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Duty With Respect to Client's Incriminating Evidence

(Revised February 2025)

I. Introduction and Scope

A lawyer has an affirmative duty to surrender incriminating physical evidence in their possession. Upon surrender of the evidence, the lawyer must not reveal the identity of the client and confidential communications of the client. When a lawyer observes incriminating evidence as a result of their representation of the client and does not alter or disturb the evidence, they must not disclose these observations to authorities. A defense lawyer and their agents cannot suppress or conceal incriminating physical evidence in the lawyer's possession. A lawyer cannot counsel the client or another person to alter, destroy or conceal such evidence.[1]

The Colorado Bar Association Ethics Committee (Committee) issued an opinion relating to a lawyer's duties with respect to a client's incriminating physical evidence. *See* CBA Formal Op. 60, "Duty With Respect to Client's Incriminating Physical Evidence" (1982) (Original Opinion 60).[2] Original Opinion 60 presented six hypothetical fact

[1] *See. 6, infra*.

[2] Repealed, effective upon the adoption of this opinion.

patterns, analyzed under the Code of Professional Responsibility, in which a lawyer possessed physical evidence implicating a client in a crime or knew the location of such evidence. Since 1982, the Colorado Rules of Professional Conduct (Colo. RPC or Rules) have replaced the Code of Professional Responsibility[3] and new forms of digital evidence have proliferated. Although the Committee believes the conclusions in Original Opinion 60 are consistent with a lawyer's duties under the Rules of Professional Conduct, the Committee issues this revised opinion to provide guidance as to the relevant provisions of the Rules of Professional Conduct for the original fact patterns and to provide additional guidance related to digital evidence.

This opinion analyzes the original fact patterns from Original Opinion 60 under the Rules of Professional Conduct and several additional fact patterns involving evidence in electronic formats. Digital evidence has become ubiquitous in criminal prosecutions, correlating directly with the rise of the smart phone and other digital devices. Doorbell cameras and security cameras may capture criminal activity. GPS location data and cell phone tower data are used to put suspects' devices at or in the vicinity of alleged criminal activity; communication records show communications among suspects' devices (sometimes even the content of the communications); and attribution evidence[4] may show that a suspect was in possession of or using a specific device at certain times. Digital evidence is regularly contained in physical devices like a smart phone or flash drive.

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[3] Colorado Rules of Professional Conduct, effective January 1, 1993.

[4] Attribution evidence is evidence that is relevant to determining who possessed or controlled a particular digital device at a particular time. It may include information such as geolocation, internet search history, passwords, contact information, text messages, emails, etc.

II. Illustrative Fact Patterns.

This Opinion is designed to set out ethical guidelines for lawyers when faced with situations linking their clients to incriminating physical and digital evidence. The following fact patterns, which include the six fact patterns in Original Opinion 60, are analyzed below under the Rules and applicable law:

1. The client, who is charged with murder, shows the lawyer the gun used in the crime and asks the lawyer to hold the gun.

2. The spouse of a client charged with murder brings a gun to the lawyer's office and tells the lawyer that the client told the spouse to ask the lawyer to hold the gun for the client.

3. The best friend of a client charged with murder brings a gun to the lawyer stating that before the client was jailed, the client left the gun with the friend and the gun had been used by the client in a stick-up. The friend gives the gun to the lawyer.

4. The lawyer's current client is being investigated for murder committed during a robbery that involved taking 50 unmarked $100 bills. The client offers to retain the lawyer with 50 unmarked $100 bills. The lawyer, aware of the denominations taken in the robbery, asks the client whether the retainer came from the robbery. The client grins and says, "What do you think?"

5. The client, a suspect in a robbery-homicide, before surrender takes the lawyer to the area where the getaway car and the body of the victim are located.

6. In the situation described in paragraph 5, the lawyer directs the lawyer's investigator to scrape a sample of material from the deceased's fingernails to determine whether the sample contains the defendant's flesh and could possibly support of the defense of self-defense.

7. The client, whom the lawyer knows is under investigation for perpetrating an investment fraud, tells the lawyer that they have just purchased a new cell phone and asks what they should do with the cell phone that the client was using during the time of the alleged fraud.

8. Lawyer's client is charged with drug distribution based on the delivery of illegal drugs to users by car. The client offers to sign over title and deliver the client's Brand X car to the lawyer for part of the attorneys' fees contemplated by their agreement. According to information from the manufacturer, Brand X cars "record the whole track of where you drive, the GPS coordinates, and certain other metrics for every mile driven." The recorded data may include "vehicle usage information, safety event camera recordings (if applicable), infotainment system settings information, and mobile app usage information." The lawyer accepts title and delivery of the car and credits the client for the fees as agreed. After the lawyer's fees are earned, but before trial, lawyer transfers ownership of the car with the State of Colorado and through the manufacturer. The lawyer does not recognize (and hence gives no advice to client about) the lawyer's potential obligation of disclosure associated with the car.

9. The client possesses child pornography in the form of physical photos and videos, as well as images saved electronically on the client's laptop computer. The client seeks the lawyer's advice on how to conceal the child pornography from discovery by someone else or, if necessary, how to destroy it so that it never will be discovered. The lawyer knows that even mere possession of child pornography may be a crime.

10. The client is charged with assault with a deadly weapon after a bar fight with no surveillance cameras capturing the event. The state has only the victim-witness to testify about the events. During an interview with the client's friend, the friend shows the lawyer a video recording taken of the fight stored on the friend's phone. The video depicts conduct which is adverse to the client's claim of self-defense because it shows the client assaulting the unconscious victim. The client's friend offers to give the lawyer a copy of the video.

III. Rules Applicable to Disclosure of Potential Evidence.

The Rules discussed below provide guidelines for the lawyer who may encounter evidentiary material, including evidence that may incriminate the lawyer's client. More Rules that may be relevant in specific circumstances are identified below in the discussions of the fact patterns.

A lawyer's duties in handling evidence are addressed directly in Rule 3.4(a):

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

Rule 3.4 applies to any document or material having "potential evidentiary value." *Id.* Comment [2] further delineates the scope and applicability of the Rule:

> Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

Colo. RPC 3.4 cmt. [2].

A lawyer's obligations regarding evidentiary material are also governed by applicable laws and evidentiary privileges, which are beyond the scope of this Opinion.[5] As stated in the Comment, applicable laws may require a lawyer to turn over incriminating evidence and may subject a lawyer to criminal liability if evidentiary material is destroyed

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[5] Without attempting to brief all the case law that may be applicable, the Committee notes a client's Fifth Amendment rights do not extend to incriminating evidence in a lawyer's possession. *See People v. Swearingen*, 649 P.2d 1102, 1105 (Colo. 1982); *see also Fisher v. United States*, 425 U.S. 391, 402 (1976) ("compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself"). Further, a lawyer with physical possession of incriminating evidence has an affirmative duty to give the incriminating evidence to the proper authorities. *See State v. Olwell*, 394 P.2d 681, 684 (Wash. 1964) (counsel did not engage in contempt by refusing to testify at inquest "concerning information received by him from his client in the course of their conferences," but was required to produce knife obtained from client because lawyers "should not be a depository for criminal evidence").

or access to evidentiary material is impaired.[6] The duty of competence requires a lawyer to be familiar with both rules and laws governing the lawyer's obligations with respect to evidentiary materials relevant to the lawyer's practice. *See* Colo. RPC 1.1. Likewise, as the American Bar Association (ABA) has noted in its article, *Forensic Examination of Digital Devices in Civil Litigation: The Legal, Ethical and Technical Traps:*

> A lawyer's competence will be called into question if he or she does not appreciate the possible evidentiary significance of digital files on mobile devices and does not act to preserve those files, or worse, takes steps to delete them. Indeed, a lawyer's ethical obligations include a broadly stated requirement to be competent to handle discovery of electronically stored information. Counsel must be conversant with evolving technology and know when to associate with a technical consultant or experienced counsel to address e-discovery issues. Mishandling e-discovery may demonstrate a lack of competence; it may also lead to an ethical violation of an attorney's duty of confidentiality if client confidential information is mistakenly produced.

See D. Tennant and M. McCartney, *Forensic Examination of Digital Devices,* 24 The Prof'l Lawyer, Vol. 1, at 4 (ABA Ctr. Prof. Resp., 2016).

A lawyer does not violate Rule 1.6 by turning over evidence to authorities to comply with applicable law. Rule 1.6 allows disclosure of information relating to the representation when this disclosure is required "to comply with law or other court order." Colo. RPC 1.6(b)(8). Comment [15] provides more guidance to the lawyer ordered to reveal confidential information by a court or tribunal. Unless the client gives informed consent to disclosure, "the lawyer should assert on behalf of the client all nonfrivolous

[6] *See, e.g.*, C.R.S. § 18-8-610 (imposing criminal liability for tampering with, concealing, or destroying physical evidence); C.R.S. § 18-8-105(2) (imposing criminal liability as an accessory to a crime upon a person who assists another person in concealing, destroying, or altering physical evidence).

claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney client privilege or other applicable law," Colo. RPC 1.6 cmt. [15], and if an adverse ruling is entered, "the lawyer must consult with the client" before making disclosure. *Id.*

By concealing or destroying evidentiary material, by advising a client to engage in, or by assisting with such activities, a lawyer may violate Rule 1.2(d), which states, "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent…." Colo. RPC 1.2(d). In addition, a lawyer may violate Rule 8.4 if the lawyer conceals or destroys evidentiary material or assists a client in such activities because such activities would violate the Rules of Professional Conduct, constitute one or more criminal acts that reflect adversely on the lawyer's honesty or trustworthiness, may involve dishonesty, fraud, deceit or misrepresentation, and could be prejudicial to the administration of justice. *See* Colo. RPC 8.4(a-1), (b), (c) & (d).

IV. Analysis of Illustrative Fact Patterns.

The issues that may arise when a lawyer is presented with evidentiary material by a client or third party are discussed in the fact patterns below.[7] The opinions and recommendations presented in the discussions are applicable to the specific facts presented.

[7] Additional guidance on handling evidentiary materials can be found in the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*, Standard 4-4.7, "Handling Physical Evidence With Incriminating Implications" (ABA 4th ed. 2017). This Standard does not rely on the ABA Rules of Professional Conduct.

Fact Pattern 1:

The client, who is charged with murder, shows the lawyer the gun used in the crime and asks the lawyer to take possession of the gun.

If the lawyer takes possession of the gun, Rule 3.4(a) requires the lawyer to turn the gun over to the police or prosecuting authority because retaining the gun would violate applicable law. *See* C.R.S. §§ 18-8-610 and 18-8-105(2).[8] Retaining the gun also could constitute misconduct under Rule 8.4. *See* Colo RPC 8.4(a-1) (violating or attempting to violate the Rules of Professional Conduct); 8.4(b) (criminal acts reflecting on the lawyer's honesty, trustworthiness, or fitness). Before taking possession of the gun, the lawyer would have a duty to advise the client of the lawyer's obligations under Rule 1.4(a). Colo RPC 1.4(a). The lawyer may not advise the client to destroy or conceal the gun. Colo. RPC 1.2(d). Information relating to the existence of the gun or the client's possession of the gun, however, is protected from disclosure as confidential information under Colo. RPC 1.6, absent a court order to disclose the information.

Fact Patterns 2 and 3:

2. The spouse of a client charged with murder brings a gun to the lawyer's office and tells the lawyer that the client told the spouse to ask the lawyer to hold the gun for the client.

[8] If the lawyer is compelled to turn over the gun or any other incriminating evidence, the lawyer should take steps to avoid disclosing the identity of the client. In this scenario, the lawyer should consider retaining another lawyer to deliver the gun to the authorities.

3. The best friend of a client charged with murder brings a gun to the lawyer stating that before the client was jailed, the client left the gun with the friend, stating the gun had been used by the client in a stick-up. The friend gives the gun to the lawyer.

Rule 1.6(a) states that a lawyer shall not reveal information relating to the representation of a client unless the client has given informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by one or more of the exceptions in Rule 1.6(b). In fact patterns 2 and 3, Rule 1.6(b)(8) allows the lawyer to turn over the gun to the police or prosecution because the lawyer must comply with law or order of the court. Rule 3.4(a) states that a lawyer shall not conceal material having evidentiary value. It is a crime under Colorado law for anyone to conceal physical evidence while believing that an official proceeding is pending or about to be instituted. C.R.S. § 18-8-610(1)(a). The lawyer must take steps to ensure the gun is turned over to the police or prosecution. The lawyer cannot reveal the identity of the client to the police or the prosecution pursuant to Rule 1.6(a). The lawyer may be compelled to testify about the source of the gun, either the wife or the friend, assuming there is no attorney-client relationship with the wife or with the friend.[9]

The lawyer must advise the client that the lawyer is obligated not to conceal material evidence and that the gun must be turned over. Colo. RPC 1.4(a) & (b). Because the lawyer does not have an attorney client relationship with the wife, the lawyer has no

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[9] Such a relationship with either would raise conflict of interest issues under Colo. RPC 1.7, which are beyond the scope of this opinion.

obligation to advise or counsel her; however, it is advisable to tell her to seek legal advice about her situation.

The same analysis applies to Fact Pattern 3, in which the client's friend brought the gun to the lawyer. The lawyer must take steps to have the gun turned over to the police or prosecution. The lawyer must advise client about his obligation to do so, and the lawyer has no obligation to provide legal advice to the friend.

Fact Pattern 4:

The lawyer's current client is being investigated for murder committed during a robbery that involved taking 50 unmarked $100 bills. The client offers to retain the lawyer with 50 unmarked $100 bills. The lawyer, aware of the denominations taken in the robbery, asks the client whether the retainer came from the robbery. The client grins and says, "What do you think?"

The lawyer has a duty to turn over the bills to the authorities if the lawyer takes possession of the bills as a retainer or for any other reason. Before accepting the bills, the lawyer would be obligated to advise the client that the lawyer would have to turn over the bills to the authorities.

Fact Patterns 5 and 6:

5. The client, a suspect in a robbery-homicide, before surrender, takes the lawyer to the area where the getaway car and the body of the victim are located.

6. In the situation described in Fact Pattern 5, the lawyer directs the lawyer's investigator to scrape a sample of material from the deceased's fingernails to

determine whether the sample contains the defendant's flesh and could possibly support the defense of self-defense.

The lawyer has a duty not to reveal incriminating evidence which the lawyer observes as a result of the client's communication. The lawyer may not disclose the locations of the getaway car or the body of the victim. Client information about the incriminating evidence is protected, but the physical evidence is not protected if it is possessed or disturbed by the lawyer or the lawyer's agents.

Therefore, the lawyer's testing of the scrapings of the deceased's fingernails must be voluntarily revealed to the prosecution because the disturbance of the evidence deprived the prosecution of the opportunity to discover and test the evidence in its original location and state. *See Swearingen,* 649 P.2d at 1105; *Olwell*, 394 P.2d at 684. A defense lawyer who takes possession of physical evidence for testing that may establish the client's innocence is not violating Rule 3.4(a). However, the lawyer must carefully consider the consequences of the testing and should advise the client of the lawyer's disclosure obligations before the lawyer or the lawyer's agent disturbs the evidence.

Fact Pattern 7:

The client, whom the lawyer knows is under investigation for perpetrating an investment fraud, tells the lawyer that they have just purchased a new cell phone

and asks what they should do with the cell phone that the client was using during the time of the alleged fraud.

The lawyer, as a matter of competence, is charged with recognizing that the old cell phone may contain potentially relevant evidence, including communications, such as text messages and emails, evidence of intent, such as internet search and viewing histories, evidence related to the phone's location, and by implication the client's physical location at particular times relevant to the investigation, and other attribution evidence. For these reasons, the lawyer may not advise the client to destroy or conceal the old cell phone, nor may the lawyer assist the client with such conduct. Colo. RPCs 1.2(d) and 8.4(b). Information relating to the existence of the phone or the client's possession of the phone, however, is protected from disclosure as confidential information under Rule 1.6, absent a court order to disclose the information.

If the client asks the lawyer to take the old phone, the lawyer should advise the client that: (1) the lawyer is very likely to have a duty to turn the phone over to law enforcement authorities if the client is ultimately charged with the fraud and (2) regardless of whether charges are pending, the lawyer would have to surrender the phone to law enforcement authorities if served with a search warrant or other investigative process.[10] *See* Colo. RPCs 3.4(a) and 1.6(b)(8).

[10] *See supra* Note 5 and accompanying text.

Fact Pattern 8:

Lawyer's client is charged with drug distribution based on the delivery of illegal drugs to users by car. The client offers to sign over title and deliver the client's Brand X car to the lawyer for part of the attorneys' fees contemplated by their agreement. According to information from the manufacturer, Brand X cars "record the whole track of where you drive, the GPS coordinates, and certain other metrics for every mile driven." The recorded data may include "vehicle usage information, safety event camera recordings (if applicable), infotainment system settings information, and mobile app usage information."

The lawyer accepts title and delivery of the car and credits client for the fees as agreed. After the lawyer's fees are earned, but before trial, the lawyer transfers ownership of the car with the State of Colorado and through the manufacturer. The lawyer does not recognize (and hence gives no advice to client about) the lawyer's potential obligation of disclosure associated with the car.

Many "smart" devices contain microchips or micro-computers that collect data that may disclose information about the owners or users of such devices. In the fact situation here, the car's systems may contain data showing that the client's car was at locations known to the government to be places where drugs were delivered. Moreover, the data may identify the device or application used to operate the car. The car's systems may record videos internally or transmit videos or other potentially relevant information to the vehicle's manufacturer. The lawyer should recognize that the car may contain digital

evidence. *See* Colo. RPC 1.1, cmt. [8] ("a lawyer should keep abreast of changes in ... relevant technologies....). The lawyer risks violating Rule 1.4 if the lawyer fails to disclose to the client the risk that the lawyer may have to provide data stored in the car's systems, or the car itself, to the government upon request.

The lawyer should be aware of the potential for destroying evidence by using the car. The lawyer may delete potential evidence recorded when the car was used by the client at times relevant to the allegations by driving the car and overwriting old data with new data. The process of transferring ownership information for the car to the lawyer's name through the manufacturer also may delete information stored in the car. Either means of destroying evidence could implicate Rule 3.4(a). If the lawyer plans to drive the car, the lawyer should consider using a digital forensic expert to create a forensic image of the car's data before moving or otherwise taking possession of the car. Should the relevant law require disclosure of such inculpatory evidence to the prosecution, the lawyer may have to surrender the car or any forensic image of its data to the prosecution.[11]

Fact Pattern 9:

The client possesses child pornography in the form of physical photos and videos, as well as images saved electronically on the client's laptop computer. The client seeks the lawyer's advice on how to conceal the child pornography from being discovery by someone else or, if necessary, how to destroy it so that it never will be

[11] *Id.*

discovered. The lawyer knows that even mere possession of child pornography may be a crime.

If the photos, videos, or images on the laptop computer are the subject of a search warrant or subpoena in a pending legal proceeding or investigation, the lawyer may not advise the client about how to conceal or destroy them. Colo. RPC 3.4(a). Likewise, if the items were the subject of a discovery request in a civil case, the lawyer may not advise the client about how to conceal or destroy them. Colo. RPC 3.4(a). Even if legal proceedings were not pending, the lawyer's advice about concealment or destruction of the items could be a violation of Colo. RPC 3.4(a) if commencement of a legal proceeding, in which the items could be evidence, "can be foreseen." Colo. RPC 3.4, cmt. [2]. Even when no legal proceeding or investigation is pending or can be foreseen, the client's knowing possession of the child pornography is a crime. By advising the client to conceal or destroy evidence of a crime, the lawyer would violate Rule 1.2(d) by counseling or assisting the client in conduct the lawyer knows is criminal, and would violate Rule 8.4(b), (c) and (d) by engaging in a criminal act that reflects adversely on the lawyer's honesty or trustworthiness, engaging in conduct involving dishonesty or deceit, and engaging in conduct prejudicial to the administration of justice. Such advice could also subject the lawyer to criminal charges under applicable law, a discussion of which is beyond the scope of this opinion.

Given the potential consequences to the client and the lawyer from advising the client to conceal or destroy evidence of a crime, the lawyer's advice should be consistent

with Rule 1.2(d), which provides that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." This discussion may include informing the client that possessing, concealing, or destroying child pornography would violate the law and may include a discussion of the potential legal consequences to the client of continuing to possess the child pornography versus destroying it. But because possession of the items is illegal, the lawyer cannot advise the client how to keep and conceal the child pornography, how to destroy the child pornography, or assist the client in doing so. *See* Colo. RPCs 1.2(d), 1.4(a)(2) and 1.4(b).

Fact Pattern 10:

The client is charged with assault with a deadly weapon after a bar fight with no surveillance cameras capturing the event. The state has only the victim-witness to testify about the events. During an interview with the client's friend, the friend shows the lawyer a video recording taken of the fight stored on the friend's phone. The video depicts conduct which is adverse to the client's claim of self-defense because it shows the client assaulting the unconscious victim. The client's friend offers to give the lawyer a copy of the video.

In this scenario, although the lawyer has viewed the electronic file which has potential evidentiary value, absent the lawyer taking possession of the file (i.e. via file transfer, email, text, etc.), the lawyer is not required to disclose the existence of this evidence to the opposing party because it was obtained through investigations covered by

attorney work-product doctrine. Colo. RPC 1.6. Also, while the lawyer is under no obligation to take possession of the evidence, the lawyer may not counsel the witness to destroy, alter, or conceal the evidence. Colo. RPC 8.4(b), (c) & (d). Furthermore, to ensure the lawyer does not inadvertently compromise the integrity of the evidence, the lawyer should refrain from engaging in any manipulation of the device which contains the electronic file, including holding it, touching the screen to enlarge or zoom, or pressing pause/play/back. Doing so may constitute possession of the file, no matter how temporary, thus triggering the attorney's disclosure obligations.[12] Equally important, manipulation of the device by the attorney could inadvertently result in alteration or destruction of the electronic file.

By contrast, if the witness had mailed a flash drive with a copy of the electronic file to the lawyer and the lawyer accepted it and inserted it into their computer to view, the lawyer would not have an obligation to turn over the file to the authorities because the original file remains on the friend's cell phone and is available to the opposing party. However, the lawyer should inform the client that the lawyer may have an obligation to turn over the copied electronic file if the lawyer is served with a subpoena or other process or court order to do so. Colo. RPC 1.6(b)(8). If that were to occur, unless the lawyer has the informed consent of the client to voluntarily turn over the copied electronic file, the lawyer "should assert on behalf of the client all non-frivolous claims that the order is not

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[12] Possession is a "voluntary act" when it is performed consciously as a result of effort or determination if the actor was aware of his or her physical possession or control thereof for a sufficient period to have been able to terminate it. C.R.S. § 18-1-501.

authorized by other law or that the information sought is protected against disclosure by ... applicable law." Colo. RPC 1.6, cmt. [15].

V. Conclusions and Recommendations.

Given the ethical and other rules applicable in many situations involving physical and digital evidence, the Committee recommends some standard operating procedures that may serve Colorado lawyers to avoid ethical dilemmas. Ostensibly, items provided by a client to a lawyer in a civil matter are for the express purpose of disclosure. Civil matter attorneys should make express the expectation of disclosure and advise the client that the attorney is subject to process, whether it be from opposing counsel or law enforcement authorities. No attorney may conceal evidence of a crime from the authorities.

Criminal defense attorneys should avoid taking or handling potential evidence, whether it be a device, drive, or firearm, from anyone, especially a client. They should instruct regular attorney agents, paralegals, investigators and experts, to follow the same practice. When circumstances require a criminal defense attorney or agent to handle or take possession of an item, they should advise the client that the item may have to be turned over to the authorities within a reasonable time prior to trial. They should advise the client on the limitations of the attorney-client privilege, the possibility that the attorney may be called as a witness to testify about the circumstances in which they acquired the item, the possibility the attorney would have to provide the item to the authorities, and specifically that handing an item to the attorney does not make it privileged.

It appears well settled that a lawyer may say that possessing an item is against the law when it is against the law (e.g., "You cannot lawfully possess cocaine under Colorado and federal law.") It is problematic for a lawyer to discuss with a client how to dispossess contraband, although a lawyer can say, "I cannot advise you on how to no longer be in possession of the cocaine." A lawyer must advise the client that it is criminal to destroy or conceal evidence (e.g., "If you destroy or conceal the cocaine, you may be committing a crime in addition to the illegal possession of a controlled substance.") For items that are not patently illegal, but nonetheless are or contain inculpatory evidence against the client, the lawyer should be careful not to encourage or condone destruction of the item (e.g., "You cannot destroy or conceal the face mask without committing a crime.")