

Corporate Compliance in Document Retention in Today's Business Environment

Presenter

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PART ONE—DOCUMENT RETENTION AND THE GENERAL COUNSEL

I. THEORY OF DOCUMENT RETENTION POLICY

A. Basic Concepts

The General Counsel is really measured on the effectiveness of the Company's document retention policy when there is document production in an adversarial proceeding. If there is no document retention policy, then no one has any idea what will happen when documents must be produced. However, document production in the absence of a preexisting systemic policy promises to be both expensive and to result in unpredictable legal consequences in the proceedings. If there is a document retention policy but the General Counsel has no idea whether that policy has been observed, then no one has any idea what will happen when documents must be produced. However, document production in the absence of rigorous observation of a preexisting systemic policy promises to be both expensive and to result in unpredictable legal consequences in the proceedings. If documents are destroyed on fixed timelines but the General Counsel has no idea whether the timeline meets regulatory and legal retention requirements, then the document production may be less expensive but promises to result in unpredictable legal consequences in the proceedings. If the Company has a formal document retention policy containing deliberately created retention schedules that address legal and regulatory retention requirements, and if that policy has been consistently observed, then the document production should be both less expensive and should result in more predictable legal consequences in the proceedings. A good document retention policy keeps everything that the Company must keep and nothing else.

B. Why Document Retention In The Absence Of A Policy Is Such A Problem

A business person is unlikely to focus upon and implement an effective document retention policy. Fundamentally, this is because no one ever became the Chief Executive Officer because they did such a fine job in document retention and data maintenance. Lawyers draft document retention policies but do not typically promulgate or enforce them. Boards of Directors adopt document retention policies but do not typically promulgate or enforce them. Executives promulgate document retention policies but do not typically enforce them. A responsible officer of the corporation, such as the General Counsel, should both carry out and verify compliance with the Company's document retention policy. If there is broad based and routine violation of the Company's document retention policy, and if this violation is widely known, an ignored but well crafted document retention policy will not protect the Company. To consider the degree of neglect of document retention policies reflect upon the degree of effort and verification that a Company places on compliance with insider trading, hiring and work place policies. Now compare that effort with the effort that a Company expends upon its document retention policy.

C. Why a General Counsel Wants a Consistently Observed Document Retention Policy

The Company does not want to incur the expense and disruption of an involved document production to search through records that the Company was not required to maintain. The Company does not want to report to the Court and the other side that it has inconsistently destroyed documents because this will look like selective destruction of damaging records with resulting adverse consequences in the proceeding. The Company does not want to be unable to find, in a document production, records that the Company is legally required to maintain. This means that the Company must eliminate individual discretion over the maintenance and destruction of Company documents. Records should be maintained, stored and destroyed only in accordance with Company policy and without individual customization. The Company should establish a record keeping inventory and tracking system and all documents should be forced to fit into the Company's naming, description and retention standards. Individual creators of records should not be responsible for determining the retention or the destruction of individual records. All documents should be maintained and destroyed in accordance with the retention standards adopted by the Company as part of the Document Retention Policy.

II. WHAT CAN HAPPEN IN LITIGATION WITHOUT A CONSISTENTLY OBSERVED DOCUMENT RETENTION POLICY¹

A. The Duty of Disclosure

Magistrate J. Schenkier expressed the duty of disclosure in litigation very clearly as follows:

Federal Rule of Civil Procedure 26 requires a party to produce non-privileged documents which are "relevant to the subject matter involved in the pending action." That requirement embraces not only documents admissible at trial but also documents and information that are "reasonably calculated to lead to the discovery of admissible evidence." This broad duty of disclosure extends to all documents that fit the definition of relevance for the purposes of discovery – whether the documents are good, bad or indifferent. While it may seem contrary to the adversarial process to require such "self-reporting," it is in fact a central tenet of our discovery process. The duty of disclosure finds expression not only in the rules of discovery, but also in this Court's Rules of Professional Conduct, which prohibit an attorney from "suppress[ing] any evidence that the lawyer or client has a legal obligation to reveal or produce," Rules for the Northern District of Illinois, LR 83.53.3(a)(13), or from "unlawfully obstructing another party's access to evidence... *Id.* LR 83.53.4(1).²

A corollary to the duty to produce is the duty to preserve relevant documents and information. This includes preserving documents that damage the producing party. The only limitation on the Company's duty to preserve and produce records once a proceeding begins is relevance.

The duty to preserve and produce discoverable evidence only covers the discoverable information that a party knows or reasonably should know may be

relevant to the pending or impending litigation. *Wm. T. Thompson, Co.*, 593 F. Supp. at 1455.³

The Company must take affirmative steps to enforce document retention.

The duty to preserve documents in the face of pending litigation is not a passive obligation. Rather, it must be discharged actively:

[i]t was incumbent on senior management to advise its employees of the pending litigation..., to provide them with a copy of the Court's order, and to acquaint its employees with the potential sanctions... that could issue for noncompliance with [the] Court's Order.

When senior management fails to establish and distribute a comprehensive document retention policy, it cannot shield itself from responsibility because of field office actions. The obligation to preserve documents that are potentially discoverable materials is an affirmative one that rests squarely on the shoulders of senior corporate officers. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 615 (D.N.J. 1997).⁴

B. Direct Expenses in the Absence of a Document Retention Policy

Danis is a federal securities lawsuit. The defendants included individual officers and directors. The Company, USN Communications, Inc., which went through bankruptcy, was not an active participant in the discovery wars. On just fighting over whether sanctions should be imposed on document discovery issues the plaintiffs spent \$757,559.61 and the individual defendants spent \$767,202.42. The documents that were fought over were readily obtained, ultimately, from third parties.

Because the conduct of each side has contributed to an excessive expenditures of fees and costs, the Court considers the fees and costs incurred to be a self-inflicted wound by each side, in that neither side should be forced to pay the costs and fees of the other side.⁵

That is a significant amount of money to spend unnecessarily on a single issue that could have been precluded by a consistently observed document retention policy.

C. What USN Communications Did Wrong

On the same day that the first securities lawsuit was filed there was a meeting of the Board of Directors of USN Communications attended by the Directors, the General Counsel, an Executive Vice President who was its former General Counsel and outside lawyers from the Skadden, Arps law firm. Outside counsel emphatically advised the Directors to preserve documents. The Board of Directors formally instructed the Chief Executive Officer to preserve the documents. The Chief Executive Officer then held a staff meeting of all officers and high level managers. At this meeting the General Counsel directed that all documents be preserved and that each manager relay the General Counsel's instructions.

The Chief Executive Officer did not take affirmative steps to ensure that the instructions of the Board were followed. The Chief Executive Officer did not ensure that a written document retention policy was promulgated and he did not ensure that written communication be sent to the work force instructing the work force to preserve documents. The Chief Executive Officer did not have follow-up meetings with his officers and high level managers to verify that they had followed the document preservation instructions. The Chief Executive Officer instead turned over responsibility for document preservation to the General Counsel. The General Counsel did not consult outside counsel on implementing document preservation procedures. The General Counsel did not hold meetings or issue written instructions to ensure that documents were preserved. The General Counsel did not even review USN Communications' existing document retention policies. The outside Directors preserved their personal records but took no further steps to ensure that the document retention policy was observed.

Financially distressed USN Communications began closing offices after the lawsuit commenced. The employees responsible for sorting, saving and destroying documents from the closed offices were unaware of the lawsuit and did not know that documents were to be retained for the litigation. As a result, "numerous dumpsters full of documents were discarded from that office."⁶ Electronic records on hard drives were deleted when employees were transferred. This deletion took place at the instruction of a senior manager who had been present at the meeting in which the General Counsel had instructed managers to ensure that documents were preserved. The employee who purged e-mails of terminated employees denied that he had ever been told to preserve documents. Not surprisingly, to the plaintiff, this indicated systemic purging of USN Communications' servers.

USN Communications was sold out of bankruptcy to another company. The parties brought twenty-eight contested discovery motions, exchanged one million pages of documents and deposed ninety non-expert witnesses. After months of fighting over whether to produce certain electronic information due to costs and lack of appropriate software, when asked the company that had purchased USN Communications was able to easily deliver the data in a matter of days.

D. Lessons Learned

The time to craft and adopt a document retention policy is before the stress of litigation. The General Counsel possesses the training, responsibility and authority to ensure that the Company's document retention policy is followed both during, and outside of, litigation. A General Counsel must take affirmative steps to successfully discharge this responsibility. Litigation creates stress and disruption. The General Counsel should use outside counsel to ensure that the General Counsel is taking all appropriate steps with respect to document preservation and production in litigation.

A good, preexisting document retention policy will have destroyed all unnecessary records before the litigation starts and will be able to locate, after the litigation starts, the relevant records that the Company was required to retain. The direct cost of document production in the absence of a good preexisting document retention policy can be very high. The damage to the Company's legal position in litigation from selective document destruction or the inability to

find documents that exist but cannot be retrieved due to the lack of an organized storage system can be significant. Third party document and data storage vendors should be contractually bound to observe the Company's document retention policy.

III. WHAT IS THE INFERENCE IN LITIGATION IF RELEVANT DOCUMENTS ARE DESTROYED UNDER A PRE-EXISTING DOCUMENT RETENTION POLICY?⁷

A. Background

Remington involved a products liabilities lawsuit. The plaintiff requested and received jury instructions against Remington as follows:

If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not. E. Devitt, C. Blackmar & M. Wolff, 3 Federal Jury Practice and Instructions § 72.16 (4th ed. 1987).⁸

Remington had destroyed records following a routine procedure that had been in place for many years. Remington's position was that there should be no adverse inference.

B. Reasoning of the Court

The court of appeals developed a three part test for the trial court to consider when determining whether to give the negative inference instruction to the jury. The trial court was first to consider whether the record retention policy was reasonable.

First, the court should determine whether Remington's record retention policy is reasonable considering the facts and circumstances surrounding the relevant documents.⁹

In determining reasonableness, the trial court was free to consider other lawsuits.

Second, in making this determination, the court may also consider whether lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of the complaints.¹⁰

The final factor to consider was the intent with which the policy was promulgated.

Finally, the court should determine whether the document retention policy was instituted in bad faith.¹¹

Bad intent means that the spoliation of evidence was intentional, and not routine destruction without fraudulent intent.

For example, if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.¹²

C. Conclusion

A document retention policy should be adopted in advance of litigation and consistently applied. The General Counsel must be prepared to intervene to preserve documents when, in the judgment of the General Counsel, destruction of the documents, even under the document retention policy, could create an inference of bad intent on the part of the Company.

IV. WHAT CAN HAPPEN WHEN A COMPANY HAS, BUT IGNORES, A DOCUMENT RETENTION POLICY¹³

A. Background

1. *Carlucci* involves an aircraft fatality.
2. Piper actually had three different and inconsistent document retention policies.
3. Piper adopted a formal document retention policy at the corporate level which apparently was just for show and was not followed.
4. Piper also had a formal departmental document retention policy which was not consistently followed.
5. Piper then had an oral policy of destroying any potentially damaging record. This oral policy was consistently followed.

B. Conclusion of the Presiding Judge

Analysis of the formal policy follows:

Piper has utterly failed to demonstrate that its document retention policy is actually implemented in any consistent manner. The defendant included with its initial response to plaintiffs' motion a copy of a portion of the Corporate Procedures Manual addressing document retention. ...He was unable to answer my questions and it has become apparent that the document submitted to me is virtually irrelevant to the issues before this court.¹⁴

Analysis of the departmental policy follows:

The relevant document retention procedures are contained in the Engineering Procedures Manual which the defendant never introduced into evidence or submitted to the court. ...In fact, with the exception of the improper destruction

of the Product Condition Reports, discussed supra, the defendant did not provide any evidence that the procedures are ever complied with by its personnel. ...Piper's absolute failure to provide any evidence on this issue must be construed as a tacit admission that the policy is a sham.¹⁵

The actual policy follows:

The policy was initiated in the late 1960's or early 1970's when they received the instruction from J. Meyers, the flight test supervisor and their direct superior, to "purge" the department's files.... The stated purpose of the destruction of records was the elimination of documents that might be detrimental to Piper in a lawsuit.... Wrisley and Lister were delegated the discretion to determine which documents were to be destroyed.... The initial purging involved hundreds of flight tests department documents.... They were also directed to retrieve copies of the detrimental documents from other departments.... Thereafter, the destruction of all potentially harmful documents was an ongoing process¹⁶

The judge's conclusion follows:

Therefore, I conclude that the defendant engaged in the practice of destroying engineering documents with the intention of preventing them from being produced in law suits. Furthermore, I find that this practice continued after the commencement of this lawsuit and that documents relevant to this lawsuit were intentionally destroyed. I would note that I am not the first fact finder to conclude that Piper has intentionally destroyed documents. *Piper Aircraft Corp. v. Coulter*, 426 So.2d. 1108, 1110 (Fla. 4 DCA 1983).¹⁷

The judge recognized the validity of reasonable document retention policies:

I am not holding that the good faith disposal of documents pursuant to a bonafide, consistent and reasonable document retention policy can not be a valid justification for a failure to produce documents in discovery. That issue never crystallized in this case because Piper has utterly failed to provide credible evidence that such a policy or practice existed.¹⁸

Piper paid a steep price for this failure to consistently follow its formal document retention policy:

By deliberately destroying documents, the defendant has eliminated the plaintiffs' right to have their cases decided on the merits. Accordingly, the entry of a default is the only means of effectively sanctioning the defendants and remedying the wrong.¹⁹

V. A SAMPLE DOCUMENT RETENTION POLICY

A. Background and Purpose

The confidentiality and proper management of client engagement information is critical to the Company. This Policy Statement describes our policies with regard to protecting the confidentiality of client information through its creation, active use to support or defend our work, and destruction.

The policies described in this memo relate to hard copy and electronic documents and files and client information used or produced by Company personnel in providing arranged services to clients. While the specific guidelines employed by service lines may vary based on the technologies employed, all current and future service lines should adhere to the guiding principles and policies described herein. It is the responsibility of each service line and Service Category to create and maintain policies and procedures consistent with this Policy Statement.

Certain Service Categories and service lines may wish to adopt different retention guidelines based on local regulations, customs and practices, confidentiality agreements or other privileged protections and arrangements. If different guidelines are appropriate, it is the responsibility of the heads of these groups to obtain approval from the Managing Partner - Global Risk Management and communicate these different guidelines as appropriate.

More specific guidance can be obtained from other documents published or utilized by the Company relating to the use and confidentiality of client information such as the Personnel Reference Binder, Ethical Standards/Independence, Audit Objectives and Procedures and Service Category/Line Policies and Procedures.

B. Executive Summary

This Statement establishes critically important policies that enable us to protect confidential client information, retain it as needed to support or defend our work, and eliminate or destroy it when it is no longer needed. The following summarizes the significant policies expressed herein; however, it is necessary to read the entire Policy Statement for a complete understanding.

1. Material pertaining to each engagement will be contained in one central file (hard copy and/or electronic). (Section 3.1)
2. This central file will not include any personal or gratuitous information. (Section 3.1)
3. Engagement information is the property of the Company and will not be copied or electronically transferred to personal files of any Company personnel. (Section 3.10)
4. Only final documents will be retained; drafts and preliminary versions of information will be destroyed currently. (Section 3.5)

5. The legal and professional requirements in each country will determine the type of material, and the retention period required for engagement files. These requirements may vary by service line. In the U.S., such files will be generally retained for six years (see Exhibit A). (Section 4.4)

6. Engagement material not to be retained permanently (see Exhibit A) will be destroyed after the required retention period, subject to the approval of the engagement partner or division head. (Section 4.5)

7. Voice messages recorded in Octel or other voicemail systems must be deleted monthly or sooner. (Section 4.1.2(d))

8. Deletion of information from electronic files will be accomplished in such a way that precludes the possibility of subsequent retrieval by Company personnel or third parties. (Section 4.6)

9. In cases of threatened litigation, no related information will be destroyed. (Section 4.5.4)

10. Each country, office and service line should review their documentation, retention and destruction policies, assess where they are, develop a plan for getting into compliance with the principles of this Policy Statement, and monitor compliance on an ongoing basis.

C. Guiding Principles

1. One Central Engagement File

Only one central file (electronic, hard-copy or combination) will be maintained for the storage of engagement and related documents. This central file will contain all information related to the engagement. Multiple copies of engagement documents should not exist. Each person needing access to engagement documents should follow a process to obtain documents from the central file. The central file should contain only that information which is relevant to supporting our work. It should not contain gratuitous comments or personal information. At the end of the engagement, all electronic documents in all locations should be reviewed and any of continuing significance should be included in the central file area. All other documents stored in any other location should be deleted. The central file area should then be moved to a permanent storage area such as a CD and then deleted. This permanent media should be stored with the hardcopy workpapers.

2. Compliance with Country and Governmental Regulatory Requirements

All our document retention and destruction practices should adhere to the applicable country, legal, professional and regulatory requirements. Should any of the policies in this statement violate such requirements, we should adhere to the applicable country legal

requirements, and advise the Managing Partner - Global Risk Management of the departure from this policy.

3. Standard Classification and Indexing System.

While no specific system is mandated, a well-designed system should use the same organization structure for both hard copy and electronic documents to facilitate retrieval and easy application of the retention/destruction policy.

4. Retain Only Essential Information

Information gathered or considered in connection with performing client engagements should be evaluated by the engagement partner and manager, and only essential information to support our conclusions should be retained. Management of each service line should develop and publish documentation standards indicating the types of information that should be retained. It is the engagement partner's responsibility to assure compliance with these standards.

5. Timely Document Destruction

Engagement documents (in whatever form—paper, electronic, voice) must be destroyed in accordance with the destruction guidelines set forth in Exhibit A. The “central file” objective is crucial to accomplishing this objective, and to having confidence that it has been accomplished. Information having relevance to our opinion or findings should be part of the central client engagement files. Drafts and preliminary versions of memos and reports, superseded workpapers, backup diskettes, and other types of information not in the central client engagement files should be destroyed when they are no longer useful to the engagement and no later than when the engagement is completed. Draft versions of documents should be discarded or deleted at the time the final document is completed. Individuals who create these drafts are responsible for destroying them. Exceptions to this may exist in situations where the pre-final versions are the working papers (the source documents for supporting our work) in which case they should be retained. Engagement personnel may want to advise clients of our destruction policy in order to eliminate their reliance on our files for prior year information.

6. Appropriate Discarding of Confidential Information

Each office should have appropriate procedures for handling wastepaper that ensure that wastepapers are securely handled after they leave the office and that confidential papers are burned, shredded or otherwise safely and completely destroyed. For electronic files, appropriate techniques (such as “absolute delete”) should be used to make sure the data cannot be reconstructed from the storage mechanism on which it resided.

7. Generic Form

Copies (or portions) of engagement-related documents that Company saves for research, template, risk management, training, best practices or other similar purposes must be

saved in a generic manner—e.g., client names changed to fictional names (“ABC Corp”). This is to avoid inadvertently disclosing client information.

8. Compliance

Global Risk Management will be responsible for assuring compliance of each Service Category with this Statement. This may be accomplished through the practice review program, internal audit or other appropriate means. Each country, office and service line should review their documentation, retention and distribution policies, assess where they are, develop a plan for getting into compliance with the principles of this Policy Statement, and monitor compliance going forward.

9. Local Procedures

The Director-Administration for each office is responsible for the implementation of a comprehensive file management program that includes systematically controlling files during their lifetime. This means proactively managing records a) at creation, b) during the active use and c) during destruction or movement to off-site retention facilities. This Statement generally refers to the “office” as the implementer of those policies; in some geographical areas, a country or a group of offices may be the responsible entity.

10. Personal Use of Client Information

It is a violation of Company policy for personnel to use or access client engagement materials, with no substantial business purpose. Engagement information is the property of Company, and will not be moved, copied or electronically transferred to personal files.

D. Procedures

This section contains the following information and guidelines:

1. Indexing Workpapers, Reports and Electronic Information.

Hard copy working papers and reports should be indexed by the Files Department of each office as they are received. The Files Department (Files) will assign an index code to each file.

An index code is composed of two parts - the Firm client code (see Firmwide Client List), and a file number. The file number should consist, at a minimum, of the two digits of the year (e.g., 98 for 1998), plus a number serially assigned to each file received for that year. It may be useful to assign additional code letters or numbers as a prefix or suffix to the file number to further distinguish the contents of the file (i.e., report, working papers, etc.), and/or the practice to which the file pertains. For instance, the first tax file received for 1998 tax work for XYZ Company, Inc., might be indexed XYZ123-TR981. This could indicate a 1998 tax return (“TR”) file. Once an office adopts a numbering system, it should be applied to all new files to establish uniform indexing.

Where there is more than one file on an individual engagement, the partner, manager or senior may want the files indexed in a particular sequence which will be convenient for future reference. To do this, all workpapers for that engagement should be sent to the File Department at the same time, accompanied by a listing of the files in the order in which file numbers are to be assigned to them. If the individual sending papers to the Files Department wishes to index them in advance, he or she may request that the Files Department reserve numbers for that purpose.

Working papers and reports of associated entities are filed under their unique client code.

Electronic data should be indexed and stored as described below, or stored on appropriate storage media and included with the hard copy workpapers. The file covers on the hard copy files should indicate the location of any related electronic information.

Information retained on the network should be filed by client. All client files stored on a networked file server should be stored in a manner as follows: J:\division\client\year\filetype\documents. If the network is accessible by multiple parties, the data should be stored in a manner as follows: J:\division\ptr\mgr\client\year\filetype\documents. This standard format will facilitate locating documents and will ease identifying documents ready to be destroyed within the defined timeframe. It will also reduce the risk of duplicate copies or multiple versions that are accidentally retained. Documents can be password protected, if appropriate, to help safeguard the information. In exceptional cases, data can be stored off-line on disks or CDs to prevent access from unauthorized individuals.

All client files stored on PC hard drives should be indexed as follows: c:\data\client\year\filetype\documents. This information should be eliminated when it is no longer useful. At that time, the appropriate engagement documents should be stored on the network or on appropriate storage media filed with the hard copy workpapers.

Any supporting documentation on voicemail should be converted to electronic or hardcopy memo and filed with the engagement documents. Accordingly, voicemails should not be retained for longer than 30 days.

All engagement items should be placed in the hard copy file at the time the file is submitted to the Files Department for storage. The hard copy file should be complete, including any electronic files. Only final versions of data should be stored in the file. Printed copies can substitute for electronic copies and e-mail.

2. Storage of Working Papers, Reports and Electronic Information

Storage of Working Papers, Reports and Electronic Information—The following policies apply to the storage of working papers:

(a) Current files should be stored in the office before transfer to storage; older files may be placed in storage outside the office in space provided by the office building or in a public or rented warehouse. Local offices can determine the number of years to retain on site.

(b) Reasonable protection against fire and other hazards should be provided in storage areas by the use of metal doors, fire-retardant walls, or other devices.

(c) Appropriate listing and indexing of such files should be maintained to facilitate access to them when required.

(d) Once approved for filing by the engagement partner or manager, sign-out procedures should be established to control the access and location of such files.

(e) Appropriate procedures should be established to prevent unauthorized access to working papers in client locations, our office or in public storage. Such papers contain confidential information, and the integrity of that information must be maintained. Accordingly, client information should not be left overnight on desks, floors, etc.

(f) In-office storage areas should be securely locked after hours. Public or rented warehouse space should not be available to persons other than Company personnel or authorized warehouse employees as necessary to file or retrieve files.

Methods of storing network backup, archive and other related tape, are covered fully in the Company Admin Binder, and should be referred to when developing destruction procedures for each location.

The following procedures ordinarily should be followed for the storage of electronic CDs or diskettes:

(a) CDs or diskettes will be used only for a specific client. Storing of multiple client data files on the same CDs or diskettes should be avoided.

(b) CDs or diskettes should be stored in our hard copy working paper files. For 8¹/₂ x 14 inch and other sized working paper files, a cardboard/vinyl diskette storage board should be used. For 8¹/₂ X11 inch and other sized binders, vinyl - holder inserts should be used. These supply items can be obtained through Central Purchasing.

(c) Each CD or diskette and any separate working paper files of printouts, etc., should be labeled with: Client Name and Client Code. Fiscal Year-End or Period of Project or Project Name. Date of Last Update.

(d) When backup copies of the CDs or diskettes and related documentation are deemed necessary, they should be stored offsite. If this is not practical, the backup copies should be kept in a separate protective cabinet outside of the General and/or Division file departments. These backup copies should also be controlled and indexed.

The engagement partner is responsible for assuring that all unnecessary information is destroyed before storage of client files (hard-copy and electronic).

3. Highly Sensitive Information

Because all client information within our organization is considered confidential, attempts to classify such information by degree of confidentiality or to provide differing protective procedures generally are to be avoided. However, where unusually sensitive information is involved or when a client specifically requests that we exercise extra precaution with respect to the confidentiality of certain information, or where the files are subject to attorney-client or accountant client privilege, the procedures detailed below apply:

(a) In most cases, the material in question should be placed in the regular files under seal and should be labeled indicating the restrictions on opening it.

(b) In rare and extreme cases (such as investigations of officers of companies, or in cases involving public personalities), the information relating to such investigations may be highly restricted so that only approved access to such information is permitted. In these situations, the Company "Secretary Files" can be used to restrict access to such data. Counterparts to the Company Secretary Files are maintained in each office under the direction of the Office Managing Partner (OMP) so these files do not leave the individual office.

(c) When the Company Secretary Files are used for this purpose, the restricted information should be indexed "Company Secretary File C-8" for client files.

(d) When information or a file is deposited in the Company Secretary Files under such circumstances, the file should carry a label indicating:

- (i) the name of the entity;
- (ii) a general description of the information;
- (iii) the names of partners and managers having knowledge of the material; and
- (iv) to whom and under whose direction such information can be disclosed.

(e) When highly sensitive information (as described above) is deposited in the Company Secretary Files of an office, a file front (in the case of working papers) or a report cover (in the case of a report) must be filed and indexed in our regular files without any contents except reference to the Company Secretary File. In most cases, the only document appearing in the regular files will be a copy of the letter to the Company Secretary Files. In this way, our regular files will include a record of all papers and reports while at the same time providing methods by which access to their contents may be completely restricted.

(f) In the case of files subject to the attorney-client or accountant-client privilege, Service Category specific procedures may apply. The confidentiality of information entrusted to us should be conscientiously protected in all phases of our professional activities.

4. Retention Guidelines—Destruction Guidelines—Suggestions for Deleting Electronic Data.

When working papers are no longer needed to support or defend our work, they should be destroyed. As a general rule, all working papers should be retained for six years and then destroyed. This period is predicated upon legal statutes of limitations in the United States.

File retention requirements in the Service Categories and service logs are summarized on Exhibit A. The retention periods apply to both electronic and hardcopy information. Exhibit E contains policy suggestions for Electronic Data Retention. Each country management should determine if these exhibits should be revised for their practices. If different practices are appropriate, the Global Risk Management Group should be advised.

All client-related files, such as those containing correspondence, or other records and documents, should be retained until not useful. Material contained in client folders or other files maintained by individual partners and managers should be purged, and out-of-date papers and information should be destroyed in accordance with the procedures established in this Statement. However, no client-related materials in any files should be retained more than six years unless the related working papers prepared in connection with a professional engagement for a particular client are also required to be retained.

Assurance and Business Advisory (ABA)—Generally, the purpose of preparing and retaining ABA working papers is to provide documentation and evidence in support of a professional report. They should not be retained beyond the period of their usefulness for this function as set forth in Exhibit A. Historical information about a client's accounts and financial statements should be available from client records, and our working papers are not a proper permanent source of such data.

Tax, Legal and Business Advisory (TLBA)—Our Tax and Business Advisory (TBA) work involves much more than preparation and review of income tax returns. Accordingly, we impose on all our TBA services the same standards of practice that we prescribe

for our income tax return engagements, except where those standards clearly have no application.

Tax working papers provide a medium to accumulate reference material necessary to provide documentation in support of tax work products such as tax returns, tax opinions, refund claims, protests, etc. They also provide support for decisions made regarding matters affecting a client's tax posture. Such working papers should not be retained beyond the period of their usefulness for these functions as set forth in Exhibit A. Historical information regarding such matters should be available from client records, and tax working papers are not a proper permanent source of such data. Positions taken and elections made on tax matters are evident from copies of the relevant tax work products themselves.²⁰

Working papers, documents and files related to the Legal Practice will be retained according to the regulation, customs and practices of the legal profession in each country. Accordingly, the Country Tax and Legal Partner should prepare a country supplement outlining the policies to be followed. In this connection, it should be noted that many law firms retain client information until termination of their relationships and, in other cases, may destroy information shortly after completion of an assignment.²¹

Business Consulting and Global Corporate Finance (BC and GCF)—The major purpose of retaining BC and GCF working paper files is to provide documentation to support a recommendation made or conclusion reached on a particular engagement. Such papers should not be retained beyond the period of their usefulness for this function, as set forth in Exhibit A. Other material (e.g., copies of source documents, reports, and organization charts) should be left with the client or destroyed at the conclusion of the engagement unless they are a necessary part of that support.

Special considerations may apply to certain service lines and retention periods in certain lines may be requested by the client (particularly law firms) or the courts, in which cases the Global Risk Management Group should be advised.

5. Delay of Destruction

The destruction of all working papers and electronic data must be accomplished in such a way as to prevent the data from falling into unauthorized hands and to prevent any possibility of reconstruction from partially destroyed files.

The procedures outlined below are to be followed with respect to the destruction of hardcopy working paper files. Cremation, shredding, mulching or pulping procedures are preferable. Where available, commercial facilities that are bonded and that provide proof of destruction should be used for destruction of records:

- (a) Once each year, the Director - Administration in each office will initiate a comprehensive file listing, organized by service line, to be used with respect to ABA, TLBA, BC and GCF working papers which are anticipated to be destroyed under the normal retention policies set forth above.

(b) The Office Managing Partner or area Service Category Head is to issue a working paper file destruction memorandum (see Exhibit B) each year reemphasizing the BU retention policies and requesting each partner in the office to identify within 30 days any files among those anticipated to be destroyed which should be retained. These exceptions must be approved by an area Service Category Head and be supported by sound reasons. The memorandum will advise each partner as to where the comprehensive listing discussed in the preceding paragraph is available and reemphasize the relevant criteria discussed earlier in this Statement. As deemed necessary by the Managing Partner - Office (or Service Category Head), this circulation may include the partners transferred to other offices in recent years or engagement partners from referring offices.

(c) The Managing Partner - Office (or Service Category Head) is to determine the most practical means to make the comprehensive file listing available for partner review and to assure materials (if any) required to be retained under the policy guidelines set forth above are identified.

(d) Each partner is responsible for identifying materials to be retained (if any), and for responding to the working paper file destruction memorandum in writing (see Exhibit B), listing the files (if any) which should be retained, and the reason retention is appropriate.

(e) The Director - Administration will make arrangements for the destruction of all materials not specifically identified for retention based on a review and compilation of all the partner responses and will coordinate any required follow-up procedures necessary to be certain all partners have responded.

(f) A responsible individual should check the files to be destroyed against the approved list, control the destruction process and prepare a summary of disposition of files (see Exhibit C) which is to be retained permanently in the office.

The primary purposes for retaining electronic information on diskettes or networks are to support conclusions, to provide a backup to the copy left with the client or for use in creating subsequent year working papers, carry forward balances, etc. This information should not be retained beyond the period of its usefulness for these functions, as set forth above.

Electronic information should be retained for the same reasons and periods, and destroyed at the same time and in the same manner as hard copy working papers. Electronic data can exist in a number of different locations such as on local area networks, Lotus Notes, servers, ELANs, Zip drives, PCs, archive tapes, backup tapes and diskettes. Destruction procedures need to be considered for all such media within your local office, and the Director - Administration should make sure all necessary destruction takes place. While the procedures necessary will need to change periodically, paragraph 3.6 suggests steps to make sure this happens.

The Director of Technology serving each office is responsible for developing procedures for destroying appropriate electronic data. Exhibit E shows the majority of current possible locations, along with suggestions for destruction techniques.

In the event the Company is advised of litigation or subpoenas regarding a particular engagement, the related information should not be destroyed.²²

The following are suggestions for deleting electronic data:

(a) Establish a routine for “wiping clean” or destroying all tapes, disks and other media on which records reside that are not meant to be retained for future access—such that the data is not retrievable.

(b) Servers, desktop computers and laptops should be regularly purged of all unnecessary data.

(c) Stored Lotus Notes messages, documents, databases and bulletin boards must be erased in accordance with prescribed limits on retention of such records.

(d) Retention of back-up and archived file server records must be limited to the required standards—as described in the Company Admin Binder. When tapes are “recycled” for future use, they must be effectively “erased” (using a bulk eraser or other effective method) so that the data is made unretrievable.

(e) Retention rules regarding Personal Computer hard-drive documents, floppy disk back-ups, personal/desk files and home files must be complied with—these “off-line” storage opportunities must be subject to similar discipline as the network systems.

(f) Subject files, Smart and WIN Smart files, Proposal Toolkits, the TIKTS database and other such specialty/research/training/reference sources in the Company must be monitored and “purged” of material that relates to client engagements and has exceeded its normal retention period; if such materials have continuing usefulness, they should be made generic if they are to be retained.

(g) Annual statements (Exhibit D) should be obtained from each person confirming that a) he/she has destroyed all extraneous files and documents regarding engagements worked on (or they have been generically retained in a particular specialty, research or reference database) and b) any client information that they have retained on their PC’s, on disks or in other locations has been destroyed.

(h) All other data storage areas on the network should be purged on a regular basis to aid in enforcing proper client files storage.

(i) A Company approved disk wiping utility should be used when computers are turned in for reassignment or disposal.

(j) Any diskettes stored with working papers should either be destroyed or reformatted (“absolute delete”) at the same time the papers are destroyed. Diskettes or other external storage media used off-site should be managed by the engagement manager or senior. Any client data that needs to be retained should be moved to proper storage areas on the office file server and the diskettes destroyed or reformatted. This should be done at the end of the job.

The purpose of obtaining responses from the responsible ABA, TLBA, BC and GCF partners for all working paper files destruction is to assure proper consideration at the appropriate level of any reason why such files should not be destroyed and to synchronize the extended period of their retention if this is necessary. Reasons for extended retention might include regulatory agency investigations (e.g., by the SEC), pending tax cases, or other legal action in connection with which the files would be necessary or useful. In such cases, material in our files cannot be altered or deleted (See Policy Statement No. 780 regarding notification of litigation). Other reasons might include litigation involving the Company or the client, the number of open tax years, the possible need for historical information regarding loss or credit carryovers, LIFO inventory calculations, or arrangements that may have been made with specific clients to retain working papers under special circumstances. In some cases, destruction may be delayed to conform with the period of retention required of the client for its records on a particular matter, if the period exceeds our policy retention periods.

If, in the judgment of the engagement partner(s), any working paper files should not be destroyed, notation to this effect and a brief description of the reasons) therefore should be made in responding to the destruction request. Such information should be included in the office’s annual summary disposition report (see Exhibit C) which should be reviewed annually thereafter (or at such later date as may be designated by the responsible partner(s)) for reconsideration.

6. Indexing Workpapers, Reports and Electronic Information

VI. THE ARTHUR ANDERSEN EXPERIENCE²³

A. Background

February of 2000 Andersen, \$9.3 billion annual revenue global accounting firm with 85,000 employees, adopts a comprehensive document retention policy. A top Andersen audit, tax and consulting client is Enron. David Duncan is the Andersen engagement partner for the Enron account.

An internal memorandum is prepared by an Andersen partner of topics covered during a February 5, 2001, internal meeting on Enron.

On September 21, 2001, Vinson & Elkins delivers oral advice to Enron on the results of its investigation of the Sherron Watkins warning of accounting improprieties. During the investigation Vinson & Elkins interviewed Andersen partners.

October 12, 2001, internal Andersen e-mail from in-house counsel Nancy Temple to Michael Odom, forwarded with the message “More help.” by Michael Odom to David Duncan:

“It might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions.”

October 16, 2001, Enron reveals a \$1.2 billion drop in shareholder equity.

October 19, 2001, David Duncan learns that the SEC has initiated an investigation of Enron.

October 21, 2001, David Duncan orders the destruction of Enron related documents so that they will not be available to the Securities and Exchange Commission in the SEC’s investigation of Enron.

October 23, 2001, Andersen accelerates the disposal of Enron related documents.

November 8, 2001, Andersen receives a subpoena from the SEC.

November 9, 2001, David Duncan’s secretary sends an e-mail to “stop the shredding.”

November 30, 2001, Andersen expands the scope of peer review of audit practices.

December 12, 2001, Andersen CEO testifies before Congress.

January 10, 2002, Andersen notifies the SEC, Justice Department and Congress of the disposal of Enron related documents.

January 15, 2002, Andersen takes disciplinary action, including dismissal of David Duncan, for the Enron matter and appoints new leadership for the Houston office.

January 17, 2002, Andersen issues the following statement placing the desired spin on the internal Andersen Memorandum of February 5, 2001:

“Nothing in the meeting or the memo indicated that any illegal actions or improper accounting was suspected. It was not until Ms. Watkins notified the firm, as discussed previously, that we became aware that individuals within Enron believed that there may have been accounting improprieties. The presence of a large number of Andersen partners, in person or by phone, was consistent with our practice of involving members of the engagement team and technical advisers as well as appropriate representatives of our service lines and operations.

Discussion of related party transactions with LJM, their materiality to Enron's income statement and the CFOs' role as fund manager was consistent with our determination to be sure we had considered all issues, including the board's involvement, and appearance questions, in our review. A reference to mark-to-market accounting as "intelligent gambling" is consistent with the widely recognized fact that such accounting is based on sophisticated models using assumptions about events likely to occur in the future. The use of mark-to market accounting is widely accepted. As the note indicates, the comment that "Enron is aggressive in its transaction structuring" was made in the context of making sure appropriate parties within the firm were being consulted to ensure that the firm's judgments about these matters were informed and correct. And discussion about the potential that fees could rise to as much as \$100 million was not in the context of the firm's desire to grow revenues. Rather, the discussion related to concerns about the possibility that the size of the fees could be misperceived as affecting independence and making sure the nature of the firm's services did not compromise independence"

March 14, 2002, Department of Justice indicts Andersen for obstruction of justice in the Enron matter.

March 20, 2002, Andersen pleads not guilty to charges of obstruction of justice.

April 4, 2002, Andersen states that it is willing to consider public admission of responsibility for the shredding of Enron documents but will not plead guilty; announces appointment of a new CEO; and announces the pending sale of part of its tax practice to competitor Deloitte & Touché.

April 8, 2002, Andersen announces plans to eliminate 7,000 jobs in the U.S.

April 9, 2002, David Duncan pleads guilty to obstruction of justice and agrees to cooperate with prosecutors.

April 15, 2002, the Wall Street Journal reports that Andersen and the Justice Department are close to a settlement in which, in exchange for deferral of prosecution for three years, Andersen will publicly admit that senior Andersen officials in Andersen's headquarters knew of the destruction of Enron related documents and that Andersen will take certain remedial steps in Andersen's procedures.

May 6, 2002, the trial begins.

May 7, 2002, Judge Melinda Harmon allows evidence of past Andersen audit problems at Sunbeam and Waste Management.

May 10, 2002, Andersen key attorney Nancy Temple takes the Fifth and will not testify.

May 13, 2002, government star witness David Duncan, former Andersen partner in charge of Enron's auditing, testifies that he gave orders to follow "document-retention policy," directing workers to destroy documents.

May 14, 2002, Duncan testifies that he gave the document destruction order to protect Andersen from potential lawsuits and probes into Enron audits.

May 16, 2002, Duncan testifies that he saved documents revealing wrongdoing in Enron's audit.

June 6-11, 2002, jurors deliberate without reaching a verdict.

June 12, 2002, jurors send a note to Judge Harmon stating they are not able to agree on a verdict. Judge Harmon tells jury to continue deliberations.

June 13, 2002, jurors continue deliberations, requesting an answer from the judge on whether they need to agree on the same person acting corruptly.

June 14, 2002, Judge Harmon advises jurors that they do not have to agree on who committed wrongdoing to find Andersen guilty of obstruction of justice.

June 15, 2002, the jury finds Arthur Andersen guilty of obstruction of justice, the first accounting firm ever to be convicted of felony.

B. Policies

Andersen adopted and had in place an extensive document retention policy. The policy of part V. of this outline is the Andersen policy, without exhibits.

Andersen additionally promulgated, in Policy Statement No. 780 ("Statement 780") dated October 1999, procedures to be followed "regarding notification of threatened or actual litigation, governmental or professional investigations."

Statement 780 also contains "procedures to be followed regarding received (sic) of a subpoena or other request for documents or testimony."

Statement 780 provides for the reporting of seven different categories of event, including governmental investigations.

The Statement 780 notification procedure follows:

"Notification to the relevant Area office of the AA Legal Group should be made promptly when AA personnel become aware of investigations involving a client or former client and AA or any AA personnel, (e.g. investigations by ... the SEC or the IRS in the United States"²⁴

Vinson & Elkins investigated, for Enron, alleged accounting improprieties, interviewing Andersen partners in September of 2001.

Further guidance of situations that are to be reported under Statement 780 follows:

“Any situation that may result in a claim being made against the Firm related to services provided to clients of the Firm previously or currently should be reported pursuant to Paragraph 2.5 of this Policy Statement.”

Should Andersen legal have been notified in September of 2001 when Vinson & Elkins interviewed Andersen partners during that investigation?

Under Section 4.5.4 of Andersen’s document retention policy, documents were to be preserved only if “advised of litigation or subpoenas.”

Andersen knew of internal Enron concerns with accounting no later than September 21, 2001.

Andersen knew of the SEC investigation on October 19, 2001.

On November 9, 2001, immediately after receiving the SEC’s subpoena, Andersen ceased destroying documents.

Andersen may have literally followed the Andersen document retention policy.

“[A] corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.”²⁵

C. Lessons Re-Learned

Business colleagues, at best, will not take a leadership role in preserving and producing evidentiary documents.

The General Counsel must take the leadership role in preserving and producing evidentiary documents.

As soon as the General Counsel learns that the Company will be involved in an investigation or litigation the General Counsel should stop the destruction of relevant documents.

As a general rule, there will be nothing in the destroyed documents that will have legal consequences worse than being caught destroying evidence.

As a general rule, copies will survive of the documents that are being destroyed and those copies will wind up in evidence anyway.

A great document retention policy alone will not protect the Company against bad intent, bad acts and bad judgment.

Never reduce to writing something that you are not prepared to read on the front page of the New York Times.

ETHICAL DUTIES RELATED TO DOCUMENT RETENTION AFTER ANDERSEN

PART TWO— AVOIDING CIVIL & CRIMINAL PENALTIES

I. INTRODUCTION

In light of the recent spate of federal criminal investigations of corporations, most companies, irrespective of size, would be prudent to implement and maintain policies that provide for the management and destruction of corporate documents to avoid or minimize civil and criminal liability. Documents should be maintained and destroyed in a uniform and systematic manner in full compliance with all legal, regulatory, and business requirements. There are several business reasons for an entity to implement a document management policy:

- effective management and easily retrievable business records;
- efficiency in gathering documents in response to litigation, audit, governmental or regulatory agency investigation;
- reduction in storage costs; and
- avoidance or reduction of civil and criminal penalties.

This paper will focus on the most significant business and legal reason for implementing an effective document management policy. The most common claim against corporations and their employees that improperly destroy documents is spoliation of evidence. This paper will first define spoliation and discuss its consequences in the civil and criminal context. Second, this paper will discuss the adverse inference that may be drawn against a party who improperly destroys documents. Lastly, this paper will compare the status of the law in Texas concerning spoliation of evidence claims with that of a few other states that have recognized a separate tort for spoliation of evidence.

II. WHAT IS SPOLIATION?

Spoliation of evidence is the intentional destruction, mutilation, alteration, or concealment of evidence, i.e. documents; if established, an inference may be drawn that the evidence destroyed was unfavorable to the destroying party.²⁶ However, intent to destroy is not always required for a claim of spoliation.²⁷ Furthermore, the accompanying adverse inference (discussed herein) applies to parties to an action and not witnesses.²⁸

III. WHAT AUTHORITY VESTS FEDERAL COURTS WITH THE POWER TO SANCTION FOR IMPROPER DOCUMENT DESTRUCTION?

A. Inherent Power to Sanction

Federal district courts possess the inherent power to sanction litigants for abusive litigation practices that are taken in bad faith.²⁹ This inherent power vests the courts with the power to sanction for improper document destruction.³⁰

B. Federal Rules of Civil Procedure

Although spoliation of evidence is not specifically covered by the Federal Rules of Civil Procedure, the discovery rules and spoliation are undoubtedly intertwined to promote the administration of justice. Accordingly, under Rules 26, 34, and 37 of the Federal Rules of Civil Procedure, a federal court has the power to sanction parties who abuses the discovery process by destroying documents that are discoverable.

FED. R. CIV. P. 26(b)(1) defines the scope of discovery in civil litigation. It states that:

Parties may obtain discovery regarding any matter, not privileged that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence...³¹

To this end, documents are discoverable if they are relevant to any claim or defense of any party and need not necessarily be admissible at trial for a party to be required to produce it.

Rule 34 sets forth the scope and procedure for parties who are requested to produce documents for inspection to another party.³² The Rule has a broad definition of the term “documents” so that it includes, “writings, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”³³ This definition is broad enough to include electronic documents in any format. Moreover, Rule 34 mandates that a party producing documents produce them as they are kept in the usual course of business or organize and label them to correspond with the categories of request.³⁴ Accordingly, any document that is created and kept in the usual course of business may be subject to production.

Rule 37 provides the procedure for obtaining sanctions, and the court’s power to sanction a party for discovery abuse including spoliation.³⁵ After a requesting party moves for an order to compel production, the producing party or its corporate officers, directors, managing agents or other persons designated as the corporation’s representative under Rule 30(b)(6) or 31(b), must produce the documents requested to avoid costs and possible sanctions. If the producing party fails to obey an order to produce documents, the court may sanction that party by entering:

- (A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
- (C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings until the order is

- obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party;
- (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as contempt of court the failure to obey any orders except an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
 - (E) Where a party has failed to comply with an order under Rule 35(a) [physical and mental examinations of persons]....

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.³⁶

Rule 37 sanctions for spoliation of evidence should be proportional to wrongs, *i.e.*, spoliation that sabotages a strong case supports default judgment, whereas spoliation that destroys collateral evidence in a weak case does not require same penalty.³⁷ To this end, some courts have dismissed causes of action or entered default judgments against a corporation, its employees, or counsel that destroyed documents otherwise discoverable in litigation.³⁸

The factors used to assess potential sanctions for spoliation of evidence include: (1) the availability of other evidence; (2) culpability; (3) prejudice; (4) interference with judicial process; (5) other available sanctions; and (6) a determination whether sanctions will fairly punish the offending party.³⁹

1. Duty of a Litigant⁴⁰

A court may sanction a corporation that destroys documents and information if it is on notice that the information or documents it destroys are reasonably calculated to lead to the discovery of admissible, relevant to litigation, or even potential litigation.⁴¹

The *Thompson* court defined the scope and duty of a litigant concerning the retention of documents:

While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know is relevant in an action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.⁴²

The *Thompson* case⁴³ is one of the most egregious cases concerning document destruction during discovery and therefore, is worthy of extensive discussion. The underlying dispute arose from General Nutrition Corporation, Inc.'s ("GNC") national advertisement campaign in which GNC stated that many of its national brand vitamins, including those manufactured by the William T. Thompson Company ("Thompson") and sold at GNC stores, were on sale by 20%.⁴⁴ Thompson claimed that GNC's advertisements were "false and

misleading to the extent that many GNC stores maintained inadequate stocks of Thompson products to meet expected customer demand.”⁴⁵ As the case progressed, however, the Special Master’s inquiry shifted from the underlying claim to whether sanctions were warranted against GNC for destroying certain documents relevant to the litigation.⁴⁶ In determining whether sanctions were warranted, the court made the following findings of fact:

- GNC created and maintained certain purchase, sale, and inventory records, at its individual store offices in paper format with duplicates in its corporate office in Pittsburgh in both paper and electronic formats.⁴⁷ GNC and its senior management were on notice from the pre-litigation correspondence between counsel for the parties, the complaint filed by Thompson, and subsequent discovery, that these records were relevant to the litigation.⁴⁸ Nonetheless, GNC failed to instruct its employees to preserve these records or make any other efforts reasonably calculated to insure that the records would be preserved following the inception of the litigation; as a result, the records were destroyed by GNC employees.⁴⁹
- The Special Master entered an order staying all proceeding.⁵⁰ After the order was entered, GNC destroyed certain purchase, sale, and inventory records.⁵¹ Neither GNC nor its counsel notified Thompson or the court that it was destroying documents, or took any steps to prevent or defer the destruction of these records pending the dissolution of the order.⁵² GNC also failed to request leave for permission to destroy the documents.⁵³
- The Special Master later entered an order mandating that GNC preserve all purchase, sale, and inventory records maintained by GNC in the ordinary course of business at its headquarters.⁵⁴ GNC contends that it never had a formal or written document retention or preservation policy, and that the retention of all such records were left up to the individual departments, and sometimes individual employees for their decisions.⁵⁵ GNC, its general counsel, and outside counsel failed to instruct, monitor, or contact any of these individual departments and employees maintaining these records regarding the need to preserve the records as required by the order.⁵⁶
- The Special Master entered several more orders compelling GNC to produce documents in response to Thompson’s discovery requests, preserve certain documents, and not alter its document retention practices at its other business locations until further notice. However, after being served with Thompson’s discovery requests, GNC destroyed the requested documents and consequently, it could not produce such documents to Thompson, in violation of the order.⁵⁷ In addition, GNC failed to circulate anything in writing or give any oral instructions on a company-wide basis requesting or instructing employees to conduct an actual and through search for, or to identify any documents relating to those persons identified by GNC.⁵⁸
- The records destroyed by GNC are not capable of reconstruction or replication.⁵⁹
- GNC’s violations of orders and destruction of records have prejudiced Thompson.⁶⁰

- GNC's destruction of documents, violation of court orders, and violations of its duties reflect bad faith.⁶¹

In light of these facts, the court held that GNC was subject to sanctions imposed under both the inherent powers of the court and FED. R. CIV. P. 37, for "knowingly and purposefully permitting its employees to destroy key documents and records," and failing to comply with four successive orders to produce certain documents.⁶² In reaching its holding, the court determined that GNC deliberately and purposefully took actions to impede and obstruct the litigation process, and anything less than a default judgment and dismissal would only reward GNC for its conduct.⁶³ The court further determined that imposition of monetary sanctions in addition to the default judgment and dismissal are necessary to fully compensate Thompson for the costs incurred by it as a result of GNC's misconduct.⁶⁴ The court also dismissed GNC's complaint against Thompson in a related case.⁶⁵

2. Possible Avoidance of Sanctions If Document Management Policy in Place⁶⁶

In contrast to *Thompson*, is the case of *Hansen v. Dean Witter Reynolds, Inc.*, 887 F. Supp. 669 (S.D.N.Y. 1995). The *Hansen* court denied sanctions against a corporation when certain documents were destroyed in accordance with the corporation's document retention policy and the corporation had no notice of the potential relevance of the documents to the plaintiff's claims.⁶⁷

In *Hansen*, the plaintiff brought a sex and pregnancy action under Title VII, the Pregnancy Discrimination Act, and the New York Human Rights Law against her employer, Dean Witter Reynolds, Inc. ("Dean Witter").⁶⁸ The plaintiff worked at Dean Witter as an Intermediate Mortgage-Backed Repo Trader on the Transaction Finance Unit repo trading desk ("TFU desk") along with two other employees.⁶⁹ During trial, the plaintiff moved for sanctions under Rule 37(b) based on Dean Witter's destruction of the trading tickets that were processed by the TFU desk during Hansen's employment.⁷⁰ The trade tickets at issue were destroyed in accordance with Dean Witter's document retention policy (three year retention in accordance with SEC requirements).⁷¹ The plaintiff claimed that these tickets were necessary to support her claim that she performed substantially all of the trades at the TFU desk, and that Dean Witter's failure to retain these tickets constituted spoliation.⁷² In reaching its holding, the court reasoned:

Although applicable SEC regulations permit the destruction of these documents after a period of three years, the fact that Dean Witter's policy, and observance of that policy, complied with the SEC requirement does not render Dean Witter immune from charges that it spoiled evidence. The same is true concerning Dean Witter's compliance with the EEOC requirement that employers retain certain employee personnel information upon receipt of an EEOC charge filed by the employee [Dean Witter retained such information]. Instead, I must ascertain whether Dean Witter had an independent duty to preserve the trading tickets for the benefit of Hansen in this litigation. Such a finding, I conclude, requires Dean

Witter to have been on notice that the tickets would be relevant to the Hansen litigation.⁷³

In determining whether Dean Witter had a duty to preserve the trading tickets, the court stated that:

Aside from discovery requests, the complaint itself can put an adversary on notice of the duty to preserve evidence that is relevant to the action as can the communication that litigation is merely anticipated. Although it is a close question, I find that neither the filing of the complaint nor the letters that the EEOC and the New York State Division of Human Rights sent to Dean Witter were such that Dean Witter knew or should have known that the trading tickets would be relevant to this litigation. This is true despite the fact that such documents should have, at the very least, put Dean Witter on notice that the relative performance of Hansen and Relova [another employee] would be at issue in the litigation.⁷⁴

In addition, the court found the following facts to be persuasive in reaching its conclusion that Dean Witter did not have a duty to preserve the trading tickets: (1) absence of any evidence that Dean Witter relied on the trading tickets for the purpose of evaluating the performance of its employees; (2) the time at which plaintiff specifically requested the tickets; and (3) the existence of credible testimony contracted plaintiff's claim that she was responsible for most of the trades.⁷⁵

What is the lesson from *Hansen*?

- Destruction of corporate documents in accordance with a document management policy may not preclude sanctions, unless at the time of destruction the corporation had no notice of the potential relevance of the documents to a plaintiff's claims.

C. Criminal Liability: Obstruction of Justice 18 U.S.C. §§ 1503, 1512

1. 18 U.S.C. § 1503

18 U.S.C. §1503 punishes those persons or entities that endeavor to or successfully influence or injure a federal officer or juror, with the intent to obstruct the due administration of justice. In relevant part, the statute provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States...or **by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice** shall be punished... the punishment for an offense under this section is...imprisonment for not more than 10 years, a fine under this title, or both.⁷⁶

The key words in the statute are “corruptly” and “endeavors.”⁷⁷ The term, “corrupt” in the statute means for an evil or wicked purpose.⁷⁸ Furthermore, it is clear from the express language of the statute that, “success is not the criterion of the statute though it may aggravate the offense.”⁷⁹

A prerequisite for a conviction under the omnibus provision of §1503 (emphasized in bold above) is that some sort of judicial proceeding must be pending and equates to an administration of justice.⁸⁰

In addition, a defendant’s specific intent to impede the administration of justice is an essential element of the offense.⁸¹

Destruction, alteration, or concealment of documents falls under the omnibus provision of 18 U.S.C. §1503 because it deprives the courts of the necessary evidence to achieve justice.⁸²

a. Grand Jury Subpoenas

As evidenced by the extensive body of caselaw, §1503 prosecutions for destruction of documents most often occur in the context of grand jury subpoenas. The most common example is when a party receives a *subpoena duces tecum* from the grand jury ordering it to produce certain documents, but rather than complying with the subpoena, the party decides to destroy or alter the documents.⁸³ In such cases, the burden of proof is upon the government to prove that the production would “throw some light on the subject of the grand jury investigation.”⁸⁴ Simply put, “the acts complained of must bear a reasonable relationship to the subject of the grand jury investigation.”⁸⁵ The government must prove beyond a reasonable doubt that the defendant knew of a pending grand jury proceeding and specifically intended to impede its administration.⁸⁶ However, the government need not prove, as an element of the crime, in cases where documents have been altered in response to a grand jury subpoena, that the alterations were relevant to the grand jury’s investigation.⁸⁷

In *Ryan*, the Ninth Circuit held that the evidence was insufficient to sustain a conviction, based on alteration of documents sought by grand jury *subpoena duces tecum*, because of a lack of intent and showing by the government of any relevancy of the documents to the grand jury investigation.⁸⁸ The *Ryan* court, however, suggested that the defendant, who altered documents responsive to the grand jury subpoena, could only be punished under 18 U.S.C. §401(3) (contempt statute) and FED. R. CRIM. P. 17(g) (failure to obey subpoena is contempt).⁸⁹

In *Walasek*, defendant, a vice president and general manager of WUI/TAS Inc., was convicted on one count of obstruction of justice under §1503 and one count of conspiracy under 18 U.S.C. §371.⁹⁰ The defendant caused certain records of the company to be destroyed after he had been advised that a federal grand jury *subpoena duces tecum* had been served on the company’s Philadelphia office.⁹¹ The defendant worked out of the company’s New York office.⁹² The evidence showed that the defendant called two employees who worked in the Philadelphia office and under his direct supervision, during the hours between the receipt of the grand jury subpoena and the destruction of the documents.⁹³ The issue in the case was whether

the defendant's conduct was within the reach of §1503.⁹⁴ The court held that the defendant's conduct was within the literal meaning of the statute.⁹⁵

b. Maverick Corporate Officer⁹⁶

Yet another case, exemplifying egregious conduct by upper level management is *Lench*.⁹⁷ In that case, the Ninth Circuit upheld a conviction under § 1503 and the resulting two year prison sentence where a defendant concealed documents responsive to two different grand jury subpoenas.⁹⁸ The defendant was a regional vice president in charge of a northern California office of Howard P. Foley Co. ("Foley"), a national electrical contracting firm. The defendant concealed documents responsive to two different grand jury subpoenas.⁹⁹ The court found the evidence against Foley to be overwhelming, as the record showed:

- in June 1982, a grand jury in Washington, D.C. was investigating possible antitrust violations in the electrical construction industry and issued a *subpoena duces tecum* to Foley, requesting a wide variety of documents from certain employees including the defendant; relating to certain unsuccessful bids (including notebooks prepared or used in the course of employment and records of telephone calls);
- Foley's General Counsel wrote defendant, enclosing a copy of the subpoena and detailed instructions for complying with it; two weeks later, the general counsel followed up with a memorandum stating that the subpoena had been modified to permit Foley to submit bid summary sheets for certain projects in lieu of all documents;
- after receiving the letter and memo from Foley's General Counsel, defendant instructed an employee to destroy certain materials which could document "bid rigging" prior to 1981 and stated that he would take care of the other incriminating evidence, including telephone calls. (it was unclear as to whether the employee destroyed the documents, but there was evidence that the employee did fill 14 boxes with pre-1981 bid information and marked each box with green tape in the shape of an X);
- defendant sent some, but not all responsive documents to Foley's General Counsel, and represented in a cover letter that his office did not maintain records of telephone calls or copies of phone bills and that files in his office of estimates of past bids only went back to January 1981;
- defendant's representations in his cover letter to Foley's General Counsel were false;
- in January 1984, a federal grand jury in San Francisco was investigating bid rigging and issued a *subpoena duces tecum* to Foley demanding documents similar to those requested by the grand jury in Washington D.C., except that this subpoena covered the period 1976-1984;
- Foley's attorneys sent a copy of the subpoena together with an explanation to defendant;
- defendant learned that Foley agreed to cooperate with the grand jury and that another vice president would conduct the search of defendant's files for subpoenaed documents; the next day (a Saturday), the defendant, working alone and using his own car, moved the 14 boxes marked with an X to his garage and a box containing telephone bills, which documented extensive contacts between defendant's office and competitions around the time bids were due.
- after the search of defendant's office, one of Foley's attorneys, provided the government with a copy of the compliance affidavit for the Washington subpoena plus additional

documents responsive to the San Francisco subpoena; the attorney, however was unaware of the 15 boxes that the defendant had in his garage or certain records or other corporate records maintained in defendant's home; and

- defendant's motive for concealing evidence was to avoid personal criminal liability.¹⁰⁰

In March 1984, the government obtained a search warrant for defendant's home based upon the grand jury testimony of the employee whom defendant asked to destroy documents.¹⁰¹ The search produced the 15 boxes in defendant's garage and 13 notebooks in which defendant had made business-related notes and a folder containing the bid summary sheets.¹⁰² In light of the evidence, the court held that it was rational for the jury to disbelieve defendant's story that he: (1) misunderstood the subpoenas and the detailed instructions for complying with them; (2) was innocently safeguarding the documents in his home during the renovation of his office; and (3) he was ready to produce them at the request of the grand jury.¹⁰³

What is the lesson from *Lench*?

- There may be mavericks in every corporation. It is imperative that those rogues are just that, and not the norm. A person attempting to avoid personal criminal liability may do just about anything. The General Counsel for Foley's and its outside attorneys appeared to do everything that was needed to do what they believed would insure compliance with the subpoenas; their conduct may have protected the corporation from § 1503 liability.

c. Jury Instructions¹⁰⁴

Turning now to jury instructions for obstruction charges when a defendant destroys documents responsive to a grand jury subpoena, the following has been determined to be proper to convict a defendant under 18 U.S.C. § 2 and 18 U.S.C. § 1503 for aiding and abetting the obstruction of justice in a case:

- the defendant destroyed documents which had been subpoenaed in connection with an investigation by a federal grand jury;
- that by destroying said documents, the defendant endeavored to influence, obstruct or impede the due administration of justice in the matter then under investigation by the grand jury;
- that the defendant's acts were done knowingly, willfully, and corruptly.¹⁰⁵

Although the government failed to allege that the defendant destroyed documents willfully, the Eighth Circuit found that the indictment was valid because the jury was instructed on willfulness.¹⁰⁶ An instruction that a judicial proceeding was pending and the defendant had knowledge of the pending proceeding is not necessary.¹⁰⁷

In *McKnight*, the FDIC was auditing Southern Missouri Bank and then turned certain documents over to the FBI.¹⁰⁸ The FBI then launched an investigation of the bank for possible violations of money laundering, and a grand jury was impaneled to investigate the matter.¹⁰⁹ Joanna McKnight, the head cashier at the bank was personally served with a *subpoena duces tecum* ordering her to produce certain bank records for the grand jury.¹¹⁰ The owner of the bank

asked a friend to meet McKnight at the bank to help McKnight destroy records that had been subpoenaed, but were outdated.¹¹¹ McKnight sorted through the bank records and destroyed records responsive to the subpoena.¹¹² She was found guilty of aiding and abetting obstruction of justice under §1503, and given a three year suspended sentence and placed on probation for three years.¹¹³ In upholding her conviction, the Eighth Circuit held that although the indictment did not allege that McKnight willfully destroyed documents, the indictment was valid because the district court gave the proper instruction.

d. Subpoena Not Always Required¹¹⁴

While a *subpoena duces tecum* had been issued in *McKnight*, it is not required to indict a defendant under §1503. In *Solow*,¹¹⁵ the defendant moved to dismiss an indictment, in part upon the non-service of a subpoena duces tecum for the production of certain correspondence. The indictment alleged that certain correspondence in the files of the magazine, *The Nation*, was material and relevant to a grand jury investigation as it pertained to meetings between employees of the magazine and a third person whom the grand jury was investigating for perjury in two separate and unrelated trials.¹¹⁶ The indictment further alleged that the defendant believed, or had reason to believe, that he would be called as a witness before the grand jury and ordered to produce such correspondence at that time; but he willfully and corruptly destroyed the correspondence before being called before the grand jury.¹¹⁷

The *Solow* court concluded that:

Since an indictment may be grounded for obstructing justice under §1503, where a witness or juror has been interfered with, even though no subpoena has been served upon the former and no oath of office has been administered to the latter, there appears to be no logical basis on which to treat differently any obstruction or any endeavor to obstruct justice by the destruction of documents required before a pending grand jury investigation where a party in control of the documents has consented to appear without the service of formal process. The broad scope of the statute and the evils it sought to combat fully warrant this conclusion¹¹⁸

e. Miscellaneous §1503 Applicability

Further, at least one court has held that §1503 is applicable to the willful destruction of documents during civil litigation.¹¹⁹

The law does not, however, impose an obligation on a party to actively prevent a third party (like one's bank) from destroying records, in the ordinary course of business, in the event that the government might later want to use it in prosecuting that party for obstruction of justice case.¹²⁰

2. 18 U.S.C. § 1512

18 U.S.C. §1512 is another obstruction of justice statute that has been used to punish those persons who direct or persuade another to destroy documents needed in an official proceeding. In relevant part the statute provides:

Whoever knowingly uses intimidation or physical force, threatens or **corruptly persuades** another person, or attempts to do so, or engages in misleading conduct toward another person, with **intent to...cause** or induce any person to...alter, destroy, mutilate, or conceal an object with **intent to impair** the object's integrity or availability for use in an **official proceeding**...shall be fined under this title or imprisoned not more than ten years or both.¹²¹

An official proceeding includes “[a] proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Claim Court, or a Federal Grand Jury.”¹²² Thus, the key difference between the §1503 and §1512, is that the latter statute does not require that an official proceeding be pending or about to be instituted at the time the defendant corruptly persuades another to destroy evidence.¹²³

a. Corruptly Persuades¹²⁴

In *Applewhaite*, defendants Romero and Applewhaite were charged in a multi-count indictment with intentionally causing another person to destroy evidence to be used in an official proceeding.¹²⁵ At trial, the evidence showed:

- defendants had tried to murder Romero's husband by bludgeoning him on the head while he was leaning against a stone wall at Romero's house.
- Two neighbors observed Romero and a young Hispanic male (not Applewhaite) painting the same stone wall at the Romero house the morning after their attempted murder of Romero's husband.¹²⁶
- during the eighteen years that the neighbors had lived across the street from Romero, the stone wall had never been painted.¹²⁷
- forensic analysis disclosed that there was blood on the wall underneath the paint and in the soil beneath the wall, and that the blood was that of Romero's husband's.¹²⁸

The Third Circuit held that even though there is no independent evidence that Romero persuaded anybody to destroy evidence, the jury was allowed, based on the evidence adduced at trial by the neighbors and the forensic specialist, to reasonably conclude that Romero had persuaded the young male to paint the wall in order to “impair the [wall's] integrity or availability for use in an official proceeding.”¹²⁹

b. Intent to Cause¹³⁰

In *Shotts*, the defendant was accused of directing an employee destroy bonds.¹³¹ At trial, the government offered the testimony of the defendant's secretary.¹³² The secretary claimed that one day she took the bonds out of her desk drawer, handed them to another employee, and then heard defendant instruct the other employee to destroy them.¹³³ The government offered no further proof of the destruction of the bonds.¹³⁴ On appeal, Defendant argued that there was insufficient evidence to convict him of a violation of § 1512 because the government failed to prove that the bonds had been destroyed.

The Eleventh Circuit held that, even if §1512 required that the bonds be destroyed, the secretary's testimony attesting that the bonds were spoliated after defendant told the employee to destroy them was sufficient evidence to convict the defendant because the jury was instructed during trial that they must find that defendant intended to cause a person to destroy the bonds.¹³⁵ Simply put, the secretary's testimony reasonably supports the conclusion that defendant intended another person to destroy the documents.¹³⁶

c. Official Proceedings¹³⁷

In *Kellington*, the Ninth Circuit affirmed the trial court's decision to grant the defendant's motion for judgment of acquittal.¹³⁸ The underlying dispute in the case involved the defendant-lawyer's telephoning an employee of his jailed client, at the client's instruction, to destroy an envelope that was hidden in a chair at the client's house and to rid the house of other items, such as money stuffed between the mattresses, a laptop computer, electronic organizers, files, and a black attaché case.¹³⁹ To dispose of the envelope, the defendant-lawyer suggested that the employee burn it and also instructed him to discontinue his employer's instructions if he "ran into the police or 'somebody bigger than you.'"¹⁴⁰

At the time of the call, the defendant-lawyer knew that: (1) there was a warrant out for the arrest of his client, whom he had represented purely on business matters in 1993, in Vermont; (2) his client was in jail and had several aliases; (3) his client owed time for prior drug convictions in the East; and (4) his client had planned to go back East to face the charges against him there.¹⁴¹

At trial, the defendant testified that at the time he told the employee to destroy the envelope, he did not know or even suspect that the envelope contained potential evidence.¹⁴² As for the other items he asked the employee to take from the house, the defendant said that he assumed his client wanted his employee "to secure his property and business assets since he would be away for a long time."¹⁴³ The defendant reasserted on his cross-examination that he should have been more inquisitive of his client at the time the client asked him to have the items moved and envelope destroyed, but he thought that he was purely helping his client deal with business matters and claimed that "none of the flags were up."¹⁴⁴ Indeed, as regards the envelope, the defendant claimed that he assumed the envelope contained a love letter.¹⁴⁵ When the defendant was asked on cross-examination why he did not tell the employee that his employer was using an alias or that there was a warrant out for his arrest, the defendant

responded that he does not disclose to third parties information that he learns in confidence from his clients.¹⁴⁶

In addition, testimony regarding legal ethics by expert witnesses was presented by both the government and the defense at trial. The court, however, disallowed both sides from making legal ethics arguments in their closings and instructed the jury that the expert testimony was to be regarded as purely “background” information.¹⁴⁷ The trial court denied the government’s request for a jury instruction that would allow the jury to find that the defendant purposefully avoided learning all the facts in order to have a defense in the event of a subsequent prosecution.

The trial court required the government to prove that the defendant knew that he was instructing another to destroy evidence that was useful to an official proceeding.¹⁴⁸ After the jury convicted the defendant, the trial court found that it had committed plain error by instructing the jury that the expert testimony was only “background information” and by prohibiting the defendant’s lawyer from arguing that the defendant-lawyer’s ethical obligations to his client negated his criminal intent.¹⁴⁹

In *Frankhauser*, the First Circuit holds that because §1512(e)(1) provides, in contrast to §1503, that an official proceeding need not be pending or about to be instituted at the time the defendant corruptly persuades another to destroy evidence, § 1512 does not require actual knowledge of a pending proceeding.¹⁵⁰ In other words, liability may attach if the defendant has reason to believe that an official proceeding will ensue or has ensued. In *Frankhauser*, the defendant knew that at the time he corruptly persuaded someone else to destroy evidence there was an ongoing FBI investigation into the corrupt acts to which the evidence was related and made statements indicating that he expected a grand jury investigation and/or trial to begin in the future.¹⁵¹

Furthermore, under §1512, the Third and Fifth Circuits have reached different conclusions as to whether the defendant must have knowledge of the federal character of the proceedings.¹⁵²

IV. ADVERSE INFERENCE

As noted above, if spoliation of evidence is established, an inference may be drawn that the evidence destroyed was unfavorable to the destroying party.¹⁵³ “A district court has discretion to admit evidence of spoliation and to instruct the jury on adverse inferences.”¹⁵⁴

However, the circuits are split on the issue of whether bad faith must be present to give an adverse inference instruction regarding the spoliation of evidence.¹⁵⁵

The destruction of a record in violation of a regulation requiring its retention can also give rise to an inference of spoliation.¹⁵⁶

Although a regulation may supply the duty to preserve records, a proponent of the inference of spoliation must show that the records were destroyed with the culpable state of mind on the part of the spoliator (i.e. where, for example, the records, were destroyed knowingly, even

if without intent to violate the regulation, or negligently), and that the records were relevant to its claim or defense.¹⁵⁷

In *Testa*,¹⁵⁸ a truck driver for Heavenly Fish asserted a negligent claim against Wal-Mart Stores, Inc., (“Wal-Mart”) after he slipped and fell on an icy delivery ramp at a Wal-Mart store on February 2, 1993. Wal-Mart photographed the ramp the same day that the driver fell and conducted a full investigation.¹⁵⁹ By the end of February 1993, Wal-Mart had generated an internal report, noting that Testa had threatened to sue.¹⁶⁰ The driver filed his complaint against Wal-Mart on April 24, 1995.¹⁶¹ At trial, a Wal-Mart invoice clerk at the store, Rachele Manning, testified that she had previously put the order, placed on February 1, 1993 with Heavenly Fish on hold, supporting Wal-Mart’s position that it had no duty to clear the delivery ramp on February 2, 1993, because no deliveries were expected.¹⁶² Manning further testified that both the purchase order addressed to Heavenly Fish and the telephone records of the call for February 1 (collectively, “records”), had been discarded by her pursuant to a standard record-retention policy in February 1995.¹⁶³ Manning also testified that she did not know about the accident at the time she destroyed the records and no one instructed her to preserve the records.¹⁶⁴ Nonetheless, a jury verdict was entered in favor of the driver.¹⁶⁵

On appeal, Wal-Mart challenged the propriety of the court’s adverse instruction to the jury regarding the unavailability of the records.¹⁶⁶ Wal-Mart argued that: (1) the plaintiff failed lay the proper predicate to warrant an adverse jury instruction; (2) the records were destroyed in good faith in compliance with a corporate record-retention policy; and (3) there was no evidence that Manning, the employee who actually destroyed the records, knew of the potential claim or the records’ relevance to the potential claim brought by the driver.¹⁶⁷ The First Circuit held that, “the district court properly instructed the jury that it could (but need not) draw a negative inference if the plaintiff proved by a preponderance of the evidence that, when Wal-Mart destroyed the documents, it had notice both of a potential lawsuit and of the documents’ relevance to the claims [underlying the] suit.”¹⁶⁸ The court found it obvious that a rational jury could conclude that Wal-Mart was on notice of the driver’s claim because the internal accident report completed on February 18, 1993, noted that the driver may sue.¹⁶⁹ Similarly, the court found that a rational jury could conclude that Wal-Mart was on notice that the documents were relevant to its defense that no deliveries were expected on the day of the accident.¹⁷⁰

In analyzing Wal-Mart’s claims, the court determined that a proponent for the adverse inference must proffer evidence sufficient to permit the trier of fact to find that the that the alleged spoliator knew of: (1) he claim (that is, the litigation or the potential for litigation); and (2) the document’s potential relevance.¹⁷¹ However, even if a proponent lays the preceding predicate, the trier of fact may refuse to draw the adverse inference.¹⁷² The court determined that whether the particular person who spoils the evidence has notice of a potential claim is not dispositive of the adverse inference instruction; the focus should be on the institutional notice—the aggregate knowledge possessed by a party and its agents, servants, and employees.¹⁷³

Moreover, with respect to the destruction of documents in accordance with the document retention policy, the court concluded that the mere introduction of such evidence does not preclude the jury from drawing a negative inference.¹⁷⁴

V. TEXAS JURISPRUDENCE CONCERNING SPOILIATION VERSUS OTHER STATES RECOGNIZING SPOILIATION AS A SEPARATE TORT CLAIM

A. Texas: No Separate Tort Cause of Action for Spoliation

While some states (discussed below) have recognized a separate tort cause of action for spoliation, in *Trevino v. Ortega*¹⁷⁵, the Texas Supreme Court declined to do so. The court held that Texas does not recognize spoliation as a tort cause of action because spoliation does not give rise to independent damages, and because spoliation is better remedied within the lawsuit affected by the spoliation.¹⁷⁶ The court noted that the damages are speculative when spoliation is treated as a tort.¹⁷⁷ Furthermore, the court reasoned that to create a separate tort action for spoliation of evidence would lead to duplicative litigation, and that the adverse inferences during trial are sufficient checks on parties who engage in evidence spoliation.

In *Doe v. Mobile Video Tapes, Inc.*,¹⁷⁸ the Corpus Christi court of appeals held that a television station, which destroyed videotapes of its entire broadcast in the ordinary course of business, adequately defended itself against an assertion of negligent or intentional destruction of evidence. In this case, a male high school band teacher placed a hidden video camera in the school's female dressing room in order to determine who was stealing from the dressing room.¹⁷⁹ A local television station ultimately obtained possession of the videotape and aired segments of the videotapes including distorted images of some students changing clothes on several occasions whenever there were new developments in the story.¹⁸⁰ The female high school students and their parents sued the television station for various causes of action including libel, invasion of privacy, and intentional infliction of emotional distress alleging that the television station made false statements during the station's newscasts.¹⁸¹ At trial, the evidence showed:

- the television station kept a rundown of the broadcast that showed how the newscast was set up, what stories were to be covered within the broadcast;
- a script was kept that set out what was said by the anchor and/or reporter;
- the television station kept reporter packages; these were videotapes used within the broadcasts aired during the story, but do not show the anchor or the lead-ins to the story;¹⁸²

The rundown, script, and reporter packages were introduced into evidence for each of the broadcasts in question.¹⁸³ The evidence further showed that the television station's regular practice was to keep the entire broadcast tape for only seven days, at which time the tape is reused and the broadcast is recorded over by another broadcast.¹⁸⁴

On appeal, the students contend that because the television station spoliated the videotapes of the entire broadcasts, the script and the reporter packages should not have been admitted into evidence under Texas Rule of Evidence 403.¹⁸⁵ The videotapes of the entire broadcasts were the only way to determine whether the broadcast were highlighted with captions such as "Naked Tapes," "Naked Cheerleaders," and/or "Naked Truth Tapes."¹⁸⁶ However, the Corpus Christi court of appeals declined to find that the television station had spoliated evidence;

rather the court concluded that there was no spoliation by the television station based upon evidence in the record that the television station's regular practice in the ordinary course of business was to tape an entire broadcasts, keep the recording for seven days, and then reuse the videotape for subsequent broadcasts.¹⁸⁷

In *Lively v. Blackwell*,¹⁸⁸ the Tyler court of appeals held that under Rule 403 of the Texas Rules of Evidence, trial judges may exclude relevant evidence pertaining to evidence spoliation if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. In this case, the underlying dispute involved a medical malpractice suit in which the plaintiff wanted to put forward evidence that would have allowed the jury draw an inference that, because the videotape depicting the allegedly botched operation at issue was blank, the doctor who stands accused of malpractice erased it in order to avoid liability.¹⁸⁹ The trial court opted not to allow the plaintiff to pursue this line of testimony because there was other evidence suggesting that the doctor in fact did not erase the tape, namely, that no tape was made at all, and thus, the court did not allow the testimony at issue because the unfair prejudice to the doctor substantially outweighed the probative value of the evidence.¹⁹⁰

In a recent decision, the 14th District Court of Appeals held that two rules apply to presumptions that follow from the failure to produce evidence:

1. Intentional spoliation of evidence relevant to a case raises a presumption that the evidence would have been unfavorable to the spoliator.
2. Failure to produce evidence within a party's control raises a rebuttable presumption that the missing evidence would be unfavorable to the nonproducing party. However, if the nonproducing party testifies as to the substance or content of the missing evidence, an opposing party is not entitled to the presumption.¹⁹¹

B. California: From Sanctions to Tort to Sanctions Again

California was the first state to recognize a common law cause of action for the intentional spoliation of evidence.¹⁹² In *Smith*, the underlying dispute involved an agreement between a car dealer and the plaintiff's lawyer to keep certain automotive parts that were the alleged to be the cause of an accident.¹⁹³ That agreement was breached when the car dealer either destroyed or lost the parts, and the plaintiff brought a cause of action for the intentional spoliation of evidence against the car dealer.¹⁹⁴

The *Smith* court held that, although the plaintiff's damages could not be stated with certainty, public policy dictates that the plaintiff's right to be compensated for her injuries should be protected by tort from the actions of those who seek to prevent her from making her case in the first place.¹⁹⁵

The very next year, California went a step further and recognized a negligent cause of action for spoliation of evidence.¹⁹⁶ In that case, the plaintiffs alleged that a janitor negligently spoliated evidence when, during his cleaning of a lawyer's office, he disposed of an unmarked brown paper bag containing a broken bottle that was sitting on the lawyer's desk.¹⁹⁷ The broken

bottle was not trash, as the janitor assumed, but rather material evidence that the plaintiff meant to rely on in proving a products liability claim.¹⁹⁸ The *Velasco* court held that, a claim of negligent evidence spoliation is a legitimate cause of action, as long as it is reasonably foreseeable that the object destroyed or lost is evidence, or at least meant to be kept.¹⁹⁹ As a matter of law, the California court of appeals further held that the janitor should not be held liable for the loss of the bottle because “[a] reasonably thoughtful janitor is entitled to assume that, if an item that seemed to be garbage were actually evidence, its container would be appropriately marked and, quite likely, not left lying about.”²⁰⁰ In addition, the court concluded that if anybody is to be held liable for the loss of the bottle, it should be the lawyer and not the janitor.²⁰¹

Another good example of a claim for negligent spoliation of evidence occurred in *Solano County v. Delancy*.²⁰² In that case, Brian Delancy was a driver involved in a car accident.²⁰³ The passenger in his car filed a lawsuit against Delancy alleging that he was driving negligently.²⁰⁴ As part of her complaint, the passenger alleged that the road was unsafe and that the county had rejected the unsafe road claim filed against it.²⁰⁵ Delancy hired an accident reconstruction specialist to test the car for defects, and then he destroyed it to prevent the county from learning of the defects that were detected.²⁰⁶ The *Delancy* court held that Delancy was liable for the negligent spoliation of evidence because it was reasonably foreseeable, based on the passenger’s complaint, that the county would be sued and that the destruction of the car would prejudice the county’s case.²⁰⁷ In reaching its holding the *Delancy* court nonetheless outlined the elements of intentional spoliation of evidence:

1. pending or probable litigation involving the plaintiff,
2. knowledge by the defendant of the existence or likelihood of the litigation,
3. intentional “acts of spoliation” on the part of the defendant designed to disrupt the plaintiff’s case,
4. disruption of the plaintiff’s case; and
5. damages proximately caused by the acts of the defendant.²⁰⁸

In outlining these elements of intentional spoliation, the court noted explicitly that for liability to attach, there need not be an agreement to preserve the evidence between the custodian of the evidence and a potential party to a lawsuit.²⁰⁹ In other words, as long as the custodian of the evidence knew that it might be needed as part of a potential lawsuit, he can be held liable for intentional spoliation. The focus is not on a “voluntary assumption of responsibility,” but rather, the inquiry is whether liability is deserved based on intentional acts “designed to disrupt” a potential benefit.²¹⁰

More than a decade after the California Court of Appeals’ decisions regarding independent tort causes of action for intentional spoliation of evidence, the California Supreme Court finally addressed these issues in *Cedars-Sinai Medical Center v. Superior Court*.²¹¹ In that case, the California Supreme Court overruled the court of appeals’ decision in *Smith v. Superior Court* and held that there is no tort remedy for the intentional spoliation of evidence by a party to the underlying cause of action if the spoliation victim knew of or should have known of the spoliation before the decision on the merits of the underlying action. Recognizing that the intentional destruction of evidence must be condemned because it destroys fairness and justice,

the court notes that there are three main concerns dictating why the evidence spoliation tort should be abandoned:

1. The conflict between a tort remedy for intentional first party spoliation and the policy against creating derivative tort remedies for litigation-related misconduct;²¹²
 - Related case law holds that it is more favorable to remedy litigation-related misconduct by sanctions imposed within the underlying lawsuit rather than by creating new derivative torts.²¹³
2. The strength of existing non-tort remedies for spoliation;
 - Evidentiary inferences that the evidence destroyed or rendered unavailable by a party was unfavorable to that party.²¹⁴
 - Discovery laws that provide broad sanctions (including monetary and contempt sanctions) against parties who violate discovery rules pertaining to evidence spoliation.²¹⁵
 - Disciplinary sanctions against lawyers who encourage or contribute to evidence spoliation.²¹⁶
 - Criminal remedies for spoliation.²¹⁷
3. The uncertainty of the fact of harm in spoliation cases.
 - “Even if the jury infers from the act of spoliation that the spoliated evidence was somehow unfavorable to the spoliator, there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed in the spoliation victim’s favor.”²¹⁸

In addition, the court noted that there are various costs created by the tort remedy of intentional evidence spoliation:

1. The possibility that liability will be found in instances where the availability of the spoliated evidence would not have changed the original litigation’s outcome.²¹⁹
2. A spoliation victim could recover damages or avoid liability when he would not have recovered if the evidence had not been spoliated.²²⁰
3. Indirect costs are imposed on persons who, to avoid possible liability, preserve documents of no apparent value in case those documents happen to become important in some future litigation.²²¹
 - Many corporations have perfectly legal document retention policies in which they destroy periodically those documents for which they have no anticipated need.²²²
 - However, mere destruction of these documents might be enough to bring a cause of action under the tort of intentional spoliation.²²³
4. Trying a cause of action alleging intentional spoliation jointly with the other underlying claims can potentially cause jury confusion and inconsistency in outcomes.²²⁴
5. On the other hand, pursuing a spoliation tort remedy in a separate proceeding, results in disruptive proceedings and can also cause inconsistent results.²²⁵

After the California Supreme Court's decision in *Cedars-Sinai*, the California Court of Appeals, a negligent evidence spoliation cause of action could no longer be recognized.²²⁶ In that case, the court stated that the policy reasons found in *Cedars-Sinai*, meriting the elimination of the intentional spoliation tort remedy, are equally as compelling in relation to the overruling of the negligent spoliation tort remedy.²²⁷ In addition to the same policy reasons outlined in *Cedars-Sinai*, the court determined that, “. . . it would be anomalous to impose liability for negligence with respect to conduct that would not give rise to liability if committed intentionally.”²²⁸

Moreover, it is important to point out that the *Coprigh* court did not rule out the possibility that there may be a cause of action based on a contractual duty not to spoliolate evidence.²²⁹ Thus, if a party agrees not to dispose of a piece of evidence and then disposes of it, that party may be liable for negligent spoliation of evidence based on that party's breach of contract.

C. Florida: Independent Torts for Both Negligent and Intentional Spoliation

Florida recognizes independent causes of action for both the negligent and intentional spoliation of evidence.²³⁰ In *Bondu*, a Florida court of appeals recognized the existence of common law causes of action in Florida for negligent failure to preserve evidence for civil litigation and for intentional interference with a prospective civil action by the spoliation of evidence.²³¹ However, a cause of action may be pursued only if there is a duty owed to the plaintiff by the defendant.²³² In this case, the plaintiff alleged that the anesthesiologists responsible for her husband's welfare during a surgery incorrectly administered his drug dosage, and thus directly caused his death by cardiac arrest.²³³ The plaintiff also claimed that the hospital not only “‘purposely and intentionally lost and/or destroyed,’ among others, the anesthesiology records, . . . ‘[frustrating her] ability to pursue certain proof which may be necessary to establish her case’” but also negligently lost the records causing her to lose “‘a medical negligence lawsuit [because she] could not provide expert witnesses.”²³⁴ The trial court dismissed the plaintiff's case, holding that the plaintiff had not stated a cause of action.²³⁵

The court of appeals reversed the trial court, holding that as long as there is a duty owed the plaintiff by the defendant, a cause of action alleging intentional or negligent spoliation of evidence will lie.²³⁶ In *Bondu*, because there was a statutory duty on the part of the hospital to keep and maintain medical records including surgical treatment notes, the plaintiff is authorized to sue the hospital.²³⁷

In *Miller v. Allstate Ins. Co.*,²³⁸ a Florida court of appeals expanded on the principles articulated in *Bondu*, holding that defendants may be liable for evidence spoliation, even if their duty to the plaintiff is imposed solely by contract and not through tort. In *Miller*, the plaintiff reached an agreement with her insurance company whereby the insurance company would return her totaled car to her after they had prepared a defense of the accident, so that she could then have the car inspected in order to prepare a products liability claim against the car manufacturer.²³⁹ The insurance company breached the agreement when it failed to return the car to the plaintiff and sold it to a salvage yard where it was destroyed.²⁴⁰ The plaintiff then sued the

insurance company, alleging that because it did not return the car to her, she could not prepare a cause of action against the manufacturer.²⁴¹

The Florida court of appeals upheld the right of the plaintiff to pursue a cause of action against the insurance company, despite the fact that the duty was created by contract, because as in *Bondu*, the plaintiff's interests are entitled to legal protection against the defendant's conduct. *Miller*.²⁴² Simply put, it makes no difference from where the duty arises, as long as a duty exists.

The elements of a cause of action for negligent destruction of evidence in Florida was set forth in *Continental Ins. Co., v. Herman*.²⁴³ After a jury verdict finding the defendant negligent in failing to preserve the plaintiff's car, the defendant appealed to a Florida court of appeals, claiming that the plaintiff had no cause of action for destruction of evidence against it in the first place because the plaintiff was not, as a result of the destruction, deprived of an opportunity to fully and successfully present a personal injury claim.²⁴⁴ The court of appeals agreed.²⁴⁵ In reaching its holding, the court set forth the elements of a cause of action for negligent destruction of evidence:

1. existence of a potential civil action;
2. a legal or contractual duty to preserve evidence that is relevant to the potential civil action;
 - this requirement encompasses a reasonable belief that a civil action will ensue;²⁴⁶
 - insurance policies do not always cover spoliation of evidence claims;²⁴⁷
3. destruction of that evidence;
4. significant impairment in the ability to prove the lawsuit,
5. a causal relationship between the evidence destruction and the inability to prove the lawsuit; and
6. damages.²⁴⁸

Sometimes evidence is destroyed and neither party is at fault.²⁴⁹ In *Derosier*, the defendants moved for summary judgment arguing spoliation of evidence as a defense in a case where neither they nor the plaintiffs were responsible for the loss of the evidence. The defendant, a tire company, claimed that they could not defend the products liability suit brought against them without the tire that had been inadvertently been lost through no fault of its or the plaintiff's own.²⁵⁰ The trial court granted the defendant's summary judgment motion.²⁵¹

The Florida court of appeals reversed, holding that because the spoliation was not the plaintiff's fault, the defendants could not rely on evidence spoliation theories as a defense.²⁵² In other words, parties can only rely on spoliation if the other side is at fault for the loss or destruction of the evidence.

VI. CONCLUSION

Spoliation of evidence can subject a corporation to both civil and criminal sanctions. A corporation is wise to implement and follow a document management policy to avoid these sanctions. Although a document management policy neither makes a corporation immune from

a charge of spoliation, precludes liability, nor prevents a jury from drawing an adverse inference, a management policy may, nonetheless, prevent liability if the corporation destroyed the documents in accordance with the policy and the corporation was not on notice of the potential relevance of the documents to the government's or plaintiff's claims against it.

ENDNOTES

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- 1 *See Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 U.S. Dist. WL 1694325
(N.D. ILL. Oct. 23, 2000)..
- 2 *Id.* at 1.
- 3 *Id.*
- 4 *Id.* at 32.
- 5 *Id.* at 6.
- 6 *Id.* at 17.
- 7 *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, (8th Cir. 1988).
- 8 *Id.* at 1111.
- 9 *Id.* at 1112.
- 10 *Id.*
- 11 *Id.*
- 12 *Id.*
- 13 *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. FLA. 1984).
- 14 *Id.* at 485.
- 15 *Id.*
- 16 *Id.*
- 17 *Id.* at 485-86.
- 18 *Id.* at 486.
- 19 *Id.*
- 20 *See Tax and Business Advisory Services Policies and Standards—Worldwide*, Section 5.
- 21 *See Legal Practice Worldwide Bulletin*, Section 97.04.
- 22 *See Policy Statement No. 780 - Notification of Litigation.*
- 23 *See generally*, www.Time.com; www.CNN.com; www.Andersen.com; and
www.Washingtonpost.com.
- 24 *See Policy Statement No. 780 - Notification of Litigation* at 2.
- 25 *See Remington*, 836 F.2d at 1111.
- 26 BLACK’S LAW DICTIONARY 1409 (7th ed. 1999); *see West v. Goodyear Tire & Rubber*
Co., 167 F.3d 776, 779 (2nd Cir. 1999); *Whiteside v. Watson*, 12 S.W.3d 614, 621 (Tex.App.—
Eastland 2000, pet. denied).
- 27 *See Continental Ins. Co., v. Herman*, 576 So.2d 313, 315 (Fla. Dist. Ct. App. 1990).
- 28 *U.S. v. Esposito*, 771 F.2d 283 (7th Cir. 1985).
- 29 *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455 (1980).
- 30 *See Wm. T. Thompson Co., v. General Nutrition Corp., Inc.*, 593 F. Supp. 1443, 1455-56
(C.D. Cal. 1984) (discussed herein).
- 31 FED. R. CIV. P. 26(b)(1).
- 32 FED. R. CIV. P. 34.
- 33 FED. R. CIV. P. 34(a).
- 34 FED. R. CIV. P. 34(b).
- 35 FED. R. CIV. P. 37.
- 36 FED. R. CIV. P. 37(b)(2)(A)-(E).
- 37 *Boneck v. City of New Berlin*, No. 01-1803, 2001 WL 134609 *1 (7th Cir. October 30,
2001).

³⁸ See *Telectron v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987) (where Defendants' counsel ordered destruction of documents to avoid Plaintiff's discovery request, default judgment was appropriate sanction to deter similar conduct in the future); *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) (dismissal as a sanction for spoliation may be necessary, even if conduct is not culpable, if because of the document destruction, a party is unable to adequately present or defend its case); See also, *Milbourn v. Marriott*, 67 F.3d 307 (9th Cir. 1995) (the power of federal trial courts to make appropriate evidentiary rulings in response to evidence spoliation includes the power to sanction the responsible party, to exclude spoiled evidence, to admit evidence of the circumstances of the destruction or spoliation, or to instruct the jury that it may infer that the spoiled or destroyed evidence would have been unfavorable to the responsible party); *Beil v. Lakewood Engineering and Mfg. Co.*, 15 F.3d 546 (6th Cir. 1994) (unavailability of evidence due to plaintiff's prelitigation destruction of that evidence, and corresponding negative inferences, do not necessarily mandate dismissing case or granting summary judgment; nevertheless, summary judgment may be granted or a verdict directed if the district court determines that the defendant is entitled to judgment as matter of law because plaintiff is unable, due to unavailability of evidence and negative inferences, to offer evidence sufficient to support its case); Cf., *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2nd Cir. 1999) (dismissal is not an appropriate sanction for spoliation of evidence when the court can serve alternative sanctions, such as giving adverse presumption instructions or precluding introduction of evidence on related issues); *Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423 (2nd Cir. 2001) (indicating that a spoliation sanction is not an option when the party asking for the sanction was given an opportunity to view the evidence prior to its destruction).

³⁹ *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992); See also, *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994) (district court can bar all evidence emanating from the observations of a witness who has destroyed evidence upon consideration of the degree of fault of the party who altered or destroyed evidence, the degree of prejudice suffered by opposing party, whether there is a lesser sanction that will avoid substantial unfairness to opposing party, and, where the offending party is seriously at fault, whether the sanction will serve to deter such conduct by others in the future); *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804 (7th Cir. 1995) (under Illinois law, the test of whether the moving party is entitled to sanctions for opposing party's spoliation of evidence is whether the moving party was deprived of the ability to establish its case due to the opposing party's failure to preserve the evidence).

⁴⁰ *Wm. T. Thompson Co.*, 593 F.Supp. at 1455.

⁴¹ *Id.*

⁴² *Id.*; See also, *Howell v. Maytag*, 168 F.R.D. 502, 505 (M.D.Pa. 1996) (party that reasonably anticipates litigation has an affirmative duty to preserve relevant evidence); *United States v. ACB Sales & Serv., Inc.*, 95 F.R.D. 316, 317-318 (D. Ariz. 1982) (sanctions imposed for destruction of documents when party had notice of dispute prior to destruction, and destruction appeared to be an attempt to suppress evidence rather than a need for additional storage space); *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984) (imposing one million dollar sanctions on Piper for destruction of computer stored evidence in light of litigation), *aff'd in part and rev'd in part*, 775 F.2d 1440 (11th Cir. 1985).

⁴³ See 593 F.Supp. at 1443.

⁴⁴ *Id.* at 1444.

⁴⁵ *Id.*

⁴⁶ *Id.*

47 *Id.* at 1445-46.

48 *Id.* at 1446.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.* at 1447-48. The preservation order was entered in part, after counsel for GNC represented to the Special Master that GNC routinely maintained copies of all purchase, sale and inventory records, or their originals, as well as other documents, at its corporate headquarters.

55 *Id.* at 1448.

56 *Id.*

57 *Id.* at 1448-1453.

58 *Id.* a 1453.

59 *Id.* at 1451.

60 *Id.* at 1450-1451.

61 *Id.* at 1454.

62 *Id.* at 1455-1456.

63 *Id.* at 1456.

64 *Id.*

65 *Id.* On August 17, 1978, Thompson filed its complaint against GNC in federal court in California alleging that GNC had violated federal antitrust statutes and state laws. The following day, GNC filed a complaint in federal court in Pennsylvania alleging that Thompson had participated in an unlawful conspiracy to violate federal antitrust laws; this case was transferred to California federal court and assigned a different docket number.

66 *Hansen v. Dean Witter Reynolds, Inc.*, 887 F. Supp. 669 (S.D.N.Y. 1995).

67 *Id.* at 675-76.

68 *Id.* at 671.

69 *Id.*

70 *Id.* at 675.

71 *Id.*

72 *Id.*

73 *Id.* (citations omitted) (emphasis added)

74 *Id.* at 676.

75 *Id.*

76 18 U.S.C. §1503(a),(b)(3) (emphasis added).

77 *United States v. Cioffi*, 493 F.2d 1111, 1118-1119 (2nd Cir.), *cert. denied*, 419 U.S. 917, 95 S.Ct. 195 (1974).

78 *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1972).

79 *United States v. Siegal*, 152 F.Supp. 370, 373 (S.D.N.Y. 1957); *United States v. Gage*, 183 F.3d 711, 715 (7th Cir. 1999) (a court can enhance a defendant's offense level under §3C1.1 if the defendant willfully obstructed or impeded...the administration of justice during the course of the investigation, prosecution, or sentencing).

80 *Pettibone v. United States*, 148 U.S. 197, 12 S.Ct. 542 (1893) (construing predecessor statute to §1503; *United States v. Mullins*, 22 F.3d 1365, 1370 (6th Cir. 1994) (grand jury proceeding is such a proceeding); *Cf.*, *Bologna v. Allstate Ins. Co.*, 138 F.Supp.2d 310, 321

(E.D.N.Y. 2001) (in a civil RICO action, allegations that defendants erased a portion of a tape-recorded action and submitted the altered tape to a state supreme court was insufficient to constitute obstruction of justice because the allegations did not relate to proceedings in federal court).

⁸¹ *United States v. Jeter*, 775 F.2d 670, 675-676 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142, 106 S.Ct. 1796 (1986) (court of appeals determined that §1503 contains a clear *mens rea* requirement that limits its scope to those who corruptly or intentionally seek to obstruct the due administration of justice); *Ryan*, 455 at 734; *United States v. Fineman*, 434 F.Supp. 197, 202 (E.D.Pa. 1977), *aff'd* 571 F.2d 572 (3rd Cir.), *cert. denied*, 436 U.S. 945 (1978) (circuit court held that government must show that a federal grand jury was duly empanelled and engaged in the administration of justice, and that defendant corruptly sought to impede the grand jury's efforts); *United States v. Faudman*, 640 F.2d 20, 23 (6th Cir. 1981) (defendant who altered or destroyed corporate records with knowledge that records were being sought by grand jury investigating the company's activities was properly convicted under §1503); *United States v. Lahey*, 55 F.3d 1289, 1297 n. 10 (7th Cir. 1995) (knowledge of pending grand jury investigation and specific intent to impede the administration of justice required).

⁸² *See United States v. Solow*, 138 F.Supp. 812 (S.D.N.Y. 1956); *Fineman*, 434 F.Supp. at 202 (person who knows that a federal grand jury is investigating possible violations of federal law, has reason to believe that a certain incriminating document is likely to come to the grand jury's attention, and who intentionally causes the destruction of that document in order to prevent it from falling into the hands of the grand jury, may be convicted under §1503); *Siegal*, 152 F.Supp. at 376 (indictment need not allege that defendants knew or should have known that the documents and notes that they destroyed were material to the grand jury's investigation); *United States v. Craft*, 105 F.3d 1123, 1128 (6th Cir. 1997) (altering or fabricating documents used or to be used in a judicial proceeding is within §1503 if the intent is to deceive the court); *United States v. Lench*, 806 F.2d 1443, 1445 (9th Cir. 1986) (holding that §1503 encompasses concealment of documents requested by grand jury subpoena).

⁸³ *See United States v. Rasheed*, 663 F.2d 843, 853 (9th Cir. 1981), *cert. denied sub. nom.*; *Phillips v. United States*, 454 U.S. 1157, 102 S.Ct. 1031 (1982) (court of appeals held that the failure to provide documents requested by grand jury *subpoena duces tecum* violated §1503; crime of obstruction complete when such documents were directed to be destroyed or concealed).

⁸⁴ *Ryan*, 455 F.2d at 734.

⁸⁵ *Id.*; *Siegal*, 152 F.Supp. at 374.

⁸⁶ *Lahey*, 55 F.3d at 1297 n. 10.

⁸⁷ *Mullins*, 22 F.3d at 1370.

⁸⁸ *Ryan*, 455 F.2d at 734-735.

⁸⁹ *Cf.*, *Faudman*, 640 F.2d at 22 (finding that while *Ryan* required a strict construction of § 1503, there were so many errors discussed that it is impossible to be certain of the basis for reversal of the conviction); *United States v. Walasek*, 527 F.2d 676, 680 (3rd Cir. 1975) (finding that the *Ryan* court did not present any persuasive reasons to limit the scope of §1503, which was designed not only to protect participants in judicial proceedings but also to prevent miscarriages of justice).

⁹⁰ *Id.* at 677.

⁹¹ *Id.*

⁹² *Id.*

93 *Id.*
94 *Id.* at 679.
95 *Id.*
96 *United States v. Lench*, 806 F.2d 1443, 1445 (9th Cir. 1986).
97 *Id.* at 1444
98 *Id.* at 1444, 46-47.
99 *Id.* at 1446-1447.
100 *Id.* at 1444-46.
101 *Id.* at 1444.
102 *Id.*
103 *Id.* at 1446.
104 *U.S. v. McKnight*, 799 F.2d 443, 446 (8th Cir. 1986).
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.* at 444.
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*
114 *See United States v. Solow*, 138 F. Supp. 812 (S.D.N.Y. 1956).
115 *Id.* at 814
116 *Id.* at 813.
117 *Id.* at 813-814.
118 *Id.* at 815. *See also Fineman*, 434 F.Supp. at 202 (no subpoena necessary); *United States v. Platt*, NO. 85 CR 162, 1985 WL 3244 (N.D.Ill. Sept. 5, 1985) (denying defendant's motion, in which defendant argued that she could not be charged for attempting to destroy or conceal evidence under §1503 absent a charge that the document requested had been requested by the government via subpoena or otherwise).
119 *United States v. Lundwall*, 1 F.Supp.2d 249, 250 (S.D.N.Y. 1998)(denying defendant's motion to dismiss in which defendants argued that §1503 does not apply to civil discovery matters).
120 *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 440 (7th Cir. 1994).
121 18 U.S.C. §1512(b)(2)(B)(emphasis added).
122 *United States v. Applewhaite*, 195 F.3d 679, 688 (3rd Cir. 1999).
123 *See United States v. Frankhauser*, 80 F.3d 641, 651 (1st Cir. 1996).
124 *United States v. Applewhaite*, 195 F.3d 679 (3rd Cir. 1999).
125 *Id.* at 688.
126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.* Applewhaite is held liable for violation of § 1512 on a Pinkerton co-conspirator liability theory. *Applewhaite* at 688, FN 5.
130 *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998).
131 *Id.* at 1302.

132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *United States v. Kellington*, F.3d 1084 (9th Cir. 2000); *United States v. Frankhauser*, 80 F.3d 641 (1st Cir. 1996).
138 *Id.* at 17 F.3d at 1092.
139 *Id.* at 1088.
140 *Id.*
141 *Id.* at 1087-1088.
142 *Id.* at 1089.
143 *Id.*
144 *Id.*
145 *Id.* at 1089 n.5.
146 *Id.* at 1089.
147 *Id.* at 1090. In brief, the expert on legal ethics for the defense asserted that the defendant's actions were legitimate under the circumstances, and the expert for the government reasoned that they were not. *Kellington* at 1089-1090.
148 *Id.* at 1091.
149 *Id.* at 1092.
150 80 F.3d 641, 651 (1st Cir. 1996).
151 *Id.* at 652.
152 *United States v. Bell*, 113 F.3d 1345, 1349 (3rd Cir. 1997) (holding that there is no knowledge requirement with respect to the federal character of the proceedings); *United States v. Shively*, 927 F.2d 804, 812-813 (5th Cir. 1991) (government must show that the defendant had knowledge of the federal nature of the proceedings). There are a total of eighteen obstruction of justice statutes in Title 18 of the United States Code of Crime and Criminal Procedure. §1503 and §1512 are not the only obstruction of justice statutes that apply to improper document destruction; the other applicable statutes include: §1505, obstruction of proceedings before departments, agencies, and committees; §1506, theft or alteration of record or process; §1509, Obstruction of court orders; §1510, obstruction of criminal investigations; §1511, obstruction of State or local law enforcement; §1515, general obstruction of justice provision; §1516, obstruction of federal audit; §1517, obstructing examination of financial institution; and §1518, obstruction of criminal investigations of health care offenses.
153 BLACK'S LAW DICTIONARY 1409 (7th ed. 1999); *See also, Partington v. Broyhill Furniture Industries, Inc.*, 999 F.2d 269 (7th Cir. 1993) (although employer cannot be criticized for being aware of possibility of suit under age discrimination law, if employer, being sensitive to possibility of suit, then destroys the very files which would be expected to contain evidence most relevant to suit, an inference then arises that employer has purged incriminating evidence).
154 *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000); *See also, Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998); *Blinzler v. Marriott Intern., Inc.*, 81 F.3d 1148 (1st Cir. 1996) (holding that circumstantial evidence can both suffice to establish that a party destroyed document for ulterior reason and support an adverse inference that evidence was destroyed out of realization that contents were unfavorable); *Welsh v. U.S.*, 844 F.2d 1239 (6th Cir. 1988) (where one party wrongfully denies another the evidence necessary to establish a fact

in dispute, the court should draw the strongest allowable inferences in favor of the aggrieved party); *Anderson v. Production Mgmt. Corp.*, No. Civ.A.98-2234, 2000 WL 492095, at *3 (E.D. La. April 25, 2000); *Cf.*, *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326 (3rd Cir. 1995) (no unfavorable inference arises from party's inability to produce evidence when circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for).

¹⁵⁵ See *Eaton Corp. v. Appliance Valves Corp.*, 790 F.2d 874, 878 (Fed. Cir. 1986) (two conditions precedent are destruction of evidence and bad faith); *Cotton & Selfon v. Charnock*, 10 Fed. Appx. 70 (4th Cir. 2001) (for spoliation of evidence to permit an adverse inference against the culpable party, the other party must prove not only that the party that destroyed the evidence knew that it was relevant to an issue at trial but also that he willfully caused the destruction of that evidence); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995) (recognizing that that an adverse inference about a party's consciousness of the weakness of its case requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction); *Vick v. Texas Employment Com'n*, 514 F.2d 734 (5th Cir. 1975) (circumstances of spoliation of evidence must manifest bad faith; mere negligence is not enough, for it does not sustain inference of consciousness of weak case); *Wise*, 221 F.3d at 156 (because there was no evidence of bad faith conduct by the government, the district court properly declined to instruct the jury on the issue of spoliation); *S.C. Johnson & Son v. Louisville & Nashville R.R.*, 695 F.2d 253 (7th Cir. 1982) (stating that a court may infer that the evidence would be unfavorable to the destroying party only if the court opines that the evidence was destroyed in bad faith); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987) (the court and jury are entitled to presume that documents destroyed in bad faith while litigation is pending would be unfavorable to party that has destroyed documents); *Higgins v. Martin Marietta Corp.*, 752 F.2d 492, 496 (10th Cir. 1985) (absent a showing of bad faith, failure to produce records is insufficient to warrant a spoliation or missing evidence instruction); *Cf. Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253 (2nd Cir. 1999) (finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator with an adverse inference instruction); *Glover v. BIC Corp.*, 6 F.3d 1318 (9th Cir. 1993) (only a minimum link of relevance is required to permit an adverse inference; the party seeking to introduce evidence of spoliation need not establish bad faith on the part of the party who destroyed the evidence); *U.S. v. Weiner*, 578 F.2d 757 (9th Cir. 1978) (evidence that defendants in securities fraud prosecution knowingly suppressed one fact, permitted, but did not compel, inference that their suppression of another was likewise knowing and willful).

¹⁵⁶ *Byrnie v. Town of Cromwell, Board of Educ.*, 243 F.3d 93, 108-109 (2nd Cir. 2001) (for purposes of finding an inference of spoliation, a regulation requiring that records be retained can, under some circumstances, create the requisite obligation to retain records, even if litigation involving the records is not reasonably foreseeable, as long as the party can demonstrate that the records were destroyed with a culpable state of mind and were relevant to the party's claim or defense); *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 716 (7th Cir. 1998) (violation of a record-retention regulation creates a presumption that the missing record contained evidence adverse to the spoliator); *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994) (because employer violated record retention regulation, plaintiff was entitled to presumption that the destroyed documents would have bolstered her case).

¹⁵⁷ *Byrnie*, 243 F.3d at 109.

¹⁵⁸ 144 F.3d at 174

159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.* at 176.
163 *Id.*
164 *Id.*
165 *Id.* at 174-175.
166 *Id.* at 177.
167 *Id.*
168 *Id.* at 178.
169 *Id.*
170 *Id.*
171 *Id.* at 177.
172 *Id.*
173 *Id.*
174 *Id.* at 178.
175 969 S.W.2d 950 (Tex. 1998)
176 *Trevino* at 950.
177 *Trevino* at 952.
178 43 S.W.3d 40, 56 (Tex.App.—Corpus Christi 2001, no pet.).
179 *Id.* at 46.
180 *Id.* at 46-47.
181 *Id.* at 46.
182 *Id.* at 55.
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.* at 55-56.
187 *Id.* at 56.
188 51 S.W.3d 637, 640-641 (Tex. App.—Tyler 2001, pet. denied)
189 *Id.* at 639.
190 *Id.* at 640.
191 *Brumfield v. Exxon Corp.*, 63 S.W.3d 912 (Tex. App.—Houston [14th Dist.] 2002, pet.
denied).
192 *Smith v. Superior Court*, 151 Cal. App. 3d 491 (1984).
193 *Id.* at 494.
194 *Id.* at 494.
195 *Id.* at 503.
196 *Velasco v. Commercial Building Maintenance Co.*, 169 Cal. App. 3d 874 (1985).
197 *Id.* at 876.
198 *Id.*
199 *Id.* at 878.
200 *Id.*
201 *Id.* at 879.
202 264 Cal. Rptr. 721 (1989)
203 *Id.* at 723.

204 *Id.*
205 *Id.*
206 *Id.*
207 *Id.* at 730.
208 *Id.* at 729.
209 *Id.* at 728.
210 *Id.* at 728-729.
211 954 P.2d 511, 521 (Cal. 1998)
212 *Id.* at 515.
213 *Id.*
214 *Id.* at 517.
215 *Id.*
216 *Id.* at 518.
217 *Id.*
218 *Id.*
219 *Id.* at 519.
220 *Id.*
221 *Id.*
222 *Id.* at 520.
223 *Id.*
224 *Id.*
225 *Id.*
226 *Coprigh v. Superior Court*, 80 Cal. Rptr. 2d 884, 890 (2000).
227 *Id.* at 888.
228 *Id.* at 890.
229 *Id.* at 891.
230 *See Bondu v. Gurvich*, 473 So.2d 1307, 1312 (Fla. Dist. Ct. App. 1984).
231 473 So.2d 1307, 1312 (Fla. Dist. Ct. App. 1984).
232 *Id.*
233 *Id.* at 1309.
234 *Id.* at 1309-1310.
235 *Id.* at 1311.
236 *Id.* at 1312.
237 *Id.*
238 573 So.2d 24, 27 (Fla. Dist. Ct. App. 1990)
239 *Id.* at 1089.
240 *Id.*
241 *Id.*
242 573 So.2d at 27.
243 576 So.2d 313, 315 (Fla. Dist. Ct. App. 1990)
244 *Id.*
245 *Id.*
246 *See Hagopian v. Publix Supermarkets, Inc.*, 788 So.2d 1088 (Fla. Dist. Ct. App. 2001)
(defendants held liable for evidence destruction in products liability suit even though the plaintiff never requested, either personally or through her lawyer, the retention of the evidence before case was filed)

²⁴⁷ See *Norris v. Colony Ins. Co.*, 760 So.2d 1010 (Fla. Dist. Ct. App. 2000) (holding that a spoliation of evidence claim against insurance company arising from insured's destruction of evidence is not "property damage" under commercial general liability policy)

²⁴⁸ *Herman*, 576 So.2d at 315.

²⁴⁹ See *Derosier v. Cooper Tire & Rubber Co.*, 2002 WL 492927, *1 (Fla. Dist. Ct. App. 2002).

²⁵⁰ *Id.*

²⁵¹ *Id.* at *2.

²⁵² *Id.*