THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 690
October 2020

QUESTION PRESENTED

Does a lawyer who represents a defendant in a criminal matter violate the Texas Disciplinary Rules of Professional Conduct if, after receiving tangible evidence from the lawyer's client, the lawyer does not reveal the existence of the evidence until trial and refuses to allow the prosecuting attorney to inspect the evidence until the court orders the lawyer to do so?

STATEMENT OF FACTS

A lawyer represents a client who is in jail awaiting trial in a felony domestic violence case. While in jail, the defendant receives several letters from a victim in the case that contain relevant information. The defendant gives those letters to the lawyer, who takes the letters to his office for safekeeping. The lawyer does not reveal the existence of the letters until trial. The prosecuting attorney informally asks to inspect the letters, but the lawyer refuses. The lawyer continues to refuse to allow inspection of the letters until ordered to do so by the court after a hearing.

DISCUSSION

"Unlawful" obstruction or concealment in general. Rule 3.04(a) of the Texas Disciplinary Rules of Professional Conduct prohibits the unlawful obstruction, concealment, alteration or destruction of evidence. Rule 3.04(a) provides:

> "A lawyer shall not . . . unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act."

To constitute a violation of Rule 3.04(a), the obstruction or concealment must be done "unlawfully." The term "unlawfully" is not defined in the Rules. Nevertheless, as discussed below, the term "unlawfully" is generally understood to refer to conduct that violates a statute, court order, or other mandatory disclosure obligation.

Any obstruction or concealment that violates criminal law would clearly be "unlawful" and therefore would violate Rule 3.04(a). Criminal conduct related to obstruction or concealment could also likely violate subsections (2), (3), (4), or (12) of Rule 8.04(a):

> "A lawyer shall not:
>
> . . .
>
> (2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (4) engage in conduct constituting obstruction of justice; . . . [or]
>
> (12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law."

Whether particular conduct violates a criminal obstruction statute is a question of substantive law that is outside the Committee's purview. The Committee is not aware of any authority holding that it is a crime for a lawyer to accept and retain ordinary tangible evidence from a client accused of a crime.

Obstruction or concealment of evidence is also "unlawful" if it violates a court order. For example, a lawyer in possession of tangible evidence may violate Rule 3.04(a) by knowingly failing to obey a court order requiring production of the evidence. Such conduct could also violate Rule 3.04(d), which provides:

> "A lawyer shall not . . . knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience."

Finally, a lawyer acts "unlawfully" for purposes of Rule 3.04(a) if the lawyer knowingly fails to provide evidence when disclosure is mandated by the rules of the tribunal, a subpoena, a discovery obligation, a cooperation agreement, or the like (hereafter, a "Mandatory Disclosure Obligation"). It is not unlawful, however, for an attorney to withhold ordinary tangible evidence pending a ruling on a good faith, legally available objection, motion for protection, or other procedurally legitimate challenge to a Mandatory Disclosure Obligation.

Mandatory Disclosure Obligations of criminal defense counsel. There is no traditional discovery process in Texas that allows the State to obtain evidence from a criminal defendant. Absent a court order, therefore, a lawyer who receives ordinary tangible evidence from a client

generally does not have an obligation to turn over the evidence to the prosecuting authority. In such a situation, the lawyer does not act unlawfully, and consequently does not violate Rule 3.04(a), merely by maintaining non-destructive custody of such evidence.

Special Criminal Evidence. It is generally accepted that a lawyer has a self-executing obligation to turn over some special types of tangible evidence. This opinion will refer to such evidence as "Special Criminal Evidence," as opposed to "ordinary evidence." The definition of Special Criminal Evidence varies by jurisdiction, but generally includes contraband, the instrumentalities of a crime, or the fruits of a crime. Common examples are illegal narcotics, a murder weapon, and stolen jewelry. Depending on the jurisdiction, the definition of Special Criminal Evidence may also include documents and records directly involved in the perpetration of a crime, such as book-making receipts or falsified records, as well as other direct evidence of the client's involvement in the crime (such as a bloody glove). The rationales offered to support the obligation to turn over Special Criminal Evidence are that (1) possession of such evidence—by anyone—is usually illegal, (2) preparing the client's defense does not require counsel to possess the evidence, and (3) any evanescent evidence (such as fingerprints) could degrade while in the lawyer's possession.

Most United States courts that have considered the issue have held that a lawyer who comes into possession of Special Criminal Evidence—however defined in that jurisdiction—has a self-executing obligation to turn over the evidence to police or other law enforcement authorities. *See Rubin v. State*, 602 A.2d 677, 686 (Md. 1992) (collecting cases); *see also Hitch v. Pima County Superior Court*, 708 P.2d 72, 75 (Ariz. 1985); *In re Ryder*, 381 F.2d 713, 714 (4th Cir. 1967) ("It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime"); *see generally* Restatement (Third) of the Law Governing Lawyers § 119 (2000) (lawyer must notify prosecuting authorities or turn over the evidence after reasonable time for non-destructive testing); Gregory C. Sisk, *The Legal Ethics of Real Evidence: Of Child Porn on the Choirmaster's Computer and Bloody Knives under the Stairs*; 89 Wash. L. Rev. 819 (2014); Stephen Gillers, *Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence*, 63 Stan. L. Rev. 813 (2011).

It appears to be the general rule that, before turning over Special Criminal Evidence to law enforcement authorities, a lawyer may be allowed to examine the evidence and subject it to tests that do not alter or destroy material characteristics of the evidence. Restatement (Third) of the Law Governing Lawyers § 119 (2000). It also appears to be the general rule that if a lawyer turns over Special Criminal Evidence acquired from a client, the trial court should not allow the jury to learn the source of the evidence. *See Rubin v. State*, 602 A.2d at 688 (collecting cases); *see also Henderson v. State*, 962 S.W.2d 544, 556 (Tex. Crim. App. 1997) (holding that trial court properly compelled lawyer to turn over maps received from client when kidnapping victim was possibly still alive, but noting that neither the client's communications to the attorney nor the attorney's communications to law enforcement could be admitted at trial); *Sanford v. State*, 21 S.W.3d 337, 344 (Tex. App.—El Paso 2000, no pet.), *abrogated on other grounds by Motilla v. State*, 78 S.W.3d 352 (Tex. Crim. App. 2002) ("[b]y allowing the State to recover the evidence, the public

interest is served, and by refusing the State an opportunity to disclose the source of the evidence, the attorney-client privilege is preserved"). At least one jurisdiction has endorsed a procedure designed to avoid disclosing the source of the evidence to the prosecution. *See* District of Columbia Rules of Professional Conduct, Rule 3.4, Comment 5 (D.C. Office of Bar Counsel may accept evidence and turn it over to proper authorities without revealing its source, thereby preserving the defense lawyer's obligation of confidentiality).

At present, the scope of a lawyer's self-executing obligation to turn over Special Criminal Evidence has not been well-defined in reported Texas law. *E.g.*, *Sanford v. State*, 21 S.W.3d at 344, n. 6 (declining to decide question of whether attorney had an obligation to reveal to law enforcement the location of an instrumentality of the crime, which the lawyer had learned from client); *Henderson v. State*, 962 S.W.2d at 556 (referring to "cases in other states that require an attorney to release physical evidence in his possession to the authorities but prevent the government from disclosing to a trier of fact that the evidence came from the defendant's attorney"). For purposes of this opinion it is sufficient to note that a Texas court *might* recognize a self-executing obligation to produce Special Criminal Evidence. If so, a violation of that obligation would be "unlawful" for purposes of Rule 3.04.

Application to assumed facts. The Committee now turns to the specific statement of facts presented at the start of this opinion. The assumed facts involve an incarcerated client who, during a jailhouse visit, gives tangible evidence (letters) to his lawyer. At the time of receipt, the lawyer is not subject to any order or agreement that mandates producing the evidence to the State. The lawyer declines to produce the letters in response to an informal request from the prosecuting attorney but produces the letters when ordered to do so by the trial court.

The lawyer is not subject to a self-executing obligation of production by virtue of the special character of the evidence. A letter from a victim does not qualify as Special Criminal Evidence, even if the letter might be incriminating or exculpatory. Specifically, such a letter is "ordinary evidence"—it is not contraband, a fruit or instrumentality of the alleged crime, a document directly involved in the perpetration of a crime, or other direct evidence of the client's involvement in the crime (such as a bloody glove). A Texas criminal defense attorney has no obligation to turn over ordinary tangible evidence to the prosecuting attorney. That the lawyer receives the ordinary tangible evidence from an incarcerated client does not change the result, assuming the lawyer does not violate the law in the process.

No obligation to accept custody of evidence tendered by client accused of a crime. The Committee also notes that a lawyer is under no obligation to accept or act as custodian of tangible evidence tendered by a client accused of a crime. Assuming the lawyer does not believe the client will destroy the evidence if the lawyer refuses to accept it, and assuming the lawyer counsels the client as to the applicable laws regarding evidence preservation, the most prudent course is often to decline a client's request to accept custody of evidence related to an alleged crime. *See generally "What Do I Do with the Porn on My Computer": How a Lawyer Should Counsel Clients About*

Physical Evidence, 54 Am. Crim. L. Rev. 751 (2017) (comprehensive discussion of advice that lawyers should give clients if lawyer declines to take possession of tangible evidence).

Unaddressed issues. This opinion does not address (a) the destruction or alteration of evidence, (b) a lawyer's obligation with respect to mere information received from a client related to tangible evidence (e.g., the location of a corpse or murder weapon), (c) a lawyer's obligation with respect to tangible evidence independently discovered by the lawyer or the lawyer's agents, (d) evidence that is not provided directly to the lawyer by the client, or (e) evidence that might exonerate a co-defendant or third-party. The Committee also cautions that it offers no opinion regarding the application of criminal obstruction statutes and that prosecuting authorities may take a broad view on what conduct constitutes criminal obstruction or concealment.

CONCLUSION

A lawyer who elects to take possession of tangible evidence from a client in a criminal matter may not conceal that evidence from a prosecuting attorney or obstruct access to that evidence if doing so would be "unlawful." A lawyer's conduct with regard to potentially relevant evidence is unlawful if it is prohibited by statute, court order, or Mandatory Disclosure Obligation, as defined above. In general, however, a Texas lawyer is not required to disclose ordinary tangible evidence in a criminal matter in the absence of a court order or agreement.

The common law may impose a self-executing obligation of disclosure if a lawyer takes possession of Special Criminal Evidence, such as contraband, instrumentalities of a crime, or fruits of a crime. The precise scope of such an obligation is a question of substantive Texas law to be addressed by the courts. The failure to comply with a judicially recognized obligation of disclosure would be considered "unlawful" and would violate Rule 3.04(a).

Under the facts stated in this opinion, a lawyer who obtains ordinary tangible evidence from an incarcerated client does not violate the Texas Disciplinary Rules of Professional Conduct by refusing to produce the evidence to the prosecuting attorney until ordered to do so.

A lawyer is under no obligation to accept tangible evidence from a client charged with a crime. Assuming the lawyer does not believe the client will destroy the evidence if the lawyer refuses to accept it, and counsels the client regarding evidence preservation, the most prudent course may be to decline a client's request to accept custody of evidence related to an alleged crime.