NAPD Formal Ethics Opinion 16-1

Question: The Ethics Counselors of the National Association for Public Defense (NAPD) have been asked to address the following scenario:

> An investigator working for Defense Counsel obtained a copy of a DVD from an in-store surveillance system recording the scene of an alleged crime. This tape became the only existing copy of the DVD, as the store subsequently destroyed the original pursuant to a retention policy that provided for erasure and re-use of discs every 30 days. The Prosecution – having never attempted to obtain the DVD prior to the original's destruction – demanded that Defense Counsel turn over her copy of the DVD.
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> Is Defense Counsel ethically obligated to turn over her copy of the DVD:
> 1) when she becomes aware that the original recording is unavailable to the prosecutor, regardless of whether the prosecution requests or demands it;
> 2) when an informal, direct request is made by the prosecutor; or
> 3) when a formal discovery request or lawful subpoena follows an informal request?

DUTIES ABSENT ANY PROSECUTION REQUEST

Although defense counsel's obligations to her client may be qualified by her duty of candor to the tribunal, counsel is *not* obligated to *volunteer* factual evidence.

Under the American Bar Association (ABA) Model Rules of Professional Conduct, Defense Counsel's obligation to zealously advocate for her client is "qualified by [her] duty of

candor to the tribunal." *See* Model Rules of Prof'l Conduct R. 3.3 cmt. 2 (2013). On the one hand, as established in the Preamble of the Model Rules, Defense Counsel must be a zealous advocate for her client in her capacity as an advocate in an adversary proceeding. *Id.* pmbl. (2) (2013); *see also* R. 3.3 cmt. 2. On the other hand, Defense Counsel, in her capacity as an officer of the legal system, is also obligated to uphold the truth-seeking process on which the adversary system is based. *Id.* R. 3.3 cmt. 11 (2013) (discussing a lawyer's duty to conduct herself in service of "the truth-finding process which the adversary system is designed to implement"). Accordingly, under the Model Rules, Defense Counsel's obligation to zealously advocate for her client is "qualified by [her] duty of candor to the tribunal." *Id.* cmt. 2 (2013).

In certain circumstances, the duty of candor toward the tribunal will require a lawyer to act contrary to her client's interests. For instance, under the Model Rules, a lawyer may be obligated to disclose legal authority to the court even if it is adverse to her client's position. *Id.* R. 3.3(a)(2) (2013) ("[A] lawyer shall not knowingly [...] fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."). However, Rule 3.3 does not include an analogous provision pertaining to the presentation of factual evidence, so the duty of candor, standing alone, would not require production of the DVD.

As a further note, although Rule 3.3 obligates the disclosure of factual evidence in ex parte proceedings,[1] the scenario presented is not an ex parte proceeding and thus would not fall under this rule. The parties in this scenario, unlike in an ex parte proceeding, have the opportunity and obligation to seek all relevant evidence; the Prosecution is aware of Defense Counsel's copy of the DVD and can request it through discovery.

[1] Model Rules of Prof'l Conduct R. 3.3(d) (2013) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.").

Moreover, while it is true that some courts have found counsel guilty of obstruction of justice for failing to turn over evidence to the prosecution, these cases consider only *physical* evidence and/or evidence *relating to the planning or execution* of an alleged crime. *See, e.g.*, In re Richard R. Ryder, 381 F.2d 713 (4th Cir. 1967) (affirming suspension of a lawyer who took a sawed-off shotgun and a bag of money from a client suspected of bank robbery and kept these items in a safe deposit box); Hitch v. Pima County Superior Court, 708 P.2d 72 (Ariz. 1985) (requiring defense counsel to turn over potentially inculpatory physical evidence to the prosecution); Morrell v. State, 575 P.2d 1200 (Ak. 1978) (ruling that defense counsel had a duty to turn over client's written kidnap plan to the prosecution). The DVD in the scenario presented is distinguishable from the evidence in the foregoing cases because it is documentary evidence rather than physical evidence, and it was not used in the planning or execution of the crime.

Other authorities support this result. ABA Standards for Criminal Justice: Defense Function 4.4-7(e) (4th ed. 2015), which obligates Defense Counsel to turn over evidence in certain circumstances, explicitly applies only to physical evidence. ("If defense counsel receives physical evidence that might implicate a client in criminal conduct, counsel should determine whether there is a legal obligation to return the evidence to its source or owner, or to deliver it to law enforcement or a court, and comply with any such legal obligations. A lawyer who is legally obligated to turn over such physical evidence should do so in a lawful manner that will minimize prejudice to the client.") There is no analogous provision in the ABA Standards applying to documentary evidence.

In addition, the Restatement of the Law Governing Lawyers requires defense counsel to turn over only the following types of evidence to the prosecution: "evidence of a client crime, contraband, weapons, and similar *implements used in an offense*. [The disclosure requirement]

also includes such material as documents and material in electronically retrievable form *used by the client to plan the offense*, documents *used in the course of* a mail-fraud violation, or transaction documents evidencing a crime." Restatement (Third) of Law Governing Lawyers § 119 cmt. (a) (2000) (emphasis added). The DVD in the scenario presented does not fall under this provision, since it is not an implement used in the offense, nor a document used to plan the offense or used in the course of committing it. Thus, failure to volunteer the DVD could not rightly be construed as obstruction of justice.

Moreover, defense counsel is ethically *barred* from providing the prosecution with a potentially inculpatory DVD unless she has informed consent from her client or the situation falls within an exception to Rule 1.6.

A lawyer cannot reveal "information relating to the representation" without violating Model Rule of Professional Conduct 1.6 if she lacks the client's informed consent, unless the situation fits an exemption outlined in the Rule's Subsection (b). Given the inculpatory nature of the tape, it would be neither expected nor advised that the client consent to production. Thus, production could only realistically occur pursuant to an exemption, and only one of the exemptions even plausibly applies to these facts.[2] Specifically: Rule 1.6(b)(6) provides that a

[2] Model Rule of Professional Conduct 1.6(b) provides:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(6) to comply with other law or a court order; or

lawyer "may" reveal information "to the extent the lawyer reasonably believes necessary" to "comply with other law or a court order." Thus, any sharing of the tape would be limited to circumstances involving specific law or court order.

Still, defense counsel *does* have an affirmative obligation not to conceal or destroy the DVD, or to counsel or assist the client in doing the same.

The Model Rules of Professional Conduct prohibit Defense Counsel from unlawfully interfering with the prosecution's access to evidence. Rule 3.4(a) provides 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," while Rule 3.4(d) further requires counsel to make a "reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

The Model Rules do not define the words "unlawfully" or "legally." Inserting the ordinary (dictionary) meaning of the words into Rule 3.4, it is clear that a lawyer cannot prevent disclosure of evidence if the steps she takes or omits are "against the law; illegal." *Webster's New World College Dictionary* 1582 (5th Ed. 2014). What is more, the Model Rules prohibit a lawyer from "counsel[ing] a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." *Id.* R. 1.2(d) (2013). Thus, the lawyer would be required to avoid assisting the client by destroying the DVD or replacing the original DVD with other video. If the lawyer discovered that the client had destroyed or altered the DVD or was in the process of destroying or altering the DVD, the lawyer would be required to withdraw from representing the client. *See* R. 1.2 cmt. 10; R. 1.16(a)(1).

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(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

A last consideration on this question involves the substantive criminal law of the jurisdiction. The variations in laws relating to obstruction of justice and concealment of evidence make a definitive statement difficult. But some guidance can be obtained by consideration of provisions like the offense of tampering with physical evidence found in Section 241.7 of the Model Penal Code (2015). Under this law, a "person" commits the crime when, "believing that an official proceeding or investigation is pending," the person "conceals" a tangible item with the "purpose to impair its verity or availability in such proceeding."

And in submitting affidavits or making statements in open court, the lawyer must not present—or fail to correct—evidence that the lawyer knows to be false.

A lawyer has an affirmative obligation not to make statements or present evidence to a tribunal that the lawyer knows is false, or fail to correct such evidence, because of the lawyer's "special duties . . . as officers of the court to avoid conduct that undermines the integrity of the adjudicative process." *See* Model Rules of Prof'l Conduct R. 3.3 cmt. 2 (2013). Specifically, Rule 3.3(a)(1) provides that a lawyer shall not "knowingly . . . make a false statement of fact . . . to a tribunal or fail to correct a false statement of material fact . . . previously made to the tribunal by the lawyer." Thus, in making representations in open court, a lawyer must "know[] the assertion is true or believe[] it to be true on the basis of a reasonably diligent inquiry." *Id.* R. 3.3 cmt. 3 (2013).

In this case, if the lawyer watched the DVD, the lawyer would be prohibited from introducing evidence that was clearly contradicted by the DVD. For example, if the lawyer observed the DVD unmistakably showing the lawyer's client in the store at a particular time,[3] unless the lawyer had reason to believe the time shown in the DVD was incorrect, the lawyer

[3] Given the current quality of video security footage, it would be unusual for the lawyer or anyone else to unequivocally identify an individual captured on the store's videotape camera(s). For the purposes of this illustrative hypothetical, it is assumed the lawyer has knowledge that it is her client, in fact, who is captured in the footage at a particular time.

would be prohibited from introducing other evidence suggesting the client was not in fact present.

Further, the lawyer is also forbidden from knowingly allowing his client to make statements to the court that he knows to be false.[4] The Model Rules provide that a lawyer who "knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." R. 3.3(b).

As a note of caution, while under the Model Rules, "knows" denotes "actual knowledge of the fact in question," the Rules also provide that a lawyer's knowledge "may be inferred from circumstances." R. 1.0(f). As a result, the lawyer's possession of the DVD and the fact that the lawyer or another member of the lawyer's team obtained the DVD from the scene of the crime could give rise to the inference that the lawyer had watched the DVD and had knowledge of its contents. This result would be the case even in the event that the lawyer had not in fact viewed the relevant DVD.

DUTIES IN THE EVENT OF AN INFORMAL, DIRECT REQUEST

In the event of an informal, direct request from a prosecutor, the lawyer still has no obligation to turn over the DVD.

As previously mentioned, Defense Counsel faces an ethical bar from providing the prosecution with "information relating to the representation"—in this instance the DVD—unless she receives client consent or else acts pursuant law or court order (per the exemption in Model Rule of Professional Conduct1.6(b)). An informal request for the evidence from the prosecution

[4] N.B., "Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. " Model Rules of Prof'l Conduct R. 3.3 cmt. 9 (2013). Do note that in some jurisdictions, criminal defense lawyers are required to present the accused as a witness "or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false," and in those jurisdictions such a legal obligation would trump the ethical duty against the same. *Id.* R. 3.3 cmt. 7 (2013).

does not meet the level of legal formality necessary to trump such ethical duties. Rather, the prosecution's right to demand and receive such production exists *only* when proper steps are taken to secure that evidence.

In a typical criminal case, the parties obtain production of evidence by service of a subpoena. In certain circumstances, the government can obtain a search warrant. And in many jurisdictions there are provisions authorizing or mandating pretrial exchange of information. These are the "other law" and "court order[s]" referred to in Model Rule of Professional Conduct 1.6(b)(6). Unless the prosecution pursues one of these methods, Defense Counsel remains ethically barred from handing over the potential evidence.

DUTIES IN THE EVENT OF A LAWFUL, FORMAL DISCOVERY REQUEST

In the event of a lawful, formal discovery request or subpoena that follows an informal request, the lawyer likely does have an obligation to turn over the DVD, unless the lawyer is allowed to challenge such a request in good faith.

Assuming that the request for production is proper in the jurisdiction in which it is made,[5] a lawyer must respond or interpose a privilege. If the request for production is not proper, then the lawyer can challenge it in good faith. The second phrase of Model Rule of Professional Conduct 3.4(c) makes this clear. Knowing disobedience of a court order or other obligation of a tribunal is prohibited "except for an open refusal based on an assertion that no valid obligation exists." In the absence of an assertion that a privilege excuses production or that no valid obligation exists, a lawyer faced with a search warrant, a subpoena, or a lawful discovery request is ethically bound to produce the requested items.

[5] Regarding compliance with discovery requests under Model Rule of Professional Responsibility 3.4(d), the ethical duty is premised on requests that are "created by, based upon, or authorized by law." *Webster's New World College Dictionary* 831 (5th Ed. 2014). In a typical criminal case, the parties obtain production of evidence by service of a subpoena. In certain circumstances, the government can obtain a search warrant. And in many jurisdictions there are provisions authorizing or mandating pretrial exchange of information. Of course, a facially valid court order must also be obeyed until vacated by the court that entered it or by a higher authority. These are the "other law" and "court order[s]" referred to in Model Rule of Professional Conduct 1.6(b)(6).

It is difficult to identify a specific privilege that might excuse production of the DVD.[6] Because the client had no part in obtaining the copy of the DVD, the typical attorney-client privilege for confidential communications is inapposite. Thus, the most obvious reason for refusal to produce would be that the DVD is the work product of the attorney. There is support for this view in Section 87, Comment (f) of Restatement (Third) of the Law Governing Lawyers (2000). In this Comment, work product is defined as "tangible materials and intangible equivalents prepared, collected, or assembled by a lawyer." It can include materials in "electronic and other technologically advanced forms." *Id*. The DVD in this matter would qualify under Section 87(1) as "ordinary" work product and the defense lawyer's initial invocation of this privilege would be justified.

Upon interposition of the privilege, the duty of proceeding under Section 88 of the Restatement would fall on the prosecutor. "Ordinary" protection may be overcome by a showing of relevance to a claim or defense, "and that the inquiring party will likely be prejudiced in the absence of discovery." *Id.* §88 cmt. (b) (2000).

In jurisdictions following a pretrial disclosure policy like that stated in Rule 16(b) of the Federal Rules of Criminal Procedure, however, the Restatement policy of general privilege is superseded by specific exemptions from a more general obligation to disclose.[7] Rule

[6] It is important to note at this point that the DVD is not the evidence sought. The government is seeking the contents of the DVD presumably for introduction at trial under an evidence rule similar to Federal Rule of Evidence (FRE) 1003. This Rule allows introduction of duplicates without proof that the original was destroyed. However, it may well be that the request for production of the DVD is merely to establish the foundation for introduction of other evidence of the contents under a rule like FRE 1004(a). In this scenario, Rule 1004 would not require production of the original upon showing that it was destroyed "and not by the proponent acting in bad faith." In this fact pattern, the duplicate would become irrelevant. The defense lawyer's failure to turn it over might actually serve the prosecutor's needs better than compliance by setting the stage for testimony by prosecution witnesses about the contents of the DVD.

[7] The obligation to disclose is premised on the defendant's intent to use a particular item during his case in chief. FED. R. CRIM. P. 16(b)(1)(A)(ii).

16(b)(1)(A) provides that if the government complies with a defendant's request for disclosure, then:

> "the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial."

If the defendant does not intend to use the DVD in his case-in-chief, he would not be obliged to disclose under the Federal Rules. However, to the extent that the defendant in this scenario intends to use the DVD at trial, it is clear that under the Federal Rule he would be obliged to disclose.

A last consideration on this question involves the substantive criminal law of the jurisdiction. The variations in laws relating to obstruction of justice and concealment of evidence make a definitive statement difficult. But some guidance can be obtained by consideration of provisions like the offense of tampering with physical evidence found in Section 241.7 of the Model Penal Code (2015). In this law, a "person" commits the crime when, "believing that an official proceeding or investigation is pending," the person "conceals" a tangible item with the "purpose to impair its verity or availability in such proceeding." *Id.*

CONCLUSION

A lawyer has no special exemption from the criminal law. But the Model Penal Code does provide a defense when "any other provision of law imposing a public duty" requires or authorizes the conduct. *Id.* §3.03(1)(e) (2015). As explained above, the Model Rules of Professional Conduct 1.6 and 3.4 not only authorize retention of the DVD in this case, they require it until a "lawful" request is made. A telephone call from the prosecutor will not do. But a lawful subpoena, a properly obtained and executed search warrant or an appropriate, authorized

discovery request almost certainly impose a duty to obey the lawful orders of the tribunal in the absence of a viable claim of privilege. If and whenever that happens, Defense Counsel must be prepared to turn over the evidence, in good condition; unless that happens, defense counsel has no affirmative ethical obligation to turn over the DVD in this scenario.

Respectfully submitted,

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