client and report him to law enforcement, which would be

234. Defendant Russell's Application for Downward Departure Consideration and/or a Non-Guidelines Sentence at 2, *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn. 2007) (Crim. No. 3:07-CR-31).

235. See Uphoff, *supra* note 115, at 1181 ("[V]ariations on the physical evidence dilemma often arise in circumstances that do not allow for careful reflection and meaningful consultation.").

236. See Gillers, *supra* note 3, at 867 (describing this variation on the *Russell* case and noting that, at the time of the hypothetical meeting, "the choirmaster might never have become the focus of an investigation").

antithetical to the fiduciary attorney-client relationship and an egregious breach of professional confidentiality.²³⁷ Moreover, given the “basic human right not to assist the government in causing one’s own destruction,”²³⁸ the client is not obliged to self-report nor is the lawyer ethically obliged to encourage him to do so (ordinarily, quite the opposite). At the same time, the lawyer cannot tell the client to simply hold on to the child pornography-tainted computer, not only because it would be detrimental to the client’s mental recovery but also because the continued possession of such contraband is illegal. And the lawyer cannot take the laptop and turn it over to law enforcement, given the ease with which computer forensics would identify the owner. As Stephen Gillers writes, surrender of the laptop to law enforcement “would certainly seal the choirmaster’s fate,” which is an “unacceptable” solution.²³⁹

The courts should long hesitate to read an obstruction of justice statute to effectively forbid a person from ever turning away from past misdeeds and shutting the door by discarding the residue of that past life. To be sure, once an investigation is underway or is reasonably anticipated, it may be too late and steps taken at that point to hide, destroy, or alter that which may constitute evidence of criminal wrongdoing are difficult or impossible to separate from an intent to impede the investigation.

But when an investigation is only a possibility from the perspective of the actor, with no awareness of law enforcement interest or objective reason to believe a specific investigation into this matter will be forthcoming, then a person should be encouraged to make a break from a criminal past. An individual’s admirable resolve to separate from wrongdoing by tossing aside the instruments and forbidden objects of that wrongdoing should not readily be characterized as the equivalent of a specific intent to obstruct justice.

Let me take it a step further and make the hypothetical even more difficult. Suppose that our hypothetical client-choirmaster had acknowledged that he is finding it difficult to take the last step and destroy the cache of child pornography. Might the lawyer offer to do it himself, just as a loved one of an alcoholic or a heroin addict might intervene by finding all of the intoxicating beverages or narcotics in the

237. *See* *Counsel for Discipline v. Tonderum*, 840 N.W.2d 487, 491–92 (Neb. 2013) (suspending a lawyer indefinitely for disclosing to the prosecution confidential information about criminal charges against a former client).

238. *See* Green, *supra* note 208, at 32.

239. GILLERS, *supra* note 158, at 435.

house and pouring them down the drain or flushing them down the toilet? If a lawyer does the hypothetical choirmaster-client this favor of facilitating his psychological rehabilitation by removing the child pornography from him and then destroying it (remembering that keeping it would amount to his own possession of contraband), would that lawyer really be targeted for criminal prosecution? If so, then the lawyer really is left with the “irreconcilable options” of abandoning a client in his moment of need, leaving the client to continue in the unlawful possession of contraband, or betraying the client to law enforcement.²⁴⁰

5. *Encouraging Zealous Advocacy and Discouraging Prosecutorial Overreach*

The prosecution of the lawyer in *Russell* plainly was designed to send a chilling message from the government to lawyers.²⁴¹ And the message was that a lawyer in possession of evidence of someone’s wrongdoing must report that person to prosecutors—or turn over the incriminating material, which is the same thing—even if the lawyer has no concrete and objective reason to believe the person is coming under criminal investigation.²⁴² When we recognize that this message remains the same even if the wrongdoer is the lawyer’s client, the danger to effective representation of possible targets of criminal investigation becomes plain. As the Connecticut Criminal Defense Association argued as amicus in the *Russell* case:

If attorneys are forced to incriminate their clients in an effort to avoid being charged with obstruction of justice themselves, zealous advocacy becomes impossible, the attorney-client relationship becomes imperiled, and the careful balance of our adversarial system is disrupted.²⁴³

The appropriate solution, then, is to balance (A) the lawyer’s need to uphold her duties to a client without fear that any misstep will lead to a criminal conviction and loss of a professional license against (B) the public interest in preventing someone from knowingly or recklessly

240. See Fails, *supra* note 9, at 423 n.123.

241. See *id.* at 429 (“Commentators largely condemned [Russell’s] prosecution as retribution and prosecutorial overreach.”).

242. See Evan T. Barr, ‘*Russell*’: Prosecuting Defense Counsel for Obstruction, N.Y.L.J., Nov. 21, 2007, at 2 (advising that, in light of the *Russell* court’s failure to dismiss, lawyers who come into possession of “questionable material” should “assume the worst, and contact the authorities right away, rather than face the dilemma of being blamed either for retaining or destroying the contraband in question”).

243. Brief of the Amicus Curiae, *supra* note 187, at 3.

destroying evidence that would be relevant in prosecuting an offender. And that line is best drawn by a presumption, consistent with the heightened burden of proof in a criminal charge of obstruction of justice, that a lawyer acts legitimately in handling and destroying documents or items unless there is a clear signal of a foreseeable criminal investigation that a reasonable lawyer would recognize. The courts should permit a prosecution for obstruction of justice against a lawyer representing a client to proceed only if convinced that a jury could find beyond a reasonable doubt that the lawyer had anticipated an investigation and acted to impede it.²⁴⁴

In *United States v. Stevens*,²⁴⁵ a federal district court took the unusual but commendable step of interrupting the prosecution of a lawyer for obstruction of justice and ordering acquittal for charges based on the lawyer's legal advice to a client.²⁴⁶ While the court acknowledged that some of the responses made by the pharmaceutical company to the Food and Drug Administration were imperfect, the in-house counsel had directed the drafting of those statements as legal advice and in good faith reliance on the advice of other internal and outside lawyers.²⁴⁷ In an earlier ruling, the court held that "the most reasonable reading" of § 1519 "imposes criminal liability only on those who were conscious of the wrongfulness of their actions," because otherwise § 1519 would "reach inherently innocent conduct, such as a lawyer's instruction to his client to withhold documents the lawyer in good faith believes are privileged."²⁴⁸

The judge in *Stevens* "carved out a specific role for the judiciary"²⁴⁹ in preventing prosecutorial overreach in targeting lawyers for obstruction of justice charges:

The institutional problem that causes me a great concern is that while lawyers should not get a free pass, the Court should be vigilant to permit the practice of law to be carried on, to be engaged in, and to allow lawyers to do their job of zealously representing the interests of their client. Anything that interferes with that is something that the court system should not

244. Barr, *supra* note 242 (saying that, on whether there was a foreseeable matter to obstruct, the *Russell* court "should have explored how these allegations, even if established at trial, ever could have led to a sustainable finding of guilt beyond a reasonable doubt").

245. Bench Ruling, Crim. No. RWT-10-694 (D. Md. May 10, 2011).

246. *Id.*

247. *Id.* at 5; see generally Fails, *supra* note 9, at 413-30 (discussing the *Stevens* case).

248. *United States v. Stevens*, 771 F. Supp. 2d 556, 561 (D. Md. 2011).

249. Fails, *supra* note 9, at 419.

countenance.²⁵⁰

IV. HOW MAY THE LAWYER ENGAGE WITH REAL EVIDENCE? THE LAW ON OBSERVATION AND EXAMINATION

For the next two parts of this Article, I assume that the documents or items involved in the cases and hypothetical discussed are indeed real evidence that is potentially relevant to a reasonably anticipated investigation or proceeding.²⁵¹ Accepting that the real evidence may not be destroyed, which would constitute obstruction of justice,²⁵² the next questions concern the lawyer's responsibilities when observing evidence without removing it or taking possession,²⁵³ after taking possession of evidence for examination,²⁵⁴ and when receiving evidence from the client or a third person,²⁵⁵ as well as the tricky problem of examining contraband evidence.²⁵⁶

A. *Defense Lawyer Observing Evidence Without Taking Possession*

When a lawyer takes actual possession of real evidence, even temporarily, special responsibilities attach.²⁵⁷ By contrast, when the lawyer learns about the location of real evidence from the client, even if followed up by passive observation, the attorney-client privilege protects against disclosure.²⁵⁸ The lawyer for a client may observe evidence in its original condition, such as by verifying that an item truly exists at a particular location or by taking photographs at the scene of a crime, at least if the lawyer takes appropriate steps to avoid altering characteristics of the scene. In sum, when based on a client's description of events or circumstances, the lawyer's knowledge and attendant observations short of taking possession of real evidence are protected by the attorney-client privilege.

In the classic "Buried Bodies Case" from Lake Pleasant, New York, a

250. *Stevens*, Bench Ruling, Crim. No. RWT-10-694, at 10.

251. *See supra* Parts II & III.

252. *See supra* Parts II.A-C.

253. *See infra* Part IV.A.

254. *See infra* Parts IV.B & E.

255. *See infra* Part IV.C.

256. *See infra* Part IV.D.

257. *See infra* Parts IV.B-E.

258. *Wemark v. State*, 602 N.W.2d 810, 816 (Iowa 1999); *Clutchette v. Rushen*, 770 F.2d 1469, 1473 (9th Cir. 1985).

person charged with murder confidentially confessed to his lawyers that he had also committed other murders and left the bodies of the victims in a wooded area, which he described to the lawyers.²⁵⁹ One of the lawyers visited the scene and found skeletal remains, which he photographed.²⁶⁰ The lawyers kept the crimes, as well as the location of the bodies, secret for many months, only revealing this information when calling the client to testify to the additional murders in support of an insanity defense at the client's murder trial. When one of the lawyers was indicted for a violation of a state statute requiring anyone knowing of the death of a person to report it to authorities to afford a decent burial, the trial court dismissed the charges on the ground that the lawyer's silence was required by the attorney-client privilege.²⁶¹

While the New York appellate court affirmed the dismissal of the indictment, it expressed unease about whether the attorney-client privilege covered the situation, saying that the lawyer's protection of the client's interest ought to be balanced against "basic human standards of decency" and "due regard to the need that the legal system accord justice to the interests of society and its individual members."²⁶² However, the New York State Bar Association ethics committee opined that the lawyers were obliged under the ethics rules not to reveal the information because it was the result of the client's confidential communication.²⁶³ In the ensuing thirty years, the consensus among scholars and other observers has been that the state bar ethics committee reached the correct result, which is that the observation of evidence in its original location by a lawyer pursuant to a client's confidential communication falls comfortably within the privilege.

B. Defense Lawyer Taking Possession of Evidence for Examination

1. Defense Lawyer's Right to Examine Evidence

A lawyer representing an actual or potential criminal defendant "has the same privilege as a prosecutor to possess and examine [physical evidence] for the lawful purpose of assisting in the trial of criminal

259. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.6.1, at 664 (1986).

260. The lawyer also moved some of the remains, *id.*, although no suggestion apparently was made in this case, arising in the early 1970s, that forensic characteristics of the scene had been altered in a material way.

261. *People v. Belge*, 372 N.Y.S.2d 798 (Cnty. Ct. 1975), *aff'd*, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976).

262. *Belge*, 376 N.Y.S.2d at 772.

263. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 479 (1978).

cases.”²⁶⁴ As the Iowa Supreme Court stated in *Wemark v. State*,²⁶⁵ “[i]f the defense lawyer does not take possession of the instrument of the crime, there can be no opportunity to have it examined for any evidence that may be critical to the defense.”²⁶⁶

Section 119 of the *Restatement of the Law Governing Lawyers* states that a lawyer properly may take possession of physical evidence of a client crime “to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence.”²⁶⁷ Accordingly, a lawyer who is not reasonably familiar with and prepared to adhere to standards for collection and examination of evidence—including modern forensic techniques, preserving and avoiding contamination of evidence, establishing the chain of custody, etc.²⁶⁸—should not remove evidence from its original location or conduct tests of the items.

Moreover, because taking possession of real evidence could lead to disclosure to the prosecution, even if law enforcement would not otherwise have discovered it,²⁶⁹ defense counsel should acquire real evidence only if “*they believe the client’s defense genuinely requires it.*”²⁷⁰ Indeed, commentators advise that “a lawyer can avoid some subsequent legal and ethical dilemmas by refusing to take possession of evidence of a client’s crime.”²⁷¹

Today, however, a lawyer’s right to independent examination of real evidence takes on heightened importance as the infirmities of state and county crime laboratories become increasingly manifest.²⁷² A series of public scandals involving law enforcement-affiliated crime labs, from the St. Paul, Minnesota police department crime lab to the North Carolina State Bureau of Investigation crime lab, have revealed a troubling absence of standard procedures, faulty testing techniques, the failure to acknowledge when initial test results could not be confirmed, a general “pro-prosecution bias,” and poorly trained staff with a “woeful

264. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 cmt. b (2000).

265. 602 N.W.2d 810 (Iowa 1999).

266. *Id.* at 817.

267. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119(1) (2000).

268. *See generally* OFFICE OF JUSTICE PROGRAMS, CRIME SCENE: A GUIDE FOR LAW ENFORCEMENT (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/178280.pdf> (providing guidelines for law enforcement officers).

269. *See infra* Part IV.B.2.

270. Norman Lefstein, *Incriminating Physical Evidence, the Defense Attorney’s Dilemma, and the Need for Rules*, 64 N.C. L. REV. 897, 931 (1986) (emphasis in original).

271. Joy & McMunigal, *supra* note 37, at 55.

272. *See* Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 782–83.

ignorance of basic scientific principles.”²⁷³ A 2009 study of public forensics labs by the National Academy of Sciences reported:

[T]he quality of forensic practice in most disciplines varies greatly because of the absence of adequate training and continuing education, rigorous mandatory certification and accreditation programs, adherence to robust performance standards, and effective oversight. These shortcomings obviously pose a continuing and serious threat to the quality and credibility of forensic science practice.²⁷⁴

Even before it arrives at the crime lab, police may fail to properly collect, handle, and preserve real evidence.²⁷⁵

For many reasons, then, defense counsel should hesitate to accept any forensic findings by law enforcement. Effective assistance of counsel for a criminal defendant, as expected under the Sixth Amendment, may mandate independent scientific testing of real evidence.²⁷⁶

Indeed, if it truly is the case that a criminal defense lawyer has the same privilege to examine the evidence as does a prosecutor, then the defense lawyer should also have the right to conduct or arrange for laboratory tests of the evidence, even if such testing may affect the characteristics of the evidence. When appropriate forensic examination of real evidence will unavoidably degrade the evidence or change its characteristics, the criminal defense lawyer nonetheless should be permitted to conduct those tests. No principle of law requires that a criminal defense lawyer defer to or grant priority to law enforcement-affiliated crime labs. Prosecutors should not later be heard to insist that a defense lawyer should have immediately surrendered the evidence, refrained from any testing, and abjectly deferred to state or county crime laboratories that may or may not be competent to perform the task.

In sum, contrary to the conventional wisdom held by many lawyers,

273. Mark Hansen, *A String of Shoddy, Suspect and Fraudulent Results Has Put Forensics Labs under the Microscope*, A.B.A. J., Sept. 2013, at 45, 46–50.

274. NAT'L ACAD. OF SCIS., *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* 6 (2009), available at http://www.nap.edu/openbook.php?record_id=12589&page=6.

275. Uphoff, *supra* note 272, at 782 (referring to the “Myth” that “the Police Properly Collect, Handle, Preserve, and Analyze Forensic Evidence”).

276. See STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1(d) (Proposed Revisions 2010) (stating that defense counsel’s “investigation should include independent evaluation of the prosecution’s evidence (including possible retesting or reevaluation of physical, forensic, and expert evidence)”), appended to Rory K. Little, *The Role of Reporter for a Law Project*, 38 HASTINGS CONST. L.Q. 747, 785 (2011) [hereinafter PROPOSED REVISIONS TO ABA STANDARDS FOR CRIMINAL JUSTICE].

law enforcement does not hold a legal monopoly on the finding and examination of real evidence. While a defense lawyer may not invade a crime scene that is under the control of law enforcement, that lawyer is not prohibited from visiting the crime scene beforehand or afterward.

To be sure, the criminal defense lawyer may take a risk of being accused of improper behavior or of obstruction of justice if she visits a crime scene, examines and tests evidence, and the evidence is thereby necessarily or inadvertently altered. When law enforcement personnel improperly handle or incompetently test evidence, they rarely need fear an obstruction of justice charge. But a criminal defense attorney or investigator may well come under greater scrutiny and be extended little benefit of the doubt.

Not surprisingly, criminal defense lawyers are leery about engagement with real evidence, at least prior to examination by law enforcement. For practical reasons, including the sad possibility of overzealous reaction by prosecutors, this is understandable. But reticence is not legally compelled and, indeed, zealous advocacy for a criminal defendant may require such engagement, as uncomfortable as it may make the criminal defense lawyer.

After this Article had originally been written, the Council of the American Bar Association's Criminal Justice Section approved a revised draft of Standard 4-4.7 of the *Standards for Criminal Justice* that more affirmatively recognizes the criminal defense lawyer's right to conduct independent forensic examination and testing of physical evidence.²⁷⁷ Indeed, in contrast with the *Restatement of the Law Governing Lawyers*,²⁷⁸ this revised Standard—if ultimately approved by the ABA House of Delegates—would authorize testing that alters forensic characteristics, as long as the testing does not consume or destroy the item.

Under paragraph (g) of the proposed revision, a lawyer who “determines that effective representation of the client requires that the evidence be submitted for forensic examination and testing” would be permitted to go forward.²⁷⁹ The lawyer would be expected to follow procedures for handling the evidence that “insure its integrity” and to “avoid, whenever possible, consumption of the item” so that the evidence could later be tested or examined by the prosecution.²⁸⁰ If a test

277. Proposed Revision to Standard 4-4.7(g), *supra* note 124.

278. *See supra* note 267 and accompanying text.

279. Proposed Revision to Standard 4-4.7(g), *supra* note 124.

280. *Id.*, Standard 4-4.7(g)(i) to (ii).

of the evidence would “entirely consume or destroy the prosecution’s opportunity to re-test the item,” then a criminal defense lawyer would be obliged to notify the prosecution to allow an opportunity to object and ask for judicial relief.²⁸¹

If the forensic testing by the criminal defense team does change or alter material characteristics of real evidence, then the defense lawyer might be required to share the laboratory results or at least confirm that testing was done, at the appropriate time.²⁸² However, in discussing disposition of evidence immediately below, I submit that notification of forensic testing need be made only when law enforcement appropriately and independently obtains the evidence. If law enforcement would not find the evidence for reasons other than the lawyer’s interference (such as a failure to search the original location), then law enforcement should not receive the windfall of defense counsel’s diligent work in conducting a test of the evidence—unless, of course, the defense intends to use the evidence as exculpation, in which case early disclosure is probably wise.

Under the proposed revision of the ABA Standard, a criminal defense lawyer who planned to conduct testing that would consume or destroy the evidence altogether would be required to give advance notice to the prosecution.²⁸³ Given that consumptive testing would deprive the prosecution of any opportunity to conduct its own tests, such a notice requirement tends to uphold fair and equal treatment in the adversarial process. Under similar circumstances, law enforcement presumably has a similar duty of advance notice to defense counsel when forensic testing would consume or destroy physical evidence. Circumstances are not always parallel, of course; law enforcement may need to conduct testing before a suspect has been identified or when exigencies of public safety are present.

When a criminal defense lawyer’s examination or testing of evidence has not consumed the item, but some characteristics necessarily have been altered at least to the extent of indicating the evidence was handled, the defense lawyer is under no such duty to provide advance notification. Indeed, the criminal defense lawyer should not be obliged to confirm the existence of the real evidence or that non-consumptive testing was performed unless and until law enforcement has independently discovered the evidence in its original location or from the original

281. *Id.*, Standard 4-4.7(g)(iv) to (v).

282. *Cf.* Uphoff, *supra* note 115, at 1211 (“If testing will use up the entire sample, however, and then [the lawyer] decides to test anyway, she is obligated to reveal the results to the authorities even if doing so might prove incriminating.”).

283. Proposed Revision to Standard 4-4.7(g), *supra* note 124.

possessor.

2. *Disposition of Evidence by Defense Lawyer After Examination*

After a lawyer has taken possession of real evidence of a potential crime for examination or testing, the crucial remaining question regards proper disposition of that evidence. And on this point, the authorities are in conflict.

Comment 2 to Rule 3.4 is equivocal, saying that the “law *may* require the lawyer to turn the evidence over to the police or other prosecuting authority, *depending on the circumstances.*”²⁸⁴ A few state court decisions suggest the lawyer must turn over real evidence to the government after testing,²⁸⁵ but these courts arrive at that conclusion with little analysis and without careful evaluation of defense counsels’ professional responsibilities and defendants’ constitutional rights.²⁸⁶

By contrast, Standard 4-4.6 of the American Bar Association’s *Standards for Criminal Justice* suggests that the lawyer should disclose the location or deliver the item to law enforcement only if law or a court order requires or, depending on the circumstances, if the item is contraband.²⁸⁷ Instead, as a general rule, Standard 4-4.6 directs that the lawyer should return such evidence to the source, which may be either a person or a location.²⁸⁸ The commentary to the standard warns that a mandate to turn over all real evidence to the government would discourage defense counsel investigations and undermine the confidentiality of attorney-client communications.²⁸⁹

In the course of preparing the *Restatement of the Law Governing Lawyers*, the drafters at the American Law Institute began with one position (which coincided with that of the *Standards for Criminal Justice*) but ended with another. A tentative draft of the *Restatement* would have allowed the lawyer “to return the evidence to the site from which it was taken, when that can be accomplished without destroying

284. MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. 2 (2013) (emphasis added).

285. See Joy & McMunigal, *supra* note 37, at 45.

286. Lefstein, *supra* note 270, at 918. For further discussion of the erroneous conventional wisdom that real evidence must be delivered to law enforcement after examination, see *infra* Part IV.E.

287. STANDARDS FOR CRIM. JUST. § 4-4.6(a)(1), (a)(2), (d) (1993).

288. *Id.* § 4-4.6(b). The commentary to the standard explains that “[t]his rule of return to the source applies whether the source is the client, a third party, or a physical location.” *Id.* § 4-4.6 cmt.; see also Hitch v. Superior Court, 708 P.2d 72, 78 (Ariz. 1985) (en banc) (allowing attorney to return evidence to source).

289. STANDARDS FOR CRIM. JUST. § 4-4.6 cmt.

or altering material characteristics of the evidence.”²⁹⁰ However, in the final version of the *Restatement of the Law Governing Lawyers*, the provision allowing return of the item to the site from which it was taken was deleted. Section 119 instead states that, after possession, “the lawyer must notify prosecuting authorities of the lawyer’s possession of the evidence or turn the evidence over to them.”²⁹¹

Notwithstanding this change in language to this *Restatement* section, the accompanying comment notes that some decisions “allude[] to an additional option—returning the evidence to the site from which it was taken, when that can be accomplished without destroying or altering material characteristics of the evidence,” although the comment suggests that approach “will often be impossible.”²⁹² Ronald Rotunda and John Dzienkowski similarly argue that “[i]n light of advances in forensic science, it is hard to imagine how a lawyer could return physical evidence to the scene of the crime without leaving the lawyer’s DNA on the evidence or without feeling the need to remove fingerprints and other indicia of the lawyer’s possession of the evidence,” which conduct “would constitute tampering or altering the evidence.”²⁹³

In my view, the option of returning the evidence to its source after examination ought to be presumptively and generally available. Law enforcement would not be disadvantaged and would have every fair and reasonable opportunity to discover the evidence at its original location. When the evidence is promptly returned to its original place, even after the lawyer has examined it, the situation is restored to what it would have been had the lawyer merely been informed of the location (which of course imposes no duty of disclosure).²⁹⁴ While a lawyer may have “no right to make the police officer’s job more difficult with respect to the discovery of physical evidence,”²⁹⁵ the lawyer also has no duty to make the police officer’s job any easier. As Stephen Gillers writes, “[t]he [ethical] rules don’t transform the lawyer for a private client into

290. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 179 (Tentative Draft No. 8, 1997).

291. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119(2) (2000); *see also* 1 HAZARD & HODES, *supra* note 33, § 9.32, at 9-130 (arguing that, while mandatory disclosure “run[s] counter to the tradition of client loyalty, any other rule would inevitably degenerate into a race between the police and a suspect’s lawyer to be first to take possession of evidence”).

292. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 cmt. c (2000).

293. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE § 3.4-2(a), at 821 n.10 (2013/2014).

294. Lefstein, *supra* note 270, at 929; *see also supra* Part IV.A.

295. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 30.5, at 30-14 (3d ed., 2001 & Supp. 2011).

an arm of the state.”²⁹⁶

Moreover, the defendant’s constitutional right against self-incrimination is not adequately preserved if a lawyer who examines evidence must thereafter deliver it up to law enforcement.²⁹⁷ Even if the real evidence is not a document that amounts to a testimonial statement, and thus is not itself protected by the Fifth Amendment right against self-incrimination, the Supreme Court in *Fisher v. United States*²⁹⁸ observed that the act of producing evidence has “communicative aspects of its own, wholly aside from” the nature of the paper or item.²⁹⁹ Thus, as the Court held in *United States v. Hubbell*,³⁰⁰ the Fifth Amendment is implicated when the act of production “could provide a prosecutor with a ‘lead to incriminating evidence,’ or ‘a link in the chain of evidence needed to prosecute.’”³⁰¹ Indeed, two members of the *Hubbell* Court found historical evidence “that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence.”³⁰²

To compel an attorney who has examined evidence, which the attorney uncovered through the client’s confidential communication, to then pass it on to law enforcement is constitutionally dubious. In that scenario, the accused has been degraded into “the deluded instrument of his own conviction.”³⁰³ As Monroe Freedman and Abbe Smith emphasize, a criminal “defendant’s constitutional privilege against self-incrimination [is] safeguarded by his constitutional right to counsel.”³⁰⁴ At the very least, as Kevin Reitz rightly insists, “[t]here should be no constitutional tariff upon the act of obtaining counsel.”³⁰⁵

To be sure, in many or most cases that involve real evidence other than documents, it may be impossible to return physical evidence to the

296. STEPHEN GILLERS, ESSENTIALS: REGULATION OF THE LEGAL PROFESSION 243 (2009).

297. Gillers, *supra* note 3, at 824–29.

298. 425 U.S. 391 (1976).

299. *Id.* at 410. On the privilege against self-incrimination as preventing a suspect from being compelled to produce real evidence where production would authenticate evidence, admit that it exists, or show the suspect had control over it, see generally Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege*, 41 DUKE L.J. 572, 642–45 (1991).

300. 530 U.S. 27 (2000).

301. *See id.* at 41–42.

302. *Id.* at 49 (Thomas, J., concurring).

303. *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961) (quoting 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 595 (8th ed. 1824)).

304. MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS § 6.16, at 175 (4th ed. 2010).

305. Reitz, *supra* note 299, at 650.

original location without some alteration of material characteristics at the site, if not in the evidence itself. Thus, under *Restatement* § 119, the lawyer who has taken possession of physical evidence of a client crime for examination would be obliged to notify the prosecuting authorities that the lawyer has the evidence or to directly turn the evidence over to those authorities. But the conclusion reached by the *Restatement* does not logically follow. As Gillers aptly writes, the “breadth” of the *Restatement* § 119 mandate to deliver evidence to law enforcement is “astonishing.”³⁰⁶

To begin with, if the forensic properties of the site or the evidence itself have been altered by the criminal defense lawyer exercising the right to examine the evidence, then that change in characteristics will have occurred whether the lawyer returns the evidence to its original location or instead delivers it to law enforcement. The question is not whether there are changes caused by the lawyer’s appropriate examination but what should be done to apprise law enforcement of such changes. Thus, the real issue is whether, when, and how law enforcement should be notified of those changes in the evidence so that law enforcement is not disadvantaged by the lawyer’s otherwise proper examination.

Ordering that the lawyer deliver real evidence to law enforcement after examination ensures both that law enforcement will gain access to the evidence, which may or may not otherwise have occurred, and that law enforcement will know that the lawyer had been an intervening player, which thus explains any changes in forensic characteristics. The government may be entitled to the latter, but not the former. If there is a way to fairly ensure that lawyer-caused changes in forensic characteristics come to the attention of law enforcement if and when it finds evidence, then there is no reason to give law enforcement the windfall of delivery of evidence that it would not have found on its own. Again, given that the lawyer’s knowledge about the real evidence and its location frequently comes from a confidential communication to the lawyer, simply delivering the evidence to law enforcement in every case punishes the client for the confidential communication and discourages defense counsel from exercising the important right to examine evidence. In sum, imposing a general and unqualified duty of delivery of examined evidence to the government contravenes basic principles of professional responsibility as well as a criminal defendant’s constitutional right against self-incrimination and constitutional

306. Gillers, *supra* note 3, at 848.

entitlement to effective assistance of counsel.

As discussed below, Gillers proposes a new registry system which would allow lawyers to retain evidence while giving law enforcement access to that evidence if an investigation later is directed against the client and law enforcement is unaware of the lawyer's retention.³⁰⁷ In any event, the lawyer who examines evidence should be permitted to return it to the original location, notwithstanding forensic consequences (at least as long as the lawyer acted with reasonable care in compliance with expectations of forensic science).

In most instances, the lawyer could simply attach a note or label to the real evidence, perhaps encased in clear plastic like the common desk-top paper weight. The plastic casing would serve to hold down the note, so it does not blow away, and to protect it from the elements. The note would inform law enforcement that, if the evidence should be discovered, that the lawyer conducted forensic testing and that the examination necessarily made changes in the site or evidence. And if the original location of the evidence is the client's home or place of business, the lawyer will be informed if a search is conducted, at which point the lawyer might be obliged to explain any alteration. In neither case has the lawyer caused an obstruction of the investigation, much less had the requisite specific intent to do so.³⁰⁸ Instead, the lawyer would be prepared to offer appropriate assistance to the investigation through the sharing of information if and when that investigation successfully uncovers the evidence.

In any event, the option to replace evidence plainly is appropriate when the item does not contain any material forensic characteristics that could be altered. In particular, real evidence within the scope of this Article includes not only objects, but also documents and computer data. Documents and electronic data ordinarily may be returned to the original location, such as a client's office files or computer archives, without affecting any evidentiary characteristics (and assuming the client has been appropriately counseled about the law against improper concealment or destruction of evidence).

Whatever might be the correct disposition of evidence under other circumstances, when even temporary possession of the evidence by the lawyer has operated to deny lawful discovery of the evidence by law enforcement, the lawyer then probably should be obliged to disclose the evidence to law enforcement. For example, if the lawyer was holding the

307. *See infra* Part IV.E.

308. *See supra* Parts II.C.2 & D.

evidence at the very point in time that a search warrant was executed at the client's home or that police searched the site where the item was originally located, then returning the item to its original location afterward is effectively a form of concealment.

If, contrary to the above analysis, a jurisdiction does insist that disclosure of real evidence to law enforcement must follow any possession of it, then the lawyer ordinarily would have to avoid any examination beyond the most passive observation.³⁰⁹ As Rodney Uphoff predicts, “[z]ealous defense lawyers will be extremely reluctant to take possession of evidentiary items at all, if doing so always requires disclosure to the authorities.”³¹⁰ And, as discussed previously, the lawyer thereby may be unable to effectively prepare for the defense and must rely on dubious government-controlled forensics testing.

3. *Preserving Confidentiality if Defense Lawyer Delivers Evidence to Law Enforcement*

If the lawyer must deliver real evidence to the authorities,³¹¹ Standard 4-4.6(c) of the ABA's *Standards for Criminal Justice* directs that it be done in the manner “best designed to protect the client's interests.”³¹² When possible, and when it matters, the lawyer should arrange for anonymous delivery through another person or perhaps the local bar association,³¹³ an ingenious option put into practice by the District of Columbia Office of Bar Counsel.³¹⁴ But if the lawyer has removed the item from a location that itself has evidentiary value, then failing to disclose as much could be regarded as concealing evidence (which is all the more reason to permit the item to be returned to the original location).

If anonymous delivery is not available or practically effective, the prosecution and the lawyer should make appropriate arrangements for introduction and authentication of the evidence in a manner that preserves client confidences as much as possible. As suggested in the comment to the *Restatement of the Law Governing Lawyers*, to avoid

309. Uphoff, *supra* note 115, at 1190 (noting that, if California case law requires turning over real evidence sua sponte, then a competent lawyer must refuse to retrieve the evidence rather than ensure that the prosecution gains access to it).

310. *Id.* at 1213.

311. *But see supra* Part IV.B.2.

312. STANDARDS FOR CRIM. JUST. § 4-4.6(a)(1), (a)(2), (d) (1993).

313. *Id.* § 4-4.6 cmt.; *see also* Uphoff, *supra* note 115, at 1199, 1221.

314. *See* RULES OF PROF'L CONDUCT R. 3.4, cmt. 5 (D.C. Bar Ass'n 2014).

prejudice to the client and to preserve attorney-client confidentiality, the material or items should be admitted into evidence at the trial “without improperly revealing the source of the evidence to the finder of fact.”³¹⁵ The proposed revision to Standard 4-4.7 of the ABA *Standards for Criminal Justice* recently approved by the section council recommends, “the prosecution should be prohibited from presenting testimony or argument identifying or implying the defense as the source of the evidence, except where the defense objects to introduction of such evidence for lack of foundation.”³¹⁶

Still, the value of such arrangements for the client should not be overstated, nor should the duty to deliver to law enforcement be casually accepted on the assumption such protections in introduction of evidence will mitigate harm to the defendant. As Stephen Gillers notes, withholding the identity of the source of the item “may be small comfort to the client if the thing itself must be turned over and can implicate the client in a crime (e.g., if it’s the victim’s wallet containing the client’s fingerprints).”³¹⁷

In the classic California case of *People v. Meredith*,³¹⁸ based on a confidential communication by the client with the lawyer, an agent of the lawyer retrieved a wallet, which had belonged to the victim of a robbery and homicide, from a burn barrel located near the defendant’s home. The lawyer examined the contents of the wallet to confirm it was the victim’s, and then turned it over to the police. By removing it from the original location, the lawyer of course had altered the evidence; it was as if the wallet “bore a tag bearing the words ‘located in the trash can by [defendant’s] residence,’” and the lawyer, “by taking the wallet, destroyed this tag.”³¹⁹ Thus, under those circumstances, the prosecutor was entitled to bring to the jury’s attention that the wallet had been found in that particular location. In an important footnote, the California Supreme Court advised:

[T]he 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

315. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119, cmt. c (2000).

316. Proposed Revision to Standard 4-4.7(j)(ii), *supra* note 124.

317. GILLERS, *supra* note 296, at 249.

318. 631 P.2d 46 (1981).

319. *Id.* at 53.

those facts from defendant.³²⁰

C. *Evidence Delivered to Defense Lawyer*

Even when a lawyer has not affirmatively taken possession of real evidence of a possible crime to examine it, such evidence nonetheless may find its way into the lawyer's hands by being delivered to the lawyer by a client or another person.

A lawyer should not counsel another person, whether a client or otherwise, to remove evidence from its original location if to do so would effectively destroy or alter the evidence, including forensic characteristics that a trained criminal investigator could discover. Thus, for example, the lawyer should not direct a client to return to the scene of a crime and carry away objects that were present there, even for the purported purpose of examining the object in the lawyer's office, because such removal probably could not be accomplished without altering material characteristics of the scene or the evidentiary object. If the lawyer wishes to exercise the right to examine the evidence,³²¹ the lawyer herself should make proper arrangements for doing so.

By contrast, if the evidence is already in the client's immediate possession or is located in a place where it may be retrieved without changing evidentiary qualities (such as the client's home or office), the lawyer may ask to see it or ask the client to retrieve it. For example, the lawyer may ask the client to take documents out of the client's files for delivery to the lawyer for examination and to make copies. If the client did remove evidence from the scene (perhaps prior to receiving a lawyer's contrary advice) or the evidence has always been in the client's possession, and the client then delivers it to the lawyer, the lawyer may accept temporary possession of that evidence for examination purposes as discussed above.³²² Disposition of the evidence afterward is a more complex question, as addressed above and below.³²³

When the lawyer has received evidence from a client or other person, the American Bar Association's *Standards for Criminal Justice* state that the lawyer may be permitted to return the evidence to the person who delivered it, while counseling that person regarding the illegality of

320. *Id.* at 54 n.8; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 cmt. c (2000) ("The parties may also agree that the tribunal may instruct the jury, without revealing the lawyer's involvement, that an appropriate chain of possession links the evidence to the place where it was located before coming into the lawyer's possession.").

321. See *supra* Part IV.B.1.

322. See *supra* Part IV.B.1.

323. See *supra* Part IV.B.2; *infra* Part IV.E.

concealing, altering, or destroying that evidence after taking it back.³²⁴ By this guideline, the lawyer must seriously impress upon the client or other person who brought the evidence to the lawyer that hiding the item, destroying it, or changing its evidentiary characteristics might constitute obstruction of justice, assuming that the item has potential evidentiary value to a reasonably anticipated criminal proceeding.³²⁵ In explaining to a client the legal consequences of retaining or destroying the evidence, the lawyer may also offer “any good-faith arguments for contesting the validity or applicability of the law to the client’s situation.”³²⁶

However, leading authorities place important limitations on the lawyer’s ability to return evidence to the person who delivered it. First, the evidence can be returned to the person who delivered it only if that person also is the rightful owner or possessor.³²⁷ Thus, if a client or other person delivers to the lawyer material that not only is evidence of a crime but which has been taken from another, such as stolen property, the lawyer is obliged to see that these materials are either presented to law enforcement or are restored to the rightful owner from whom they were wrongfully taken (which can be accomplished anonymously).³²⁸ Not only is retention of stolen goods a crime, but it could be criminal misconduct for “the lawyer, once having taken possession of the goods, to return them to the thief.”³²⁹ Geoffrey Hazard and William Hodes state that the lawyer has “no right to delay return of the fruits of crime to their rightful owners.”³³⁰

Second, even when the person who delivered the evidence to the lawyer is the rightful possessor, the *ABA Standards* provide that the lawyer may not return the evidence to that person if the lawyer reasonably fears that evidence will be unlawfully destroyed or altered.³³¹

324. STANDARDS FOR CRIM. JUST. § 4-4.6(b) (1993).

325. On the duty to preserve and not destroy evidence, see *supra* Part II.

326. Joy & McMunigal, *supra* note 37, at 44.

327. See RULES OF PROF’L CONDUCT R. 3.4(a) (D.C. Bar Ass’n 2014) (providing that when a lawyer receives physical evidence that belongs to someone other than the client, “the lawyer shall make a good faith effort to preserve it and to return it to the owner”).

328. STANDARDS FOR CRIM. JUST. § 4-4.6 cmt.

329. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 45 cmt. f (2000).

330. 2 HAZARD & HODES, *supra* note 295, § 30.5, at 30-14.

331. STANDARDS FOR CRIM. JUST. § 4-4.6(c); see also *Hitch v. Superior Court*, 708 P.2d 72, 78 (Ariz. 1985) (en banc) (“[I]f the attorney reasonably believes that evidence will not be destroyed, he may return it to the source, explaining the laws on concealment and destruction.”). The proposed revision to Standard 4-4.7 approved by the ABA section council in early 2014 would provide that counsel *may* take possession of evidence when counsel fears that the evidence would be destroyed,

If the lawyer has reason to believe that the client or other person will not treat the evidence with respect, then Standard 4-4.6(c) states that the lawyer may not return it to the source heedless to its likely destruction or concealment.³³² In most cases involving an ordinary street crime then, the lawyer would not act reasonably under Standard 4-4.6(c) in returning evidence plainly indicating illegal conduct, such as the instrumentalities of the crime or clothing stained with blood, to the apparent perpetrator, who almost certainly would conceal or destroy it.

But the assumption that the lawyer's fear of possible destruction by another, even over the lawyer's contrary advice, imposes a duty to retain the evidence should be questioned. The lawyer had no duty to accept the evidence in the first instance, even for temporary examination. And the lawyer "does not have a corresponding duty to preserve incriminating evidence not in her possession or control."³³³ Since returning it to the person who delivered it to the lawyer initially would simply restore the status quo that existed before taking temporary possession, one should wonder why the lawyer would be obliged to retain it even though she reasonably fears that it may be destroyed.³³⁴ To be sure, the lawyer should counsel the person to whom it is returned about the legal duty to preserve and not conceal evidence (under the law of obstruction of justice).³³⁵ But the lawyer's temporary examination of the evidence should not so easily be converted into a duty to take permanent possession of it, even to prevent its destruction or concealment by someone else—especially if the (mistaken) conventional assumption prevails that a lawyer taking possession of evidence must then deliver it to law enforcement.

In any event, when a business client has shared documents with the lawyer that are arguably relevant to an alleged financial crime, returning the documents with the instruction that they should be placed back in the client's files is appropriate, at least provided the lawyer has a reasonable basis for believing the client will comply. In addition, the lawyer could retain copies of those documents, with the client's understanding that, should the client conceal or destroy them, the lawyer *might* be obliged to

but does not appear to impose a requirement. Proposed Revision to Standard 4-4.7(d)(i), *supra* note 124. Again, the assumption here is that the real evidence is pertinent to a pending or reasonably anticipated criminal investigation or proceeding and thus may not be lawfully destroyed. On the duty to preserve and not destroy evidence, see *supra* Part II.A.

332. STANDARDS FOR CRIM. JUST. § 4-4.6(c).

333. Uphoff, *supra* note 115, at 1203.

334. Gillers, *supra* note 3, at 847.

335. See *supra* Parts II & III.

provide those copies to law enforcement. With respect to any real evidence and for the purpose of memorializing the matter in the event of later inquiry, the ABA's *Standards for Criminal Justice* direct the lawyer to prepare a written record for the lawyer's files of the item and its return to the source.³³⁶

Third, under the ABA *Standards for Criminal Justice*, the lawyer should not return an item to the client or other person if the lawyer "reasonably fears that return of the item to the source will result in physical harm to anyone."³³⁷ Thus, for example, the lawyer understandably will be reluctant to return a weapon to a client if the lawyer has a reasonable basis to believe that the weapon has been or may be used in a crime. Toxic substances, even if legal to possess, likewise ought not be left in the hands of a person without appropriate training and equipment to handle them safely.

Fourth, for obvious reasons and as discussed in a separate part below, the lawyer ordinarily may not simply return contraband items to a client for continued possession, because the client's restored possession of the item may be unlawful.³³⁸

If the lawyer must turn over real evidence to law enforcement when it cannot be returned to the person who delivered it, then the lawyer generally should decline to accept such evidence in the first instance. By declining to accept real evidence, the lawyer takes on no responsibility for its preservation or disposition,³³⁹ and thus no conceivable duty to act against the client's interests by handing the evidence over to law enforcement. To be sure, the lawyer ought to warn the continuing possessor about the consequences of retaining or destroying it and the legal significance of real evidence.

Whenever the lawyer is unable to return items to the source or to the rightful owner and is obliged to deliver the item to law enforcement, the lawyer ought to take steps to protect the client's confidentiality by withholding information about the source of the evidence.³⁴⁰ As Charles Wolfram observes, while courts frequently have obliged lawyers to turn over evidence to law enforcement, "courts have drawn the line at the turn-over obligation . . . and have generally protected the lawyer's information about the source of the incriminating evidence if that source

336. STANDARDS FOR CRIM. JUST. § 4-4.6(b).

337. *Id.* § 4-4.6(b).

338. *See infra* Part IV.

339. Gillers, *supra* note 3, at 855-56.

340. *See supra* Part IV.B.3.

is the lawyer's client."³⁴¹ As the Washington Supreme Court stated in *State v. Olwell*,³⁴² an early decision on this subject, "the state, when attempting to introduce such evidence at the trial, should take extreme precautions to make certain that the source of the evidence is not disclosed in the presence of the jury and prejudicial error is not committed."³⁴³

D. *The Tricky Problem of Contraband*

Both the ABA (in the *Standards for Criminal Justice*) and the American Law Institute (in comments to the pertinent section of the *Restatement of the Law Governing Lawyers*) take the position that a lawyer may take temporary possession of contraband as part of his professional duties in representing a client. The *Standards for Criminal Justice* generally permit a lawyer to "receive" an item of physical evidence for, among others reasons, "to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client."³⁴⁴ While the lawyer then has a duty to either destroy the item or notify law enforcement when the item is contraband,³⁴⁵ the initial reception of it for examination falls under the general permissive rule. The *Restatement* comment states that as long as the lawyer's possession of materials is for the purposes of examining or testing physical evidence of a possible client crime, "criminal laws that generally prohibit possession of contraband or other evidence of crimes are inapplicable to the lawyer."³⁴⁶

Provided the lawyer holds it only for a short duration and only to confirm its nature, this is a sensible approach. Indeed, with respect to most items, that the item truly is contraband would not be certain until after some objective examination, even if it appears from a first-glance to be an item the possession of which is prohibited. Thus, what appears to be cocaine could be an innocuous white powder; what appears to be child pornography could be depictions of a young-looking adult.

The more difficult question is what to do with the contraband after examination. The conventional wisdom is that when "an object is contraband . . . the obligation to turn it over to law enforcement is self-

341. WOLFRAM, *supra* note 259, § 12.3.5, at 645.

342. 64 Wash. 2d 828, 394 P.2d 681 (1964).

343. *Id.* at 685.

344. STANDARDS FOR CRIM. JUST. § 4-4.6(c)(4) (1993).

345. *Id.* § 4-4.6(d).

346. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 cmt. b (2000).

executing, and no prosecution motion or court order is required.”³⁴⁷ But the *ABA Standards for Criminal Justice* are more nuanced:

If such destruction is not permitted by law or if in defense counsel’s judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.³⁴⁸

The *Standards* thereby suggest that the lawyer’s judgment on whether to retain or disclose the item turns, not on whether it is contraband (unless it is destroyed as not relevant evidence), but on whether counsel may otherwise retain the item. In sum, the *Standards* contemplate the same analysis that would apply generally to a lawyer’s disposal of evidence after examination.³⁴⁹

In a professional disciplinary proceeding, the Montana Supreme Court, citing to the *Standards*, approved a lawyer’s taking possession of contraband for purposes of examination. In the case of *In re Olson*,³⁵⁰ a lawyer for a criminal defendant accused of possession of child pornography was contacted by the client’s mother who suggested there were items in the client’s apartment that the lawyer should view.³⁵¹ The lawyer went the apartment and took possession of photographs, which depicted naked young children in erotic poses.³⁵² Although the lawyer testified that he did not believe the photographs constituted child pornography, the court later stated that it was “difficult . . . to comprehend how anyone would not ‘know’ that these are examples of child pornography.”³⁵³ Nonetheless, even assuming the photographs were child pornography, the court concluded that the lawyer had engaged in no misconduct, recognizing that he “had a duty to conduct an investigation on behalf of his client and prepare a defense.”³⁵⁴ Moreover, the *Olson* court noted that, while the state had not formally adopted them, the *ABA Standards for Criminal Justice* were properly relied on

347. Jenness, *supra* note 220, at 18.

348. STANDARDS FOR CRIM. JUST. § 4-4.6(d).

349. *See supra* Part III.B.2.

350. 222 P.3d 632 (Mont. 2009). For a thoughtful and complete discussion of *Olson*, see Uphoff, *supra* note 115, at 1204–09.

351. *Olson*, 222 P.3d at 634.

352. *Id.*

353. *Id.* at 638.

354. *Id.*

“for guidance in analyzing this matter.”³⁵⁵

With the disciplinary commission in *Olson* characterizing the lawyer’s conduct as “a ‘text book example’ of the type of functioning expected of defense counsel,”³⁵⁶ it is important to outline the careful steps this conscientious professional took in handling this contraband.³⁵⁷ First, from the apartment scene, the items were tagged and sealed and then were securely locked in the lawyer’s office.³⁵⁸ Second, the lawyer obtained an ex parte protective order from a state judge authorizing him to retain possession of the items, in the event someone might consider them to be contraband.³⁵⁹

Although *Olson* stands as solid precedent for the proposition that a lawyer may take temporary possession of contraband evidence to examine it as part of a criminal defense investigation, the decision is unclear about what should happen afterward. In *Olson*, the lawyer retained the evidence in his office (sealed and under lock) until a replacement lawyer later took over the case and delivered the photographs to the prosecution.³⁶⁰ The dissent insisted that the evidence should have been made available to the prosecutor and that the lawyer had wrongly concealed it.³⁶¹ The majority sidesteps the question of when, if ever, a lawyer should disclose the evidence.³⁶² The court stated that the lawyer did not, “at that point in the proceedings” have a duty to turn over the information and concluded there was “no evidence in this record of [the lawyer’s] intent to tamper with or fabricate physical evidence.”³⁶³

With respect to the proper disposition of the evidence after examination, the circumstances presented in the *Olson* case may be unusual. The evidence could not be returned to the apartment, not only because that might be restoring someone to wrongful possession of contraband, but because the client apparently remained in custody and

355. *Id.*

356. *Id.* at 637.

357. Uphoff, *supra* note 115, at 1204 (describing *Olson* as an example of “the conscientious criminal defense lawyer when dealing with contraband”).

358. *Olson*, 222 P.3d at 638.

359. *Id.* at 635.

360. *Id.* at 635–36.

361. *Id.* at 640 (Nelson, J., dissenting).

362. Uphoff, *supra* note 115, at 1207 (“The majority did not indicate whether *Olson* would have been obligated to turn over the evidence sua sponte at some point, even without a court order.”).

363. *Olson*, 222 P.3d at 638.

the landlord was evicting her from the apartment.³⁶⁴ The police had already searched and released the apartment, without taking the subject photographs.³⁶⁵ And during the successful federal prosecution of the client, the photographs were never used, as most of those photographs had already been found elsewhere and were simply unnecessary to prosecute and convict.³⁶⁶ In sum, as Rodney Uphoff concludes in his thoughtful dissection of the *Olson* case, “the authorities already had full access to this evidence and, for whatever reason, decided not to take possession of the items.”³⁶⁷ Thus, *Olson* cannot be cited in general support for a lawyer taking permanent possession of evidence, contraband or not, at least without steps to ensure that law enforcement could find the evidence through an ordinary investigation.

When a lawyer does conclude that contraband must be delivered to law enforcement, the lawyer should act carefully and with forethought. To avoid transporting such material with the possibility that it might be lost or that the lawyer would be stopped while holding it, the lawyer probably should not attempt a direct delivery to law enforcement and should instead notify authorities to come to the lawyer’s office to secure the contraband evidence.

E. Defense Lawyer’s Retention of Evidence with Contingent Notice to Law Enforcement (and the Gillers Proposal for a Registry for Real Potential Evidence)

The conventional wisdom has been that a lawyer may not retain possession of evidence of a crime beyond the time reasonably necessary to examine and test it. As this presumption is often expressed, the lawyer should not become “a depository for criminal evidence.”³⁶⁸ Moreover, the prevailing but largely unexamined precedent holds that the lawyer must turn over real evidence to the prosecution, even if received directly from a client.³⁶⁹

364. *Id.* at 634.

365. *Id.*

366. *Id.* at 636.

367. Uphoff, *supra* note 115, at 1207.

368. *State v. Olwell*, 64 Wash. 2d 828, 833, 394 P.2d 681, 684 (1964).

369. *See Morrell v. State*, 575 P.2d 1200, 1210–11 (Alaska 1978). *But see* RULES OF PROF’L CONDUCT R. 3.4 cmt. 7 (D.C. Bar. Ass’n 2014) (stating that when the lawyer has received physical evidence for examination or testing, the lawyer may return the property to the client, unless it would be contraband or belongs to someone else). For a powerful critique of the assumption that a criminal defense lawyer must deliver evidence to the prosecution, as stated in decisions such as *Olwell* and *Morrell*, see Reitz, *supra* note 299, at 584–613.

Stephen Gillers, one of the nation's leading figures in professional responsibility, writing in an important article on this subject, submits that on this question, "the courts have it wrong."³⁷⁰ The "nearly unanimous belief" that a lawyer who takes possession of real evidence either for examination or because it was delivered by someone (and return was not proper or possible) must thereafter deliver it directly to law enforcement is simply "wrong."³⁷¹

In saying the conventional wisdom is *wrong*, Gillers has it exactly *right*. First, the assumption that law enforcement is entitled to receipt of evidence that it would not otherwise have discovered on its own is impossible to square with zealous advocacy by a defense lawyer as a professional responsibility, protection of the confidentiality of client communications, the client's constitutional right against self-incrimination, and the guarantee to defendants of effective assistance of counsel.³⁷² To be sure, the real evidence itself—that is, the object—is not protected by privilege. But the client's description of where the evidence is located certainly is privileged,³⁷³ as is the client's communicative act of delivering evidence to his lawyer and any forced act of production by the lawyer to law enforcement.³⁷⁴

In sum, the criminal defendant's right to have counsel investigate and examine real evidence³⁷⁵ is compromised, and probably must be abandoned, if the lawyer knows that exercising that right will redound to the client's detriment when the evidence afterward must be laid at the doorstep of the prosecution.³⁷⁶ But, as Kevin Reitz puts it, suspects in criminal matters should not be penalized for hiring lawyers who then "must behave as government agents or informants, providing client-incriminating evidence and information to prosecutors."³⁷⁷

Second, imposing a mandatory duty of delivery after the lawyer takes possession of real evidence is not in the public interest, even aside from the criminal defendant's constitutional privilege and right to effective

370. Gillers, *supra* note 3, at 846.

371. *Id.*

372. *See supra* Part IV.B.2.

373. *See supra* Part IV.A.

374. GILLERS, *supra* note 35, at 242; *see also* Lefstein, *supra* note 270, at 903 ("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.").

375. *See supra* Part IV.B.1.

376. *See supra* Part IV.B.2.

377. Reitz, *supra* note 299, at 573.

representation that includes a full defense investigation. When real evidence is at risk of being destroyed, when an item may pose a public danger (such as a loaded gun left in a public place), or when stolen property may disappear beyond recovery, the lawyer who takes possession of that real evidence and thereby preserves, disarms, and returns it has served a genuine public service.³⁷⁸ But, as Gillers writes, “[b]y commanding turnover whenever a lawyer chooses to receive and cannot (or is not allowed) to return an item, the courts discourage lawyers from protecting these public interests if doing so will harm their clients.”³⁷⁹

The difficulty lies in realizing these apparently conflicting goals in a manner that prevents the harm to the state interest posed by a lawyer effectively concealing real evidence, while encouraging the lawyer to take possession of real evidence in a manner that does not betray the client’s interests. For those few cases in which the lawyer cannot return the real evidence and law enforcement does not know the identity of the lawyer for the suspect, the solution proposed by Gillers is creation of a new evidence registry.³⁸⁰ The lawyer would record that she represented a client, thereby notifying law enforcement of that representation if and when the client comes under investigation. As previously proposed by Kevin Reitz, law enforcement then would serve a court-approved subpoena on the lawyer, who then would be obliged to either turn over any real evidence being held that is identified by law enforcement with reasonable particularity or seek court suppression of the subpoena or search.³⁸¹

The elegance of the Gillers solution lies in its simultaneous respect for the premises that “neither the client nor the Government [should be left] worse off than he or it would be if the evidence had remained in the client’s or a third person’s possession or in a location known to the lawyer (e.g., the loaded gun in the woods).”³⁸² If law enforcement never conducts an investigation or never searches for the evidence (or perhaps never searches in the right location), then the real evidence remains undiscovered and the client’s communication with the lawyer remains sealed. But if law enforcement does conduct an investigation that would uncover the evidence, the lawyer’s retention of it does not amount to

378. Gillers, *supra* note 3, at 848–51.

379. *Id.* at 851.

380. *Id.* at 862.

381. Reitz, *supra* note 299, at 655–58; Gillers, *supra* note 3, at 861–62.

382. *See* Gillers, *supra* note 3, at 829, 863–64.

concealment and the lawyer is then obliged to respond lawfully to a subpoena.

However, in our imperfect world, the wisdom of a solution does not translate into the likelihood of its adoption. Because the current expectation that a lawyer cough up any evidence retained for examination or not returnable to the source produces a windfall to the government, law enforcement agencies and prosecutors may well resist any alternative. And even if a state or two does act to establish a registry, the patchwork of differing expectations among the states (and the federal government) will leave many a lawyer dangling from an ethical noose, especially if a matter extends across state borders or if the choice of state or federal criminal jurisdiction cannot be readily predicted.

In meantime, however, there are other ways by which we could move in the direction of upholding professional responsibilities without improperly impeding law enforcement:

First, the mistaken presumption that a lawyer may not return evidence to its original location, even if forensic characteristics have been altered, should be overturned. As discussed earlier, as long as the lawyer provides some type of notice at the location itself as to the availability of a forensics report, the lawyer has acted properly to examine evidence and has taken no action to obstruct any criminal investigation.³⁸³

Second, if a lawyer does choose to take the bold step of openly retaining evidence in the confident expectation that the client will certainly know if any search or subpoena is directed at the client, then the lawyer should be permitted to act at that time to notify law enforcement that evidence is being held and not be accused of concealment.

In either event, the lawyer should create a record that the purpose of holding the evidence is not concealment, such as by creating a contemporaneous written document explaining the decision made to retain the evidence, the lawyer's plan for ensuring that he will be alerted to any search or interrogation of the client as a suspect, and how law enforcement would be notified at the appropriate time. And the lawyer probably should ensure that this record is confidentially shared with other respected lawyers in the community who can later vouch that these steps were considered professional judgments and not post hoc inventions after being caught holding the evidence.

Returning to the subject of obstruction of justice discussed earlier in

383. *See supra* Part IV.B.2.

this Article, this is a specific intent crime.³⁸⁴ And the federal criminal statute includes a safe harbor for actions taken by a lawyer in representing a client in a proceeding.³⁸⁵ As one state court puts it, “[t]he main rationale for the rule requiring disclosure of the fruits and instrumentalities of the crime when taken into possession by the lawyer is that a lawyer must not impede or inhibit the discovery of evidence by the state.”³⁸⁶ Thus, a lawyer who forthrightly acts by holding evidence in a manner that does not conceal it from law enforcement if and when an investigation is actually initiated and a search or subpoena is forthcoming is not legitimately subject to prosecution and has contravened no ethical constraint.³⁸⁷ The *ABA Standards for Criminal Justice* arguably contemplate this possibility by providing that “[i]f defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.”³⁸⁸ However, unless the courts act to suspend abusive prosecutions, lawyers understandably will be reluctant to boldly act as zealous advocates with respect to possession of real evidence. And our legal system will remain the poorer for it.

Finally, as Norman Lefstein advises, “retention of physical evidence by counsel should be the exceptional case, not an everyday event.”³⁸⁹ A lawyer who chooses to retain real evidence undertakes a weighty responsibility, although that may simply follow from the increasingly weighty responsibilities of criminal defense lawyers in an era where missteps may draw prosecutorial attention and public forensics labs are of dubious reliability. As noted earlier, the lawyer certainly must treat the evidence in accordance with reasonable forensic standards and with careful documentation of the chain of evidence.³⁹⁰ The lawyer must ensure that evidence is stored in a secure manner, both to ward against abuse by employees and the possibility of theft by outsiders. And the

384. *See supra* Part II.C.2.

385. *See supra* Part II.D.

386. *Wemark v. State*, 602 N.W.2d 810, 816 (Iowa 1999).

387. *See Green, supra* note 9, at 361 (“For example, a lawyer who puts evidence in a drawer with the intent to safeguard it until it must be produced presumably would not be guilty of obstruction, while a lawyer who engaged in the same conduct with the intent of hiding the evidence permanently from criminal investigators probably would be.”).

388. STANDARDS FOR CRIM. JUST. § 4-4.6(c) (1993).

389. Lefstein, *supra* note 270, at 933.

390. The proposed revision to Standard 4-4.7 approved by the ABA section council in early 2014 states that “[c]ounsel should keep the evidence in counsel’s office separate from privileged materials of other clients and preserve it in a manner that will not impair its evidentiary value.” Proposed Revision to Standard 4-4.7(i), *supra* note 124.

passage of time must also be addressed, including what happens if many months or years go by without a criminal investigation (that is, when does the duty to retain rather than destroy the evidence expire), the lawyer retires (that is, how is deposited evidence transferred to other stewards), or the evidence is perishable and deteriorates while being held.

V. HOW MAY THE LAWYER ENGAGE WITH REAL EVIDENCE? A CASE ILLUSTRATION

A. *The Case of the Bloody Knife Under the Stairs* (Wemark v. State)

1. *The Death of Melissa Wemark and the Arrest of Robert Wemark*

On January 19, 1993, Winneshiek County sheriff's deputies were called for a second time to a residence owned by Robert Wemark, age 51, in the small village of Ridgeway in northeast Iowa.³⁹¹ Inside the house, Robert's adult daughter by an earlier marriage had discovered the body of Melissa Ann Casper Wemark, 32, the estranged wife of her father.³⁹² Law enforcement had visited the home the previous day after Melissa had failed to arrive at a friend's house.³⁹³ No one had answered the door and her car was not parked there.³⁹⁴

After ten years of marriage and three children together, Melissa had filed for divorce from Robert the previous October.³⁹⁵ The day before her body was discovered, Melissa had gone to Robert Wemark's Ridgeway residence to pick up Robbie from the child's father after delivering their other two young children to school.³⁹⁶ The previous night, Robert had told Melissa that he was lonely and wanted one of the children to spend the night with him.³⁹⁷

The body of Melissa was found under a pile of blankets in a

391. Ken MacAdam, *Autopsy: Woman Died of Multiple Stab Wounds*, WATERLOO COURIER, Jan. 22, 1993, at A7.

392. *Id.*; Jack Swanson, *Wemark's Daughter Tearfully Testifies at Trial*, OELWEIN DAILY REGISTER, June 24, 1993, at 1.

393. Jack Swanson, *Wemark Murder was "Crime of Passion,"* OELWEIN DAILY REGISTER, June 23, 1993, at 1.

394. Jack Swanson, *Daughters Testify in Wemark Trial*, OELWEIN DAILY REGISTER, June 29, 1993, at 1.

395. Jack Swanson, *Melissa Wemark's Mother Testifies at Murder Trial*, OELWEIN DAILY REGISTER, June 23, 1993, at 1.

396. MacAdam, *supra* note 391, at A7; Swanson, *supra* note 395, at 1.

397. Swanson, *supra* note 395, at 1.

bedroom.³⁹⁸ Based on the perforated condition of the body, Melissa appeared to have been shot several times, but an autopsy later revealed she had died of multiple stab wounds.³⁹⁹ She had been stabbed fifteen times.⁴⁰⁰ Although the injuries were horrendous, Melissa had not died immediately and, with “prompt medical attention, she could have survived.”⁴⁰¹

Missing from the home was both Robert Wemark and the couple’s three-year-old son, Robbie.⁴⁰²

At about the same time that deputies were discovering the body of Melissa in Ridgeway, a motorist on a gravel county road noticed bloody clothing strewn along the drive to a farmhouse in northwest Iowa, about 165 miles away.⁴⁰³ Dickinson County sheriff’s deputies went to a farmhouse whose owners were in Florida and found broken windows.⁴⁰⁴ Inside, they found Robert lying on the floor, still conscious but badly wounded from an apparently self-inflicted gunshot wound to the chest.⁴⁰⁵ Robert had several other cuts and scratches on his abdomen and chest.⁴⁰⁶ The toddler Robbie was playing on the floor nearby, uninjured.⁴⁰⁷

In great pain, Robert Wemark told the deputies he had “gotten into a fight with his wife,” who had “come at him with a knife.”⁴⁰⁸ He claimed that during the struggle she had fallen back on the knife.⁴⁰⁹ After driving Melissa’s car to the other side of the state,⁴¹⁰ he had shot himself in the chest and accidentally in the foot.⁴¹¹

Robert Wemark was arrested at the hospital in Sioux Falls, South Dakota, where he underwent surgery for a bullet wound that had pierced

398. Swanson, *supra* note 392, at 1.

399. MacAdam, *supra* note 391, at A7.

400. Jack Swanson, *Notes May Reveal Wemark’s State of Mind*, OELWEIN DAILY REGISTER, June 25, 1993, at 1.

401. *Wemark v. Iowa*, No. C00-2023- MWB, 2002 WL 1724022, at *1 (N.D. Iowa Mar. 6, 2002).

402. MacAdam, *supra* note 391, at A7.

403. *Id.* at A7.

404. Swanson, *supra* note 392, at 1.

405. MacAdam, *supra* note 391, at A7; Swanson, *supra* note 393, at 1.

406. Swanson, *supra* note 393, at 1.

407. MacAdam, *supra* note 391, at A7.

408. Swanson, *supra* note 392, at 1.

409. *Id.* at 1.

410. Swanson, *supra* note 394, at 1.

411. Swanson, *supra* note 392, at 1.

part of his heart.⁴¹² After being returned to Winneshiek County, Robert was charged with first-degree murder.⁴¹³

2. *The Search of Robert Wemark's Residence*

A two-day search of the Ridgeway home pursuant to a warrant found indications that the home had been cleaned of blood on the floor and that Robert apparently had washed his clothes.⁴¹⁴ Law enforcement found a family photo on the refrigerator with Melissa's face scratched out, along with a note saying, "I cannot live without Missy . . . I will always be with Missy. I cannot live by myself. Forgive me. I will always love her. Take care of Robbie."⁴¹⁵ On a Father's Day card from Melissa, Robert had written "You are as low as a snake," "Go to hell," and "You're dead."⁴¹⁶

No weapon was found. Law enforcement unsurprisingly found several knives in the kitchen, but none of them had human blood on the blades.⁴¹⁷ The basement of the home was never searched.⁴¹⁸

3. *Robert Wemark Tells His Lawyers the Location of the Knife and Is Advised to Disclose the Location*

Robert Wemark's lead defense attorney was a two-decade veteran of the criminal bar and a former prosecutor.⁴¹⁹ Two years after the Wemark trial, he would be appointed to the Iowa trial bench in Des Moines. He was assisted on the case by another two-decade veteran criminal trial attorney and former prosecutor.⁴²⁰

In confidence to his defense counsel, Wemark revealed that he had hidden the knife in the basement of the home under automobile parts.⁴²¹ Not sure that they could trust their client, both lawyers went to the home

412. MacAdam, *supra* note 391, at A7; Swanson, *supra* note 393, at 1.

413. *Autopsy: Decorah Woman Died of Stab Wounds*, OELWEIN DAILY REGISTER, Jan. 23, 1993, at 1.

414. Amy Davis, *Wemark Jury Sees 'You're Dead' Notation*, WATERLOO COURIER, June 25, 1993, at A4; Swanson, *supra* note 393, at 1; Swanson, *supra* note 400, at 1.

415. Jack Swanson & Amy Wainwright, *New Evidence Submitted in Wemark Trial*, OELWEIN DAILY REGISTER, June 24, 1993, at 1.

416. Davis, *supra* note 414, at A4.

417. Swanson, *supra* note 400, at 1.

418. Swanson, *supra* note 393, at 1.

419. Robert J. Blink in West Legal Directory.

420. *Attorneys*, SANDY L. FIRM, <http://www.sandylawpractice.com/attorneys-jls.html> (last visited Sept. 15, 2014).

421. Appellant's Brief at 4, *Wemark v. State*, 602 N.W.2d 810 (Iowa 1999) (No. 98-586).

in Ridgeway.⁴²² Without removing anything, they observed that the knife was indeed in the basement where Wemark had said it would be.⁴²³

Wemark's counsel contacted a chief judge of the state trial court in another county as well as experienced criminal defense lawyers for advice based on hypothetical facts, all of whom confirmed there was an ethical problem.⁴²⁴ Believing that the disclosure from Wemark put them in an ethical quandary, the lawyers concluded that they had only three options: (1) wait to see if law enforcement would search the house again, which was highly unlikely; (2) have a third person reveal the location of the knife to law enforcement without identifying the source of the information; or (3) encourage Wemark to disclose the location of the knife himself to someone affiliated with law enforcement.⁴²⁵

In preparation for the trial, Wemark's defense counsel had been considering the possibility of a diminished capacity defense.⁴²⁶ However, after having him examined by their own expert, who concluded that Wemark was capable of deliberate premeditation, they realized this possibility was negligible.⁴²⁷ Nonetheless, rather than abandoning the defense, the lawyers decided to have Robert Wemark meet with the state's psychiatrist.⁴²⁸ Having encouraged Wemark to be very truthful, counsel expected he would disclose the location of the knife to the state's medical expert who in turn would report to the prosecution.⁴²⁹

And that is precisely how events unfolded. Based on the report of Wemark's confession to the state psychiatrist that he had hidden the knife, the state searched the home again.⁴³⁰

The lock-blade hunting knife with a four-inch blade was found by

422. Appellee's Brief at 10, *Wemark v. State*, 322 F.3d 1018 (8th Cir. 2003) (No. 02-1755) (quoting deposition).

423. *Id.*

424. *Wemark v. State*, 602 N.W.2d 810, 813 (Iowa 1999); Appellee's Brief, *supra* note 422, at 10 (quoting deposition). In addition, defense counsel later testified that Wemark suggested that if the knife was a problem, he could have a relative go to the house and "just get rid of it." Appellee's Brief, *supra* note 422, at 8 (quoting deposition) (emphasis removed). Given that they had told him that the evidence could not be destroyed, and that Wemark remained incarcerated, the risk that the evidence would be destroyed appears to have been minimal. In any event, the risk that someone else might remove the evidence would not change the ethical obligations of the lawyers to maintain confidentiality while legally advising of the criminality of destruction.

425. *Wemark*, 620 N.W.2d at 813; Appellant's Brief, *supra* note 421, at 4–5.

426. Appellant's Brief, *supra* note 421, at 4.

427. *Id.*

428. *Id.* at 5.

429. *Wemark*, 602 N.W.2d at 813; Appellant's Brief, *supra* note 421, at 4–5.

430. *Wemark*, 602 N.W.2d at 813; Appellant's Brief, *supra* note 421, at 5–6.

police in the basement of Wemark's home.⁴³¹ A blood analysis expert identified Melissa's blood on the blade.⁴³²

4. *The Murder Trial and Guilty Verdict*

Robert Wemark's murder case went to trial in June 1993, where it remained on the front page in the local newspaper from the day jury selection began on Monday, June 21⁴³³ through the guilty verdict on Thursday, July 1.⁴³⁴

The case was prosecuted by Tom Miller, an Assistant Attorney General for the State of Iowa, who had been Attorney General until three years earlier when he unsuccessfully ran for Governor.⁴³⁵ Miller was elected again as Attorney General the following year and remains in that office today as one of the longest continuously serving state Attorneys General.⁴³⁶ Miller was assisted by Karl Knudson, the Winneshiek County attorney.⁴³⁷

Agreeing with defense counsel that Wemark could not receive a fair trial in his home county, the judge had moved the trial to Fayette County, immediately to the south.⁴³⁸ Although defense counsel argued that the location was still too close to find an unbiased jury, the judge declined to move the location for a second time.⁴³⁹ During the trial, spectators in the courtroom circulated purple ribbons in apparent support for Melissa as a victim of domestic abuse, until Wemark's lawyers objected and the judge ordered the ribbons removed in front of the jury.⁴⁴⁰ After the verdict had been returned, the group returned to the

431. Appellant's Brief, *supra* note 421, at 4–5.

432. Jack Swanson, *Bloody Garments Displayed in Robert Wemark Trial*, OELWEIN DAILY REGISTER, June 28, 1993, at 1.

433. Jack Swanson, *Jury Selection for Wemark Trial Begins*, OELWEIN DAILY REGISTER, June 21, 1993, at 1.

434. Jack Swanson, *Wemark Guilty of First Degree Murder*, OELWEIN DAILY REGISTER, July 2, 1993, at 1.

435. Jack Swanson, *Court Continues Jury Selection*, OELWEIN DAILY REGISTER, June 22, 1993, at 1.

436. Jennifer Jacobs, *Iowa Attorney General Tom Miller to Announce Re-Election Campaign*, DESMOINESREGISTER.COM (Nov. 12, 2013), <http://blogs.desmoinesregister.com/dmr/index.php/2013/11/12/iowa-attorney-general-tom-miller-to-announce-re-election-campaign/article>.

437. Swanson, *supra* note 434, at 1.

438. Jack Swanson, *Wemark Murder Trial Moved to Fayette County*, OELWEIN DAILY REGISTER, Apr. 20, 1993, at 1.

439. *Trial Will Stay in Fayette County*, OELWEIN DAILY REGISTER, June 1, 1993, at 1.

440. Swanson, *supra* note 395, at 1.

courtroom to pass out purple ribbons.⁴⁴¹

In both the opening and closing to the jury, defense counsel acknowledged that Robert Wemark had stabbed his wife Melissa but denied that it was premeditated.⁴⁴² Counsel described the act as a “crime of passion.”⁴⁴³ He pointed to the fact that the crime occurred in Wemark’s own home in broad daylight to show that Wemark had not planned to kill her that day.⁴⁴⁴ The defense contended that Melissa had come at Wemark with the knife and that he had defended himself.⁴⁴⁵ After that provocation, he then had gone too far and continued to stab her.⁴⁴⁶ The defense challenged the assertion that the knife wounds on Wemark’s chest were self-inflicted rather than being defensive wounds.⁴⁴⁷ Robert Wemark did not take the stand.⁴⁴⁸

Prosecutor Miller contended that Robert Wemark had acted with malice and forethought in killing his wife.⁴⁴⁹ He observed that Wemark had failed to call for aid when Melissa lay dying on the floor.⁴⁵⁰ And then, according to the prosecutor, Wemark inflicted knife scratches on himself to make it appear that he had been attacked and acted in self-defense.⁴⁵¹ Miller referred to the threatening notes as evidence of malice.⁴⁵² And he focused on the hiding of the knife and cleaning of the home as evidence of deliberation:⁴⁵³ “The very fact of destroying, altering, concealing evidence by the defendant in this case is the act of a man who wants that evidence to show something other than the truth”⁴⁵⁴

Most importantly, prosecutor Miller emphasized that Wemark had stabbed his wife fifteen times, saying, “[c]ertainly before the 15th time

441. Swanson, *supra* note 434, at 1.

442. Jack Swanson, *Defense Wraps Up, Jury Deliberates Over Fate*, OELWEIN DAILY REGISTER, July 1, 1993, at 1; Swanson, *supra* note 393, at 1.

443. Swanson, *supra* note 393, at 1.

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. Swanson, *supra* note 434, at 1.

449. Jack Swanson, *State Argues for First Degree Murder Against Wemark*, OELWEIN DAILY REGISTER, June 30, 1993, at 1.

450. *Id.*

451. *Id.*

452. Swanson, *supra* note 442, at 1.

453. Swanson, *supra* note 449, at 1; Swanson, *supra* note 393, at 1.

454. Val Swinton, *Wemark Murder Trial Goes to Jury*, CEDAR RAPIDS GAZETTE, July 1, 1993, at 9B.

he stabbed her, he knew he was taking her life.”⁴⁵⁵ During closing argument, Miller moved his arms up and down with the knife before the jury, mimicking the multiple stabbings of Melissa.⁴⁵⁶ Arguing that even if the “first blow was passion,” Miller re-enacted how Wemark had done it “again . . . and again . . . and again . . . and again.”⁴⁵⁷

The jury deliberated for seven hours before returning a verdict of guilty of first degree murder on July 1, 1993.⁴⁵⁸ On August 17, 1993, Robert Wemark was given the mandatory sentence of life in prison without the possibility of parole.⁴⁵⁹ The conviction was affirmed on appeal.⁴⁶⁰ As of this writing, Robert Wemark remains incarcerated at the Anamosa State Penitentiary.⁴⁶¹

5. *The Iowa Supreme Court’s Ruling on the Application for Post-Conviction Relief*

After the conviction was affirmed on direct appeal, new counsel for Robert Wemark contended in post-conviction proceedings that Wemark had received ineffective assistance of counsel because his counsel betrayed a confidential disclosure by revealing the location of the knife to law enforcement.⁴⁶² In *Wemark v. State*, the Iowa Supreme Court confirmed the protection of privilege for matters observed by a lawyer based upon a client’s confidential communication, although finding the lawyer’s erroneous disclosure in that case to have been harmless error that did not justify upsetting a criminal conviction.⁴⁶³

The Iowa Supreme Court agreed that “the attorney-client privilege protects statements by a client revealing the location of the fruits or instrumentality of a completed crime.”⁴⁶⁴ Along the same lines, when defense counsel observes real evidence in its original condition but “leaves the evidence alone,” the privilege prohibits revelation absent informed consent of the client.⁴⁶⁵

455. Swanson, *supra* note 449, at 1.

456. Swanson, *supra* note 442, at 1.

457. *Id.*

458. Swanson, *supra* note 434, at 1.

459. *Wemark Sentenced to Life*, OELWEIN DAILY REGISTER, Aug. 18, 1993, at 1.

460. *Wemark v. State*, 602 N.W.2d 810, 812 (Iowa 1999).

461. IOWA DEPARTMENT OF CORRECTIONS, <http://www.doc.state.ia.us/InmateInfo.OffenderCd=1054363> (last visited Sept. 15, 2014).

462. *Wemark*, 602 N.W.2d at 812.

463. *Id.* at 816–18.

464. *Id.* at 816.

465. *See id.* at 817.

By disclosing this information to authorities, or effectively forcing the defendant to do so through mistaken counsel, defendant's attorneys had acted upon the "faulty premise" that this knowledge was not privileged.⁴⁶⁶ In so doing, Wemark's lawyers had breached an "essential duty."⁴⁶⁷ Although acknowledging that the lawyers' mistaken advice did constitute ineffective assistance of counsel, the Iowa Supreme Court concluded that no prejudice resulted given other overwhelming evidence of the defendant's guilt.⁴⁶⁸

B. Lessons Learned?

1. Preserving Confidentiality of Location of Evidence

The primary lesson to be learned from the *Wemark* case, of course, is that a lawyer for a criminal defendant should not reveal the location of real evidence to law enforcement when the location was learned through a confidential communication from the client.⁴⁶⁹ Unless the lawyer and client together decide to reveal the location for proper strategic reasons, or maybe if the lawyer retrieves the evidence and thus changes its characteristics, the location of real evidence remains privileged.⁴⁷⁰ On this point, the Iowa Supreme Court was adamant and unequivocal.⁴⁷¹

If Robert Wemark had not been encouraged to reveal the location of the knife to the state psychiatrist, law enforcement would never have found the weapon and it would never have been introduced into evidence at trial. To be sure, defense counsel later contended that they had encouraged Wemark to meet with the state psychiatrist because (1) there was a remote possibility that this expert would support a diminished capacity defense and (2) they hoped that Wemark's candid disclosure might bolster his credibility later before the jury.⁴⁷² But, as the Iowa Supreme Court recognized, these tactical considerations were a response to "a faulty premise," that is, the belief by criminal defense counsel that they were obliged to bring about the disclosure of the location of the knife as real evidence.⁴⁷³

466. *Id.* at 814–17.

467. *Id.* at 815.

468. *Id.* at 817.

469. *See supra* Part IV.A.

470. *See supra* Part IV.B.

471. *Wemark*, 602 N.W.2d at 816.

472. Appellee's Brief at 7–10, *Wemark*, 602 N.W.2d 810 (No. 98-586).

473. *Wemark*, 602 N.W.2d at 817.

Nor can we be confident that the legal error was harmless in Wemark's case. Both the knife itself and Wemark's conduct in affirmatively hiding it under the basement stairs became central themes in the prosecution's case:

During closing argument, the once and future state attorney general prosecuting the case referred to the blood analysis on the knife blade: "Blood on the knife. Ladies and gentlemen, the blood on the weapon used to take the life of Melissa Wemark [was confirmed by the laboratory]." ⁴⁷⁴ In that closing argument, the prosecution conducted what Wemark's post-conviction counsel called "a theatrical display," in which he brought the knife up and down fifteen times to mimic the repeated stabbing of Melissa. ⁴⁷⁵

The prosecution also relied on the concealment of the knife in the basement as evidence that Wemark did not act from passion but behaved with deliberation and guilty knowledge:

Robert Wemark hid the weapon. He didn't toss it into the basement as we heard his act described a week ago. He hid it. He went down there and stashed it inside under that pile, hiding the weapon The very fact of destroying, altering, concealing evidence by the Defendant in this case is the act of a man who wants that evidence to show something other than the truth ⁴⁷⁶

Now given that Wemark had stabbed his wife fifteen times, including multiple thrusts in the back, the prosecution's case was compelling. ⁴⁷⁷ And the state contended that the prosecution would have mimicked the multiple stabbing motions, even without a knife actually being in evidence. ⁴⁷⁸ Nonetheless, the power of the knife itself being present and used demonstratively cannot be denied. Moreover, its discovery in the basement under automobile parts allowed the prosecution to argue that he had deliberately concealed the weapon, indicating his guilty knowledge. If it had never been found by law enforcement, the parties and jury might well have concluded it had been heedlessly discarded during Wemark's frantic travel across the state after the incident.

And even one of the prosecutors conceded when the jury verdict was returned that he had harbored doubts about the likely outcome, given

474. Appellant's Brief at 7, *Wemark v. State*, 322 F.3d 1018 (8th Cir. 2003) (No. 02-1755) (quoting trial transcript).

475. Appellant's Brief, *supra* note 421, at 5–6.

476. Appellant's Brief, *supra* note 474, at 8 (quoting trial transcript).

477. See *supra* notes 399–400 and accompanying text.

478. Appellee's Brief, *supra* note 472, at 17–18.

that there were “so many variables.”⁴⁷⁹ After all, the question was not whether Wemark would be found guilty of homicide, but rather whether he would be convicted of first degree murder rather than a lesser offense.

2. *Doubts About the Lawyer’s Duties Regarding Disposition of Real Evidence After Examination*

Suppose that the lawyers in *Wemark* had not stopped at simply observing the knife being under the basement stairs, where the client had said it would be located. Suppose they had taken possession of the knife for examination and testing.

Wemark’s lawyer later testified at the post-conviction hearing that Robert Wemark was “the most patently incredible defendant that I had observed” in nearly two decades of practice.⁴⁸⁰ Indeed, because they doubted their client’s veracity, the defense lawyers went to the house in Ridgeway to see if the knife really was there.⁴⁸¹

The existence of a knife and verification that it was the actual weapon with which Melissa Wemark was stabbed are not one and the same. Even if the lawyers had seen a red smear on the blade, “visual inspection alone [could not establish that] the substance is human or animal blood, or even blood at all,” given that “paint, rust, ketchup, shoe polish, dye, and ink all visually resemble blood.”⁴⁸²

And, of course, even assuming the red substance proved to be blood, the question remained as to whose blood it would prove to be. Now because knives are not ordinarily hidden under automotive parts in a basement, and this knife was precisely where Wemark said that he had concealed the weapon, there was no reason to doubt that it was the murder weapon. Still, Robert Wemark claimed that his wife had initially attacked him with the knife, so determining whether his blood was also on the blade might have bolstered that self-defense or provocation defense.

The Iowa Supreme Court confirmed that the defense lawyers would have been well within their rights to examine the knife: “If the defense lawyer does not take possession of the instrument of the crime, there can be no opportunity to have it examined for any evidence that may be

479. Swanson, *supra* note 434, at 1.

480. Appellee’s Brief, *supra* note 472, at 9.

481. *Id.* at 10 (quoting deposition).

482. Uphoff, *supra* note 115, at 1210 & n.210 (citing ANDRE A. MOENSSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 982–83 (5th ed. 2007)).

critical to the defense.”⁴⁸³ Immediately above in the opinion, however, the court had said that “a defense lawyer has no legal obligation to disclose information about the location of an instrument of a crime when possession of the instrument is not taken.”⁴⁸⁴ Thus, without saying so directly, the court appears to assume that, had Wemark’s counsel taken possession of the knife, even for examination, counsel would have been obliged to disclose the knife or its location afterward.

But why? In what way would the state have been disadvantaged by defense counsel taking possession of the weapon for examination, including a forensics test for blood, followed by a return of the knife to its original location (that is, back under the basement stairs)? The state already had spent two days searching the Wemark residence. The police were not going to return to the house. The knife would never have been discovered, not because of anything done by defense counsel but because law enforcement had conducted an inept search, failing even to look in the basement of the home.

To be sure, defense counsel might have disturbed the evidence by removing it, even temporarily, from the basement and by testing it for blood. But that situation could have been entirely ameliorated by simply leaving a note attached to the knife explaining that defense counsel had conducted forensic tests. In the unlikely event that the knife and attached note were later found by someone and delivered to law enforcement, criminal defense counsel might be obliged to confirm the testing of the evidence.⁴⁸⁵ In sum, returning the knife to the home, even after being examined, would have restored the status quo.

A contrary rule—one that mandates disclosure of the knife to law enforcement after examination—means that competent counsel ordinarily will choose not to examine the knife under circumstances such as these.⁴⁸⁶ Whatever benefit to the defendant might follow from verifying that human blood is on the knife, and determining whose blood is on the blade, would likely be heavily outweighed by the damage to the defense through the gift to the prosecution of a weapon that it otherwise would not have found.

Thus, a criminal defense lawyer should not be forced to choose between (1) betraying the client’s confidence by effectively disclosing that the client had hidden the knife in the basement or (2) forgoing the

483. *Wemark v. State*, 602 N.W.2d 810, 817 (Iowa 1999).

484. *Id.*

485. *See supra* Part IV.B.2.

486. *See supra* notes 309–310 and accompanying text.

important right to examine evidence for the benefit of the defense. The state's interest in being alerted to the temporary possession of the knife by the defense (and any consequences of that temporary possession) could be readily protected by other means, such as a note attached to the returned evidence or a registry if created.⁴⁸⁷ Accordingly, a rule of mandatory turn-over of evidence after examination sacrifices either the defense prerogative to investigate the evidence or the client privilege against self-incrimination. As that Hobson's choice is unnecessary, a rule that would create it cannot be justified on grounds of either professional responsibility or the constitutional rights of the accused.

3. *The Danger to Effective Assistance of Counsel Posed by Uncertainty on the Ethics and Law of Real Evidence*

The broader lesson to be drawn from the *Wemark* episode is that this area of legal ethics remains so opaque that veteran criminal defense lawyers, even after seeking advice from others, still stumble in the dark. As the Iowa Supreme Court reported, “[d]efense counsel were immediately concerned they had an ethical obligation to disclose the location of the knife to the prosecution. They considered nondisclosure to be the same as concealment and an interference with police investigation.”⁴⁸⁸ To say that the lawyers were mistaken is easy after the fact. To acknowledge that the legal system bears substantial responsibility for such errors is only fair.

The misimpression that evidence must be delivered even when merely observed may well have been engendered by the frequently stated (and, in my view, mistaken) assumption that a criminal defense lawyer who takes possession of real evidence must thereafter altruistically deliver it into the hands of the prosecution.⁴⁸⁹ Legal ethics authorities must speak clearly and accurately to this subject, with a full evaluation of the professional responsibilities of the criminal defense lawyer and the rights to effective assistance of counsel of the criminal defendant.

Without saying so directly, many courts and commentators appear to be operating under the erroneous premise that law enforcement has an absolute entitlement to evidence, even if its own investigation has fallen

487. See *supra* Part IV.E.

488. *Wemark*, 602 N.W.2d at 813.

489. See Gillers, *supra* note 3, at 818 (observing that courts are mistaken when they assume that, because the attorney-client privilege does not attach to the thing itself, “a lawyer’s duty to deliver the object to authorities should necessarily follow”). For further critique of the supposed duty to deliver evidence to law enforcement, see *supra* Parts IV.B.2 & IV.E.

short and the source of that evidence is the criminal defense lawyer who learned of its location from the client. Unsurprisingly, these mistakes and misstatements lead to the deceptive apprehension that defense lawyers must act as agents of the government when engaging with real evidence.

Witness *Wemark*.

CONCLUSION

[T]he legal responsibility imposed upon lawyers who learn of the existence of tangible evidence of a completed crime in the course of an attorney-client relationship is complex and far from settled. Moreover, a lawyer can be faced with a host of conflicting important obligations to balance, including the duty to preserve client confidences, investigate the case, and maintain an allegiance to the system of justice as an officer of the court.⁴⁹⁰

Every lawyer must appreciate that this is an ever-changing area, with important new and expanding statutes on obstruction of justice being enacted and with fresh court rulings being rendered on lawyer responsibilities regarding real evidence. To add to the uncertainty, the legal obligations regarding preservation of and access to real evidence vary not only by the underlying area of activity involved and by the jurisdiction whose laws govern, but often depend as well on the circumstances under which the lawyer comes to have contact with the evidence, on the likelihood that an investigation or proceeding will follow, the nature of the evidence and its forensic characteristics, and perhaps even on the notoriety of the underlying criminal activity.

Nor is avoidance of the difficult ethical and legal responsibilities a professional option, especially in the criminal defense setting. A lawyer should not casually take possession of potential evidence of a client crime. Yet the need for an independent examination of evidence to uphold the defendant's constitutional right to effective assistance of counsel, as well as the possibility that evidence may unexpectedly be delivered to the lawyer, precludes absolute professional resistance to engaging with real evidence.

And once evidence is in hand, or its location is known, the lawyer may not simply err on the side of openly revealing information and disclosing potential evidence. The lawyer's duty of zealous advocacy and the obligation to protect client confidences direct otherwise under

490. *Wemark*, 602 N.W.2d at 816.

some (perhaps most) circumstances. And certainly the lawyer's responsibilities constrain the manner in which real evidence and the source of that evidence would be disclosed.

In sum, the legal ethics of real evidence is messy, just like the real world in which disputes arise. As the late Judge Warren Ferguson of the United States Court of Appeals for the Ninth Circuit wrote, "criminal defense attorneys should be prepared to meet the myriad challenges of their vocation—investigating and uncovering disturbing evidence related to their representation is but one; confronting moral and ethical dilemmas competently is another."⁴⁹¹

But prosecutors and judges should not be adding to those difficulties by threatening zealous criminal defense lawyers with criminal charges or by failing to clarify the rightly robust protections for criminal defendants and their counsel. Under the current draft for revision of the American Bar Association's *Standards for Criminal Justice*, defense counsel are directed to "competently advise the client about lawful options and obligations," after "examin[ing] the specific law of the jurisdiction on topics such as obstruction of justice, tampering with evidence, and privileges protecting the client's confidentiality and against self-incrimination."⁴⁹² But, as this Article seeks to demonstrate, the confusion of the law in this field is a scandal to our profession, impeding such competent advising of clients. And criminal defense lawyers, fearing a hostile response by prosecutors, are too often inhibited in diligent representation of individuals who face investigation and prosecution by those same prosecutors.

The consequences of sloppiness in articulation of the ethical regime for real evidence are real. Thoughtful academics and experienced lawyers who reviewed earlier drafts of this Article frequently remarked that most criminal lawyers would steer clear of the problems described in these hypotheticals, regarding acceptance of such cases as too risky for the lawyer. And yet clients facing such perilous situations are precisely those who most need conscientious and committed legal counsel.

We should insist that professional, bar, legislative, and judicial authorities act to clarify the rules and guidelines. Lawyers are being chilled from zealous representation as much by the continuing ambiguity of the constraints as by the constraints themselves. I hope that the foregoing offers assistance to some intrepid defense lawyers and

491. *McClure v. Thompson*, 323 F.3d 1233, 1254 (9th Cir. 2003) (Ferguson, J., dissenting).

492. Proposed Revision to Standard 4-4.7(a), *supra* note 124.

challenges to others in our criminal justice system. I hope I have advanced the discussion one small step forward toward a clearer resolution. In an era of encroaching law and expanding federal criminal liability, sometimes without the explicit protection of a meaningful *mens rea* requirement, the ethical problems for lawyers engaging with real evidence are likely to increase and magnify in the coming years.