

# The Defense Perspective: Collecting & Accepting Evidence

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A complicated question is often confronted by an equally complicated answer. Can or should defense attorneys and their agents, such as investigators, collect evidence from individuals and other sources including the crime scene? If so, under what conditions and what does the defense do with it? It is the proverbial “hot potato” and failure to handle it correctly can result in a serious burn.

It is understood that the question of collecting physical evidence as a policy is something that the attorney must always consider. Furthermore, the investigator as an agent of counsel and often the front line contact to such evidence must also be well equipped to deal with such questions. The investigator must always keep in mind that they are an “agent of counsel” and subject to the rules and parameters defined by the attorney client privilege and work-product doctrine. The criminal defense investigator, public or private, has a professional obligation to seek the training and knowledge necessary to be well informed regarding such issues and recognize that they are subject to the ethical rules of conduct as an agent of counsel. The investigator may not pay the price for such violations when functioning in the capacity as an agent of counsel. However, the attorney will be subject to disciplinary action and possibly criminal prosecution if they willingly instructed the investigator to engage in unethical or criminal violations.

A policy should be considered relative to the instructions of defense counsel on all matters with special consideration given to such questions as collecting and accepting evidence. Agencies such as public defenders have adapted policies. Policies vary from never collecting evidence to collecting only exculpatory evidence and following the directions of individual counsel. Of course, such directions should not be followed if the request is unlawful, unethical or in violation of policy, rules or the law.

One accepted policy has been that exculpatory evidence should be collected at the request of counsel. In fact, it is done so on a regular basis. In fact, ignoring or dismissing the presence of exculpatory evidence could lead to an ethical violation, claim of ineffective counsel or injustice. The line is drawn if the evidence to be collected is incriminating. In such a case the evidence encountered will not be collected until counsel is advised of the situation and further instructions are provided. Counsel can discuss the issues with their legal team and also have the option of seeking advice from professional support sources such as the Florida Ethics Hotline. The issue of collecting and taking possession of evidence by the defense has been addressed by the Florida Bar and the American Bar Association.

## AMERICAN BAR ASSOCIATION:

### RULE 4-3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

#### Subsection a

A lawyer must not:

(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;

#### Rule 4-3.4 Sub a Comments

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

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 the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Subdivision (a) applies to evidentiary material generally, including computerized information.

#### CASE IN POINT:

The defendant was charged with aggravated battery for the Slashing of the alleged victim with a knife. The defendant claimed that he acted in self-defense.

The state argued for a mistrial citing misconduct by defense counsel and suppression of critical evidence. “Apparently determined to violate as many ethical rules as possible, during the direct examination of his client, defense counsel reached into his pocket and produced a knife which his client identified as the knife he used to defend himself when he was attacked by the alleged victim.” Also, during the trial, defense counsel called the prosecutor “stupid and incompetent” and that her witnesses were “clowns and the case was a “joke”.

Additional footnote –

Our concern on this issue goes beyond the obvious and willful discovery violation, and addresses the question of whether defense counsel actually violated the law by suppressing critical evidence from law enforcement. Section 918.13(1), Florida Statutes (1995), entitled “Tampering with or fabricating physical evidence” reads, in pertinent part, as follows:

No person, knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted, shall:

Alter, destroy, conceal, or remove any record, document, or thing with the purpose to impair its verity or availability in such proceeding or investigation ... (Emphasis added).

Counsel admitted that he had been in possession of the knife “from day one,” and for over 18 months. The overwhelming authority in the nation concludes that an attorney may not accept evidence of a crime unless he or she makes the same available to the prosecutor or the investigating law enforcement agency.

The court did not take issue with the fact that counsel recovered the knife. The violation was that he failed to disclose it.

#### THE VALUE OF EVIDENCE:

Evidence may or may not be clearly inculpatory or exculpatory. The Facts and the Circumstances will contribute to determine the classification. Certain types of evidence can be problematic. Electronics such as cell phones, computers, and tablets may be password protected and may also have incriminating evidence stored. Collection of evidence should be carefully considered.

#### OPTIONS WHEN CONFRONTED WITH COMPELLING EXCULPATORY EVIDENCE

- 1) Report to law enforcement/prosecutor and have them collect it.
- 2) Have the defense investigator collect it.
- 3) Just leave it alone and document its existence via notes and photography. None of the options would be done without consulting the attorney first.

The option of contacting law enforcement regarding the existence of exculpatory evidence and asking them to collect may be beneficial.

First, if law enforcement collects it they are now in possession of it and must deal with it.

Second, they must also now explain why they failed to collect it in the first place. Did they miss it or intentionally dismiss it? Either they are incompetent or unethical.

Thirdly, if they refuse they are now subject to explaining another failure to pursue an objective and impartial investigation. All benefit defense counsel and an expansion of compelling cross examination questions.

## CONTROL AND AUTHORITY OF THE CRIME SCENE:

Of course, it goes without saying that the items in an active crime scene should not be collected or touched in any manner by defense counsel or agents of counsel. However, this begs the question: How long is a crime scene sacred ground?

The generally accepted view is that when the scene is abandoned and released by law enforcement, then anything there is fair game to be collected by the defense as exculpatory evidence.

## WHAT ABOUT TAMPERING?

As defined under Section 918.13, Florida Statutes, "tampering with evidence occurs when a person alters, destroys or conceals a record or physical evidence with the intent to impair the use of that evidence, while he or she is aware that an investigation or criminal proceeding is underway or about to be underway." What is the obligation of defense counsel?

The American Bar Association provides guidance on the issue with a focus upon "material evidence". The ABA addresses the issue by asking "what are the ethical obligations of a criminal defense attorney during the course of a pending criminal matter when the client places upon the attorney's desk or informs the attorney of the location of the instrumentality, fruits, or other physical evidence of the crime?"

Although the case law is limited in this area, the trend clearly seeks to strike a balance between the potentially opposite adversary poles of truth seeking and client loyalty by requiring physical evidence of a crime to be turned over by the attorney to the prosecution within a reasonable time, while broadly construing the attorney-client privilege so as to protect against the compelled disclosure of confidential communications."

## RETURN TO THE SOURCE RULE:

Additional research reveals ABA Criminal Justice Standard 4-4.6 provides insight regarding the collection of incriminating physical evidence. For some legal scholars who have addressed the physical evidence quandary, the "return to the source" rule reflects a more nuanced, sounder approach. Standard 4- 4.6 embraces an approach that seeks to balance defense counsel's duty of loyalty to the client with the duty as an officer of the court not to unfairly hinder the prosecution's access to evidence. Standard 4-4.6 acknowledges that ordinarily defense lawyers cannot simply receive and retain physical evidence related to an investigation or pending criminal charges.

The commentary to 4-4.6 echoes the oft-repeated notion that "law offices must not become depositories for physical evidence." Standard 4-4.6(a) does not generally require lawyers, however, to deliver physical evidence to law enforcement authorities unless required to do so by law or a court order or as provided in 4-4.6(d).

Standard 4-4.6(b) states that: (b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

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Standard 4-4.6 contemplates that normally defense counsel will not keep possession of incriminating evidence but will return the item of physical evidence to the location or person from whom counsel received it. Standard 4-4.6 recognizes, however, that at times defense counsel may have to temporarily retain possession of physical evidence. Standard 4-4.6(c) expressly allows defense lawyers to temporarily possess physical evidence, including contraband, for a limited period of time before returning the item to the source.

The provision reads: (c) Defense counsel may receive the item for a reasonable period of time during which defense counsel:

- (1) intends to return it to the owner;
- (2) reasonably fears that return of the item to the source will result in destruction of the item;
- (3) reasonably fears that return of the item to the source will result in physical harm to anyone;
- (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or
- (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is a reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

#### IN CONCLUSION:

Collection of exculpatory and inculpatory evidence is a complicated question and should be approached from a strategic perspective. The other question that begs to be answered is relative to the interpretation of "reasonable". What is a reasonable time period for the defense to not disclose possession of the evidence if they are required to do so? Of course, each case is unique and must be subjected to fact specific analysis. The dangers of collecting evidence is obvious. However, failing to collect exculpatory evidence may also be dangerous. Navigating such circumstances and questions demands the highest level of knowledge and training.

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