

# GUNS, FRUITS, DRUGS, AND DOCUMENTS: A CRIMINAL DEFENSE LAWYER'S RESPONSIBILITY FOR REAL EVIDENCE

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*A criminal defense lawyer may need to read a document, test a weapon, or analyze a substance in order to advise a client. Or there may be no such need but a client may show up at a law office with an illegal weapon, contraband, or stolen property. In either event, what should a lawyer do with the item following any evaluation? What should she do if her client reveals where a weapon, contraband, or stolen property is hidden? Some cases say that a lawyer who receives or retrieves an item of real evidence must give it to the authorities after examining it. But because the item may implicate the client in a crime, the client may instead withhold it or the lawyer may refuse to accept it, even if the lawyer needs to evaluate it. Or a lawyer may choose not to retrieve a hidden item if she must then deliver it to the authorities. Other cases say that after evaluation, a lawyer may return an item to the source if possible. But is that the right rule when the item is stolen property, a dangerous weapon, or drugs? And what if return is not possible? This Article argues that the holdings of these cases, and secondary authorities that agree with them, are wrong. They impede the need for informed legal advice. They frustrate return of stolen property. And where the item is a weapon or drugs, they endanger public safety. This Article proposes solutions that avoid these results while protecting the legal rights of clients and the interests of law enforcement and the public.*

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## INTRODUCTION

### A. *The White House Tapes and the Church Laptop*

In 2009, after thirty-five years of lingering questions, I went looking for Leonard Garment. Garment had been Richard Nixon's law partner and then a member of his White House staff.<sup>1</sup> I had questions about the White House tapes, surely the most consequential piece of real evidence in all of American history. Once public, the tapes forced Nixon to resign.<sup>2</sup> What advice did Nixon get about his duty to preserve the tapes? Was any thought given to their destruction? Identifying Nixon's options required close reading of criminal statutes and court decisions dealing with such mundane items as guns, drugs, and the fruits of crime. Some information about the advice Nixon received appears in Garment's autobiography<sup>3</sup> and elsewhere.<sup>4</sup> But I still had questions. So I searched for Garment who, as luck would have it, was living a mile from my law school.

Given the stakes—the political equivalent of a bet-the-company lawsuit to the *n*th power—I expected that a team of lawyers from a powerful private firm would have tracked down every relevant argument and authority. To my surprise, that team consisted of Garment and one other White House lawyer.<sup>5</sup> They relied on the White House Library's limited collection. They found a 1956 district court decision that upheld an obstruction of justice indictment of a man who allegedly destroyed documents he knew were sought by a sitting grand jury, even though the man had not received a subpoena to appear.<sup>6</sup> Gar-

1. LEONARD GARMENT, *CRAZY RHYTHM: MY JOURNEY FROM BROOKLYN, JAZZ, AND WALL STREET TO NIXON'S WHITE HOUSE, WATERGATE, AND BEYOND* 62, 156 (1997). Nixon and Garment were partners in the now-defunct law firm Nixon Mudge Rose Guthrie & Alexander. *Id.* at 62.

2. The Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683, 713-14 (1974), issued on July 24, 1974, enforced a subpoena for the tapes. They were released August 5, and Nixon resigned effective August 9. Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A1.

3. GARMENT, *supra* note 1, at 277-82.

4. I collect sources and use this event to illustrate the obligations of lawyers with regard to real evidence in STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 457-59 (8th ed. 2009).

5. The information in this and the next paragraph comes from my interview with Garment in New York City on May 20, 2009. Nixon also had the advice of a lawyer outside government. Washington, D.C., trial lawyer Edward Bennett Williams (the Williams of Williams & Connolly) advised Nixon to destroy the tapes and then falsely explain that he did so to protect secret exchanges with other heads of state. *See* GILLERS, *supra* note 4, at 458.

6. *See United States v. Solow*, 138 F. Supp. 812, 813-14, 817 (S.D.N.Y. 1956) (Weinfeld, J.). The defendant had orally agreed to appear before the grand jury but had not yet received a subpoena. *Id.* at 814.

ment then advised Nixon, correctly in my view, that destroying the tapes would probably be a crime.

"Everyone was aware of the risk of a conspiracy charge," Garment told me. "Some executive branch officials had already been indicted and convicted." If the decision were made to destroy the tapes, he said, the lawyers and other aides would play no part. The President would have to do it alone. But it would not have been easy. The tapes were not digital recordings but rather, Garment explained, "the old acetate reel-to-reel tapes"—and many of them. As it happened, no decision was consciously made. "Events just drifted toward a decision by not deciding," he told me.<sup>7</sup>

I was prompted to search for Garment because of another case about real evidence more than three decades later. This case ended badly for the lawyer, not the client. A Connecticut church had discovered child pornography on a laptop used by its choirmaster.<sup>8</sup> The church told its lawyer, Philip Russell, that it did not want to report the choirmaster's crime (although the choirmaster did resign). So Russell chose what he likely saw as the only remaining option to protect the church from illegal possession of the images<sup>9</sup>—he destroyed the hard drive. Federal prosecutors indicted Russell on two counts of obstruction of justice, each carrying a twenty-year prison term. What Garment and his colleagues intuitively understood, and what Russell did not seem to appreciate, 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.

The harshness of Russell's prosecution and the story of Nixon's White House tapes cemented my decision to try to make sense of court opinions and other authorities that purport to explain how lawyers may or must handle real evidence that implicates a client in criminal conduct. I have learned that it is impossible to make sense of those authorities. Rulings are confusing and inconsistent, ignore constitutional or other rights, impede return of stolen property, and endanger the public.

I appreciate that judges do not want to authorize defense lawyers to retain an item of incriminating physical evidence when doing so may prevent prose-

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7. Interview with Leonard Garment in N.Y.C., N.Y. (May 20, 2009). Garment believes that Nixon had no interest in destroying the tapes because they were "historically unique presidential memoirs" and "financially priceless." GARMENT, *supra* note 1, at 281. So it would not have mattered to Nixon whether he could legally do so. Garment also came to conclude, along with the "Watergate revisionists," that, legal or not, if Nixon had destroyed the tapes, he would have survived politically. *Id.* at 280-81. Nixon later remembered it differently. In 1984, he told CBS in a televised interview that one reason for his failure to destroy the tapes was bad advice "from well-intentioned lawyers who had sort of the cock-eyed notion that I would be destroying evidence." John Herbers, *Nixon, in TV Talk, Shuns Watergate Apology*, N.Y. TIMES, Apr. 6, 1984, at A17.

8. See *United States v. Russell*, 639 F. Supp. 2d 226, 230 (D. Conn. 2007). See notes 99-106 and accompanying text for more discussion of the *Russell* prosecution.

9. Knowing possession of child pornography is a crime. See 18 U.S.C. § 2252(a)(4)(B) (2006).

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cutorial discovery. Fortunately, the interests of prosecutors, clients, and the public can all be satisfied with the rules discussed in Part IV. In particular, Part IV.E proposes a new registry that will enable law enforcement agencies to discover the identity (if they do not already know it) of any law office that is or has been in possession of physical evidence of a crime. The agencies can then seek to use judicial processes to secure the item and any unprivileged testimony connecting the item to the accused.

*B. Lawyers on the Spot: How the Dilemmas May Arise*

A man walks into his lawyer's office, takes a loaded .45 from his pocket, and puts it on the desk. Visibly distressed, he says, "I shot Lenny," and points to the gun. "He's dead." Or maybe the man walks in and says, "I shot Lenny. His body is near the abandoned mill covered with leaves. I tossed the gun in the woods. It's loaded." Or it might happen this way: The man is arrested for homicide. He tells his wife that he hid the gun under a floorboard in the shed behind their home. She brings it to his lawyer. It's loaded.

What may or must the lawyer in each scene do about the gun? What is a lawyer's responsibility for physical objects—weapons, documents, drugs, contraband, stolen property—that come into her possession and are relevant to a pending or foreseeable court case? What if the item is merely the client's incriminating diary or documentary proof of tax fraud? These questions create serious dilemmas for lawyers. Answers may require us to reconcile as many as seven interests: the client's right to the loyalty and confidential advice of counsel; the attorney-client privilege; the client's Fifth and Sixth Amendment rights; the lawyer's need to avoid criminal prosecution and professional discipline; the state's interest in prosecuting crime; the right of the owner of stolen property to its return; and public safety.

Take the distressed client who brings a loaded gun to his lawyer's office and says he has just used it to kill someone. The lawyer can keep the gun in an office safe, but she may then be prosecuted for concealing evidence or for illegal possession of a firearm and professionally disciplined. She can give the gun to the police, but that may help convict the client of murder because the client's fingerprints are on the gun or because it can be traced to him in other ways. She can first wipe the gun free of prints but she may then be charged with altering or destroying evidence. She can tell the client to return without the gun, but she may then be sending an emotionally distraught person onto the street with a loaded (and possibly unlicensed) firearm. Similar dilemmas confront the lawyer if the client's wife brings her the gun. If instead the client has hidden the gun in the woods, the lawyer can leave it there. But someone may find it and accidentally or intentionally fire it. Yet if the lawyer retrieves the gun to protect public safety, she risks prosecution if she retains it and incriminating her client if she turns it in.

A lawyer who confronts one of these situations will find that the law is burdened with confusion. Rules of ethics in nearly all jurisdictions offer no help. ABA Model Rule 3.4(a), broadly adopted, says that a lawyer “shall not *unlawfully* obstruct another party’s access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . . .”<sup>10</sup> Emphasis is added to underscore that the ethics rule yields to the law. If it’s legal, it’s ethical. If not, not.

Pursuing her research, the conscientious lawyer will discover that penal statutes are of modest help, that courts partly disagree, and that judges on the same court disagree among themselves. The lawyer may conclude that courts have failed to identify, let alone reconcile, all of the competing interests at play. As I will argue throughout but mainly in Part IV, courts have focused on the wrong question. They have asked an easy one: does the attorney-client or other privilege protect the real evidence—the thing itself? The answer is no.<sup>11</sup> Courts then assume that a lawyer’s duty to deliver the object to authorities should necessarily follow. That is a mistake. We must first ask whether mandated delivery jeopardizes the client’s rights, the return of stolen property, or public safety. If so, we must ask whether we can protect each interest without harming law enforcement.

Whatever our answers when the object is a loaded gun, should they differ when the item is not dangerous, not illegal in itself to possess, not stolen property, but nonetheless relevant to a foreseeable criminal case? Suppose that the Attorney General announces the indictment of a company and its officers for price fixing. He says that the investigation is continuing and that more indictments are expected. The CFO of another company in the industry brings her lawyer her personal laptop. On it are documents that implicate the CFO in the scheme. What may the lawyer do with the laptop? Is the answer the same as it is for the gun?

I am more optimistic than earlier scholars that answers to all of these questions can mostly avoid an either/or clash, where either the client’s interests or the state’s interest must prevail. To some extent, of course, that will be true, and when it is we will have to choose between them. I suggest, however, that we can reduce the incidence of irreconcilable interests close to the vanishing point, while paradoxically strengthening protection for all. My proposals build on the work of Kevin Reitz and Norman Lefstein, discussed below, and on the three premises identified in Part I.

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10. MODEL RULES OF PROF’L CONDUCT R. 3.4(a) (2009) (emphasis added). The D.C. and Virginia rules differ. See *infra* text accompanying notes 195-203.

11. See, e.g., *State v. Olwell*, 394 P.2d 681, 685-86 (Wash. 1964).

C. *Prior Scholarship*

Kevin Reitz's valuable 1992 study was the last sustained academic investigation of these issues.<sup>12</sup> Both Reitz and I address a lawyer's duty when coming into possession (or learning the location) of real evidence of apparent relevance to a pending or foreseeable criminal prosecution of a client. We both discuss the scope of the duty depending on whether the evidence is illegal to possess and on the identity of the source (client or third party). My answers are more protective of the client than those of Reitz, but I also propose a structural device to protect the state's interest in law enforcement. This device, a registry, will ensure that the State knows the identity of any lawyer who may possess physical evidence that the State may have a right to demand or seize.<sup>13</sup>

Court activity in the years since Reitz wrote, including Justice Stevens' opinion in *United States v. Hubbell*,<sup>14</sup> offers me additional authorities with which to work.<sup>15</sup> I also have the advantage of Reitz's article, especially his idea for "a new investigative procedure" that will permit nonintrusive searches of law offices.<sup>16</sup>

Reitz also proposed creation of a new "projected privilege," of either a constitutional or common law dimension. It would afford a defense lawyer the equivalent of a Fifth Amendment privilege to retain physical evidence that might come into her possession, whether or not the client is her source. The projected privilege was meant to enable counsel to go about investigating the client's matter without risk of becoming the unwitting agent of law enforcement if she were obligated to give the prosecution any physical evidence she managed to turn up.<sup>17</sup> This creative idea has not found favor. I concur in Reitz's goals, but argue that we can achieve them less boldly by relying upon a client's recognized need "to obtain fully informed legal advice," cited in *Fisher*

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12. Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege*, 41 DUKE L.J. 572 (1992).

13. See *infra* Part IV.E.

14. 530 U.S. 27 (2000). *Hubbell* will be further discussed in the text accompanying notes 57-67.

15. I also examine some judicial opinions that Reitz does not, including two dissents that recognize important questions that majority views largely ignore. See *People v. Sanchez*, 30 Cal. Rptr. 2d 111, 124 (Ct. App. 1994) (Johnson, J., dissenting) (discussed in the text accompanying notes 171-72); *Hitch v. Pima Cnty. Superior Court*, 708 P.2d 72, 80-81 (Ariz. 1985) (Feldman, J., dissenting) (discussed in the text accompanying notes 167-70).

16. Reitz, *supra* note 12, at 655; see also *infra* text accompanying notes 244-45. Reitz calls this new tool a "hybrid" court order because it incorporates characteristics of both a search warrant and a subpoena. *Id.*

17. See Reitz, *supra* note 12, at 651-52:

The projected privilege would be available to the attorney in all circumstances where the client could claim a lawful ability under the Fifth Amendment to resist disclosure of evidence. . . .

....  
The projected privilege would be available whether or not the lawyer has been served with a specific legal command to produce evidence.

*v. United States*,<sup>18</sup> as the justification for the attorney-client privilege. While the right to legal advice will not always have a constitutional foundation—which depends on whether the government has yet initiated “adversary criminal proceedings”<sup>19</sup>—*Fisher* endorsed a strong nonconstitutional claim to judicial protection for such advice.

In addition to my registry proposal, I go beyond Reitz’s analysis in two ways. First, I will argue that even when a lawyer does not have a valid representational reason to take possession of an item, she should nonetheless be encouraged to do so, without a turnover obligation, to protect the public against harm (e.g., when the item is a weapon) or to ensure that stolen property is eventually returned to its owner.<sup>20</sup> Second, based on the three premises introduced in Part I, I will argue that when a lawyer has no legitimate reason to take possession of an item in order to represent the client, protect the public, or ensure return of stolen property, she may not do so; or if any such reason once present has ceased to exist, she must return the item to the source unless return is excused for one of the reasons identified in Part IV.D.<sup>21</sup>

Five years before Reitz’s article, Norman Lefstein also tackled the dilemmas of lawyers who come into possession of real evidence.<sup>22</sup> Lefstein, like Reitz, saw inconsistency between the Supreme Court’s decision in *Fisher*—which held that a lawyer could refuse to comply with a subpoena for documents received from a client in order to provide advice if the client would have had a Fifth Amendment privilege to resist a subpoena for the same documents<sup>23</sup>—and the influential holding in *State v. Olwell*<sup>24</sup> that lawyers must

18. 425 U.S. 391, 403 (1976). *Fisher* will be further discussed in the text accompanying notes 34-49.

19. *Maine v. Moulton*, 474 U.S. 159, 170 (1985).

20. *See infra* Part IV.D.

21. *See infra* Part IV.A, C. Reitz would apparently allow possession under these circumstances unless affirmatively prohibited by criminal law. *See* Reitz, *supra* note 12, at 652-53.

22. Norman Lefstein, *Incriminating Physical Evidence, the Defense Attorney’s Dilemma, and the Need for Rules*, 64 N.C. L. REV. 897 (1986). For a thoughtful earlier effort to reconcile the interests raised here, published before some of the decisions that inform my analysis, see Jane Graffeo, Note, *Ethics, Law, and Loyalty: The Attorney’s Duty to Turn Over Incriminating Physical Evidence*, 32 STAN. L. REV. 977 (1980). My proposals differ from those in the note in several ways, including with regard to a lawyer’s duty to return incriminating physical evidence to the source (I specify several exceptions to that duty) and the duty in some instances to return stolen property to the owner even when doing so would harm the client (I always resolve the interests in the client’s favor). *Compare id.* at 994, 996, with *infra* Part IV.D, and *infra* text accompanying notes 239-40. Further, the note envisions that the State’s subpoena and search powers will suffice to compensate for any authority the lawyer has to withhold physical evidence. Graffeo, *supra*, at 997-98. But the State will not always know the identity of the lawyer who has (or has anonymously returned) physical evidence and so will not be able to direct those powers at the appropriate person. My registry proposal corrects for this information gap. *See infra* Part IV.E.

23. *See infra* text accompanying notes 34-49.



produce real evidence in their possession without request and even when the client is the source.<sup>25</sup> In other words, under *Ollwell* a lawyer would be required to turn over evidence that under *Fisher* she cannot be subpoenaed to produce. Courts have followed *Ollwell* on this point even after *Fisher*.<sup>26</sup> After identifying the lack of guidance in the profession's ethical rules, Lefstein proceeded to focus on a then-recent addition to the ABA Criminal Justice Standards, which attempted to provide that guidance. Lefstein discussed how the new standard could be improved to afford greater clarity consistent with the competing interests. I think that rescuing the standard requires major surgery.<sup>27</sup>

Part I provides the three premises that form the bedrock of my argument and I will return to them and their corollaries in Part IV. Part II identifies key variables from leading cases that address the defense lawyer's dilemma. Part III explores the constitutional and criminal law background for the questions I address. It then describes and analyzes a dozen cases on these issues, whose diverse facts encompass the several variables among them, and other authorities.

#### I. THE THREE PREMISES: NO HARM TO THE CLIENT, NO HARM TO THE STATE, AND THE RECONCILIATION PREMISE

Although the issues here can arise in a civil litigation,<sup>28</sup> the courts address them in criminal prosecutions nearly exclusively, and so will I. I propose that three premises should guide us in identifying a lawyer's duty with regard to real evidence. They are simple to state but can be difficult to apply.

24. 394 P.2d 681, 684-85 (Wash. 1964). For further discussion of *Ollwell*, see text accompanying notes 110-19.

25. Reitz explores this clash. See Reitz, *supra* note 12, at 627-36. Lefstein does so as well. See Lefstein, *supra* note 22, at 916.

26. See, e.g., *People v. Nash*, 341 N.W.2d 439 (Mich. 1983).

27. See *infra* text accompanying notes 178-90.

28. Federal obstruction of justice statutes, for example, do not distinguish between obstruction of civil and criminal cases. See, e.g., 18 U.S.C. §§ 1503, 1512 (2006). But the broad discovery rules of civil litigation enable an adversary to seek access to physical evidence whether the lawyer or the client has it; the opponent can then litigate whatever objections it may have. See *Herbert v. Lando*, 441 U.S. 153, 177 (1979) ("The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials."). Consequently, there is not the same need to require lawyers in civil cases to hand over inculpatory items without request. It remains possible, of course, that a civil litigant—or even a lawyer—may destroy or alter physical evidence and thereby violate state or federal law. Yet prosecutions for obstruction in civil cases are unusual. The explanation may be as simple as this: A civil adversary is not a prosecutor and cannot indict her opponent (although she can seek court sanctions). Prosecutors, meanwhile, may not be willing to use their resources to charge civil obstructers, leaving any remedy to discovery sanctions, but they may be quite willing to bring or add obstruction charges when they are themselves denied evidence in violation of the obstruction statutes.

The first premise is that a client should not be worse off because his lawyer has received an object with evidentiary value or has learned its location. We can call this *the premise of no harm to the client*.

The second premise is that the State should not be worse off because the lawyer has received or retrieved an object with evidentiary value. We can call this *the premise of no harm to the State*.

And the third premise is that when it is not possible to honor both premises, the client's interests should prevail, *but only if* the lawyer's possession of the object serves a legitimate goal of legal representation or other public policy. Even then, harm to the State can and should be minimized. The two public policies I have in mind are public safety and return of stolen property. A legitimate need for counsel to protect the public or to return stolen property should not heighten the risk of detection or conviction. But neither should a client be able to hinder prosecution by hiding evidence in a law office. We can call the third premise *the reconciliation premise*.

## II. FACTUAL VARIATIONS IN THE SEARCH FOR RULES

Cases identifying the real evidence issues addressed here reveal five factual variations and any resolution of these issues must accommodate each one.

### A. *The Source of the Object*

The client may deliver an item to the lawyer, or the client may give the lawyer information that enables her to find it, or a third person may be the source of the item or its location. The third person is likely to be a relative or friend of the client, who delivers the object to the lawyer precisely because she is the client's lawyer.<sup>29</sup> Alternatively, the lawyer may discover the object in her own investigation, or the item may be delivered to the lawyer anonymously.

### B. *The Nature of the Object and the Legality of Possessing It*

The object may be an instrumentality of the crime, like a gun. The client's (or the lawyer's) possession of an unlicensed gun may be a crime. The object may be illegal to possess for other reasons. Drugs, child pornography, and counterfeit money are in this category, sometimes called "contraband." Or the object may be the property of another, the "fruits of a crime." The client may have the victim's Rolex. The lawyer who takes it may be receiving stolen property. Even if the object is legal to possess, it may be probative of guilt (or inno-

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29. My research has revealed no case where a stranger was defense counsel's source of real evidence, but my proposals would be the same in any event.

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cence). The client may show up with documents that reveal a motive for a homicide or support a defense of justification.

C. *Is There a Foreseeable Proceeding?*

I have used the term “real evidence” interchangeably with “object” and “item” to refer to the thing a lawyer may come to possess or learn about. But “evidence” also has a special meaning. It presumes a legal proceeding in which the item may be offered as proof. In the gun examples, the lawyer can certainly anticipate the likelihood of a homicide trial where the gun would be evidence. But what if a lawyer finds evidence of a crime in a client’s files (e.g., of tax fraud or embezzlement), or on the client’s laptop (e.g., child pornography)? The client confesses to the lawyer. The attorney-client privilege protects the confession, but what about the documents or the child pornography? No one may be aware of the crime or ever learn of it. Are the lawyer’s duties different if the lawyer believes that the items may never become evidence in a courtroom? How certain must she be?

D. *The Evidentiary Value of the Object*

Some objects will inculcate the client with no need to prove the lawyer’s source. The client’s fingerprints may be on the gun. An incriminating document may be in the client’s handwriting. Other items may have little or no probative value—no fingerprints, no identifying features—unless they can be physically connected to the client. Money from a bank robbery may be an example. For these items, turnover by the lawyer will not help the State unless it is permitted to ask the jury to infer from the lawyer’s possession—or better yet, prove through the lawyer’s testimony or a stipulation—that the lawyer’s client (or a location or person associated with the client) was the lawyer’s source.

E. *Does the Lawyer Have a Legitimate Reason to Take Possession of the Object?*

If a lawyer has no legitimate reason to take possession of the object, then its transfer to the lawyer merely impedes the State and should be forbidden. The lawyer should not accept the transfer or, if she does, the State should be put in a position at least equal to where it might have been had she not done so. That follows from the second premise: *no harm to the State*.<sup>30</sup>

To justify any possible harm to the State, the lawyer must have a legitimate reason to take possession. When will that be true? The lawyer may need to conduct tests on an item or read a document to understand its meaning. An item may have exculpatory value. A letter to the client from the victim threatening

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30. See *infra* Part IV.A.

bodily harm might bolster a self-defense claim. The lawyer may wish to retain the letter to ensure its availability and integrity at any trial.

Other values may lead a lawyer to take possession of an item even if it serves no legitimate goal of representation. Public safety is one such value; return of stolen property is a second.

### III. THE LEGAL BACKGROUND

In this Part, I first examine the constitutional and criminal law relevant to the issues here. I then synthesize a dozen appellate decisions—four in each of three categories—that together encompass the variables in Part II. Last, I consider solutions in the ABA's Criminal Justice Standards,<sup>31</sup> the American Law Institute's *Restatement (Third) of Law Governing Lawyers*,<sup>32</sup> and the professional conduct rules in Washington, D.C.<sup>33</sup>

#### A. *The Constitutional Law*

In *Fisher v. United States*,<sup>34</sup> the Internal Revenue Service (IRS) subpoenaed workpapers prepared by the clients' accountants, which the clients then gave to their lawyers. Although the subpoena to each lawyer did not violate the clients' Fifth Amendment rights, the Court held that if the amendment would have protected the papers against compelled production while in the clients' possession, and the papers were delivered to the lawyers "for the purpose of obtaining legal advice,"<sup>35</sup> the lawyers could assert the attorney-client privilege in response to the subpoena. But if the clients would have had to produce the papers in response to a subpoena, the attorney-client privilege claim would be rejected. If documents "are not appreciably easier to obtain from the attorney" than from the client, "clients will not be discouraged from disclosing the documents to the attorney, and their ability to obtain informed legal advice will remain unfettered."<sup>36</sup> However, "[i]t is otherwise if the documents are not obtainable by subpoena *duces tecum* or summons while in the exclusive possession of the client, for the client will then be reluctant to transfer possession to the lawyer unless the documents are also privileged in the latter's hands."<sup>37</sup>

31. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-4.6 (3d ed. 1993) [hereinafter ABA STANDARDS].

32. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 119 (2000).

33. D.C. RULES OF PROFESSIONAL CONDUCT R. 3.4(a) (2007).

34. 425 U.S. 391 (1976). The decision resolved two different cases, *Fisher v. United States* and *United States v. Kasmir*, see *Fisher*, 425 U.S. at 391, but the relevant facts of the two cases were identical and the Court did not distinguish between them.

35. *Id.* at 404.

36. *Id.*

37. *Id.*

Two statements bear emphasis. First, and most important, delivery to a lawyer must have been “for the purpose of obtaining legal advice.”<sup>38</sup> The privilege is not an end in itself. Rather, “it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.”<sup>39</sup> The Court repeated this point several times and the Government conceded it.<sup>40</sup> Second, it is the client’s attorney-client privilege, not the client’s Fifth Amendment rights, that gives the lawyer a shield against disclosure. True, the next inquiry is whether the client would have had a Fifth Amendment (or other) right to refuse to produce the papers. But it is still the nonconstitutional attorney-client privilege that authorized the lawyer to resist disclosure.<sup>41</sup> Fisher could not cite the Sixth Amendment right to counsel in criminal cases because the underlying investigations were not criminal. Rather, the IRS was conducting tax audits.<sup>42</sup> No Sixth Amendment right had attached or might ever attach.

More recently, the Court reemphasized a further purpose behind the privilege—a purpose that goes beyond the client’s immediate interest in informed legal advice. In *Mohawk Industries v. Carpenter*, the Court wrote: “By assuring confidentiality, the privilege encourages clients to make ‘full and frank’ disclosures to their attorneys, who are then better able to provide candid advice and effective representation. This in turn serves ‘broader public interests in the observance of law and administration of justice.’”<sup>43</sup>

The taxpayers in *Fisher* won a battle but lost the war. Reaching their Fifth Amendment claim, the Court ruled that they would not have been able to assert the privilege against self-incrimination in response to a subpoena directed at them.<sup>44</sup> An order to produce documents—or at least these documents—would not violate the Fifth Amendment, the Court wrote, unless *the act of producing* the documents, as distinct from the contents of the documents, was incriminatory.<sup>45</sup> The act of production doctrine posits that even if the Fifth Amendment

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38. *Id.*

39. *Id.* at 403.

40. *Id.* at 404-05. The Court wrote:

Where the transfer is made for the purpose of obtaining legal advice, the purposes of the attorney-client privilege would be defeated unless the privilege is applicable. . . .

Since each taxpayer transferred possession of the documents in question from himself to his attorney in order to obtain legal assistance in the tax investigations in question, the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege.

*Id.*

41. The attorney-client privilege is a statutory or common law creation. *See id.* at 402 n.8.

42. *Id.* at 394-95.

43. 130 S. Ct. 599, 606 (2009) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

44. 425 U.S. at 408.

45. A separate issue in *Fisher* was whether and when the Fifth Amendment protects the contents of particular documents in a person’s possession. In *Fisher*, the documents were

does not apply to the item subpoenaed, the act of producing it may have “communicative aspects of its own, wholly aside from the contents of the papers [or other item] produced.”<sup>46</sup>

What might those “aspects” be? “Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer’s belief that the papers are those described in the subpoena.”<sup>47</sup> None of these three “testimonial” dangers was present in *Fisher*. According to the Court, “[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the papers.”<sup>48</sup> Nor would the act of production authenticate the papers because the taxpayer was “no more competent to authenticate the accountant’s workpapers or reports by producing them than he would be to authenticate them if testifying orally.”<sup>49</sup> The accountants would be the likely witnesses to authenticate the workpapers.

The act of production doctrine reappeared in *United States v. Doe*,<sup>50</sup> where the subject of five grand jury subpoenas (served on him personally) prevailed. The grand jury was looking into “corruption in the awarding of county and municipal contracts.”<sup>51</sup> Doe was the sole proprietor of several businesses. The Court held that compelling production of the records would not by itself violate Doe’s Fifth Amendment rights because their contents were not protected. Although Doe, not his accountants, personally prepared the records,

[t]he rationale underlying [*Fisher*] is . . . persuasive here. . . . Where the preparation of business records is voluntary, no compulsion is present. A subpoena that demands production of documents “does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought.” . . .

. . . .  
 . . . The fact that the records are in respondent’s possession is irrelevant to the determination of whether the creation of the records was compelled.<sup>52</sup>

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workpapers prepared by an accountant and the Court was unanimous that they were not protected. See *id.* at 396-401. But what if the item is the client’s personal diary? The Supreme Court has not directly addressed this question. *Boyd v. United States*, 116 U.S. 616, 634-35 (1886), held “that a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution.” But *Fisher* began to chip away at *Boyd*. And lower courts take the view that *Boyd* is dead. See, e.g., *In re Grand Jury Subpoena*, 1 F.3d 87, 93 (2d Cir. 1993). Whether it is dead or alive is irrelevant to my argument.

46. *Fisher*, 425 U.S. at 410.

47. *Id.*

48. *Id.* at 411.

49. *Id.* at 413.

50. 465 U.S. 605 (1984).

51. *Id.* at 606.

52. *Id.* at 610-12 (footnote and citation omitted) (quoting *Fisher*, 425 U.S. at 409).

But the lower courts had found that Doe's act of producing the documents "would involve testimonial self-incrimination."<sup>53</sup> The Court was unwilling to disturb that finding and, since Doe had not been offered statutory immunity, he could refuse to respond to the subpoenas.<sup>54</sup> Concurring, Justice O'Connor read the Court's rejection of a Fifth Amendment privilege for the contents of the records as establishing that the "Amendment provides absolutely no protection for the contents of private papers of any kind."<sup>55</sup> She read *Fisher* as sounding the "death knell for *Boyd*."<sup>56</sup>

A final decision, where the act of production doctrine made an even more dramatic appearance, is *United States v. Hubbell*.<sup>57</sup> Webster Hubbell cited the Fifth Amendment in refusing to produce documents in response to a broad grand jury subpoena. He received immunity and produced 13,120 pages of documents.<sup>58</sup> He was then indicted for tax crimes, which were not what the grand jury had been investigating when it served the subpoena.<sup>59</sup> He moved to dismiss the indictment, citing his immunity. The Supreme Court agreed. It rejected the Government's claim that immunity was not violated because the Government did not "need to introduce any of the documents produced by respondent into evidence in order to prove the charges against him."<sup>60</sup> Justice Stevens wrote:

But the fact that the Government intends no such use of the act of production leaves open the separate question whether it has already made "derivative use" of the testimonial aspect of that act in obtaining the indictment against respondent and in preparing its case for trial. It clearly has.

It is apparent from the text of the subpoena itself that the prosecutor needed respondent's assistance both to identify potential sources of information and to produce those sources. Given the breadth of the description of the 11 categories of documents called for by the subpoena, the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions. . . . [I]t is undeniable that

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53. *Id.* at 613.

54. The Court quoted the court below as follows:

In the matter *sub judice*, however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist—or that the appellee even is somehow connected to the business entities under investigation—is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself.

*Id.* at 613 n.12 (quoting *In re Grand Jury*, 680 F.2d 327, 335 (3d Cir. 1982)).

55. *Id.* at 618 (O'Connor, J., concurring).

56. *Id.*

57. 530 U.S. 27 (2000).

58. *Id.* at 31.

59. *Id.* at 32.

60. *Id.* at 41.

providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a lead to incriminating evidence, or a link in the chain of evidence needed to prosecute.<sup>61</sup>

The government relied on the phrase “foregone conclusion” from *Fisher*, which rejected an act of production defense because the existence of the accountants’ workpapers was a “foregone conclusion.”<sup>62</sup> Not so here.

While in *Fisher* the Government already knew that the documents were in the attorneys’ possession and could independently confirm their existence and authenticity through the accountants who created them, here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent.<sup>63</sup>

It is not a great exaggeration to write that the *Hubbell* subpoena said, in effect, “give us anything in your possession that will reveal crimes you may have committed and we will immunize your act of production.” The defect in the Government’s argument—that since it would not use the produced documents, there was no violation of the immunity grant—was that the Government did in fact make “derivative use” of the information in the documents to charge Hubbell.<sup>64</sup> Production of the documents “was the first step in a chain of evidence that led to this prosecution” even if the documents or their production would not be used to prove the case against Hubbell.<sup>65</sup> The Government could not remove the taint. It could not prove “that the evidence it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources ‘wholly independent’ of the testimonial aspect of respondent’s immunized conduct in assembling and producing the documents described in the subpoena.”<sup>66</sup>

*Hubbell* expands *Fisher* and strengthens the pre-*Hubbell* arguments made by Reitz and Lefstein. It also strengthens the distinct claims that I make here. Because there would be no match between Hubbell’s documents and the Government’s proof at trial, *Hubbell* could not easily fit within the three testimonial dangers that *Fisher* associated with the act of production. The Government would not be relying on Hubbell’s production to prove that the documents existed, that Hubbell possessed them, or that they were authentic. For Hubbell to

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61. *Id.* at 41-42 (internal quotation marks and citation omitted). The Court continued: It was unquestionably necessary for respondent to make extensive use of “the contents of his own mind” in identifying the hundreds of documents responsive to the requests in the subpoena. The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox.

*Id.* at 43 (citation omitted) (quoting *Curcio v. United States*, 354 U.S. 118, 128 (1957)).

62. *Fisher v. United States*, 425 U.S. 391, 411 (1976).

63. *Hubbell*, 530 U.S. at 44-45.

64. *Id.* at 41.

65. *Id.* at 42.

66. *Id.* at 45.



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win, the Court had to broaden *Fisher* and *Doe*, which it did, as hereafter discussed.<sup>67</sup>

These three cases are central to my argument in two ways. First, whenever under *Fisher* and the act of production doctrine a state could not use a subpoena to force a lawyer, on risk of contempt, to produce an item received from a client, neither should it be able to force a lawyer to produce an item, even without a subpoena, at the risk of discipline and prosecution. Second, whatever the lawyer's source for the item, she should be able to test or read it when necessary to provide "fully informed legal advice," the value *Fisher* protected, without assuming a duty to then give the item to law enforcement when doing so will harm the client.

## B. *The Criminal Law*

### 1. *Obstruction of justice*

My first two premises posit that a rule respecting a lawyer's duty with regard to real evidence should leave neither the client nor the Government 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). My third (or reconciliation) premise is that when the first two premises collide, the client's interest should prevail so long as the lawyer's possession of the item serves a legitimate representational purpose or other value (e.g., public safety, return of stolen property).

Will my reconciliation premise put a lawyer in violation of the law on obstruction of justice? After all, she will be taking and holding an item with potential evidentiary value. Even if she does nothing to alter or destroy it, perhaps she is unlawfully concealing it. That may make it more difficult for the authorities to discover it. And by removing the item from the client, a third person or another location, a lawyer may compromise the probative value of the item. For example, if a client gives his lawyer the victim's Rolex watch, which cannot otherwise be connected to the client (no fingerprints, no DNA), accepting the watch can eliminate its evidentiary value, which may depend on finding the watch in the client's possession.

For convenience, I will examine part of the federal obstruction statute and its New York counterpart. It is not useful to analyze the obstruction law in every American jurisdiction and since the federal law is more detailed and expansive than state counterparts, it offers the greatest challenge to my argument. I will analyze one particular provision of federal law, 18 U.S.C. § 1512(c), because of its breadth. It provides:

Whoever corruptly—

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67. See *infra* text accompanying notes 213-17.

(1) 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; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.<sup>68</sup>

This provision was added in 2002 as part of the Sarbanes-Oxley legislation.<sup>69</sup> Federal law defines an "official proceeding" to include "a proceeding before a judge or court of the United States."<sup>70</sup> And § 1512(f) provides:

For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.<sup>71</sup>

The Supreme Court and lower courts have said that the official proceeding need only be "foreseeable" for § 1512 to apply.<sup>72</sup> A proceeding in a federal grand jury is an "official proceeding."<sup>73</sup> So, too, is a "proceeding before a Federal Government agency which is authorized by law."<sup>74</sup> A rather opaque defense to the crime, which the Government must disprove beyond a reasonable doubt if the defendant raises it, resides in § 1515(c), which states: "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."<sup>75</sup>

My argument does not envision that a lawyer will alter or destroy an object that comes into her possession. It does envision that a lawyer may possess the object without disturbing its intrinsic evidentiary value, if any. Some may call it concealment, though I don't think that the word, which is a legal conclusion, fits well. In any event, my argument envisions that the lawyer's possession, whether or not characterized as concealment, is not "with the intent to impair the object's . . . availability for use in an official proceeding."<sup>76</sup> The intent may only be to avoid making the legitimate use of counsel costly to the client. For the same reason, the lawyer will not have acted corruptly, a word discussed shortly. Last, my argument posits that a lawyer who behaves as I will describe

68. 18 U.S.C. § 1512(c) (2006).

69. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 745, 807 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

70. 18 U.S.C. § 1515(a)(1)(A).

71. *Id.* § 1512(f).

72. *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 707-08 (2005); United States v. Frankhauser, 80 F.3d 641, 652 (1st Cir. 1996).

73. *See, e.g.,* United States v. Lara, 181 F.3d 183, 200 (1st Cir. 1999).

74. 18 U.S.C. § 1515(a)(1)(C).

75. *Id.* § 1515(c); *see also* United States v. Kloess, 251 F.3d 941, 948 (11th Cir. 2001) (stating that the burden of persuasion beyond a reasonable doubt is on the Government to disprove the defense in § 1515(c)).

76. 18 U.S.C. § 1512(c)(1).

may have provided “lawful, bona fide, legal representation” under § 1515(c) (or should be seen to have done so), a complete defense even if her conduct otherwise falls within the definition of § 1512(c).<sup>77</sup>

A lawyer may receive an item of real evidence for a reason other than (or in addition to) the need to advise the client. She may also or instead receive the item (and hold it) because of the danger it poses to public safety (the gun in my introductory examples) or to ensure eventual return of the item to its rightful owner (the Rolex). If these are her motives, my argument remains the same because here, again, the lawyer’s intent is not to “impair the object’s . . . availability for use in an official proceeding.” Where public safety or return of stolen property is the *sole* purpose, however, the lawyer does not have a defense under § 1515(c), which is limited to “lawful, bona fide, legal representation.”

I stress here that the lawyer will only be holding the item, without alteration. Further, as explained later, any claim that the lawyer is concealing the item within the meaning of the statute is further weakened by the opportunities I afford the State to secure the unaltered item from the lawyer via appropriate processes.<sup>78</sup>

*Arthur Andersen LLP v. United States*<sup>79</sup> supports these conclusions. It addressed the mental state required for another provision of § 1512. Section 1512(b) makes it a crime if a person “knowingly . . . corruptly persuades another person” to “alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding.”<sup>80</sup> This conduct is sometimes called witness tampering to differentiate the situation where the actor herself alters or conceals the object. One battle in *Arthur Andersen* was over whether and how “knowingly” modified “corruptly.” Reversing Arthur Andersen’s conviction because of errors in the trial court’s instructions, the Court wrote that “[o]nly persons conscious of wrongdoing can be said to ‘knowingly . . . corruptly persuad[e]’ another person.”<sup>81</sup> The trial court’s “instructions . . . diluted the meaning of ‘corruptly’ so that it covered innocent conduct.”<sup>82</sup> As a result, “the ‘corruptly’ instructions did no limiting

77. The precise scope of § 1515(c) is not entirely clear. It has rarely appeared in the case law, perhaps because lawyers are rarely charged with obstruction of justice. See Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 16-21 (2002); see also *United States v. Kellington*, 217 F.3d 1084, 1099-101 (9th Cir. 2000) (granting a new trial because the trial judge limited the defendant lawyer’s effort to show through expert testimony that he acted ethically when, on instructions from his jailed client, he attempted to cause a third person to destroy certain property in the client’s home).

78. See *infra* Part IV.E.

79. 544 U.S. 696 (2005).

80. 18 U.S.C. § 1512(b)(2)(B).

81. *Arthur Andersen*, 544 U.S. at 706.

82. *Id.* at 706. The Court wrote:

work whatsoever.”<sup>83</sup> The word “corruptly” also appears, without the word “knowingly,” in another section, which makes it a crime if a person “corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.”<sup>84</sup> The Second Circuit, consistent with other circuits, has defined “corruptly” in this stand-alone posture to mean that the Government must prove “that the defendant acted with the wrongful intent or improper purpose to influence [a] judicial or grand jury proceeding.”<sup>85</sup>

A second aspect of *Arthur Andersen* relevant here is the Court’s conclusion that the trial court’s instructions failed to require the jury to find a “nexus” between the document destruction and an “official proceeding.”<sup>86</sup> The Government, citing 18 U.S.C. § 1512(e)(1), argued that the statute did not require that an official proceeding be “pending or about to be instituted at the time of the offense.”<sup>87</sup> But the Court wrote that an official proceeding must at least 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 official proceeding in which those documents might be material.”<sup>88</sup> Often, as with my gun examples above, a lawyer should foresee an official proceeding (homicides usually lead to trials), but sometimes she will not. Webster Hubbell’s lawyer might not have foreseen an official proceeding before the Government served its subpoena. Until then, the Government was not even aware of the offenses for which it later indicted Hubbell.<sup>89</sup>

For a state analogue to the federal statute, consider New York Penal Law section 215.40(2), which defines the crime of tampering with physical evidence as when a person,

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The parties vigorously disputed how the jury would be instructed on “corruptly.” The District Court based its instruction on the definition of that term found in the Fifth Circuit Pattern Jury Instruction for [18 U.S.C.] § 1503. This pattern instruction defined “corruptly” as “‘knowingly and dishonestly, with the specific intent to subvert or undermine the integrity’” of a proceeding. The Government, however, insisted on excluding “dishonestly” and adding the term “impede” to the phrase “subvert or undermine.” The . . . jury was told to convict if it found petitioner intended to “subvert, undermine, or impede” governmental fact-finding by suggesting to its employees that they enforce the document retention policy.

These changes were significant. No longer was any type of “dishonest[y]” necessary to a finding of guilt, and it was enough for petitioner to have simply “impede[d]” the Government’s factfinding ability. . . . The dictionary defines “impede” as “to interfere with or get in the way of the progress of” or “hold up” or “detract from.” By definition, anyone who innocently persuades another to withhold information from the Government “get[s] in the way of the progress of” the Government.

*Id.* at 706-07 (citations omitted).

83. *Id.* at 707.

84. 18 U.S.C. § 1503(a).

85. *United States v. Quattrone*, 441 F.3d 153, 170 (2d Cir. 2006).

86. 544 U.S. at 707.

87. *Id.*

88. *Id.* at 708.

89. *See supra* text accompanying notes 57-66.

[b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person.<sup>90</sup>

“Physical evidence” and “official proceeding” are broadly defined.<sup>91</sup> This statute has been used when the actor could have no purpose other than to keep physical evidence from an official proceeding, such as when a person ingests drugs as police officers approach<sup>92</sup> or repairs a vehicle to conceal its use in a hit-and-run accident.<sup>93</sup> As stated in *People v. Simon*, “an essential element of the crime of [tampering] is that the defendant believed that the physical evidence is about to be produced or used in an official or prospective official proceeding and that the defendant intended to prevent such production or use.”<sup>94</sup> If a lawyer takes possession of an object for legitimate reasons and does not by doing so “intend[] . . . to prevent [its] production or use” in an “official proceeding”—if she is prepared to produce the object unaltered if ordered to do so once any legal objections are overruled—her possession would not seem to violate the New York law.

## 2. *Receiving stolen property*

A lawyer who retains the fruits of a client’s crime may also fear that she is receiving stolen property. New York penal law provides:

A person is guilty of criminal possession of stolen property in the fifth degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof.<sup>95</sup>

90. N.Y. PENAL LAW § 215.40(2) (McKinney 2010).

91. Section 215.35 provides the following definitions:

1. “Physical evidence” means any article, object, document, record or other thing of physical substance which is or is about to be produced or used as evidence in an official proceeding.
2. “Official proceeding” means any action or proceeding conducted by or before a legally constituted judicial, legislative, administrative or other governmental agency or official, in which evidence may properly be received.

*Id.* I choose New York here and elsewhere because its provisions are unremarkable descriptions of the crimes they define. It is their very ordinariness that makes them useful examples.

92. *See, e.g.*, *People v. Palmer*, 674 N.Y.S.2d 566, 568-69 (Crim. Ct. 1998) (applying section 215.40 when defendant swallowed a “bag containing a substance resembling marijuana”).

93. *See, e.g.*, *People v. Wright*, 786 N.Y.S.2d 230, 231 (App. Div. 2004) (applying section 215.40 when defendant repaired a boat that had been involved in a hit-and-run accident).

94. 547 N.Y.S.2d 199, 203 (Crim. Ct. 1989).

95. N.Y. PENAL LAW § 165.40.

The degree of the crime, from a misdemeanor to a serious felony, depends mainly on the nature or value of the property,<sup>96</sup> but in each case the statute requires that the defendant act with an “intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner.” This brings us back to *Fisher*. If the lawyer has a legitimate representational reason to receive the item, the “benefit” to the client is informed legal advice, the interest *Fisher* protected. And it brings us back to *Hubbell*, too, because requiring the lawyer to produce the item, or risk prosecution and discipline, may disclose a client’s criminal conduct of which the authorities were unaware. Furthermore, the lawyer’s intent would not be to “impede” the owner’s recovery but to avoid providing evidence against the client. If in addition or instead the lawyer holds the object in her office to protect public safety or ensure the object’s return, the public or owner benefits and the lawyer’s intent is not to keep it from the owner. Whatever the lawyer’s motives—representation, public safety, or return—social policy and statutory construction should encourage the lawyer to take and hold the item because the client, unlike the lawyer, may destroy, spend, or sell it.

### 3. *Possession of drugs (and other contraband)*

The New York penal law making possession of controlled substances a crime reads in its simplest form: “A person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance.”<sup>97</sup>

There follow various circumstances that can heighten the seriousness of the offense, most having to do with the quantity of drugs. But for each circumstance the substance must be “unlawfully” possessed. “Unlawfully” in turn is defined to mean “in violation of . . . the public health law,” which in somewhat circular fashion identifies the controlled substances that may not be lawfully possessed.<sup>98</sup> A lawyer who takes possession of drugs would therefore appear to commit this crime. Nor could she destroy the drugs if doing so would be an obstruction of justice. So a New York lawyer who comes into possession of drugs might well conclude that she has to deliver them to the authorities even if they can be traced to a client and even when the authorities may be unaware of the crime. The lawyer might believe that she would have a defense to a charge of possession, but she is not likely to want to risk being wrong. The client then would be better off if the lawyer were not given the drugs. True, it may mean the drugs are sold or used, but the alternative may help build a case against the

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96. For example, possession of stolen property is a Class A misdemeanor regardless of the value of the property. *Id.* But if the property is worth more than \$3000, the defendant can be charged with a Class D felony. *Id.* § 165.50. If the property is worth more than one million dollars, possession is a more serious Class B felony. *Id.* § 165.54.

97. *Id.* § 220.03.

98. *Id.* § 220.00(2).

client. If the lawyer has a legitimate representational purpose in accepting the drugs (for example, to identify whether they *are* drugs and to determine their purity), and return is then not possible or forbidden, the client's need for the advice of counsel comes at the price of whatever inculpatory value the drugs may have if the lawyer is then forced to deliver them to the authorities to protect herself.

It is not only drugs that can create a problem. Any item illegal in itself to possess (generically, contraband) can pose the same dilemma: counterfeit money, certain weapons, and burglar tools are examples, as is child pornography. As mentioned earlier, Philip Russell, a Connecticut lawyer, destroyed a laptop containing child pornography owned by his client, a church.<sup>99</sup> The church choirmaster had downloaded the images, but the church did not want to report him. As it happens, the choirmaster was already under investigation.<sup>100</sup> Russell was indicted for violating federal obstruction of justice statutes carrying twenty-year prison terms and which were enacted as part of the Sarbanes-Oxley legislation passed in the wake of Enron's collapse and the indictment of Arthur Andersen.<sup>101</sup> In a motion to dismiss the indictment, Russell argued that he did not foresee an "official proceeding."<sup>102</sup> He claimed not to know that the choirmaster was under investigation. The trial judge denied the motion because what Russell did or did not foresee was a jury question.<sup>103</sup> Russell then pled guilty to misprision of a felony<sup>104</sup> and was sentenced to community service, home confinement for six months, and a year's probation, during which time he was suspended from practice in federal and state court, then automatically reinstated.<sup>105</sup>

The troubling aspect of Russell's case is that for a lawyer in Russell's position, the only safe options would have been to refrain from taking possession of the laptop or to take it and give it to the authorities despite his client's desire not to report the choirmaster. Russell might have questioned whether he could even have left the laptop with the church. His client would then have been

99. I take the facts from the district court's refusal to dismiss the indictment. *See* United States v. Russell, 639 F. Supp. 2d 226, 230 (D. Conn. 2007).

100. *See id.* at 231.

101. Russell's indictment charged violations of 18 U.S.C. § 1512(c) and § 1519. Enron filed for bankruptcy on December 2, 2001. *In re Enron Corp.*, 292 B.R. 507, 509 (S.D.N.Y. 2002). Arthur Andersen was indicted in March 2002. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 (2005). Sarbanes-Oxley became law July 30, 2002. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

102. *See Russell*, 639 F. Supp. at 230.

103. *See id.* at 237.

104. Amended Application for Interim Suspension at 15, *In re Russell*, No. 3:07GP30(PCD) (D. Conn. Jan. 16, 2008).

105. *See* Stipulation of Discipline at 1-2, *In re Russell*, No. 3:07GP30(PCD) (D. Conn. June 9, 2008); Judgment in a Criminal Case at 1-2, *United States v. Russell*, No. 3:07CR31(AHN) (D. Conn. Dec. 17, 2007).

guilty of possessing child pornography. He could have warned his client of this risk, but a warning might have led church officials to destroy the laptop themselves. The problem becomes exponentially more complex if we imagine that the choirmaster, not the church, was Russell's client. Would Russell then have been obligated to hand his client's laptop to the authorities, thereby sealing his client's fate? Could he have returned the laptop to his client with a warning ("you can't retain it and you can't destroy it") or would return itself have been a crime?<sup>106</sup>

### C. *How the Competing Interests Now Fare in Court*

Although cases raising the issues addressed here are few, they do arise. Collectively, the following cases encompass all the variables listed in Part II. We can use their facts to test the three premises, which I will do in Part IV.

#### 1. *When the client is the source of an instrumentality or fruit of a crime or an incriminating document*

In each of the four cases in this group,<sup>107</sup> the client was the direct source of a weapon, the fruit of a crime, or an incriminating document. Three of the cases—*Rubin*, *Nash*, and *Ollwell*—held that defense counsel had to deliver the item to authorities without being asked. *Nash* and *Rubin* were decided after *Fisher* but the opinions do not ask whether this compulsion would come at the expense of the two interests that *Fisher* protected: the client's Fifth Amendment act of production privilege and the client's purpose to "obtain fully informed legal advice."<sup>108</sup>

The three opinions also hold that the State could not prove that the client was the lawyer's source.<sup>109</sup> Although the State could still rely on whatever inculpatory value the item inherently possessed (e.g., fingerprints), the State lost the opportunity to find the item in the client's possession or control. That loca-

106. Russell destroyed the laptop. He did not merely take it into protective custody. Prosecution would have been improbable if he had simply held it until prosecutors asked for it. But not impossible. In *Commonwealth v. Stenhach*, two lawyers were prosecuted under state law for keeping in their office the rifle stock used to bludgeon a victim. See 514 A.2d 114, 115 (Pa. Super. Ct. 1986); *infra* text accompanying notes 208-10.

107. *In re Grand Jury Subpoenas*, 959 F.2d 1158 (2d Cir. 1992); *Rubin v. State*, 602 A.2d 677 (Md. 1992); *People v. Nash*, 341 N.W.2d 439, 446-47 (Mich. 1983) (opinion of Brickley, J.) (assuming client was the source of ammunition and other items tying her to the homicide); *State v. Ollwell*, 394 P.2d 681 (Wash. 1964).

108. *Fisher v. United States*, 425 U.S. 391, 403, 409-10 (1976).

109. See *Rubin*, 602 A.2d at 689; *Ollwell*, 394 P.2d at 685. In *Nash*, a confusing decision with five opinions, four of seven justices held that the prosecutor could not prove that the lawyer was the source of the evidence to support an inference that the client was the lawyer's source. See *Nash*, 341 N.W.2d at 451-52 (opinion of Ryan, J.); *id.* at 452-53 (Cavanagh, J., concurring); *id.* at 453 (opinion of Kavanagh, J., joined by Levin, J.).



tion will often provide the most powerful proof of guilt. By taking possession, the lawyer will have destroyed the location evidence.

Because of its influence, the decision in *Ollwell*, decided before *Fisher*, requires closer scrutiny. *Ollwell*'s client, Gray, was suspected of murder with a knife. The coroner subpoenaed *Ollwell* to produce "all knives in [his] possession and under [his] control relating to . . . Gray."<sup>110</sup> The coroner's basis for believing *Ollwell* had Gray's knife was a statement Gray made while in custody.<sup>111</sup> *Ollwell* was held in contempt when he refused to produce the knife.<sup>112</sup> The court reversed the finding of contempt. It assumed that *Ollwell* had received the knife from Gray<sup>113</sup> and ruled that "in preparing the defense of his client's case," *Ollwell* could hold the knife for "a reasonable period"; he then had to "turn the same over to the prosecution" without being asked.<sup>114</sup> No subpoena was necessary. No privilege protected the knife itself. But the *fact* that *Ollwell* had received the knife from Gray *was* privileged, so the subpoena asking him to produce a knife "relating to" Gray was too broad.

Despite the court's statement that *Ollwell* could hold the knife briefly to prepare his case, it doubted that an examination would actually be helpful.<sup>115</sup> And the court voiced a concern echoed by courts in ensuing decades: "The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.), which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense of his client's case."<sup>116</sup> The court offered no authority for its further assertion that *Ollwell* had to produce the knife "on his own motion."<sup>117</sup> It did not say that Washington's obstruction statute required production. It cited no ethical rule. Yet the assertion has been influential. And while the court held that a prosecutor, in introducing "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,"<sup>118</sup> the decision is unclear whether "source" refers only to the client as the lawyer's source or also includes the lawyer as the prosecutor's source. This lack of precision may be explained by the fact that Gray had already been convicted and the proof showed that he had used another knife in the homicide.<sup>119</sup>

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110. 394 P.2d at 682.

111. *See id.* at 682-83.

112. *See id.* at 683.

113. *See id.*

114. *Id.* at 684-85.

115. *See id.* at 684.

116. *Id.*

117. *Id.* at 685.

118. *Id.* at 685.

119. *See id.* at 683 n.1.

Thereafter, *Rubin*, like *Olwell*, refused to let the prosecutor reveal the client as the lawyer's source,<sup>120</sup> and *Nash* ruled that the prosecutor could not reveal the lawyer as the State's source.<sup>121</sup> *Rubin* does not fit perfectly into this first category because the client did not personally deliver the incriminating objects (bullets) to her lawyer. Rather, the lawyer's investigator found them in her purse while the client was ill and on her way to the hospital. But the court ignored this distinction and treated the case as though the client delivered the bullets personally.<sup>122</sup>

The fourth case in which the client was the lawyer's source, *In re Grand Jury Subpoenas*, is the only white-collar case among the dozen discussed in this Part.<sup>123</sup> In its investigation of John Doe and his company, XYZ, for money laundering and securities violations, the grand jury subpoenaed certain records associated with seven telephone numbers.<sup>124</sup> The law firm Paul Weiss initially represented both Doe and XYZ but then withdrew as XYZ's counsel.<sup>125</sup> Thereafter, the Government served the law firm with a subpoena for the records or copies of them.<sup>126</sup> The firm set up defenses based on Doe's Fifth Amendment privilege, the attorney-client privilege, and the work product doctrine.<sup>127</sup> All were rejected.<sup>128</sup>

What is interesting here is not what the court held but rather what it did not even imply, namely that Paul Weiss did anything wrong in taking possession of the records or in failing, once having had a chance to examine them, to hand them to the Government without a subpoena. After all, if *Olwell* had to deliver the knife "on his own motion," didn't Paul Weiss have to do the same with the phone bill? Are documents different? Are white-collar cases different? It may be that Paul Weiss told the authorities that it had the phone bill, thereby inviting the subpoena and a chance to litigate the issues. If so, the firm can hardly be faulted for not turning over the very item that it claimed it did not have to turn over, while at the same time giving the Government the chance to prove otherwise.

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120. See *Rubin v. State*, 602 A.2d 677, 689 (Md. 1992).

121. See *supra* note 109.

122. See *Rubin*, 602 A.2d at 685, 689.

123. 959 F.2d 1158 (2d Cir. 1992).

124. See *id.* at 1161.

125. *Id.*

126. *Id.*

127. See *id.*

128. See *id.* at 1167.

2. *When a location identified by the client is the lawyer's source of an instrumentality or fruit of a crime or an incriminating document*

In the four cases in this group, a lawyer took possession of an item after the client revealed its location to the lawyer. Now the client fares less well.

In *State v. Douglass*, a lawyer retrieved the murder weapon, a pistol, from a location with evidentiary significance. The authorities then took it from the lawyer.<sup>129</sup> The State was permitted to prove that the lawyer was the source of the gun, but it could not require him to testify that his client told him where to find it or its location.<sup>130</sup> By contrast, in *People v. Meredith*, the lawyer's investigator, pursuing a jailed client's disclosure to counsel, retrieved the homicide victim's wallet from a burn barrel behind the client's home, thereby destroying the physical connection between the wallet and the client and rendering the wallet of little or no evidentiary value.<sup>131</sup> The court held that the investigator could properly have removed the wallet so counsel could examine it. The lawyer was then required to deliver it to authorities, as he had.<sup>132</sup> But delivery was insufficient to make the State whole. The court required successor counsel to repair the evidentiary gap by having the investigator testify, or by stipulating, to the location. It wrote:

When defense counsel alters or removes physical evidence, he necessarily deprives the prosecution of the opportunity to observe that evidence in its original condition or location. As the amicus Appellate Committee of the California District Attorneys Association points out, to bar admission of testimony concerning the original condition and location of the evidence in such a case permits the defense in effect to "destroy" critical information; it is as if, he explains, the wallet in this case bore a tag bearing the words "located in the trash can by [the defendant's] residence," and the defense, by taking the wallet, destroyed this tag.<sup>133</sup>

On appeal, the defendant argued that the State should not be allowed to call the investigator unless it could prove that "the police probably would have eventually discovered the evidence in the original site."<sup>134</sup> The court found this rule "unworkably speculative."<sup>135</sup> But speculation beats certainty. Future lawyers in the same position might prefer to speculate that trash collectors will empty the burn barrel before police search it—which they might never do—rather than accept the certainty of mandatory turnover if they take possession.

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129. 20 W. Va. 770, 775 (1882). *Douglass* apparently represents the first time that a state high court addressed these issues.

130. *Id.* at 790-91.

131. 631 P.2d 46, 48 (Cal. 1981).

132. *Id.* at 53 n.7.

133. *Id.* at 53.

134. *Id.*

135. *Id.*

*In re Ryder* is a disciplinary case.<sup>136</sup> Police suspected Ryder's client, Cook, of bank robbery. Cook, who was at liberty, told Ryder that marked money from the robbery was in his bank lockbox but denied robbing the bank. He claimed that someone had paid him to hold the money, but Ryder did not believe him. With a power of attorney from Cook, Ryder opened the lockbox and found not only money but also a sawed-off shotgun. Ryder claimed that he opened Cook's lockbox intending to transfer the money to his own lockbox on the theory (perhaps derived from a broad reading of *Olwell*) that, once transferred, attorney-client privilege would prevent the prosecution from "linking" the money to his client; upon finding the gun, he transferred it on the same theory.<sup>137</sup>

In the ensuing disciplinary proceeding, the court wrote that the money belonged to the bank: "No canon of ethics or law permitted Ryder to conceal from the [bank] its money to gain his client's acquittal."<sup>138</sup> The court also held that Ryder's possession of the shotgun was a crime, writing that Ryder "took possession of [the shotgun] to hinder the government in the prosecution of its case, and he intended not to reveal it pending trial unless the government discovered it and a court compelled its production."<sup>139</sup> In 1967, the district court suspended Ryder from practice, and the court of appeals affirmed.<sup>140</sup>

Ryder claimed that he had acted to "prevent Cook from attempting to dispose of the money."<sup>141</sup> Until Ryder removed the money, Cook had access to it and also to the shotgun, which posed a danger to the public. The court did not fault Ryder's removal of the money and gun. It faulted the fact that he placed them in his own lockbox. But if the consequence of disarming Cook and safeguarding the money is the creation of a duty to give the State real evidence incriminating a client, we discourage those salutary acts. Here the likelihood that the State would soon discover the items in Ryder's lockbox was high.<sup>142</sup> That in fact happened.<sup>143</sup> So Ryder's conduct did not impede the State from eventually gaining possession of the gun and money; and Ryder did, however briefly, prevent Cook from removing them. On different facts, however, a lawyer who takes possession of property or a weapon in order to deny a client access to either may hinder law enforcement because, unlike in *Ryder*, the State does not know the identity of the lawyer or even that there is one. Then we are presented with a choice: encourage the lawyer to take possession to protect the property or the public anyway, or by mandating turnover if she does, discour-

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136. 263 F. Supp. 360, 361 (E.D. Va. 1967).

137. *See id.* at 362-63.

138. *Id.* at 369.

139. *Id.*

140. *In re Ryder*, 381 F.2d 713, 715 (4th Cir. 1967).

141. *In re Ryder*, 263 F. Supp. at 362.

142. The authorities' discovery of Cook's empty lockbox would lead them to the power of attorney running to Ryder and then to Ryder's lockbox.

143. *See In re Ryder*, 263 F. Supp. at 364.

rage her from doing so, thereby endangering property or the public. I address that choice (and a way to protect all interests) hereafter.<sup>144</sup>

*Clutchette v. Rushen*<sup>145</sup> is the last case in this group. It reveals a rare judicial recognition of the possibility that a turnover duty could impinge on the interest, which *Fisher* protected, in “fully informed legal advice.”<sup>146</sup> Clutchette was convicted of murdering a passenger in his car. He had been under investigation for the homicide but the charges had been dismissed. His lawyer’s investigator (who happened to be Clutchette’s wife) then discovered receipts showing that Clutchette had reupholstered the car seats. She learned who had the receipts (identified as “an individual in Los Angeles”) from Clutchette’s lawyer, whose source was Clutchette.<sup>147</sup> Clutchette’s wife gave the receipts to the police, who retrieved the original car seats. They contained the victim’s blood. The trial court allowed that evidence but excluded Mrs. Clutchette’s communications to the police.<sup>148</sup> On appeal, the state court held that once the receipts were in the lawyer’s constructive possession, he had to give them to the State. Therefore, so did his investigator.<sup>149</sup>

On appeal from the denial of federal habeas corpus relief, Clutchette argued that the state court had forced him to make a choice between his rights under the Fifth and Sixth Amendments. “The defendant must elect either complete disclosure to his attorney, to facilitate planning an effective defense, or only partial disclosure, to avoid incriminating himself by divulging the location of key evidence which the attorney must then disclose to the prosecution.”<sup>150</sup> The court held that “Clutchette faced no such dilemma.”<sup>151</sup>

Taking possession of the receipts was unnecessary to understanding their significance. Had Clutchette’s attorney simply left the receipts in their original location and condition, he still would have fully discharged the obligation implied by Clutchette’s right to counsel. In that situation, the attorney-client privilege would have shielded Clutchette’s disclosure. Indeed, his removal of the evidence from its original location suggests an attempt to frustrate the prosecution’s efforts to find it. The Sixth Amendment plainly does not countenance the inclusion of such actions within the scope of “effective assistance of counsel.”<sup>152</sup>

In an intriguing footnote, the court said:

[T]he constitutional dilemma . . . would exist, if at all, only in situations where the defense attorney cannot gauge the import of the evidence revealed by his

144. See *infra* Parts IV.B, E.

145. 770 F.2d 1469 (9th Cir. 1985).

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

147. *Clutchette*, 770 F.2d at 1470.

148. See *id.*

149. See *id.* at 1472.

150. *Id.* at 1473.

151. *Id.*

152. *Id.* (footnote omitted).

client—and therefore cannot provide effective assistance in preparing the defense—without actually taking possession of it. Thus, for example, the need to conduct a ballistics or fingerprint test may require removing the evidence from its original resting place.<sup>153</sup>

*Clutchette* is the sole case among those highlighted here where the majority opinion even flirts with the idea that mandated turnover could, on facts like those the court hypothesized, force a person to choose between his need for the advice of counsel and his Fifth Amendment right not to give the State evidence tending to incriminate him. The facts before the court, however, did not present that dilemma. As the *Clutchette* court stated, “[i]n *Clutchette*’s case . . . no such need existed.”<sup>154</sup>

3. *When a third party is the lawyer’s source for an instrumentality or fruit of a crime or an incriminating document*

The four cases in this final category end especially badly for the client. In *People v. Lee*, the defendant’s wife was the prosecutor’s indirect source for bloody boots used in an assault.<sup>155</sup> She had given the boots to the public defender representing Lee who in turn gave them to the court, which alerted the prosecutor, who got a warrant and seized them.<sup>156</sup> Because the defense lawyer’s source was not the defendant personally, the State was entitled to prove her identity.<sup>157</sup> *Hitch v. Pima County Superior Court* reached the same result where the source of the evidence (the victim’s watch) was the defendant’s girlfriend.<sup>158</sup> The court went even further and held that not only did the defense lawyer have an obligation to produce the watch, he did not even have the option of returning it to the girlfriend.<sup>159</sup> If the defendant wanted to avoid having her testify against him, he would have to stipulate that she had found the watch in his jacket pocket, which would tie him to the crime.<sup>160</sup>

In the other two cases in this category, the State had no need to identify the lawyer’s source for the item because the item was a document powerfully incriminating in itself. In *Morrell v. State*, a kidnapping case, the source was a friend of the jailed defendant who, while using the defendant’s car with permission, discovered a plan for the kidnapping in the defendant’s handwriting.<sup>161</sup> The friend gave the plan to defense counsel and would not take it back;

153. *Id.* at 1473 n.2.

154. *Id.*

155. 83 Cal. Rptr. 715, 717 (Ct. App. 1970).

156. *See id.* at 721.

157. *See id.* at 723.

158. 708 P.2d 72, 74 (Ariz. 1985).

159. *See id.* at 78.

160. *See id.* at 79.

161. 575 P.2d 1200, 1206 (Alaska 1978).

the lawyer then facilitated its delivery to authorities.<sup>162</sup> The lawyer could have refused to take the kidnap plan, but having taken it, and unable to return it, the lawyer was required to turn it over.<sup>163</sup> The item in the final case, *People v. Sanchez*, was a diary in the incarcerated defendant's handwriting, the contents of which incriminated the defendant in a murder.<sup>164</sup> The defendant's sister discovered the diary in his room and gave it to defense counsel, who gave it to the court.<sup>165</sup> The prosecutor successfully moved to obtain it.<sup>166</sup>

*Hitch* and *Sanchez* deserve attention because each brought a dissent whose arguments the majority opinions largely ignored. In *Hitch*, Justice Feldman wrote:

In my view . . . defense counsel should never be put in the position of helping the government prove its case. . . .

I am led to the inevitable conclusion that defense counsel has no obligation to take possession of inculpatory evidence from third parties. Further, caution and common sense dictate that as a general rule he should never actively seek to obtain such evidence and should refuse possession even if it is offered to him. His guiding principle should be to leave things as they are found. If counsel has reasonable grounds to believe that evidence is in danger of being tampered with or destroyed by a third party, his obligations are satisfied by cautioning that person against such conduct. . . .

Of course, there are limited exceptions to that general rule. The defense lawyer is justified in obtaining possession of evidence where necessary to test, examine or inspect that evidence in order to determine whether it is exculpatory. Also, the lawyer may expect to use the evidence in the representation of the client.<sup>167</sup>

The majority and the dissent both relied on ABA Criminal Justice Standard 4-4.6,<sup>168</sup> which was then in draft form but has since been approved and is discussed below.<sup>169</sup> Justice Feldman wrote:

In my view . . . the standard clearly contemplates that the defense lawyer shall not obtain or take possession of evidence without good reason; but if he does receive it, when finished with it he must return it to its source and restore everything to the *status quo ante*. It is only if he finds that he is in possession of contraband or an item which may cause serious physical injury to others that the standard permits counsel to deliver inculpatory evidence to the prosecution.<sup>170</sup>

In *Sanchez*, Judge Johnson wrote:

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162. *See id.*

163. *See id.* at 1211.

164. 30 Cal. Rptr. 2d 111, 114-15 (Ct. App. 1994).

165. *See id.*

166. *See id.* at 120 & n.14.

167. *Hitch v. Pima Cnty.* Superior Court, 708 P.2d 72, 80 (Ariz. 1985) (Feldman, J., dissenting).

168. ABA STANDARDS, *supra* note 31, at 4-4.6.

169. *See infra* Part III.E.1.

170. *Hitch*, 708 P.2d at 81 (Feldman, J., dissenting).

I would . . . like to hear argument on the ramifications of a holding [that] incriminating writings [the diary] must be voluntarily turned over to the prosecution. Would an attorney defending a tax evasion or other white-collar crime involving hundreds or even thousands of documents have to make a determination as to each page of each document whether it should be revealed to the prosecution? What would the ramifications of such a rule be on the defendant's right to effective assistance of counsel?

. . . I would like to hear argument on the consequences of a policy of revealing to the prosecutor information received in confidence from a third party. What effect would such a policy have on the willingness of third parties to come forward with evidence which might be helpful to the defense? What would be the effect on the defense attorney's willingness to receive such evidence? Will the mere risk that such evidence may turn out to be incriminating be sufficient to convince attorneys to adopt an attitude of calculated ignorance?<sup>171</sup>

In a footnote contained in the passage above, Judge Johnson added:

If, as the majority asserts, California law clearly holds that once defense counsel accepted the diary from defendant's sister he had a duty to turn it over to the prosecutor, we should also request additional briefing on the issue of whether defendant was denied effective assistance of counsel.<sup>172</sup>

I quote these dissents because their perspectives are strangely absent from the cases examining the issues here. They make worthy claims that should be addressed.

#### D. *Reconciling the Cases (Where Possible)*

While the cases (which I summarize in Table 1) cannot be fully reconciled, the governing principles seem to be the following: If a lawyer receives an item of physical evidence directly from her client, as in *Olwell*, or from her personal property (the purse in *Rubin*), she must turn it over, but at trial the State may not reveal the lawyer or client as the source. The State must look to the item itself for whatever evidentiary value it may have. If a lawyer learns of the item's location from a client communication and removes it, which is not required (*Meredith*, *Clutchette*, *Morrell*), the lawyer must (*Meredith* again) reveal the location if it provides the evidentiary link the State needs to establish relevance.<sup>173</sup> But again the lawyer may not retain it (*Ryder*). If the lawyer receives the item from a third person, even the client's relative, then unless return is permitted and possible (*Morrell*), she must deliver the item to the authorities (*Hitch*, *Lee*) and the State can then prove the identity of the source. Delivery is required in each of these circumstances regardless of the nature of the item and

171. *People v. Sanchez*, 30 Cal. Rptr. 2d 111, 124 (Ct. App. 1994) (Johnson, J. dissenting) (footnote omitted).

172. *Id.* at 124 n.3.

173. *Douglass* would allow the State to prove that the lawyer was the source. *See* 20 W. Va. 770, 790-91 (1882).



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even if its possession is not independently unlawful (the documents in *Clutchette*, *Morrell*, and *Sanchez*).

That accounts for eleven of my twelve cases. The last is *In re Grand Jury Subpoenas*, which stands apart.<sup>174</sup> This white-collar crime case focused not on whether the law firm had a duty to produce documents without request, as other cases have held even for documents, but rather on its defenses to a subpoena.<sup>175</sup>

TABLE 1

Case	Item of Evidence	Source of Evidence	Holding
<i>State v. Olwell</i>	Knife	Client	Lawyer must produce unasked but State cannot require proof of source
<i>People v. Nash</i>	Gun, ammunition, and victim's wallet	Client	Same
<i>Rubin v. State</i>	Bullets	Client	Same
<i>In re Grand Jury Subpoenas</i>	Telephone bill	Client	Law firm must produce phone bill when subpoenaed
<i>State v. Douglass</i>	Gun	Place client identified	State can prove lawyer was source but not lawyer's source
<i>People v. Meredith</i>	Victim's wallet	Place client identified	State can prove lawyer's source
<i>In re Ryder</i>	Shotgun and stolen money	Place client identified	Lawyer must deliver unasked
<i>Clutchette v. Rushen</i>	Reupholstery receipts	Place client identified	Same
<i>People v. Lee</i>	Bloody boots	Third party	Same and lawyer must reveal source
<i>Hitch v. Pima County Superior Court</i>	Victim's watch	Third party	Same
<i>Morrell v. State</i>	Kidnap plan in defendant's handwriting	Third party	Lawyer must deliver unasked
<i>People v. Sanchez</i>	Defendant's incriminating diary	Third party	Same

174. 959 F.2d 1158 (2d Cir. 1992).

175. *See id.* at 1161.

My argument, as developed below, is that the courts have it wrong. First, the nearly unanimous belief that in all circumstances (save perhaps for white-collar crimes) the lawyer must deliver the item to the authorities “on his own motion” is wrong.<sup>176</sup> Then, from this erroneous conclusion, the courts mistakenly treat as the main questions whether the State is entitled to prove the lawyer’s source or to prove that the lawyer was the State’s source. The courts instead should begin by asking two different questions. First, does the lawyer have a good reason to take the item? Second, if so, may the lawyer then return it to the source if and when that reason no longer exists? Or, may the lawyer retain it if return is impossible or if it is excused for one of the reasons identified in Part IV.D?

#### E. *Other Authorities*

Three institutional efforts to reconcile the competing interests deserve attention. They are the American Bar Association’s Criminal Justice Standards, the American Law Institute’s *Restatement (Third) of the Law Governing Lawyers*, and Rule 3.4(a) of the D.C. Rules of Professional Conduct.<sup>177</sup> None is adequate.

##### 1. *The ABA Criminal Justice Standards*

ABA Standard 4-4.6 appears to be the first effort to address the issues in their several permutations and remains the most detailed.<sup>178</sup> The standard sometimes requires a lawyer to act against his client’s interests even when substantive law does not.

The standard identifies three situations where a lawyer who “receives a physical item under circumstances implicating a client in criminal conduct should” deliver it, or disclose its location, to law enforcement authorities.<sup>179</sup> Delivery or disclosure is required in these situations even if the item “implicat[es]” the client in a crime.<sup>180</sup> Doing so, on facts like those in *Rubin*, *Hitch*, *Morrell*, and *Sanchez*, for example, can go quite far toward implication. In some instances, the item may prove guilt without regard to source, so even anonymous disclosure, which the comment to the standard envisions as a possibility, will not protect the client.<sup>181</sup>

176. *State v. Orwell*, 394 P.2d 681, 685 (Wash. 1964).

177. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 119 (2000); ABA STANDARDS, *supra* note 31, at 4-4.6; D.C. RULES OF PROF’L CONDUCT R. 3.4(a) (2007).

178. ABA STANDARDS, *supra* note 31, at 4-4.6.

179. *Id.* at 4-4.6(a), (d).

180. *Id.* at 4-4.6(a).

181. *See id.* at 4-4.6 cmt. at 196.

The first circumstance in which the standard mandates disclosure is when the law or a court order requires it; if law does not require turnover, the standard itself does so if the item is contraband or if it poses a risk of physical harm.<sup>182</sup> Before turning to items that are contraband or harmful, I describe the lawyer's options for other items where turnover is *not* legally required.

The lawyer may then return the item to the source and "should advise the source of the legal consequences pertaining to possession or destruction."<sup>183</sup> The lawyer may also keep the item "for a reasonable period of time" before returning it in order to perform tests on the item, so long as the tests do not result in alteration or destruction.<sup>184</sup> If the lawyer has "reason to believe" that the item will be destroyed if returned, could be "used to harm another," or if return is impossible (e.g., the source refuses to take it back, cannot be found, or is in jail), the lawyer may keep the item in her office "in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item."<sup>185</sup> The standard does not explain why the lawyer has a duty to retain the item when she has "reason to believe" it will be destroyed. Why can't she simply restore the status quo ante? Apparently, no law requires a lawyer to take possession of an item in the first place to prevent destruction. The standard does not do so either.

Contraband must be turned over even if the law does not require it (although the lawyer's continued possession will likely be unlawful). Contraband is defined as "an item possession of which is in and of itself a crime such as narcotics."<sup>186</sup> This would seem also to include weapons illegal to possess and stolen property, but not most documents.<sup>187</sup> There is a partial exception: the lawyer "may suggest that the client destroy [the contraband] where there is no pending case or investigation relating to this evidence and where such destruction is *clearly not* in violation of any criminal statute."<sup>188</sup> This option may be an illusion given the high threshold of the "clearly not" test. If destruction of the contraband is forbidden, or if the item belongs to another, the lawyer must deliver it or reveal its location. The standard seems to operate from the assump-

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182. *See id.* at 4-4.6(a), (d).

183. *Id.* at 4-4.6(b).

184. *Id.* at 4-4.6(c). A circumstance the standard does not address and where the lawyer may choose (in fact be obligated) to retain an item is if it has exculpatory value and the lawyer wants to ensure that it will retain its integrity for trial.

185. *Id.*

186. *Id.* at 4-4.6(d).

187. *Webster's New Collegiate Dictionary* defines "contraband" to include "goods or merchandise whose . . . possession is forbidden," which would seem to include stolen items. WEBSTER'S NEW COLLEGIATE DICTIONARY 284 (9th ed. 1983). However, the standard's text and the comment offer drugs as their only example. ABA STANDARDS, *supra* note 31, at 4-4.6(d) & cmt. at 195-96.

188. ABA STANDARDS, *supra* note 31, at 4-4.6(d) & cmt. at 195-96 (emphasis added). But what if the source is not the "client" but his relative? Can the lawyer make the same suggestion to a nonclient source? The standard does not say.

tion that the client, if he is the source, cannot be trusted not to destroy contraband and that the lawyer has a duty to ensure he does not, even if that will mean handing over evidence that can be used to convict the client.

Even if the item is not contraband, the lawyer will have to disclose it if retaining it “pose[s] a risk of physical harm to anyone.”<sup>189</sup> This language is unclear. It would certainly include chemically unstable poisons and explosives. But it would not seem to include a gun, not even a loaded gun, because it and nearly all weapons can be secured safely. But a gun may also be contraband if possessing it is illegal because it is unlicensed or because it is, for example, a sawed-off shotgun as in *Ryder*. If it is contraband, the lawyer must turn it over unless the “clearly not” standard permits her to recommend that the client destroy it.<sup>190</sup>

The standard is consistent with many of the decided cases but potentially inconsistent with some of them. Most noteworthy, if the substantive criminal law does not forbid a lawyer to retain or return real evidence—say documentary evidence—then the standard says that the lawyer may ethically do so in a way that does not alter or destroy it. This would be true for the kidnap plan in *Morrell*, the reupholstery receipts in *Clutchette*, and the diary in *Sanchez*. None is a fruit or instrumentality of a crime as generally understood. (Even if the *act* of the reupholstery is an obstruction of justice, the receipts would not have been used to commit the crime.) These three cases, however, reached a contrary conclusion for the documents they addressed, as discussed in Part III.C.

## 2. Restatement of the Law Governing Lawyers

Restatement section 119 is spare and unhelpful.<sup>191</sup> It provides:

With respect to physical evidence of a client crime, a lawyer:

- (1) may, when reasonably necessary for purposes of the representation, take possession of the evidence and retain it for the time reasonably necessary to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence; but
- (2) following possession under Subsection (1), the lawyer must notify prosecuting authorities of the lawyer’s possession of the evidence or turn the evidence over to them.<sup>192</sup>

The breadth of this duty is astonishing. Imagine a client who is not yet suspected of tax fraud but fears he may be at risk. He gives his lawyer documents to analyze the issues. The lawyer concludes that the client likely violated the criminal tax laws. The documents are “evidence of a client crime” within the

189. *Id.* at 4-4.6(d).

190. I leave unstable poisons and explosives for another day. Their presence is improbable. In the cases in which the issues addressed here actually arose, unstable poisons and explosives have not appeared.

191. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 119 (2000).

192. *Id.*

meaning of section 119. This provision would require the lawyer either to notify authorities of the documents or to deliver them. The provision does not allow return to the client. The comment to section 119 contemplates exactly the opposite:

Some decisions have alluded 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. That will often be impossible. The option would also be unavailable when the lawyer reasonably should know that the client or another person will intentionally alter or destroy the evidence.<sup>193</sup>

So the client seeking legal advice and providing a lawyer with the documents she needs in order to get that advice may thereby, through counsel, be turning himself in.<sup>194</sup>

### 3. *D.C. Rule 3.4(a)*

D.C. Rule 3.4(a)—the counterpart to ABA Model Rule 3.4(a), which forbids conduct only if the law does so—states more expansively that a lawyer shall not

[o]bstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good-faith effort to preserve it and to return it to the owner, subject to Rule 1.6.<sup>195</sup>

The comment to D.C. Rule 3.4(a) is dense.<sup>196</sup> The rule and the comment acknowledge the substantive criminal law and discovery rules and go beyond these.

- The rule and the comment forbid the lawyer to “conceal” evidence but do not say what constitutes concealment except that it is not limited to criminal concealment.<sup>197</sup>

193. *Id.* § 119 cmt. c.

194. The section applies to documents including “transaction documents evidencing a crime.” *Id.* § 119 cmt. a.

195. D.C. RULES OF PROF'L CONDUCT R. 3.4(a) (2007). I examine D.C. Rule 3.4(a) because it imposes ethical duties that go beyond the commands of the substantive law and because it attempts to define the scope of those duties. All American states but one follow the ABA Model Rule, which requires only that lawyers act lawfully. The exception is Virginia, which has a more expansive rule. But the Virginia rule, unlike the D.C. rule, does not describe the scope of the ethical duty. *See* VA. RULES OF PROF'L CONDUCT R. 3.4(a) (2004).

196. *See* D.C. RULES OF PROF'L CONDUCT R. 3.4(a) cmts. 1-10.

197. *See id.* at cmt. 4.

- If the evidence is the property of someone other than the client, the lawyer must “make a good-faith effort to return” it so long as doing so will not violate her confidentiality duties, but the rule is not explicit on when that will be so. If the lawyer cannot return the item without violating confidentiality, she apparently may hold it but again subject to the substantive law, including the law on receipt of stolen property and obstruction of justice, which may require the opposite.<sup>198</sup>
- The lawyer may return to the client any evidence that belongs to him except that the “lawyer may not be justified in returning” items illegal to possess, “such as certain drugs and weapons.” Apparently, whether she is justified turns on substantive law.<sup>199</sup>
- The Office of Bar Counsel might be willing to help the lawyer deliver an item “to the appropriate persons” without revealing the lawyer’s identity or “the client’s confidences.”<sup>200</sup>

In short, then, as an ethical matter, the D.C. rule allows a lawyer to receive physical evidence; if lawful, she may hold it in her office, but she may not alter or destroy it “if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena”; and she may return it to the client if it belongs to the client and is not illegal to possess.<sup>201</sup> The rule requires the lawyer to return property to the rightful owner if that can be done consistent with her confidentiality duties.<sup>202</sup> Moreover, if possession of the stolen property is “prohibited by law,” she may have to return the property to the owner even if doing so would reveal confidential information.<sup>203</sup> The rule does not, as an ethical matter, require that the lawyer deliver evidence to the authorities, unless she is legally required to do so. Ethics rules, of course, can have only limited value in solving dilemmas addressed here because they are subordinate to substantive law.

#### IV. APPLYING THE THREE PREMISES: TOWARD NEW RULES FOR LAWYERS

My three premises are, first, that a client should not be worse off because his or her lawyer has taken possession of physical evidence; second, that the State should not be worse off because the lawyer has done so; and third, where the first two premises clash, the client’s interest should prevail, but only if the lawyer’s possession serves a legitimate goal of legal representation or another public policy, and even then the harm to the State should be minimized so far as possible. The registry proposed in Part IV.E is meant to minimize that harm.

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198. *See id.* at cmt. 7.

199. *See id.*

200. *Id.* at cmt. 5.

201. *Id.* R. 3.4(a) & cmt. 7.

202. *See id.* R. 3.4(a).

203. *Id.*

It enables the State to identify (if it does not already know) any lawyers who may be holding physical evidence of a crime.

In this Part, I will describe where the courts have erred. Then I will use the three premises and the registry proposal to identify legal rules that should guide a lawyer who comes into possession of probative physical evidence.

The courts have reasoned from a valid position—that an item of real evidence is not within the attorney-client privilege—to a set of conclusions that do not logically follow and that undermine other legitimate interests. Two of these other interests are the client's need for fully informed legal advice and his right to assert the act of production doctrine when available. But not only the client's interests are at stake. The current rule also harms two interests of the public. It creates a risk to public safety, and it makes it less likely that the fruits of a crime will be returned to its owner. While the client has no protected legal interest in public safety or in the return of stolen property, the State has both interests.<sup>204</sup> By 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.

Courts sometimes bridge the gap between the premise (item not privileged) and the conclusion (turnover mandatory) by reliance on criminal statutes without examining whether those statutes by their terms actually forbid the lawyer to maintain possession of the item. Some courts mandate turnover without citing any source of authority.<sup>205</sup> Where the item is not illegal in itself to possess, as will often be true for documents, courts may cite obstruction of justice statutes to require turnover, as the Alaska Supreme Court did in *Morrell*, though ambiguously.<sup>206</sup> But an item may also be viewed as illegal to possess apart from obstruction statutes (e.g., in statutes forbidding possession of contraband or receipt of stolen property).<sup>207</sup> In *Commonwealth v. Stenhach*, the court reversed the convictions of two young lawyers for hindering prosecution and tampering with evidence; the lawyers had retrieved and retained a weapon a client used in a homicide (a rifle stock).<sup>208</sup> The reversal rested on statutory vagueness and overbreadth grounds.<sup>209</sup> But in its opinion, the court canvassed numerous cases, including many discussed here, and read them to legally require turnover despite harm to the client. It wrote:

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204. The client does have a practical interest in protecting the public and in the return of the property. Success in these efforts can work to the client's benefit in the event of conviction and sentence.

205. *See, e.g.*, *State v. Olwell*, 394 P.2d 681, 684 (Wash. 1964) (implementing a "balancing process between the attorney-client privilege and the public interest in criminal investigation" in arriving at its conclusion that turnover under the circumstances was necessary).

206. *See Morrell v. State*, 575 P.2d 1200, 1210-11 (Alaska 1978).

207. *See, e.g., In re Ryder*, 263 F. Supp. 360, 369 (E.D. Va. 1967).

208. 514 A.2d 114, 115-16 (Pa. 1986).

209. *Id.* at 116, 124-25.

[T]he foregoing cases provide a consistent body of law, which we adopt. To summarize, a criminal defense attorney in possession of physical evidence incriminating his client may, after a reasonable time for examination, return it to its source if he can do so without hindering the apprehension, prosecution, conviction or punishment of another and without altering, destroying or concealing it or impairing its verity or availability in any pending or imminent investigation or proceeding. Otherwise, he must deliver it to the prosecution on his own motion. In the latter event, the prosecution is entitled to use the physical evidence as well as information pertaining to its condition, location and discovery but may not disclose to a fact-finder the source of the evidence. We thus reject [the attorneys'] contention that their conduct was proper and that they had no duty to deliver the rifle stock to the prosecution until they were ordered to do so.<sup>210</sup>

The court's multiple restrictions on returning the item to the source—how, for example, can a lawyer know if she “can [return it] without . . . impairing its verity or availability?”—mean that lawyers who take possession of real evidence will then have only a single safe option, regardless of its incriminatory nature. Consequently, lawyers who are inclined to take possession of an item temporarily to represent their clients effectively—to test or read it—will shy away from doing so to avoid becoming mandatory messengers of incriminating evidence.

By starting with the truism that the physical item is not privileged and then overlaying the threat of prosecution and discipline of the lawyer who fails to deliver it on his own motion, these cases offer the Government an easy way to circumvent the *Fisher* doctrine when the lawyer obtains an item from a client. Rather than subpoena the item and anticipate resistance grounded in the attorney-client privilege and the act of production doctrine, the Government can instead tell counsel: “Forget the subpoena. If you don't give us the accountant's workpapers on your own motion, we are going to charge you with obstruction of justice through your act of concealment. And then we'll disbar you. So hand it over or face the consequences.” Indeed, under an aggressive view of the lawyer's duty, including the view in the *Restatement*,<sup>211</sup> if a future Webster Hubbell gives his lawyer incriminating papers, the lawyer will have to deliver them to the State without a subpoena, even if the State is unaware of them or unaware that the client may have committed a tax crime.<sup>212</sup>

This is where *Hubbell* opens a new window on the issues addressed here. The Government issued a subpoena to Hubbell and discovered evidence of a crime of which it was unaware.<sup>213</sup> Its grant of immunity did not prevent Hub-

210. *Id.* at 123. Rarely are lawyers prosecuted, but it does happen. Philip Russell's prosecution is another example. See *supra* text accompanying notes 99-106.

211. See *supra* Part III.E.2.

212. The fact that this does not happen merely shows that the State has not invoked the authority in white-collar criminal investigations, not that it could not do so. See Reitz, *supra* note 12, at 605-08.

213. See *United States v. Hubbell*, 530 U.S. 27, 32 (2000).



bell from asserting the act of production doctrine even though the Government was prepared to disavow use of any of the papers Hubbell produced.<sup>214</sup> “[I]t is undeniable,” said the Court, “that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a lead to incriminating evidence, or a link in the chain of evidence needed to prosecute.”<sup>215</sup> It was of no consequence that Hubbell could not cite invasion of any of the three narrow testimonial dangers that *Fisher* said the act of production doctrine protected when, as in that case, the Government *did* plan to introduce the subpoenaed documents.<sup>216</sup> Thus did *Hubbell* expand *Fisher*. Forcing Hubbell on pain of contempt to incriminate himself by providing a “link” to other evidence violated his Fifth Amendment rights.<sup>217</sup>

So too here. Forcing a lawyer on pain of prosecution or discipline to produce incriminating evidence in her possession can also undermine rights of the client. What difference should it make whether the State’s compulsion of the lawyer is through subpoena and threat of contempt (as in *Fisher*) or through the threat of prosecution and disbarment of a recalcitrant *unsubpoenaed* lawyer who fails to make delivery on her own motion? If the lawyer’s source was her client, the Fifth Amendment interest that *Fisher* and *Hubbell* protected may be equally compromised whichever the threat. And whether or not the client was the lawyer’s source, if the lawyer took possession of the item to test or read it in order to advise the client, the threat will compromise the other interest *Fisher* protected: “to obtain informed legal advice.”<sup>218</sup> That interest acquires Sixth Amendment protection if, unlike in *Fisher*, adversarial criminal proceedings have begun.<sup>219</sup>

Once we recognize that a rule mandating turnover of an item on a lawyer’s own motion does not follow from the nonprivileged status of the item, and that the criminal statutes sometimes offered to bridge the gap may be textually inapplicable or if applicable may undermine the Fifth Amendment and the right to counsel,<sup>220</sup> we need to identify a different set of rules that takes due consideration of all interests: those of the State, the client, the public, and the owner of stolen property. I will try to do so in the proposals below. Then I will apply the proposals to the facts of an actual case and to variations on those facts. *Fisher*, *Hubbell*, and the act of production doctrine support my argument where the lawyer’s source for the item is the client and the client’s purpose is to get “fully informed legal advice.” They do not support my argument where the lawyer’s source is a third party or where the lawyer accepts the item solely to

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214. *See id.* at 41.

215. *Id.* at 42 (internal quotation marks omitted).

216. *See supra* text accompanying notes 57-67.

217. *Hubbell*, 530 U.S. at 42; *see also id.* at 45-46.

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

219. *See Clutchette v. Rushen*, 770 F.2d 1469, 1473 n.2 (9th Cir. 1985) (recognizing this possibility in dicta).

220. *See supra* Part III.B.

protect the public or to preserve stolen property for eventual return. Even then, however, I maintain that a turnover duty that relies on the threat of prosecution and discipline of the lawyer is wrong. Whoever the source, that threat may undermine the interest in the advice of counsel if the lawyer needs to examine or test an item in order to represent the client. And even when no such examination is needed, the threat discourages the lawyer from taking possession of a dangerous or stolen item, as in *Ryder*.

A. *When a Lawyer Has No Legitimate Reason to Take Possession of an Item, She Should Not. If She Does So Anyway, the State Is Entitled to Require Her to Prove the Chain of Custody, even if the Source Is the Client.*

As the ABA warns in its comment to Standard 4-4.6, “[a]ttorneys should not be depositories for criminal evidence.”<sup>221</sup> I agree. If the only reason a lawyer has for taking possession of an object is to take possession of it, thereby making it even marginally more difficult for the State to find it at all or in a location where it has probative value, her conduct should be viewed as unethical and possibly illegal. The conduct violates the second premise. The State should not be disadvantaged when there is no legitimate representational or other reason to take possession of the item. The conclusion holds whether the source is the client, a third person, or a location revealed to the lawyer by either or discovered on her own. If the lawyer takes the item without a good reason, she should be required to deliver it to the State and the State should be entitled to prove the lawyer’s source through stipulation or the lawyer’s testimony.

The analysis in *State v. Taylor*<sup>222</sup> partly illustrates this position. The defendant, while in jail, gave Fish, his lawyer, information that led Fish to retrieve the murder weapon—a gun—from the defendant’s home. For nearly two years, Fish kept the gun in his office, until the police, tipped by an informant, confronted Fish, who produced the gun.<sup>223</sup> Whether the State could now call Fish to testify to the source of his knowledge of the gun’s location depended on why Fish took possession of it. The court said that if it was “in pursuit of a criminal or fraudulent act yet to be performed (such as conspiracy to secrete relevant evidence), then those communications are not protected by the attorney-client privilege.”<sup>224</sup> In other words, if the only reason to hide the gun was to obstruct justice, the State was entitled to Fish’s testimony. This is a straightforward application of the second premise: *no harm to the State*. On the facts in *Taylor*,

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221. ABA STANDARDS, *supra* note 31, at 4-4.6 & cmt.; *see also* *State v. Olwell*, 394 P.2d 681, 684 (Wash. 1964).

222. 502 So. 2d 537 (La. 1987).

223. *See id.* at 538.

224. *Id.* at 542.

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however, my rule could partly subordinate the second premise to the goal of protecting the public from the gun, as I hereafter explain.<sup>225</sup>

Of course, an item may come into counsel's possession without any effort on her part. In *Meredith*, the investigator found the victim's wallet in the client's burn barrel and brought it to counsel.<sup>226</sup> Counsel could have conducted his visual inspection and returned it to the burn barrel at once. Little time would have been lost. The lawyer did not return the wallet to the burn barrel and the longer he waited, the greater the interference with the State's interest. Evidence (the location) was destroyed and not quickly restored. Once the lawyer delivered the wallet to authorities, the court's solution—stipulate to the location—was the only available remedy.<sup>227</sup>

Often, there will be no good faith basis to take possession in order to represent the client. It is unlikely, for example, that Ryder had such a basis when he transferred the contents of his client's lockbox (a sawed-off shotgun and the marked bank money) to his own lockbox. He had no doubt of their provenance. No tests were performed. Ryder could have obtained whatever information the gun and money might have provided simply by inspecting them without removing them from his client's lockbox.<sup>228</sup> The telephone bill in *In re Grand Jury Subpoenas*<sup>229</sup> would also seem to be something that counsel had no legitimate reason to possess. No tests appear to have been performed. If it was important for the law firm to have its own copy of the client's phone bill, itself only a copy, it could have made one. The same appears true for the victim's watch in *Hitch*. No tests were performed. No need for possession was cited. Likewise, the court in *Clutchette* found that the lawyer had no professional need to take possession of the reupholstery receipts.

B. *A Lawyer Has No Duty to Take Possession of or Retain an Item to Prevent Its Destruction or Alteration, to Preserve Stolen Property, or to Protect the Public, but if a Lawyer Is Permitted or Encouraged to Do So, She Cannot Then Be Required to Give the Item to the Authorities if Doing So Harms Her Client*

The lawyer in *Hitch* could have declined to accept the watch. He had no duty to ensure its preservation, not even if the defendant's girlfriend, a non-

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225. See *infra* Part IV.D.

226. *People v. Meredith*, 631 P.2d 46, 48 (Cal. 1981).

227. See *id.* at 54.

228. See *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967). In addition to arguing that he thought that by taking possession, the attorney-client privilege would make it impossible for the Government to trace the gun and money to his client—a motive that undermines the second premise—Ryder claimed that he feared that his client, who was still at liberty, might remove and spend the money in his lockbox. *Id.* at 362. The court did not explore this other, more compelling motive. I do below. I also address removal of the shotgun. See *infra* Part IV.D.

229. 959 F.2d 1158 (2d Cir. 1992).

client, declared her immediate intention to throw it in the ocean. The lawyer in *Meredith* could have left the wallet in the burn barrel even if a sanitation truck was headed down the street to empty it. The lawyer had no duty to aid the State's prosecution by rescuing the wallet. The same is true when the item is in the possession of a person, not a burn barrel. In *Clutchette*, the court said that the lawyer was under no duty to retrieve the reupholstery receipts. In *United States v. Hunter*, jailed clients, charged with armed robbery, told their lawyers where the stolen money was hidden in their home.<sup>230</sup> The lawyers retrieved and held the boxes of cash in the office of one of them for a year.<sup>231</sup> The court wrote that the lawyers could have left the boxes where they found them.<sup>232</sup>

If a lawyer has received an item (perhaps passively) and then returns it to the source, is she obligated to instruct the source on the legal consequences of destroying, altering, or concealing it? If she fears destruction, must she refuse to return it? The ABA standard says yes to both questions.<sup>233</sup> Return is envisioned "unless there is reason to believe that the evidence might be altered or destroyed."<sup>234</sup> If there is no reason to fear destruction, the lawyer, in returning the item, "should advise the source of the legal consequences pertaining to possession or destruction."<sup>235</sup> What is the basis for these conclusions? Again, consider *Hitch*. The defense lawyer had no obligation to accept the victim's watch from his client's girlfriend. When she brought it to him anyway, why couldn't he immediately return it, leaving the State no worse off? The *Hitch* court held that he could not return it if he believed the girlfriend would destroy it. Not only did he have to give the watch to the authorities, the defendant was required to stipulate that his girlfriend had found it in his pocket. By contrast, *Morrell* held that the attorney could have returned the kidnap plan to the source, the client's friend, had the friend been willing to accept it.

As discussed in Part IV.D below, the State has good reason to want lawyers to take and retain possession of stolen property, a gun or other weapon, or drugs or other contraband. But it cannot expect them to do so if the State will then use the threat of prosecution or discipline of the lawyer to force her to deliver the item to the authorities when doing so will harm her client's legal position either because of the item's inherent inculpatory value or because the lawyer will be required to establish her source (at least where the source is not the client directly).

230. No. 93 CR 318, 1995 WL 12513, at \*1 (N.D. Ill. Jan. 6, 1995). For further discussion of *Hunter*, see note 240.

231. *Hunter*, 1995 WL 12513, at \*1.

232. See *id.* at \*2. I address this conclusion and use variations on the facts of *Hunter* to illustrate my proposals. See *infra* text accompanying notes 249-51.

233. See ABA STANDARDS, *supra* note 31, at 4-4.6(b), (c).

234. *Id.* at 4-4.6(c).

235. *Id.* at 4-4.6(b).

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C. *A Lawyer May Take Possession of an Item Temporarily when She Has a Legitimate Need to Test or Inspect It in Order to Effectively Represent Her Client, but Must Then Return It to the Source if Possible Unless Return Is Excused for a Reason Described in Part IV.D*

As the ABA standard<sup>236</sup> and various cases<sup>237</sup> recognize, a good faith need to test an item or read a document is one legitimate reason to take possession. If the lawyer takes the item to test it, she should have a reasonable basis to believe that the test will yield relevant information. Where the item is a document and its meaning is not immediately apparent, as with the workpapers in *Fisher*, taking possession will be necessary to understand its meaning. Absent an independent reason to retain the item or document, it should then be returned to its source. All that is lost is the interval, and nothing might have happened during it—no search of the source, no subpoena—which means that nothing is actually lost. The testing should be expeditious so the item remains away from the source as briefly as possible. True, even in a brief interim, the State may conduct a search of or subpoena the source, in which case it may not discover the item. I offer ways to mitigate this risk to the State below.<sup>238</sup>

D. *A Lawyer May Take Possession of and Retain an Item Indefinitely: (1) In Order to Avoid Danger to Others; (2) When the Item Is the Lawful Property of Another and Immediate Return to the Owner Is Not Possible Without Incriminating the Client; (3) If the Item Has Exculpatory Value; and (4) When Return Is Impossible*

Sometimes we should encourage lawyers to take and hold an item, in which case the duty to return is excused. The object may pose a danger, such as the sawed-off shotgun in the client's lockbox in *In re Ryder*, or the loaded gun in my examples in the Introduction. The lawyer could allow the client or his wife to leave with the loaded gun. She has no duty to disarm them. And if the gun is in the woods, the lawyer has no duty to retrieve it and may well choose not to do so if she will then have to give it to the police and thereby provide evidence, possibly overwhelming evidence, against her client. But just as we might prefer the lawyer to disarm the client or his wife, don't we want her to retrieve the gun from the woods? And while it may not be the lawyer's responsibility to protect against the disappearance of the gun, a side benefit to the

236. *See id.* at 4-4.6; *see also supra* Part III.E.1.

237. *See, e.g.,* *Clutchette v. Rushen*, 770 F.2d 1469 (9th Cir. 1985); *People v. Meredith*, 631 P.2d 46 (Cal. 1981); *State v. Olwell*, 394 P.2d 681 (Wash. 1964). All are discussed in Part III.C.

238. *See infra* Part IV.E. These mitigating options are also available where the lawyer is authorized to retain the item indefinitely.

State if the lawyer takes and keeps the gun in her office safe (for example) is its preservation.

So my first qualification to the presumptive duty not to accept real evidence if there is no legitimate representational purpose in doing so, or to return it quickly once that purpose is served, is that lawyers may take and retain possession of items that pose a threat to public safety and may hold the items without putting themselves in legal jeopardy. In failing to recognize the competing interests, case law discourages lawyers from removing dangerous items and imperils public safety.

A second situation in which a lawyer should be allowed to take and retain the item is where it is the lawful property of another and return to the owner is not possible without incriminating the client. In this situation, I doubt that we want the lawyer to return the item to the source, whether a person or a location. And we want to encourage the lawyer to take possession to ensure eventual return. Ryder's client was free and had access to his lockbox containing the bank money. He could have retrieved and spent it. The same can be said for the watch in *Hitch*. If return to the owner is possible without incriminating the client, then we have the best of both worlds. Safe return may be possible anonymously<sup>239</sup> if nothing about the item implicates the client.<sup>240</sup>

The third situation where I suggest that a lawyer should be allowed to retain the object unaltered, whatever it is and whatever the source, is where the item has exculpatory value and the lawyer reasonably fears that returning it may lead to the loss of its integrity as admissible evidence at trial or just to loss. The loss may happen through carelessness. Things disappear. By retaining the item, the lawyer ensures its availability. And the lawyer may not wish to deliver the item to the authorities, even though it does not inculcate the client, because she wants to enjoy the advantage of surprise at trial. If a subpoena or discovery rules require her to produce the item, then she will comply. But she should not have a duty to do so on threat of prosecution or discipline. This situation may be rare but it is not impossible. The client in my opening scenes

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239. The ABA standard contemplates the possibility of anonymous return. ABA STANDARDS, *supra* note 31, at 4-4.6 & cmt. at 196. But anonymous return presents a separate issue. See *infra* text accompanying notes 247-48.

240. The lawyers in *United States v. Hunter*, No. 93 CR 318, 1995 WL 12513 (N.D. Ill. Jan. 6, 1995), confronted this choice. They removed boxes of cash (\$30,000 to \$50,000) from the home of their jailed clients who were charged with armed robbery. *Id.* at \*1. The court said that the lawyers could have left the cash in the home but, having removed it, were obligated to help the State prove chain of custody. *Id.* at \*2-3. The best solution would have been for the lawyers to return the money to the victim if they could do so without harming their clients. If not, the second-best solution would have been to let the lawyers remove and hold the cash to prevent its disappearance. The harm to the State, which could not then have found the money in the defendants' home, could have been ameliorated by the registry described in Part IV.E. Even if permitted to do so, the lawyers might have chosen not to remove and preserve the cash. If someone else did so before the State discovered it, the link to the clients' home would be severed. On the other hand, if the clients were convicted, return of the money could have mitigated the length of their sentences.

may, for example, have a letter from the victim threatening the client with bodily harm, which can support a self-defense claim.

While an exception for exculpatory evidence makes great sense conceptually, as a practical matter, we probably do not need it. First, exculpatory evidence is likely to be a document or other form of communication (e.g., a letter, memo, tape recording, or e-mail), and not the fruit or instrumentality of a crime or an item that is otherwise illegal to possess. Second, no case, so far as I can tell, has ever criticized, much less prosecuted or disciplined, a lawyer for not handing over an exculpatory document. None is ever likely to do so. The obstruction statute is not a discovery rule.

Finally, a lawyer, having properly received an item or finding herself in unwitting possession of it (e.g., because it arrived unexpectedly in the mail or was dropped off at the office) may be unable to return it, even if return is permitted, because the source will not take it back, is dead, cannot be found, is unknown, or is locked up. The kidnap plan written in the client's handwriting in *Morrell* is the obvious example.<sup>241</sup> The lawyer tried to return the plan to the client's friend, who had been using the client's car with permission and found the plan in it. When the friend refused to take it back, the lawyer helped him (it is not clear exactly how) deliver it to the authorities, which had been unaware of it.<sup>242</sup> That turnover sealed Morrell's fate. The lawyer should have been permitted to keep the plan.

When a lawyer is allowed to retain an object with evidentiary value indefinitely, where she is not obligated to return it to the source expeditiously, the threat to the second premise—*no harm to the State*—is greater than when possession is temporary. There is a longer time span during which the State may subpoena the item from, or get a search warrant directed at, the client or a third person and come up empty-handed because the lawyer has it. Again, we should seek to make the State whole, but consistent with the client's legitimate interests. I now turn to how we might do so.

E. *When a Lawyer Is Permitted Temporarily or Indefinitely to Take Possession of Real Evidence or to Deliver the Item Anonymously, the State's Interests Can Be Protected Through a "New Investigative Procedure" and a Registry Requirement*

When a lawyer properly takes possession of an item in order to test or read it but she cannot return it, as apparently happened with the kidnap plan in *Morrell*, or when the State wants to encourage the lawyer to take possession and retain an item to protect the public or to preserve stolen property, we are at a crossroads. If the lawyer does take and hold the item, the State loses an opportunity to discover it in the original location. Some cases say that the lawyer has

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241. *Morrell v. State*, 575 P.2d 1200, 1206-07 (Alaska 1978).

242. *See id.* at 1200, 1211.

to make the State whole on this lost opportunity (e.g., *Meredith*) but not where the source was the client (e.g., *Olwell*, *Nash*), a location revealed by the client (e.g., *Douglass*), or the client's property (e.g., the purse in *Rubin*). But the cases—possibly excepting white-collar cases—require the lawyer to deliver the item to authorities even without subpoena and even if the item is powerfully incriminating, as were the reupholstery receipts in *Clutchette*, the kidnap plan in *Morrell*, and the diary in *Sanchez*. This is wrong both as a matter of policy and as a matter of law.

As a matter of policy, we should encourage lawyers to take possession of and retain the fruits of crimes, dangerous instrumentalities, and contraband even when they have no need to do so for effective representation. Otherwise, the gun (or it could be drugs) stays in the woods or the client keeps it. Or the lawyer leaves the stolen money with the client or in a place where the client or others can get and spend it. Today, the cases seem to foster a “leave it where it is” response. Few defense lawyers will disarm their client or secure the stolen property if a turnover duty will harm the client. It will not do to say that lawyers must retrieve and hand over weapons, contraband, and stolen money to benefit clients on the theory that doing so reduces the likelihood of future criminality or will mitigate punishment if stolen property is returned. Any such rule would turn defense lawyers into adjuncts of law enforcement. Cases have not gone so far. A lawyer who is inclined to take possession anyway—perhaps because of a perceived benefit to the client—would have to advise the client on the risks from the mandated turnover. We can imagine the result of that conversation.

As a matter of law, my claim is that when a lawyer has a legitimate need to take possession of an item in order to provide effective representation, she should be able to hold it unaltered without risk of prosecution or discipline if turnover would be harmful to the client and return is not possible or excused for one of the reasons identified in Part IV.D. This may be evidence that the State does not know exists or could not have secured with a subpoena or search if it does know. My proposed rule protects what *Fisher* recognized as an interest in informed legal advice, an interest that, after adversarial proceedings have begun, is constitutionally protected. If the client is the lawyer's source for the item, my rule also protects the client's Fifth Amendment act of production claim, as *Hubbell* expanded it. But as stated in Part IV.A, in no event may a lawyer take and hold an item simply to impede the State's ability to discover it.

While my legal and policy positions may honor both the first premise (*no harm to the client*) and the separate value of protecting public safety and preserving stolen property, we have compromised the second premise, which posits that the fact that a lawyer is holding physical evidence probative of her client's guilt (even if only temporarily) should not leave the State in a worse position than if the evidence had remained in its original location. I propose a solution that goes a substantial way toward making the State whole without compromising either the interest in the advice of counsel and the Fifth



Amendment's act of production doctrine, both of which were long ago recognized in *Fisher*, or the interest in public safety and the return of stolen property. If the State does not like my compromise, it can expect that dangerous weapons, contraband, and the fruits of crimes will remain at (or be returned to) their original location. Or the State can accept the following alternative, which I suggest it must do when the lawyer, to perform her job effectively, needs to take the item temporarily to test or read it.

No disadvantage need befall the State. If it is able legally to search for and seize the item or to subpoena it, the State can deploy these tools against the lawyer, who can then raise whatever legal arguments are available to the client.<sup>243</sup> However, as Reitz has written, we wish to avoid searches of law offices.<sup>244</sup> His solution—"a new investigative procedure" that will enable the State to conduct a noninvasive search of the law office—ensures that the lawyer's possession will not frustrate legitimate techniques for securing it.<sup>245</sup> Of course, no new discovery tool is needed for a traditional subpoena, which can be served on lawyers like everyone else. The new tool is meant to ensure that the State is not deprived of the benefit of a lawful search. While a search and a subpoena can both seek the same item, a search does not call for an act of production as did the subpoenas in *Fisher* and *Hubbell*. We can call this new tool an alternative search warrant. In addition to a subpoena or alternative search warrant for an item, the State can also seek to learn the lawyer's source and the parties can litigate that claim as well.

This solution presents no problem if the State knows that the lawyer represents or has represented the subject of its investigation, as it apparently

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243. Those objections can be raised to resist compliance with a subpoena. But a search is different. Challenges to a search occur after the search if the target seeks to suppress its fruits. So too here. The lawyer would have to produce the items identified in the alternative warrant and then seek to suppress them if possible.

244. Reitz, *supra* note 12, at 601.

245. *Id.* at 655-56. Reitz writes:

[I]t is possible to envision a new investigative procedure that would allow the authorities to obtain evidence in the law office under circumstances similar to those that would enable them to search for and seize the same articles in the hands of the client or other private parties. To effect such a goal, I propose the creation of a new "hybrid" court order that shares characteristics of both a subpoena duces tecum and a search warrant. Such a hybrid order would be designed solely for service upon counsel. It would issue upon sworn application to a neutral judicial officer, when the government can demonstrate probable cause to believe that the lawyer has possession of evidence of crime that can be described with reasonable particularity. These requirements are comparable to those in search warrant cases.

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The effect of the hybrid order, once issued and served upon the attorney, would be to compel production of the articles described irrespective of any Fifth Amendment objection the client could have interposed to a subpoena for the same evidence, including objections available under the projected privilege. In the eyes of the law, production would proceed under the rubric of a "constructive search" . . . . [If any evidence received] is later introduced at trial, the jury should be told simply that it was discovered in the course of a search of the lawyer's office.

*Id.*

did in most, probably all, of the cases discussed here. It can simply direct a subpoena or an alternative search warrant to the lawyer, along with searches or subpoenas of others. And it may litigate its claim for proof of the lawyer's source via testimony or stipulation, just as the prosecution did in *Meredith*, where the lawyer's investigator removed the victim's wallet from the client's burn barrel.<sup>246</sup>

But the State will not always know who represents a person of interest or even who is a person of interest. Or the client may have changed lawyers before the State learns the identity of a first lawyer who still possesses an item. These may be rare occurrences, but the third premise requires that we minimize any harm to the State. So we need a rule that will protect the State when it does not know the identity of the lawyer who may be holding real evidence and therefore cannot serve a subpoena or an alternative warrant on her.

The solution is to require a lawyer to record her representation of a client in a new registry created for this purpose when her representation is not known to the State. The lawyer will further have to record the identity of the source of the item if it is not the client. She will have to do this whether or not the State knows of the lawyer's representation of the client because the State may not have reason to associate the source with the client and so will not know to seek the item from the lawyer after a search or subpoena of the source proves fruitless. Failure to register when required can be a basis for discipline or prosecution to the same extent that knowing concealment of real evidence of a crime, contraband, illegal weapons, or stolen property is today. In other words, registration is a defense to disciplinary or criminal liability for retaining an item when the lawyer cannot or should not return it.

The lawyer's registration will remain on file for so long as the lawyer has the item in her possession or if she returns it anonymously as described below. When the State plans to issue a subpoena or has probable cause to conduct a search of a person (including organizations), it can ask the registry to identify any lawyer whose registration identifies that person whether as client or source. The State can then serve its subpoena or alternative search warrant on the lawyer, in addition to searches or subpoenas directed at the client or the source. If the lawyer has legal grounds to challenge the subpoena or warrant, or to resist the State's claim for proof of the lawyer's source, she can bring those grounds to court just as any subpoena or search can be challenged in court.

For example, on facts like those in *Morrell*, the Alaska kidnap case, if the State did not know the identity of Morrell's lawyer, the registry would identify both Morrell (the client) and the friend who gave the kidnap plan to the lawyer. If and when the investigation focused on Morrell or his friend, the State could give the registry the name of either or both and learn the lawyer's identity. The State could then serve the same subpoena on the lawyer that it serves on the

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246. See *supra* text accompanying notes 131-35.

friend. If it has probable cause to search the friend's home, it can "search" the lawyer's office with an alternative search warrant.

The registry should be under the control of an entity viewed as neutral. One possibility is an agency of the state judiciary. Another is the state bar association. A third is the state's lawyer disciplinary authority. Managers of the registry would be required to treat all information as confidential except to respond to a request for the name of any lawyer registered as representing a named person or whose registration identifies a named third-party source.

A computer database should ease the administration of the registry system. Lawyers would register in their home state. Each state's database can be made accessible to managers elsewhere so law enforcement in one state need only inquire of the database manager in its state. Or a request to a home-state database manager can appear on the screens of managers in other jurisdictions, too. In other words, the database and searches of it can be nationalized.

I stress that law enforcement will generally know the identity of a lawyer for a person of interest, so the need to register, and therefore to make a request of the registry, will be infrequent. But computer technology will make the enterprise simple to create and administer.

We come finally to anonymous delivery, a possibility contemplated by the ABA Criminal Justice Standards and the D.C. Rules, but not endorsed in the cases discussed here. The prospect of anonymous delivery of evidence, coupled with a registry requirement, builds on the three premises. It allows us to honor the first premise—*no harm to the client*—minimize harm to the State, protect public safety, and ensure the return of stolen property.

The first premise will forbid anonymous delivery of items that are intrinsically prejudicial to the client. The reupholstery receipts in *Clutchette*, the kidnap plan in *Morrell*, and the diary in *Sanchez* are examples. Contraband, stolen property, and weapons may or may not be intrinsically incriminatory depending on whether they can be connected to the client through fingerprints, DNA, other forensic evidence, or third-party identification. But if an item of real evidence cannot be connected to the client, and cannot or should not be returned to the source, anonymous delivery will not offend the first premise. In this category might be the watch in *Hitch*, the stolen money in *Hunter* (discussed further below), and the victim's wallet in *Meredith*. They are the sort of item that could be free of identifying information (unlike a handwritten kidnap plan).

A lawyer should be required to make anonymous delivery of an item to the authorities (or the true owner) where it will not implicate her client. There is then no reason to retain it. The advantages are apparent. Without harming the client, we put weapons and drugs out of circulation and reunite owners with their property. But suddenly, the State or the owner will get a package with no indication of the source and no forensic evidence to exploit. How do we minimize the harm to the State, which might otherwise have discovered the returned item in a location connected to the client (on his person or in his home, for example)?

Given the registry requirement, anonymous delivery need not harm and may actually help the State.<sup>247</sup> The lawyer who makes the delivery can be required to record the identity of her client in the registry. If and when the State's investigation focuses on the client, it can seek the lawyer's name from the registry and assert a claim to learn the lawyer's source.

Consider again the \$30,000 to \$50,000 in *Hunter*, which was hidden in the imprisoned clients' home.<sup>248</sup> The State and the victim of the robbery had an interest in allowing the lawyer to take possession of the money to ensure that it would not be stolen by vandals or others. If the lawyer returns the money anonymously, the owner gets it back immediately. But the State loses the chance to find the money in the client's home, which provides the probative link. If the client becomes a focus of the investigation, the State can learn his lawyer's identity from the registry. It can then seek to repair loss of the location evidence, as in *Meredith*, either through the lawyer's testimony or a stipulation. The State is no worse off and the owner of the money is better off.

As with any set of rules, slippage may be inevitable. On occasion, the State may lose evidence that under today's rules it might—or might not—discover. But the rules I propose will also (and I suggest more often) have the opposite result. The State will get evidence that would otherwise go missing. Certainly, that could be true for the money in *Hunter* and *Ryder*. My proposals will encourage a lawyer to take possession of an item (and secure it) when she has good reason to do so, knowing that she will not thereby assume a duty to deliver it to the State and contribute to her client's conviction. The State can still seek the evidence from the lawyer. The evidence is not lost. To the contrary, it is preserved.

#### F. *How the New Rules Work: A Concrete Example*

Sticking with the facts in *Hunter*,<sup>249</sup> we can see how these proposals would work. Here are the possibilities:

1. Hunter's lawyer leaves the boxes of cash in the home. Either they disappear, the State finds them, or they remain there indefinitely. No real evidence issues are present.

2. Hunter's lawyer takes the money to safeguard it and because (as I propose) doing so does not subject him to criminal or disciplinary liability.<sup>250</sup> The

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247. Nonanonymous delivery of an item, even one that is not inherently inculpatory, harms the client if the lawyer is identified with the client or if it spotlights the lawyer as a focus of discovery.

248. The case, *United States v. Hunter*, No. 93 CR 318, 1995 WL 12513 (N.D. Ill. Jan. 6, 1995), see *supra* note 240, involved two defendants and two lawyers, but for simplicity I will assume one of each.

249. Although *Hunter* dealt with stolen property, it applies just as well to a weapon or drugs because these are things we want a lawyer to retrieve and keep. And the lawyer's source could be the client or a third party.

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lawyer cannot be confident that the money (and the boxes) will not provide forensic evidence against his client. He retains them. Hunter is or then becomes a person of interest in the State's investigation of the robbery. Assume that the State knows his lawyer's identity. Using the same investigative tools it would use to seek the money in the client's home (a search warrant or subpoena), the State may seek the money from the lawyer and his testimony or a stipulation to establish the original location, except that for the lawyer it uses an alternative search warrant. A search warrant, unlike a subpoena, does not permit an act of production defense because it seeks nothing testimonial, but constitutionally it does require probable cause. In court, the lawyer can challenge the subpoena and the demand for his testimony and seek to suppress the fruits of the alternative warrant.<sup>251</sup>

3. Alternatively, Hunter is or becomes a person of interest but the State does not know the identity of his lawyer. It will seek the lawyer's identity from the registry. The lawyer will have been required to notify the registry that Hunter is his client and maintain that registration as long as he has the money (or if he returns it anonymously as next described). When the State learns the lawyer's identity, it will serve him. The lawyer may then mount the challenges identified in the previous paragraph.

4. Hunter's lawyer is confident that the boxes of money cannot be traced to his client so he returns them to the victim or the State anonymously. He does so anonymously because if the State became aware that he was the source, it may focus (or intensify its focus) on his client. If the lawyer is not known as the lawyer for Hunter, he must record that fact with the registry. If and when Hunter becomes a person of interest, the State can learn the identity of his lawyer through the registry. The parties can then litigate whether the State is entitled to the lawyer's testimony about his source.

#### CONCLUSION: A REPRISE TO RICHARD NIXON AND SOME OF THE CASES

None of the jurisdictions whose cases are discussed in this Article had a registry. However, so far as appears, none would have been required because the State was aware of the identity of the lawyer who possessed the evidence. Some of these cases may have been decided differently under my proposals. Ryder would not have been disciplined because my proposal envisions that the State should encourage lawyers to take possession of dangerous weapons and the fruits of crimes (the sawed-off shotgun and stolen bank money in that case) and, if she does, the State cannot then demand that the lawyer deliver these to the authorities if doing so harms her client. The need to protect the fruits of a

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250. Hunter's lawyer may also take possession of the boxes of money to determine if the money is, in fact, the stolen money, but then choose to retain the boxes instead of returning them.

251. *See supra* Part IV.E.

crime against dissipation would also seem to be present in *Hunter*, where the lawyers removed boxes of stolen money from the home of their incarcerated clients, and in *Hitch*, where the lawyer received the victim's watch. In *Olwell*, the 1964 case that inspired a turnover duty, a lawyer took a weapon from his client (a knife) for safety's sake and should have been allowed to retain it.

*Morrell*, the Alaska case where the defense lawyer received a kidnap plan in his jailed client's handwriting from a friend of the client, requires a different analysis. Unlike a sawed-off shotgun, the plan is neither illegal to possess nor dangerous. Unlike stolen money, the plan is not the property of another. Morrell's lawyer, however, had a legitimate need to read the plan and assess its probative value. Under my proposal, he would then have had to return it to the source (unless it was exculpatory, which it was not). But since the source rejected it, the lawyer facilitated delivery to the police and it was used to convict Morrell. Under my proposal, the lawyer could have held onto the plan unless and until a subpoena or alternative search warrant required him to produce it, at which time he would be able to assert whatever legal defenses his client may have had to prevent production or suppress the fruits of the alternative search.

By contrast, the lawyer in *Meredith* could have returned the victim's wallet to the burn barrel after his investigator retrieved it, or better yet, since there was no apparent reason for prolonged inspection or testing, it could have been left there. Similarly, the *Clutchette* court found no need for the defense lawyer to take possession of the receipt showing that his client had reupholstered his car. The lawyer should not have done so. When his investigator did so anyway, the lawyer should have returned it to the source.

What about white-collar crimes, where the real evidence will likely be documents, as in *In re Grand Jury Subpoenas*? In that case, the document was a copy of a phone bill, which the client had given the law firm. The firm may have needed to analyze the bill's contents, although given the brevity of a phone bill, this is doubtful. Further, the firm could have made a second copy, leaving the original copy with the client. Unless the firm told the prosecutor that it had the phone bill, thereby affording opportunity to litigate the (successful) effort to get it, taking the client's copy when a second copy would suffice for any legitimate professional reason would not have been justified.

Let me in conclusion apply my proposals to the gun hypotheticals at the start of this Article and to a white-collar criminal case. I will also revisit the case of Philip Russell, the Connecticut lawyer who destroyed a laptop, and conclude where I started, with the Nixon White House tapes.

For all three of the gun hypotheticals—the client brings the lawyer the loaded gun, his wife does, or either person reveals its location in the woods—the lawyer could take possession and hold the gun unaltered in a safe place unless and until she receives a subpoena or alternate search warrant, at which point she can make whatever legal arguments may be available to avoid the subpoena or suppress the fruits of the alternative search. And the State can argue that the lawyer must provide testimony or a stipulation of the lawyer's

source. If the State is unaware of the lawyer's representation, she must file a notice of it and the identity of the nonclient source with the registry I propose.

Issues in white-collar cases would also be decided in this manner. Imagine that the Justice Department has announced a criminal securities fraud investigation. The client brings his personal laptop to his lawyer. It contains documents that may tend to prove his complicity in the crime. Of course the lawyer needs to read these documents in order to advise the client, so taking possession of the laptop will be perfectly proper. But then what? The Government may not know the laptop exists. The lawyer cannot delete the documents. The criminal investigation is in progress and an official proceeding is foreseeable. After reading the documents, the lawyer must return the laptop to the client with warnings about obstruction of justice (a duty she owes the client, not the Government). The laptop is not itself illegal to possess; it is not contraband, a dangerous weapon, or the fruits of a crime. It simply contains evidence of a crime, like the kidnap plan in *Morrell* and the diary in *Sanchez*.<sup>252</sup> What the lawyer would not have to do is deliver the laptop to the Government, because that may defeat the client's act of production defense. Even if there is no such defense on the particular facts, requiring the lawyer to produce the laptop makes the client "pay"—a high price if the documents are particularly incriminating—in order to get counsel's advice.

We can also apply my proposal to a variation on the conduct of Philip Russell, the Connecticut lawyer who destroyed the church laptop containing images of child pornography.<sup>253</sup> To raise the stakes, imagine that Russell's client was not the church, which was not at risk of prosecution, but the choirmaster, who had downloaded the images. And imagine that Russell realized that the Government might later claim that he did foresee a possible prosecution. Today, Russell's only safe choices would be to decline to take possession of the laptop, leaving it with the choirmaster, or to take it and give it to the Government. But giving it to the Government would virtually ensure the client's conviction. Yet the choirmaster might never have become the focus of an investigation. My proposal would give Russell a third choice. It would let him retain the laptop unaltered without risking a charge of possessing child pornography or concealing evidence.

The current mosaic of cases, by requiring turnover of real evidence without weighing the effect on other values and other ways to protect the State's interests, converts defense lawyers to agents of law enforcement. That choice is wrong when possession is needed to provide informed legal advice and it is

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252. The lawyer must make a strategic decision about whether to print the documents. If she does, the obstruction of justice statute would prevent her from destroying them. See 18 U.S.C. § 1512(c)(1) (2006). If the Government subpoenas the documents from the lawyer, or if the lawyer keeps the laptop and the Government subpoenas it, the lawyer would be able, under *Fisher*, to assert the client's act of production defense to the subpoena. See *Fisher v. United States*, 425 U.S. 391, 410 (1976).

253. See *supra* notes 99-106 and accompanying text.

unwise when possession protects the public against harm or preserves stolen property for return to the owner.

I conclude, as I began, with Richard Nixon. Speculation is irresistible. Once a congressional investigation of the Watergate burglary was foreseeable, it would have been a crime to “corruptly persuad[e]” another person to destroy the tapes.<sup>254</sup> Nixon might have done so anyway, as Edward Bennett Williams advised and Nixon later wished he had.<sup>255</sup> We might then have had to debate whether a sitting President could be indicted. If destruction of the tapes (or the incriminating ones) had allowed Nixon to complete his second term, history would have been different. Nixon, not Gerald Ford, would have filled the Supreme Court seat that went to John Paul Stevens. Without the scandal attending Nixon’s resignation, Jimmy Carter might not have become president in 1976. The “what ifs” are many. But, happily, they are quite beyond the scope of this (and perhaps any) Article.

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254. 18 U.S.C. §§ 1512(b)(2)(B), 1515(a)(1)(B). Once the Watergate hearings were underway, it would have been a crime for anyone “corruptly” to destroy them himself. 18 U.S.C. § 1505.

255. *See supra* notes 5, 7.