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Document Destruction in Business Litigation from a Practitioner's Point-of-View: The Ethical Rules vs. Practical Realities.

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DOCUMENT DESTRUCTION IN BUSINESS LITIGATION FROM A PRACTITIONER'S POINT-OF-VIEW: THE ETHICAL RULES VS. PRACTICAL REALITIES

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I. INTRODUCTION

Discovery in modern business litigation increasingly has caused corporate clients to seek preventive legal advice from their attorneys about whether to dispose of potential "smoking-gun" evidence contained in their files. Attorneys are asked to approve clients routine document destruction programs. In some cases, lawyers are questioned as to the propriety of destroying damaging evidence in the client's possession that the opponent in a pending proceeding has requested the client to produce. At other times, the client informs the attorney that it already has disposed of a document that suddenly appears relevant to litigation.[1]

There is a clear consensus on the lawyer's ethical obligations that arise in these situations. Prior to a discovery request by the opponent or an appropriate court order in pending litigation, the attorney may freely advise his client to destroy potentially adverse evidence in its possession. Indeed, the ethical duty of client loyalty may require the attorney to inform his client that document destruction is the only prudent course of action. An attorney proceeding in this manner is in full compliance with prevailing interpretations of the ethical rules.

Because this type of behavior on the part of lawyers can impede the administration of justice — even though there is no violation of ethical regulations — commentators writing on document destruction have uniformly called for reform of the ethical codes and federal and state law.[2] All are in agreement that prevailing ethical rules are

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1. *See* S. GILLERS & N. DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 413 (1985).

> The lawyer realizes that there are documents in the client's file that can be used against it. But either the lawsuit has not yet begun or, if it has begun, no discovery request for those documents has been served. Can the lawyer tell the client to destroy the documents? Can the lawyer say nothing, even though he knows the client is intending to destroy the documents? Must the lawyer tell the client not to destroy the documents?

2. There are only four major commentaries devoted exclusively to the question of document concealment and/or destruction. *See* Fedders & Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME LAW. 5 (1980); Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185 (1983); Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085 (1987); Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979). Two other articles, Comment, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961 (1985); Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191 (1985), deal with only one issue considered here and are of even more limited scope than the foregoing pieces.

among the weakest prohibitions against document destruction.[3] Similarly, there is a consensus that the peculiarities of federal and state criminal procedure curtail the effective enforcement of modern day obstruction of justice and contempt of court provisions.[4] The literature displays a sense of guarded optimism about a relatively recent development in three jurisdictions — the tort of spoliation of evidence.[5] Each author has offered his own suggestion for controlling the problem of document destruction.[6]

Each of the major authorities on document destruction approaches the subject from a general view of the problem by asking: How can the improper destruction or concealment of evidence be controlled? While, for the most part, accomplishing the task of answering that question, these commentaries fail to guide judges and practitioners in responding to the practical realities of destruction in modern business litigation. That is the purpose of this article — to pose and answer the question: What are the considerations and courses of action open to an attorney who either is asked by his client for advice in this area or who encounters an opponent who has destroyed or is concealing evidence?

Part II of this article describes the ethical parameters of an attorney's conduct in cases where he is called upon to advise a corporate client regarding its concealment or destruction of documents. Because those parameters are so broad in practice, the ethical rules are toothless in nature. Part III examines other devices used to control improper document destruction — sanctioning under the rules of civil procedure, the spoliation inference, the new tort of spoliation of evidence, and the possibility of attorney malpractice liability. Although these are actions that a practitioner should consider in response to an opponent's wrongdoing, they may not prove to be effective in cases of egregious document destruction. In part IV, the proposals set forth in the major commentaries are reviewed and analyzed. Finally, part V presents an alternative strategy that courts and practitioners may

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3. *See* discussion *infra* at Part II.

4. *See* discussion *infra* at Part III.

5. *See* discussion *infra* at Part IV.

6. *See* Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1240-41 (1983); Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1191-94 (1987); Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1672-74 (1979).

wish to use in dealing with document destruction. Based on three hypothetical cases in which an opponent has damaged or conceals evidence, the article proposes two amendments to the Federal Rules of Civil Procedure.

II. THE TOOTHLESS NATURE OF CURRENT ETHICAL RULES

A number of devices exist to prevent improper document destruction. Primary among these are the ethical codes governing the conduct of attorneys and the federal and state laws that are incorporated into the ethics regulations. Current provisions essentially require the violation of a law to trigger any professional sanction.

The prevailing ethics provisions do little to effectively deter the types of evidence destruction that may impede the administration of justice.[7] The Model Code of Professional Responsibility does not specifically delineate the ethical limits on a lawyer's conduct with respect to the destruction of documents. Those boundaries are a product of several ethical provisions, including Disciplinary Rules 7-102(A)(3) and 7-109(A), Ethical Consideration 7-27, and Model Rule 3.4:[8]

> DR 7-102(A)(3): In his representation of a client, a lawyer shall not . . . [c]onceal or knowingly fail to disclose that which he is required by law to reveal.
>
> DR 7-109(A): A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.
>
> EC 7-27: Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce.
>
> MR 3.4(a): A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or

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7. *See* Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1666 (1979)("Yet the Code of Professional Responsibility . . . fails to resolve the problems that arise when it appears that a client's position can be improved by destroying evidence.").

8. Government prosecutors possess unique ethical obligations. *See* Model Code of Professional Responsibility DR 7-103(B).

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. *Id.*

This Article concerns itself exclusively with civil litigation and, therefore, sets aside any discussion of document concealment or destruction in criminal matters.

> other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such acts . . . ."
> MR 3.4(d): A lawyer shall not . . . in pretrial procedure . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party . . . ."

These ethics provisions are permutations of the broad prohibition against an attorney counseling or participating in illegal activity.[9]

Attorneys in some cases have been disciplined for abridging the foregoing ethical rules. As recently as 1985, the Supreme Court of Arizona imposed a two-year suspension on an attorney who violated DR 7-102(A)(3) by willfully misrepresenting his client's assets and liabilities to a court.[10] Similarly, the violation of DR 7-109(A) has served as grounds for discipline. In *Sullins v. State Bar*,[11] a lawyer was publicly reproved for intentionally misleading the court by concealing the existence of a letter pertinent to a matter before the court.[12] *In re Nixon*[13] involved the disbarment of President Nixon for attempted obstruction of investigations by the FBI and Department of Justice.[14] In a larger number of cases, attorneys have been reprimanded severely for violation of Model Rule 3.4(a).[15]

The specific laws that restrict the disposition of documents and other evidence include 18 U.S.C. § 1503, 18 U.S.C. § 401(3), state law

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9. *See* Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1666 (1979) "[P]rovisions of the Code refer only to situations in which destruction of evidence is illegal". *Id.* In addition, "[a] request involving unlawful conduct, such as conduct in furtherance of an obstruction of justice, may result in a violation of Rule 8.4(b) (prohibiting criminal conduct)." ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 61:702 (1984).

10. *See In re* Ireland, 706 P.2d 352, 359 (Ariz. 1985); Davis v. State Bar, 655 P.2d 1276, 1281 (Cal. 1983)(imposing three-year suspension, in part, for attorney's willful deception of court); *see also In re* James, 452 A.2d 163, 170 (D.C. 1982)(imposing two-year suspension for misleading court).

11. 542 P.2d 631 (Cal. 1975), *cert. denied*, 425 U.S. 937 (1976).

12. *See id.* at 639.

13. 385 N.Y.S.2d 305 (N.Y. App. Div. 1976).

14. *See id.* at 306.

15. *See, e.g.*, Price v. State Bar, 638 P.2d 1311, 1318 (Cal. 1982)(lawyer suspended for altering evidence); *In re* Jones, 487 P.2d 1016, 1023 (Cal. 1971)(lawyer suspended for fabricating evidence and later suggesting evidence to contrary be destroyed); Reznick v. State Bar, 460 P.2d 969, 974 (Cal. 1969)(lawyer suspended for altering evidence to create defense); *In re* Williams, 23 N.W.2d 4, 9 (Minn. 1946)(disbarment based upon destruction of evidence clearly necessary in possible subsequent litigation); *In re* Bear, 578 S.W.2d 928, 937 (Mo. 1979)(lawyer reprimanded for erasing tape recorded evidence); Bar Ass'n v. Zaffiro, 399 N.E.2d 549, 551 (Ohio 1980)(suspension based on lawyer's destruction of files on five fraudulent worker's compensation claims).

and applicable federal and state statutes or regulations that deal expressly with the retention of particular business documents.[16]

Section 1503, the federal obstruction of justice statute, provides for fines or imprisonment of any person who "obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice."[17] Courts have construed the phrase "due administration of justice" to prohibit the willful destruction of tangible evidence[18] relevant to any ongoing or pending matter;[19] however, section 1503 does not apply to conduct that occurs in advance of the filing of a complaint in federal court.[20] At least one state supreme court has ordered the two-year suspension of an attorney based partially on his conviction under section 1503 for endeavoring to obstruct justice.[21] Thus, this provision does not prohibit advice by the attorney to destroy documents before a suit has been instituted. Moreover, "[t]he reported document destruction cases brought under section 1503 have almost

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16. Solum and Marzen argue that, contrary to standard interpretations, the concept of illegality contained in the ethical provisions should not be limited to criminal law violations but should extend to violations of discovery law and tort law as well. *See* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1126 (1987). Moreover, they assert that because the criminal law of destruction of evidence is a "poor choice," the illegalities punishable by the ethical rules could encompass abridgments of judicial orders or even commission of the tort of intentional spoliation of evidence. *See id.* at 1127. This innovative approach to controlling document destruction is a positive one. From a practical perspective, however, it seems unlikely to take hold in federal and state courts. In Part IV, this article offers a new practice that courts might adopt as an alternative means of reaching the same objective.

17. 18 U.S.C. § 1503 (1976). Two related statutes are sections 1505 and 1510. *See id.* §§ 1505, 1510. Section 1505 concerns the obstruction of proceedings before departments, agencies, and committees, and applies only after administrative or legislative investigations have commenced. *See id.* § 1505. Section 1510 contains penalties for interference with the transmission of information to criminal investigators. *See id.* § 1510. These two sections are not immediately relevant to the present discussion. *See generally* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1108-13 (1987).

18. *See* United States v. Rasheed, 663 F.2d 843, 851-52 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982).

19. *See* United States v. McKnight, 799 F.2d 443, 446 (8th Cir. 1986); United States v. Brimberry, 744 F.2d 580, 587 (7th Cir. 1984); United States v. Solow, 138 F. Supp. 812, 814-15 (S.D.N.Y. 1956).

20. *See* United States v. Metcalf, 435 F.2d 754, 756-57 (9th Cir. 1970); United States v. Scoratow, 137 F. Supp. 620, 621-22 (W.D. Pa. 1956); *see also* Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1195, 1201 (1983).

21. *See* Louisiana State Bar Ass'n v. Vesich, 476 So. 2d 811, 815 (La. 1985).

all involved selective destruction of documents.[22] When documents are destroyed routinely and there is no outstanding document request or subpoena, it is difficult to establish the necessary criminal intent."[23] As Professor Oesterle has commented,"[i]n practice . . . the prohibition is toothless."[24]

However, a lawyer, who prior to the filing of a complaint advises his client to destroy evidence, may be found guilty of *conspiracy* to commit obstruction of justice. In *United States v. Perlstein*,[25] the Supreme Court refused to review the conviction of an attorney who advised his client to destroy certain documents if a proceeding were brought.[26] The Court of Appeals for the Third Circuit stated:

> While it is true that the obstruction can arise only when justice is being administered, that is to say when a proceeding is pending, there is nothing to prevent a conspiracy to obstruct the due administration of justice in a proceeding which becomes pending in the future from being cognizable under section 37 (the antecedent of present conspiracy statute, 18 U.S.C. § 371).[27]

But as Oesterle points out, "[a]n illegal conspiracy is extant under *Perlstein* only if an attorney advises a client, before his opponent files a complaint, to destroy records after that complaint is filed . . . ."[28]

Section 401(3) is the federal contempt statute. It empowers a federal court to punish by fine or imprisonment contempt of its authority in the form of "[d]isobedience or resistance of its lawful writ, process, order, rule, decree, or command."[29] This section conditions a violation on failure to obey a preexisting court order to preserve or produce documents for discovery; thus, destruction of documents *before* any order issues is not punishable under section 401. Therefore, section 401 is of even more limited use than is section 1503.

From the perspective of the private litigant, a major deficiency with each of these federal statutes is that "the final choice of whether even

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22. Fedders & Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME LAW. 5, 21 (1980).

23. *Id.*

24. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1201 (1983).

25. 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942).

26. *Id.* at 792.

27. *Id.* at 796.

28. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1196 (1983).

29. 18 U.S.C. § 401(3) (1976).

to bring the matter to a hearing is not the party's; a federal prosecutor or, in the case of contempt, the court, must agree to pursue the complaint."[30] A prosecutor's refusal to prosecute is virtually final.[31]

Although some states lack any law against the destruction of evidence,[32] a number of state laws make it illegal to tamper with or fabricate physical evidence. The primary difference between these statutes is the scope of activity covered by the different laws. For example, laws in a few states prohibit the destruction of evidence that may be relevant to *future* litigation.[33] A larger number of states prohibit document destruction in situations in which the actor "believes" that a proceeding is pending or about to take place.[34] Other states, such as Texas, provide that a person obstructs justice or commits contempt only if he "knows" that a suit is pending or is about to be instituted at the time he destroys evidence.[35] Texas Penal Code section 37.09(a)(1) provides, "A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he . . . alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding . . . ." Although the few state statutes that prohibit the destruction of evidence possibly relevant to future litigation constitute a relatively stringent foundation for the foregoing ethical provisions, the Texas statute limits the scope of these ethical rules to situations in which an actor has positive knowledge of an existing suit. Thus, a Texas attorney remains well within the ethical bounds when advising his client, prior to knowledge of actual litigation, to dispose of documents or other potential evidence.

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30. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1192 (1983).

31. *See* United States v. Cox, 342 F.2d 167, 171-72 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); Tonkin v. Michael, 349 F. Supp. 78, 81 (D.V.I. 1972).

32. *See* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1117-18 (1987).

33. *See* ARK. STAT. ANN. § 5-53-111 (1987); IND. CODE ANN. § 35-44-3-4(a)(3) (West 1985); MINN. STAT. § 609.63(1)(7) (West 1987); MO. REV. STAT. § 575.100(1)(Vernon 1979); NEV. REV. STAT. § 199.220 (1987); *see also* ALASKA STAT. § 11.56.610(a)(1) (1983).

34. *See* DEL. CODE ANN. tit. 11, § 1269(2) (1987); N.Y. PENAL LAW § 215.40(2) (McKinney 1988); 18 PA. CONS. STAT. ANN. § 4910(1) (Purdon 1983); *see also* State v. Johnson, 594 P.2d 514, 524-26 (Ariz. 1979); People v. Nicholas, 417 N.Y.S.2d 495, 496 (N.Y. App. Div. 1976)(construing New York provision).

35. *See* TEX. PENAL CODE ANN. § 37.09(2)(1) (Vernon 1974); *see also* CAL. PENAL CODE § 135 (West 1985); FLA. STAT. ANN. § 918.13(1)(2) (West 1985); OHIO REV. CODE ANN. § 2921.12(A)(1) (Page 1986).

Over 1300 federal statutes and administrative rules govern business record retention.[36] Numerous rules also exist at the state level. A lawyer who advises his client to destroy documents in violation of these regulations clearly is subject to criminal prosecution and professional discipline. "Most regulations, however, do not expressly provide for private enforcement, and courts have thus far refused to create it."[37]

Thus, in most cases, an attorney fully meets his ethical obligations so long as he does not counsel destruction of documents anytime after a proceeding is known to exist. As one author has explained:

> If a client has foolishly kept documents on hand that will hurt his cause if litigation later ensues, it is obviously in his interest to destroy them. If it is not criminal to do so, a lawyer may counsel the client accordingly. And if a lawyer can so counsel a client, the basic principle of client loyalty suggests that he should . . . .[38]

Should an attorney violate the law, he is subject to any of numerous punishments, including disbarment, suspension, probation, reprimand, admonition, notification of clients and counsel, restitution, and costs and fines.

Some commentators have suggested that ethical provisions governing attorney's obligations to the court also restrict their conduct in connection with the concealment or destruction of evidence. Disciplinary Rule 1-102(A)(5) provides that "[a] lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice." There is little question that, in many instances, a lawyer's duty of client loyalty may require him to advise his client to destroy certain materials. Often, such destruction will, in one way or another, prejudice the administration of justice. Thus, the foregoing disciplinary rule is far from absolute and in most cases will bend to the higher ethical duty of fidelity to the client.

In several instances, courts have punished violations of the ethical rules not by traditional disbarment or suspension but by disadvantag-

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36. *See* GUIDE TO RECORD RETENTION REQUIREMENTS (Jan. 1, 1981), Special Edition of the Federal Register; *see also* Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1210-16 & n.99 (1983).

37. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1215 (1983).

38. 1 G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 372 (1988 Supp.).

ing the attorney in the instant proceeding. Some courts have asserted that the judiciary has a *duty* "to disqualify or strike an attorney from a case who willfully obfuscates or conceals relevant facts."[39] A court may invoke these penalties for ethical violations at any time during a proceeding.[40] In *Schmidt v. Ford Motor Co.*,[41] the district court removed the plaintiff's attorney from the case on the grounds that he violated a number of disciplinary rules by willfully concealing evidence.[42]

III. THE IMPLICATIONS OF CONDUCT CONSISTENT ONLY WITH THE ETHICAL RULES

As argued in part II, the Code of Professional Responsibility alone is not an effective regulator of attorney conduct in regard to advising or participating in the destruction of documents. This, however, does not imply that the lawyer's role in document disposal is without any restraint. It is clear that an attorney who counsels or participates in document destruction while an action is pending or otherwise in violation of the law can subject his client to criminal liability and himself to professional discipline. But is the attorney who conducts his practice up to the limits of "ethical" standards entirely free of risk? From a pragmatic point of view, the answer must be no. In most instances, advising a client to dispose of documents, whether routinely or on an *ad hoc* basis, can injure the client's strategic interests along with the lawyer's own personal interests. The types of penalties to which a client might become subject include sanctions under federal and state rules of civil procedure, an inference that destroyed evidence was adverse, or liability for the tort of evidence spoliation. In some situations, an attorney may find himself subject to civil liability.

A. *The Rules of Civil Procedure*

An attorney who complies fully with the ethical rules but advises

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39. Schmidt v. Ford Motor Co., 112 F.R.D. 216, 220 (D. Colo. 1986); *see also* Musicus v. Westinghouse Elec. Corp., 621 F.2d 742, 744 (5th Cir. 1980)(district court *obliged* to remedy unethical conduct occurring in any proceeding before it); Breenbaum-Mountain Mortgage v. Pioneer Nat'l Title Ins., 421 F. Supp. 1348, 1351 (D. Colo. 1976).

40. *See* General Mill Supply Co. v. SCA Serv., Inc., 697 F.2d 704, 711-12 (6th Cir. 1982)(asserting that court should *sua sponte* raise ethical problems involving danger to just, speedy, inexpensive remedy, even if parties do not).

41. 112 F.R.D. 216 (D. Colo. 1986).

42. *See id.* at 221.

his client to dispose of particular documents in anticipation of future litigation, can expose his client to sanctions under the rules of procedure.

Federal Rule of Civil Procedure 37 empowers the federal courts to take certain matters as established, to restrict a party's introduction of evidence, to strike pleadings, to dismiss an action, or to hold the party in contempt, in circumstances where it has obstructed the discovery of true facts by destroying or concealing evidence.[43] Similarly, rule 215 of the Texas Rules of Civil Procedure authorizes Texas courts to make such orders "as are just" where a party fails to comply with an order of the court or discovery request. Such orders include cessation of a disobedient party's discovery power, the payment of an opponent's attorney's fees and expenses, striking out of pleadings, and barring the disobedient party from supporting or opposing designated claims or defenses.

The federal courts have held that the existence of a prior court order is not a prerequisite to the invocation of the foregoing sanctions.[44] In *Bowmar Instrument Corp. v. Texas Instruments, Inc.*,[45] for example, the plaintiffs asked for rule 37(b) sanctions based on the destruction of documents *before* the complaint had been filed.[46] According to that court, such sanctions were appropriate because "the defendant, with knowledge that this lawsuit would be filed, willfully destroyed documents which it knew or should have known would constitute evidence relevant to this case."[47] Similarly, in *Lewis v. Darce Towing Co., Inc.*,[48] the court opined that "even where no specific court order is involved, the district court has broad discretion to render discovery and evidentiary rulings necessary to ensure a fair

43. *See* Lewis v. Darce Towing Co., Inc., 94 F.R.D. 262, 265-66 (W.D. La. 1982).

44. *See* Professional Seminar Consultants, Inc. v. Sino Am. Technology Exch. Council, Inc., 727 F.2d 1470, 1474 (9th Cir. 1984). *But cf.* 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 37.03[2] (2d ed. 1982)(arguing rule 37(b) sanctions may be invoked only after violation of court order); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2289 (1972)(same argument as Moore).

45. 25 Fed. R. Serv. 2d (Callaghan) 423 (N.D. Ind. 1977).

46. *See id.* at 426.

47. *Id.* at 427; *see also* William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)(sanctions imposed against litigant who is notified that documents and information in possession are relevant to litigation or potential litigation and destroys them). *But see* William T. Thompson Co. v. General Nutrition Corp., 104 F.R.D. 119, 122 (C.D. Cal. 1985)(limiting an award of monetary sanction under Rule 37(b) to period *after* court's first discovery order).

48. 94 F.R.D. 262 (W.D. La. 1982).

and orderly trial."[49] This tendency to bring pre-litigation document destruction within the scope of the rules of civil procedure was also evident in two other major cases, *United States v. International Business Machines Corp.*[50] and *In re Agent Orange Product Liability Litigation*.[51] In fact, in the latter, the court found an obligation on the defendant, arising out of nothing more than the rules of procedure themselves, to preserve documents that the plaintiff later requested.[52]

Although the ethical rules may permit document destruction up to the point of the inception of actual litigation, the precedent under the federal procedural rules forcefully suggests that sanctions against a party are proper where, before a lawsuit is initiated, that party intentionally places itself in a position in which it is unable to comply with later discovery requests.[53] The leap to the state rules of civil procedure is a relatively easy one. For example, in 1987, the Supreme Court of Nevada, acting pursuant to Nevada Rule of Civil Procedure 37(b), held that "even where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action."[54] In that particular case, the plaintiff's negligent failure to preserve evidence took place over two years before a complaint was ever filed and nearly three years before a production request for the evidence was issued.[55] On this basis, the court sustained the lower court's grant of summary judgment in favor of the defendant.[56]

Solum and Marzen found that courts will impose discovery sanctions for willful destruction, and sometimes, for the negligent destruction of evidence,[57] but not for a party's inadvertent destruction.[58]

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49. *Id.* at 265.

50. 66 F.R.D. 189 (S.D.N.Y 1974). In this case, the court held that "the Government had an obligation to preserve all documents specifically requested that were relevant to this litigation." *Id.* at 194.

51. 506 F. Supp. 750 (E.D.N.Y. 1980).

52. *See id.* at 751.

53. *See* Societe Internationale v. Rogers, 357 U.S. 197, 208-09 (1958).

54. Fire Ins. Exch. v. Zenith Radio Corp., 747 P.2d 911, 914 (Nev. 1987).

55. *See id.* at 912-13.

56. *See id.* at 913.

57. *See* National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 554 (N.D. Cal. 1987)(evidence of willful or reckless action by party in obstructing discovery *not* required to sanction party).

58. *See* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1096-97 (1987).

However, there is evidence that when courts have applied such sanctions, they have proven to be quite severe. In the recent case of *Telectron, Inc. v. Overhead Door Corp.*,[59] the court discovered "a clear picture of willful and prejudicial discovery abuse, requiring imposition of the strictest of sanctions."[60] In that case, the court not only awarded attorney's fees and costs to the plaintiff, but also entered a default judgment against the defendant.[61] In *William T. Thompson Co. v. General Nutrition Corp.*,[62] the district court found that even though the defendant had notice prior to litigation that certain types of records would be discoverable in a lawsuit, it intentionally failed to preserve them, and in fact, continued to destroy those records throughout the course of the litigation.[63] So great was the destruction, that the plaintiff's ability to obtain a "full and fair" trial was almost entirely impaired.[64] The court awarded the plaintiff $453,312 in monetary sanctions, dismissed defendant's complaint against the plaintiff, and imposed the "ultimate" sanction of striking GNC's answer and entering a default.[65] In another suit, *In re Air Crash Disaster Near Chicago, Illinois on May 15, 1979*,[66] the courts ordered defendant that had destroyed documents in advance of litigation to bear all of the expenses borne by the opponent in having to compensate for the lost information.[67] In *Fautek v. Montgomery Ward & Co., Inc.*,[68] the district court awarded plaintiffs' costs and attorney's fees caused by the defendant's intentional, reckless, or negligent *concealment* of existing evidence.[69] Simply from a strategic point of view, advising a client to destroy documents on an *ad hoc* basis in advance of litigation may be a very risky proposition.

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59. 116 F.R.D. 107 (S.D. Fla. 1987).

60. *Id.* at 111.

61. *See id.* at 135-37.

62. 593 F. Supp. 1443 (C.D. Cal. 1984).

63. *See id.* at 1446.

64. *See id.* at 1451.

65. *See id.* at 1456; *see also* William T. Thompson Co. v. General Nutrition Corp., 104 F.R.D. 119 (C.D. Cal. 1985).

66. 90 F.R.D. 613, 621 (N.D. Ill. 1981)(defendant "must reimburse plaintiffs for costs and fees related to all depositions, court appearances, or motions dealing with the [destroyed report] or which might have been unnecessary had the . . . report not been destroyed").

67. *Id.*

68. 96 F.R.D. 141 (N.D. Ill. 1982).

69. *See id.* at 146-47; *see also* Lewis v. Darce Towing Co., 94 F.R.D. 262, 272 (W.D. La. 1982)(excluding all information obtained by plaintiff in process of destroying evidence).

B. *The Spoliation Inference*

Both federal and state courts often allow the factfinder to draw a presumption against a party that intentionally destroys evidence that the evidence would have been unfavorable to the cause of the spoliator.[70] In *Bird Provision Co. v. Owens Country Sausage, Inc.*,[71] the federal district court opined that "it is elementary in the law of evidence that when a party destroys, fabricates or alters evidence, the Court properly may draw inferences unfavorable to the spoliator."[72] In *Alexander v. National Farmers Organization*,[73] the Court of Appeals for the Eighth Circuit held that it was improper for the district court *not* to draw adverse inferences against a party that engaged in willful suppression and destruction of evidence.[74] "[I]f discovered, evidence of the destruction may be admissible in evidence at the trial as a circumstance showing consciousness of guilt or liability."[75]

As Solum and Marzen correctly suggest, there remains significant disagreement about the exact parameters of the spoliation inference.[76] Historically, courts have been hesitant to invoke the inference without some proof that the spoliator acted intentionally. However, in *Vick v. Texas Employers Commission*,[77] the Court of Appeals for the Fifth Circuit allowed the inference against a party whose negligence had caused the loss of evidence.[78] Moreover, just this past year, the Court of Appeals for the Sixth Circuit invoked a "rebuttable presumption" against a defendant based on its negligent destruction of crucial evi-

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70. *See, e.g.*, National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 557 (N.D. Cal. 1987); Bird Provision Co. v. Owens Country Sausage, Inc., 379 F. Supp. 744, 751 (N.D. Tex. 1974), *aff'd*, 568 F.2d 369 (5th Cir. 1978); Kroger Stores, Inc. v. Hernandez, 549 S.W.2d 16, 17 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); H.E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 343 (Tex. Civ. App.—Waco 1975, writ dism'd). "Courts appear willing to give a specific jury instruction, if requested, on the inference to highlight the matter for the jury." Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1237-38 (1983).

71. 379 F. Supp. 744 (N.D. Tex. 1974), *aff'd*, 568 F.2d 369 (5th Cir. 1978).

72. *Id.* at 751.

73. 687 F.2d 1173 (8th Cir. 1982).

74. *See id.* at 1205-06 & n.40.

75. C. WOLFRAM, MODERN LEGAL ETHICS 644 (1986); *see* United States v. Brashier, 548 F.2d 1315, 1325 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977); United States v. Cirillo, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

76. *See* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1088 (1987).

77. 514 F.2d 734 (5th Cir. 1975).

78. *See id.* at 737.

dence.[79] The court argued that "this approach merely selects which of two parties — the innocent or the negligent — will bear the onus of proving a fact whose existence or nonexistence was placed in greater doubt by the negligent party."[80]

Once an adverse inference is invoked, the exact weight it is given can vary. In some courts, the spoliation inference by itself is sufficient to justify a verdict against the spoliator. For example, in *Cecil Corley Motor Co., Inc. v. General Motors Corp.*,[81] a case involving the intentional destruction of documents while litigation was pending, the court granted "the strongest inference" against the party responsible for the destruction of evidence.[82] The *Corley Motor* court overturned a jury verdict in favor of the plaintiff and granted defendant's motion for a new trial.[83] Similarly, in *H.E. Butt Grocery Co. v. Bruner*[84], a Texas court explained that:

> Such a presumption is not evidence, but rather a rule of procedure or an "administrative assumption" which "vanishes" or is "put to flight" when positive evidence is introduced . . . . Such a presumption when unrebutted . . . may fully establish a fact in issue, not as evidence, but as an artificial legal equivalent to the evidence otherwise necessary to do so.[85]

In other courts, the inference is merely one consideration.

In many cases, the evidentiary inference raised by document destruction does not offset the loss of critical evidence. As Judge Thompson opined in *Barker v. Bledsoe*,[86] "[T]he tampering, destruction or suppression of evidence raises only a presumption that such evidence would have been unfavorable to the party responsible for doing it . . . . A presumption as to certain evidence is simply not sufficient to protect against such conduct."[87] The court argued that, in cases of serious negligent or intentional destruction of evidence, it was "required" either to dismiss the suit or otherwise eliminate the

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79. *See* Welsh v. United States, 844 F.2d 1239, 1248 (6th Cir. 1988).

80. *Id.* at 1249.

81. 380 F. Supp. 819 (W.D. Tenn. 1974); *see also* Bar Ass'n v. Zaffiro, 399 N.E.2d 549, 550-51 (1980)(attorney received indefinite suspension for destruction of evidence).

82. *Cecil Corley Motor Co.*, 380 F. Supp. at 859.

83. *See id.*

84. 530 S.W.2d 340 (Tex. Civ. App.—1975, writ dism'd).

85. *Id.* at 344.

86. 85 F.R.D. 545 (W.D. Okla. 1979).

87. *Id.* at 547-48.

"ill-gotten advantage."[88]

C. *The Tort of Intentional Spoliation of Evidence*

Courts in Alaska, California, and Florida, have adopted the tort of intentional spoliation of evidence.[89] The California court, which first recognized this tort, analogized to cases involving intentional interference with a prospective business advantage.[90] The court reasoned that a prospective civil lawsuit is a "probable expectancy" that is to be shielded from another person's injurious acts, clearly indicating that the tort reaches intentional destruction of evidence before a suit is filed.[91]

In 1987, the Supreme Court of Kansas refused to recognize this tort in a case before it on the grounds that the spoliator-defendant owed the plaintiff no duty to preserve the evidence in his possession.[92] The court concluded that "absent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the new tort of 'the intentional interference with a prospective civil action by spoliation of evidence' should not be recognized in Kansas."[93]

Where will (should) the Texas courts come down on this issue? In Texas, the parameters of what constitutes an actionable tort are quite broad. It is clear that "any intentional invasion of, or interference with, property rights or personal liberty causing injury without just cause is an actionable tort."[94] It also is well established that, in Texas, a cause of action or the right to recover damages is a property right.[95] Therefore, Texas courts easily could find that any destruction

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88. *See id.* at 548.

89. *See, e.g.*, Hazen v. Municipality of Anchorage, 718 P.2d 456, 463-64 (Alaska 1986); Smith v. Superior Court, 198 Cal. Rptr. 829, 832-33 (Cal. Ct. App. 1984); Bondu v. Gurvich, 473 So. 2d 1307, 1312 (Fla. Dist. Ct. App. 1984). For a brief explanation of developments in several other jurisdictions, see Solum and Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1100 n.69 (1987).

90. *Smith*, 198 Cal. Rptr. at 836.

91. *Id.* at 836-37.

92. *See* Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1181 (Kan. 1987).

93. *Id.* at 1182-83.

94. Tippett v. Hart, 497 S.W.2d 606, 609 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.); *see also* Cooper v. Steen, 318 S.W.2d 750, 753 (Tex. Civ. App.—Dallas 1958, no writ).

95. *See, e.g.*, Galarza v. Union Bus Lines, Inc., 38 F.R.D. 401, 404 (S.D. Tex. 1965)(right to receive damages for personal injuries is property right in Texas), *aff'd*, 369 F.2d 402 (5th Cir. 1966); Redfren v. Collins, 113 F. Supp. 892, 895 (E.D. Tex. 1953)(Texas recognizes right to sue for damages for tort is chose in action and property within legal sense of term); Ezell v.

of evidence that interferes with one's right to recover damages is a cognizable tort. Whether a Texas court might require a *duty* to preserve evidence, as the Kansas Supreme Court did, is not clear. If an analogy is made to Texas common law concerning the tort of interference with business or prospective contractual relations, then no such duty may be required. The four elements of the latter tort are: at least a "reasonable probability" that two or more parties would enter into contractual relations, willful conduct on the part of the defendant, actual damages, and proximity between the defendant's conduct and the plaintiff's injury.[96]

Soon after the decision in *Smith*, a second California court extended the new tort theory to include the negligent destruction of documents. In *Velasco v. Commission Building Maintenance Co.*,[97] the court held that "a cause of action may be stated for negligent destruction of evidence needed for prospective civil litigation."[98] Thus, the scope of the new tort in California has become extremely broad. As Solum and Marzen conclude, "together, *Smith* and *Velasco* provide a powerful alternative to the spoliation inference and civil discovery sanctions for the control of destruction of evidence relevant to civil litigation."[99]

D. *Attorney Liability*

There is some question as to whether an attorney may be liable for fraud in instances where he makes misrepresentations (or simply remains silent) to an opponent regarding the destruction or concealment of evidence. In *Cresswell v. Sullivan & Cromwell*,[100] the federal district court approved plaintiffs' attempt to sue a group of attorneys on the grounds that they intentionally withheld the production of

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Dodson, 60 Tex. 331, 332 (Tex. 1883); Renger Memorial Hosp. v. State, 674 S.W.2d 828, 830 (Tex. Civ. App.—Austin 1984, no writ)(cause of action is property right); Garrett v. Reno Oil Co., 271 S.W.2d 764, 767 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.)(cause of action is property right); Schepps v. Wilkins, 290 S.W. 909, 911 (Tex. Civ. App.—Dallas 1927, no writ).

96. *See* Levine v. First Nat'l Bank, 706 S.W.2d 749, 751 (Tex. App.—San Antonio), *rev'd on other grounds*, 721 S.W.2d 287 (Tex. 1986).

97. 215 Cal. Rptr. 504 (Cal. Ct. App. 1985).

98. *Id.* at 506.

99. Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1106 (1987).

100. 668 F. Supp. 166 (S.D.N.Y. 1987).

documents during settlement discussions in an earlier action.[101] In 1979, the federal district court for the Western District of Oklahoma levied costs and attorney's fees against a plaintiff's lawyer personally for having been "directly and solely responsible" for the destruction of evidence without notice to the opponent.[102] However, in *Telectron, Inc. v. Overhead Door Corp.*,[103] a Florida district court refused to hold the defendant's "full-time *in-house* counsel" personally liable even though he willfully and flagrantly destroyed documents.[104] The court, in its fervor to punish the corporation, argued that the attorney was not to be sanctioned because he was not acting in the capacity of an "independent professional."[105]

In *Hennigan v. Harris County*,[106] a Texas appellate court sustained a claim of fraud brought against an attorney who concealed facts when he had a professional responsibility to inform the trial court of those facts.[107] The court found "no reason why an attorney at law could not be held liable for actionable fraud as would anyone else."[108] The elements necessary to establish a valid claim are: (1) misrepresentation of a material fact (or silent concealment when there is a duty to speak[109]); (2) with intention to induce action or inaction; (3) reliance by the plaintiff; and (4) damage.[110] In a second Texas case, the court agreed that an attorney owes no "general" duty to an opposing party, but found liability for injuries sustained by an opponent due to the attorney's fraudulent or malicious conduct.[111]

The issue here is whether the attorney has a duty to disclose a confidential communication in which the client informs the attorney that it

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101. *See id.* at 173.

102. *See* Barker v. Bledsoe, 85 F.R.D. 545, 549 (W.D. Okla. 1979).

103. 116 F.R.D. 107 (S.D. Fla. 1987).

104. *See id.* at 136-37.

105. *Id.*

106. 593 S.W.2d 380 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

107. *See id.* at 381-82.

108. *Id.* at 383.

109. *See id.* at 384; *see also* Humble Oil & Ref. Co. v. Harrison, 205 S.W.2d 355, 361 (Tex. 1947); Susanoil, Inc. v. Continental Oil Co., 519 S.W.2d 230, 235-36 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); Rowntree v. Rice, 426 S.W.2d 890, 892 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.); Ruebeck v. Hunt, 171 S.W.2d 895, 896 (Tex. Civ. App.—Waco 1943), *aff'd*, 176 S.W.2d 738 (Tex. 1944).

110. *See Hennigan*, 593 S.W.2d at 383; *see also* Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 187 (Tex. 1977)(explanation of what is not misrepresentation).

111. *See* Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ).

is currently destroying or contemplating the destruction of potential evidence. The Code of Professional Responsibility allows, but does not compel, the lawyer to reveal the client's intention to commit the crime.[112]

> Although a lawyer is free to conceal his client's illegal conduct, he may risk exposure to personal liability if he does so. If the client is eventually prosecuted, the lawyer might be charged as a participant in the illegality if he knew of the misconduct but took no preventive action.[113]

IV. A CRITIQUE OF PROPOSALS

Several commentators have called for substantial reform of the current system of legal controls on document destruction. This section of the article examines and critiques alternatives proposed in three commentaries.[114]

A. *Proposed Revision of the Code of Professional Responsibility*

In order to clarify the lawyer's appropriate role in the decision to destroy potential evidence, in 1979, one commentator recommended the following new disciplinary rule, "In his representation of a client, the lawyer shall not advise or assist in the destruction of documents, records or other real evidence when he knows or reasonably should know that they are relevant to any foreseeable, planned or pending action."[115] Further, the writer suggested that "the Code also should establish a rebuttable presumption that all documents are relevant after an action has begun."[116]

The primary difficulty with this proposal is that its limited application to attorneys implies an extremely narrow form of controlling document destruction by *all* parties. Of course, the author candidly admits that "the problem cannot be completely solved by such a

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112. Model Code of Professional Responsibility DR 4-101(C)(3) (1980) states: "A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime."

113. Fedders & Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME LAW. 5, 59 (1980).

114. *See* Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1239-45 (1983); Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1191-94 (1987).

115. Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1673 (1979).

116. *Id.*

rule."[117] Further, it attempts to accomplish through ethical standards what has not and cannot be accomplished through even statutory provisions. This provision would essentially cut off advice to clients, leaving the client free to destroy evidence. "Presumably, the writer hopes that clients unable to secure advice on the matter would hesitate to proceed with plans to destroy their records."[118]

B. *Proposed Revision of the Rules of Civil Procedure*

Professor Oesterle has suggested substantial changes in the Federal Rules of Civil Procedure. First, he would introduce a new rule setting forth a party's legal obligation to preserve records.[119] In essence, this rule would require a person who, at a minimum, reasonably should foresee litigation to exercise "due care" in preserving any evidence in his possession that is within the scope of rule 26(b) discovery.[120]

Next, Oesterle proposes a new subsection to rule 34 titled "Missing Documents and Things." It would require a party responsible for the unavailability of evidence to delineate specific information such as the date of destruction, the reason therefore, the contents of the destroyed material, and the best means of reconstruction.[121] Finally, he recommends a clarification of rule 37 sanctions for parties whose lack of due care causes the destruction of evidence. Oesterle would empower the courts to designate certain facts or issues as established or to compel the destroying party to pay the expenses incurred in reconstructing such evidence.[122] Once an issue is designated, the party disadvantaged would be prohibited from introducing any evidence on that issue at trial.

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117. *Id.* at 1673 n.104.

118. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1217 (1983).

119. One similar alternative is an automatic "document preservation order." *See* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1094-95 n.44 (1987). This is a common practice in suits brought by the Securities and Exchange Commission. *See, e.g.*, Securities & Exch. Comm'n v. Levine, 689 F. Supp. 317, 320 (S.D.N.Y 1988)(seeking order preventing document destruction and alteration); Securities & Exch. Comm'n v. Vaskevitch, 657 F. Supp. 312, 314 (S.D.N.Y. 1987)(seeking *inter alia* an order preventing document alteration or destruction).

120. *See* Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1240 (1983). "Potential litigants, under the recommended rule, are on notice to preserve documents only when they have or should have a particularized suspicion that a lawsuit is likely." *Id.* at 1243.

121. *See id.* at 1240.

122. *See id.* at 1241.

This proposed change would have positive results. Its greatest impact would be in the area of routine document destruction programs because it creates an affirmative duty to preserve documents. In addition, the rules would prohibit destruction of documents that a party may later intend to claim to be privileged. Under Oesterle's scheme, a court would have an opportunity to decide on privilege objections *before* a document is destroyed.[123] The deficiency with this construct is that it is incapable of dealing with the growing problem of spoliators who deny the existence of material or who preserve evidence, yet improperly conceal it on the basis of privilege.

C. *An Integrated Alternative*

The most recent major commentary concerning document concealment and destruction concludes with a plea for coherent judicial application of three legal controls — the spoliation inference, discovery sanctions, and the new spoliation torts.[124] Solum and Marzen explain that a court faced with document destruction should first determine its objective, whether it be to restore the accuracy of a proceeding, to punish the spoliator, or to compensate an injured party. A court that aims for accuracy likely will wish to invoke a strong spoliation inference. Discovery sanctions such as dismissal or a default judgment would be best in situations where the accuracy of a proceeding cannot be restored due to spoliation.

This integrated approach certainly would be an improvement over the historically incoherent state of the doctrine; yet, the approach essentially is nothing more in the way of a concrete proposal for reform than has been presented in prior commentaries. Therefore, the next section of this article suggests an alternative strategy altogether — one that is designed to deal with some of the most perplexing problems of document destruction.

V. AN ALTERNATIVE STRATEGY

Thus far, this article has examined the limitations of the ethical guidelines and federal and state law as a means of controlling the destruction of evidence. In addition, it has been argued that other avail-

123. *See id.* at 1243-44. "Litigants are asked to preserve all privileged documents if relevant in the sense that they are otherwise discoverable under rule 26." *Id.* at 1244.

124. *See* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1192-94 (1987).

able controls, though potentially potent, have failed to stem some of the most egregious cases of destruction and concealment. An example of such outrageous conduct is when a party not only conceals adverse information, but further claims that the document containing the information never existed. As is clear, the foregoing alternatives prove ineffective as a bar to a party's (intentional) improper assertion of a claim of privilege for the purpose of concealing damaging material.

This section identifies several hypothetical situations in which an attorney encounters independent proof that his opponent has intentionally destroyed or is concealing adverse evidence. A detailed new rule for dealing with such a situation is suggested.

A. *Counsel's Chance Discovery of a Document the Opponent Claims It Never Generated*

Hypothetical Number One: In June 1988, in the course of deposing a former employee of the defendant corporation, plaintiff's counsel learns of the existence of a 1984 company memorandum titled "Liquidation v. Franchise Offering: Getting the Most from Underperforming Locations." The memo contains information highly damaging to the defendant's case. In July of 1988, plaintiff's counsel files a rule 34 discovery request asking that the specific memorandum be produced. Defendant responds that there is no recollection of any such memorandum being prepared and that, in any case, no such memorandum exists in the company files.

In an October, 1988, interview of a disgruntled, former employee of the defendant, plaintiff's counsel actually obtains a photocopy of the 1984 memorandum with substantial indicia of genuineness, i.e., the signature of the company president, the company letterhead, and an accurate and comprehensive distribution list, among other things. Out of fear of recrimination, the former employee refuses to testify as to the document's existence.

Soon thereafter, plaintiff's counsel — without disclosing his possession of a photocopy of the 1984 memorandum — files a rule 37 motion to compel, to which the defendant again responds with lack of recollection and present non-existence of any such document. Further attempts to have the defendant produce the document or admit its existence are to no avail.

What should plaintiff's counsel do? It is tempting for the plaintiff's lawyer to "plant" the photocopy in the defendant's files during a later document inspection. Does defense counsel have an ethical obligation

to reveal the memorandum's existence if he is aware of it?[125]

This hypothetical scenario is not at all unrealistic. In one lawsuit, officers of defendant American Airlines and the company's attorney denied repeatedly that American's Senior Director of Safety had ever produced a report concerning the cause of a 1979 crash — despite testimony from American employees that exactly such a report had been prepared.[126] Only when the district court compelled American to respond to discovery requests did its officers admit that such a report had in fact been prepared.[127] The court's sole means of "punishing" this concealment was to award the plaintiffs' their costs and fees caused by American's conduct.[128]

Difficult issues arise in instances where an attorney inadvertently encounters "smoking-gun" evidence through a third-party and the opponent denies any knowledge of the evidence. The present discovery structure forces the attorney in such cases to choose between a potentially unjust outcome in the case (and, in addition, one that goes against his client) and the use of deception to reach a fair result.

Courts should provide for these situations in the following way. First, the attorney who encounters evidence in this manner should be permitted to present it directly to the court and be required to demonstrate that the evidence contains substantial indicia of authenticity — e.g., that it makes sense, has significant content, or that the content is consistent with other evidence. If the court becomes convinced by the attorney's argument that the proffered document is genuine, the court should establish a rebuttable presumption that the evidence is what it purports to be. Thereafter, the burden would be on the opposing party to overcome the presumption. In appropriate cases, the court could open the discovery schedule to allow counsel to ascertain the

125. "If the information is covered by the broad protection of the rules of confidentiality, disclosure of information damaging to the client's interests without the client's permission is not permitted." C. WOLFRAM, MODERN LEGAL ETHICS 640 (1986). Model Rule 1.6(b)(1) forbids the disclosure of client wrongdoing unless such disclosure is reasonably necessary to prevent the client from committing a criminal act likely to result in "imminent death or substantial bodily harm."

126. *See In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 90 F.R.D. 613, 616-20 (N.D. Ill. 1981). American's California counsel said: "I'm making a statement to you now that this written report does not exist." *Id.* at 616.

127. *See id.* at 618. American succeeded in concealing the document's existence for approximately one full year. *Id.*

128. *See id.* at 621.

document's authenticity. Where a court finds wrongdoing, it could choose from its many sanctions to punish a recalcitrant party.

There might be some fear that the foregoing procedure would encourage some parties or lawyers to fabricate false documents. Although this is a reasonable fear, it is easier for a party to "lose" evidence or develop selective memories than it is to fabricate evidence. In the final analysis, this suggested procedure will bring more fairness to litigation than does the prevailing system.

B. *Counsel's Discovery of Evidence That the Opponent Has Elected to Conceal But That Possibly is Not Privileged*

> Hypothetical Number Two: Plaintiff's counsel in an antitrust suit files a rule 34 request that the defendant make certain categories of material available for inspection. The defendant complies, making available approximately 4,000 separate documents. In the course of a month-long review of the materials, plaintiff's counsel uncovers numerous bits of evidence that clearly establish the elements of an antitrust violation. According to practice, he requests that the defendant provide exact facsimiles of those documents and several hundred others.
>
> During a subsequent review of the reproductions, plaintiff's counsel discovers that large portions of material have been "blacked-out" or deleted on the grounds that the information is not relevant to the litigation or is confidential. The defendant's attorney censored the documents in good faith, believing all excised material to be privileged.
>
> In the course of further investigation, a third-party tenders to plaintiff's counsel full copies of some of the documents already received by defendant's counsel in an altered form. By comparing these materials, plaintiff's lawyer reaches the opinion that the propriety of a few of the excisions reasonably is open to question. The attorney cannot disclose the independent source of these documents.
>
> What should plaintiff's counsel do? Would it be ethical for the attorney to claim to have knowledge of the excised data due to independent recollection or because of a handwritten note he made during the first inspection and, on that basis, move for sanctions? Does defense counsel have, at a minimum, an ethical obligation to reveal excised material to the court in instances where the propriety of particular excisions is reasonably open to question?

The Federal Rules of Civil Procedure do not expressly provide for situations in which an opponent may have a "good faith" yet incorrect belief that it is properly withholding certain evidence. In cases where an attorney lacks proof that his opponent purposefully is con-

cealing evidence or has only a "sense" that documentation is being withheld improperly, Federal Rule of Civil Procedure 11 serves as a disincentive to a motion for sanctions,[129] particularly following the 1983 amendment.[130] Ironically, the authors of the 1983 amendment possessed some fear that just such a chilling effect might result.[131]

The Texas courts limit the risk that unfairness will arise from good faith concealment by allowing courts to require a party to submit *in camera* full, uncensored copies of all documents requested but not necessarily produced during the discovery phase of litigation. In *Peeples v. Honorable Fourth Supreme Judicial District*,[132] the Supreme Court of Texas established that:

> [A]ny party who seeks to exclude documents, records or other matters from the discovery process has the affirmative duty to specifically plead the particular privilege or immunity claimed and to request a hearing on his motion. The trial court should then determine whether an in camera inspection is necessary. If such inspection is ordered by the trial court, those materials for which the inspection is sought must be segregated and produced to the court.[133]

The *Peeples* rule saves the plaintiff's attorney in Hypothetical Number Two from the quandry he faces in federal court. Some federal district courts normally request such a submission. For example,

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129. Rule 11 provides, in part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name . . . . The signature of an attorney or party constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

130. According to the Advisory Committee Notes concerning the 1983 amendment of Rule 11, "[t]he new language is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions." FED. R. CIV. P. 11 advisory committee's note.

131. The Advisory Committee wrote:

> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. FED. R. CIV. P. 11 advisory committee's note.

132. 701 S.W.2d 635 (Tex. 1985).

133. *Id.* at 637.

the court in *In re Air Crash Disaster Near Chicago, Illinois* made exactly this request for any documents for which a claim of privilege was raised.[134] In fact, "[t]he court cautioned American to review the documents to make sure a colorable claim of privilege existed."[135]

C. *Counsel's Chance Discovery of Relevant, Unprivileged Evidence That the Opponent Willfully Concealed*

> Hypothetical Number Three: Assume the same facts as in Hypothetical Number Two except that, unbeknownst to the plaintiff, the defendant and its lawyer purposefully "cleansed" some of the most damaging evidence contained in the documents, despite the fact that the undisclosed evidence is not privileged.
>
> In the course of further investigation, a third-party tenders to plaintiff's counsel full copies of some of the documents that he had received, in an altered form, from the defendant. By comparing these materials, plaintiff's lawyer learns of the opponent's wrongdoing. The attorney cannot disclose the independent source of these documents.
>
> What should plaintiff's counsel do? Would it be ethical for the attorney to claim to have knowledge of the excised data due to independent recollection or because of a handwritten note he had made during the first inspection and, on that basis, to move for sanctions? Does defense counsel have an ethical obligation to reveal the client's wrongdoing if he is aware of it?

Unlike Hypothetical Number Two, this scenario involves an attorney with hard evidence that his opponent has willfully concealed proof that clearly is relevant to the litigation. Unfortunately, the attorney cannot disclose the source of that proof and no procedure exists for bringing the information to the court's attention. The *Peeples* rule requiring an *in camera* submission to the court may be adequate in these types of situations unless the court, in its discretion, determines that an *in camera* inspection is not necessary.

Thus, Hypothetical Number Three suggests the need for a modified version of the *Peeples* rule. That new rule might be as follows:

> a. Any party who seeks to exclude documents, records or other matters from discovery has the affirmative duty to specifically plead the particular privilege or immunity claimed.

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134. *See In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 90 F.R.D. 613, 615 (N.D. Ill. 1981).

135. *Id.*

b. The party must segregate those materials that are excluded from production and submit them to the court for *in camera* inspection.

c. The court, or a special master in appropriate circumstances, shall review and categorize the excluded materials as being "clearly privileged," "clearly relevant and not privileged," or "arguably not privileged."

d. The court shall approve the party's refusal to disclose to this opponent all material that is found to be clearly privileged.

e. The court shall require the party to produce all material that is found to be clearly relevant and not privileged. In instances where a party has intentionally concealed evidence that is found to be relevant and not privileged, the court shall respond with the severest sanctions permitted. Although the application of severe sanctions is mandatory, whether a party's improper concealment is "intentional" is within the sound discretion of the court.

f. The court shall require the party to disclose all material that is "arguably not privileged" to the opposing counsel for his sole viewing. On this basis, the court shall reach a decision on the excludability of the material. In its sound discretion, the court may order a party to pay the fees and costs incurred by its opponent.

g. In submitting materials to the court for an *in camera* inspection, any party who seeks to exclude documents, reports, or other matters from discovery may itself bring to the court's attention any material that it has elected to withhold, but that is arguably not privileged. In such instances, the party shall not be assessed fees and costs incurred by the opponent in arguing for the production of that particular material.

One major advantage of such a rule is that it eliminates the chilling effect of rule 11 on discovery in federal court. In addition, the rule allows the judicial system to strike a balance in each situation between the value of confidentiality in an adversary system and the interests of third parties and society. A critical policy reason for stringent sanctions against document destruction is to deter those who may be tempted to destroy or conceal during litigation.[136] The Supreme Court has asserted that severe sanctions serve "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to engage in such conduct in the absence of such a deterrent."[137]

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136. *See* Fautek v. Montgomery Ward & Co., 96 F.R.D. 141, 147 (N.D. Ill. 1982).

137. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976).

VI. CONCLUSION

The purpose of this article is to aid courts and litigators in responding to the practical realities of document concealment and destruction in modern commercial litigation. All other things aside, present ethical provisions and federal and state laws unfortunately will not encourage attorneys to constrain client destruction of evidence or deter lawyers themselves from participating in destruction and concealment. In the few cases where attorneys are punished under the ethical rules, the punishments tend to be quite light — a two-year suspension or public reproval — despite *willful* misrepresentations to a court. Moreover, the federal statutes and most state laws prohibiting such destruction normally are not activated until after a petition has been filed or a court order has been issued. In some instances, this is far too late to limit the damage done by a malicious opponent. The bottom line, insofar as the ethics regulations are concerned, is that any time prior to receiving knowledge of actual litigation an attorney may advise his client to dispose of documents or other potential evidence. Therefore, the litigator must turn elsewhere to respond to an opponent that intentionally has destroyed evidence.

Sanctions under federal and state rules of civil procedure, the spoliation inference, and the new torts of intentional and negligent spoliation are worthy of great attention by courts and practitioners. There is little question that federal and most state courts have adequate powers arising out of their "inherent authority" and rule 37 to deal with even the most serious cases of pre-filing document destruction. Increasingly, courts are invoking the spoliation inference in response to negligent losses of evidence as well as intentional ones. Unfortunately, in some instances, even the strongest inference will not offset the loss of critical evidence. The spoliation tort is attractive to injured parties because it is compensatory in nature, whereas discovery sanctions can be punitive in nature and the spoliation inference is designed principally to restore the accuracy of a proceeding. In states such as Texas where a cause of action is a form of property, the ground is fertile for introduction of the new tort. In addition, the litigator always should consider a cause of action against an attorney or firm directly involved in document destruction.

The major limitation with the foregoing responses to destruction and with some of the alternative remedies proposed by commentators is that they do not resolve situations in which an opponent denies a document's existence or conceals material that is relevant and clearly

unprivileged. This article has argued that courts should be open to receiving materials that a recalcitrant party claims do not exist but that contain substantial indicia of authenticity. To limit unfairness created by good faith concealment, the federal courts should follow the lead of the *Peeples* rule used by Texas courts. Also, to prevent a party from successfully concealing evidence under an improper claim of privilege, the courts should adopt a more detailed procedure providing for *in camera* submission of withheld material and severe penalties for intentional concealment of discoverable evidence.

The temptation for corporate clients to destroy "smoking-gun" evidence in their possession, whether before or after litigation has begun, is likely to grow commensurate with society's increasing litigiousness and larger damage awards. The attorney's most prudent course of action is to keep an eye to truth — to advise his client not to destroy evidence that is a true and accurate reflection of its conduct and activities. And when faced with an opponent that has destroyed or is concealing evidence, the attorney should take all appropriate steps to protect his client's interest. The challenge in our adversary system is to develop enforceable penalties necessary to offset the temptation to deceive, and to treat deviations from truth with certainty and effectiveness.

ADDENDUM

At the time this Article went to press, the author learned of a major new book by Jamie Gorelick, Stephen Marzen and Lawrence Solum, entitled *Destruction of Evidence* (1989). Because copies of the two chapters most relevant to this Article were not available for review, they can only be referenced here for the reader's benefit. Chapter nine which is titled, "Overview of Document Retention/Destruction Programs," and Chapter thirteen, "Consequences of Document Destruction in Commercial Litigation" may be helpful to researchers in this field.