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## Judicial Activism and the Destruction of Evidence: Reconsidering Traditional Responses to Evidence Destruction in Civil Proceedings

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## COMMENTS

### Judicial Activism and the Destruction of Evidence: Reconsidering Traditional Responses To Evidence Destruction in Civil Proceedings.

In 1979 a federal court observed that there is an "alarming lack of authority" for the proposition that a party cannot destroy an item of relevant evidence.<sup>1</sup> The court acknowledged that the parties to a proceeding are free to invoke the protection of courts to safeguard their right to a fair trial.<sup>2</sup> This privilege, however, must carry a concomitant duty of fairness, both to the court and the other adversaries.<sup>3</sup> Courts and juries can only reach informed decisions if all the evidence bearing on a case is brought into court.

The legal and practical consequences of evidence destruction or concealment are significant. Yet the topic has received little attention in ethical opinions, scholarly journals, or judicial decisions.<sup>4</sup> This comment will focus on the traditional responses to evidence destruction in civil proceedings as well as one recent innovative remedy. The traditional approaches employ Model Rule 3.4(a) in conjunction with obstruction of justice statutes, discovery sanctions under Rule 37 of the Federal Rules of Civil Procedure, and adverse evidentiary inferences. None have proved particularly effective in preventing evidence destruction. In response, California courts in 1984 took a novel approach to the problem by creating a tort action for the intentional destruction of evidence.<sup>5</sup> Though the tort's concept and nomenclature are unique, it is an effective alternative to past approaches.

#### BACKGROUND

The current ethical, statutory, and common law remedies work congruently with some overlap to redress the destruction or concealment of evidence. For example, ethical rules relating to evidence destruction and concealment incorporate state and federal obstruction-of-justice statutes to define the illegality of evidence destruction and concealment. These

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1. *Barker v. Bledsoe*, 85 F.R.D. 545, 547 (W.D. Okla. 1979).

2. *Id.*

3. *Id.*

4. One of the few works concerning the destruction of evidence in civil proceedings is entitled: Comment, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979). The Professional Ethics Committee of the Bar Association of Greater Cleveland recently addressed the issue in the context of court ordered mental and physical examinations. The Committee found that a lawyer may not request a physician to revise or delete portions of a written medical report, so as to change statements regarding the scope of examinations, findings, or conclusions, or otherwise make the report misleading. Likewise, the Committee further found that a lawyer may not ask a physician to destroy an earlier version of a medical report. ABA LAW. MAN. ON PROF. CON., 801:6951 (1986).

5. *Smith v. Superior Court*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984) (adopting a tort action for the intentional destruction of evidence); *Velasco v. Commercial Bldg. Maintenance Co.*, 169 Cal. App. 3d 874, 215 Cal. Rptr. 504 (1985) (extending the tort action to the negligent destruction of evidence).

state and federal obstruction-of-justice statutes apply only to criminal proceedings. In civil discovery proceedings, courts may impose sanctions under Rule 37 of the Federal Rules of Civil Procedure. Lastly, courts may impose adverse evidentiary inferences against destroying parties in both criminal *and* civil proceedings. State disciplinary committees have not extended the ethical rules' definition of illegality to encompass Rule 37 discovery sanctions or adverse evidentiary presumptions.

### *The Model Rules and Obstruction of Justice*

Prior to enactment of the Model Rules, the Code of Professional Responsibility addressed the ethical issues raised by evidence destruction and concealment in DR 7-102(A)(3). That rule states that a lawyer should not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal."<sup>6</sup> Comments to the Code describe the rule as a specific reference to the broad rule that a lawyer must not counsel his client in illegal conduct.<sup>7</sup> The Model Rules of Professional Conduct, adopted in 1983, likewise prohibited the *unlawful* destruction or concealment of evidence.<sup>8</sup> Whether attorney or client conceals or destroys evidence, such activity must be illegal as defined by state or federal statute in order to impose disciplinary or criminal sanctions upon the attorney, or to prosecute the client.<sup>9</sup>

No federal statute, however, proscribes the destruction or concealment of evidence in *civil* proceedings.<sup>10</sup> In the criminal context, once documents or other evidence are subpoenaed, intentional destruction and non-disclosure is punished under federal *criminal* contempt<sup>11</sup> or obstruction-of-justice statutes.<sup>12</sup> Before the issuance of a criminal subpoena, the

6. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1980) [hereinafter referred to as MODEL CODE].

7. *Id.* at DR 7-102(A)(7); Comment, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1666 (1979).

8. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1983) [hereinafter cited as MODEL RULES] (provides that a lawyer shall not "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." (emphasis supplied)).

9. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1057 (1968) ("Initially, the lawyer is bound to follow the law in any given jurisdiction. If, as we assume to be the case, there are laws in most jurisdictions against the suppression of evidence, it is the ethical obligation of the lawyer not to violate the law.").

10. Comment, *supra* note 4, at 1669.

11. Failure to respond to lawful process or a lawful order of a court is punishable as criminal contempt under 18 U.S.C. § 401(3) (1982) and FED. R. CRIM. P. 17(g). *See, e.g.*, *United States v. Boudreaux*, 328 F. Supp. 154, 155 (E.D. La. 1971). But no corollary to the criminal contempt rule can be found under the Federal Rules of Civil Procedure.

12. 18 U.S.C. § 1503 (1982). The statute refers exclusively to actions involving the United States in a criminal capacity. The statute provides:

Influencing or injuring officer, juror or witness generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner [magistrate] or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs,

obstruction-of-justice statute requires that parties not endeavor to "influence, obstruct, or impede, the due administration of justice."<sup>13</sup> Unfortunately, courts have interpreted the provision as not applying in civil proceedings.<sup>14</sup> In *United States v. Ryan*,<sup>15</sup> the Ninth Circuit construed the statute's specific language to delimit the statute's comprehensive language.<sup>16</sup> The statute specifically refers only to grand or petit jurors and witnesses. Thus, to find a violation of the obstruction-of-justice statute, federal courts hold that documents must be relevant<sup>17</sup> to a pending grand jury or criminal investigation<sup>18</sup> and destroyed or concealed intentionally.<sup>19</sup>

Model Rule 8.4(c) is a general provision prohibiting dishonest, fraudulent, or deceitful lawyer conduct.<sup>20</sup> Rule 8.4(d) of the Model Rules requires lawyers to abstain from conduct prejudicial to the administration of justice.<sup>21</sup> Inexplicably, these provisions are not applied in cases of evidence destruction or concealment. Thus, the Model Rules' provisions depend entirely upon the *legal duty* to preserve evidence, suggesting that an attorney may ethically recommend evidence destruction or nondisclosure where there is no statutory contradiction. Indeed, the Preamble to the Model Rules states that as an advocate, a lawyer should zealously assert the client's position.<sup>22</sup> Superimposed over Rule 3.4, this general statement would theoretically require lawyers to encourage client destruction or nondisclosure of evidence.

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or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

*Id.*

13. *Id.*

14. Comment, *supra* note 4, at 1670. See, e.g., *United States v. Fineman*, 434 F. Supp. 197 (E.D. Pa. 1977), *aff'd*, 571 F.2d 572 (3rd. Cir. 1978), *cert. denied*, 436 U.S. 945 (1978).

15. 455 F.2d 728 (9th Cir. 1972).

16. *Id.* at 733. Many federal courts apply the *ejusdem generis* rule, holding that the specific language of a statute limits the interpretation of the broad language of a statute, proscribing conduct only in the context of the specific language. Under 18 U.S.C. § 1503 (1982), the specific language of the statute refers only to enumerated conduct within the criminal context. No federal case reflects the application of the omnibus portion of the statute to evidence destruction arising within civil proceedings.

17. *Ryan*, 455 F.2d at 733. In *Ryan*, the court held that the act charged must be in relation to a pending criminal proceeding. There, the court found no evidence in the record showing any relevancy of the evidence to the grand jury investigation. The court held that the government failed to prove that the production of the evidence would shed some light on the subject of the grand jury investigation. Where relevancy could not be satisfied, there could be no violation of the statute. *Id.* at 733-34.

18. Comment, *supra* note 4, at 1670.

19. The intent requirement originates with Congress' use of the word "corrupt" in the obstruction of justice statutes. 18 U.S.C. §§ 1503, 1505 (1982). In *Ryan*, the Ninth Circuit reasoned that the word "corrupt" in the statute means "for an evil or wicked purpose." *Ryan*, 455 F.2d at 734. The court held that specific intent to impede the administration of justice is an essential element of the offense. *Id.*

20. MODEL RULES, *supra* note 8, at 8.4(c) (states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

21. *Id.* at 8.4(d) (provides that a lawyer is guilty of unprofessional conduct when he engages "in conduct that is prejudicial to the administration of justice").

22. *Id.* at preamble ("[A]s [an] advocate, a lawyer zealously asserts the client's position under the rules of the adversary system").

Nearly half of the states have enacted obstruction of justice statutes which apply to criminal and civil proceedings.<sup>23</sup> In the remaining states, however, state law parallels federal statutes, applying only to the destruction or concealment of evidence in criminal proceedings.<sup>24</sup> Interestingly, the Criminal Justice Improvement Act of 1978, proposed but not adopted by Congress, prohibited destruction of documents or other real evidence at any time if the actor intended to prevent their availability in any future civil or criminal proceeding.<sup>25</sup> Section 6-5-305 of the Wyoming Statutes is a derivative of the federal obstruction-of-justice statute. The Wyoming section applies to criminal proceedings and refers to threats and attempts to influence jurors, witnesses, or other "officers."<sup>26</sup>

### *Evidentiary Presumptions Against Destroying Party*

In addition to criminal and ethical sanctions, courts may impose adverse evidentiary presumptions in civil or criminal proceedings. Under federal common law, when a litigant destroys documents or records while litigation is pending or contemplated, the federal court may instruct the jury to draw the strongest inference against that party which the evidence permits.<sup>27</sup> A jury may not draw an adverse inference unless the non-destroying party first establishes that the evidence was relevant to the proceeding. Second, the non-destroying party must show that the destroying party was capable of producing the evidence. Third, the nonproduction must be attributable to the actions of the destroying party.<sup>28</sup> In *Vick v. Texas Employment Commission*,<sup>29</sup> the Fifth Circuit imposed the further requirement that the evidence must show the destroying party's bad faith.<sup>30</sup>

Courts base the adverse inference upon two rationales. First, the evidentiary policy realistically assumes that a party who destroys evidence

23. Comment, *supra* note 4, at 1671; see, e.g., CAL. PENAL CODE § 135 (West 1970); N.Y. PENAL LAW § 215.40(2) (McKinney 1975).

24. Comment, *supra* note 4, at 1672; see, e.g., FLA. STAT. § 918.13(1)(a) (1975); IOWA CODE ANN. § 719.3(1) (West Supp. 1978).

25. Comment, *supra* note 4, at 1672; S. 1437, 95th Cong., 2d Sess. (1978), reprinted in XIII Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary, 95th Cong., 1st Sess. 9485-9792 (1977).

26. Wyoming's obstruction-of-justice statute, WYO. STAT. § 6-5-305 (1977, Rev. 1983) provides:

(a) A person commits a felony punishable by imprisonment for not more than ten (10) years, a fine of not more than five thousand dollars (\$5,000.00), or both, if, by force or threats, he attempts to influence, intimidate or impede a juror, witness or officer in the discharge of his duty.

(b) A person commits a misdemeanor punishable by imprisonment for not more than one (1) year, a fine of not more than one thousand dollars (\$1,000.00), or both, if, by threats or force, he obstructs or impedes the administration of justice in a court.

27. Cecil Corley Motor Co. v. General Motors Corp., 380 F. Supp. 819, 859 (M.D. Tenn. 1974).

28. Friends For All Children, Inc. v. Lockheed Aircraft Corp., 587 F. Supp. 180, 189 (D.D.C. 1984).

29. 514 F.2d 734, 737 (5th Cir. 1975).

30. *Id.*

feels jeopardized by that evidence.<sup>31</sup> So reasoned, one federal court recognized that the fact of destruction satisfies the minimum requirement of relevance.<sup>32</sup> The other rationale concerns the prophylactic and punitive worth of the inference. Drawing the negative inference presumably deters parties from destroying relevant evidence.<sup>33</sup>

The additional "bad faith" requirement imposed by the Fifth Circuit excludes evidence destruction by defendants who engage in the house-cleaning function of document destruction in the regular course of business.<sup>34</sup> In such cases the defendant must show that document destruction is a regular activity and not done knowing that the documents or other evidence could be pertinent in foreseeable litigation.<sup>35</sup> Courts likewise will not draw an adverse evidentiary inference against a party merely because his records are incomplete. In *Soria v. Ozinga Bros., Inc.*,<sup>36</sup> the Court of Appeals for the Seventh Circuit held that employers are not obligated to keep adequate records which might be relevant to unanticipated litigation.<sup>37</sup> There, a discharged plaintiff, seeking to show his employer's unlawful practice of religious discrimination, contended that the company should bear the consequence of maintaining incomplete records.<sup>38</sup> The court disagreed. It refused to draw an evidentiary presumption against the employer because the informal nature of its records indicated an absence of bad faith.<sup>39</sup>

### *Rule 37 Sanctions*

Discovery is essential to the informed disposition of each case because it enables each party's attorney to isolate the strengths and weaknesses of his client's legal position.<sup>40</sup> As distinguished from the actual destruction of evidence, parties during discovery may fail to disclose evidence. Nondisclosure is tantamount to actual destruction because parties, in either case, are equally deprived of evidence. Thus, only mutual cooperation during discovery ensures a party's access to critical evidence.

31. *Nation-Wide Check, Corp. v. Forest Hills Distributors*, 692 F.2d 214, 218 (1st Cir. 1982).

32. *Id.*

33. *Id.*

34. See *Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985). In *Coates*, plaintiffs sought individual and class action relief under Title VII and the Civil Rights Act, alleging racial discrimination against plaintiffs' employer. The district court entered judgment for the employer and the plaintiffs' appealed. The court considered the circumstances surrounding the destruction of employee records and concluded that nothing gave rise to an inference of bad faith by the defendant. The court accepted the testimony of a black plant manager that the personnel files were destroyed only after he consulted with the EEOC/Affirmative Action coordinator regarding which files were necessary to the pending class action. Under such circumstances, the court found that the documents were destroyed under routine procedures and not in bad faith. *Id.* at 551.

35. *Id.*

36. 704 F.2d 990 (7th Cir. 1983).

37. *Id.* at 997.

38. *Id.* at 996.

39. *Id.*

40. *Irigoin, Rule 37 Sanctions: Deterrents To Discovery Abuses*, 46 MONT. L. REV. 95, 96 (1985).

Discovery depends upon opposing counsel's willingness to supply evidence which disadvantages his client. The temptation is great, therefore, not to disclose damaging evidence.

Parties to federal actions may obtain discovery regarding any evidence that is relevant to the subject matter of the action and not privileged.<sup>41</sup> Rule 26(b) of the Federal Rules of Civil Procedure provides that a party may not object to discovery on the ground that the information sought will be inadmissible at trial.<sup>42</sup> Specifically, Rule 34 of the Federal Rules states that a party may serve a request for production of documents on any party.<sup>43</sup> The nonrequesting party may then object to a Rule 34 request for production on the basis of privilege or on other grounds, just as a party served with interrogatories under Rule 33 may object to any interrogatory. Rule 34(b) permits the requesting party to move for an order compelling discovery under Rule 37(a) when the opposing party fails to respond to the request or objects to the request for production.<sup>44</sup>

Rules 37(b) and (d) of the Federal Rules of Civil Procedure vest federal district courts with broad discretion to impose various sanctions on parties who fail to respond to orders compelling discovery.<sup>45</sup> A federal court may impose any sanction it deems "just."<sup>46</sup> Sanctions may include: (1) an order that issues covered by the non-produced materials are considered

41. FED. R. CIV. P. 26(b). Rule 26(b) provides in part:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other 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.

42. FED. R. CIV. P. 26(b)(1) ("It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.")

43. FED. R. CIV. P. 34 provides:

Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; . . .

44. FED. R. CIV. P. 34(b) ("The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.")

45. See FED. R. CIV. P. 37(b), (d).

46. See *Insurance Corp. of Ireland, v. Compagnie Des Bauxites De Guineea*, 456 U.S. 694 (1982). In *Compagnie Des Bauxites*, the Supreme Court outlined the two standards limiting federal district court discretion in imposing Rule 37 sanctions. First, any sanction must be "just;" second, the sanction must be specifically related to the particular "claim" at issue in the order to provide discovery. The Court reasoned that the former requirement represents the general due process restriction on courts' discretion. *Id.* at 707.

established; (2) an order disallowing the disobedient party to support or oppose designated claims or references or prohibiting the party from introducing designated matters in evidence; (3) an order striking pleadings or parts thereof; or (4) dismissing or rendering a judgment by default against the recalcitrant party.<sup>47</sup> In addition, Rule 37(d) authorizes a district court to award attorney fees and impose fines against parties who fail to respond to requests for inspection.<sup>48</sup> Under this rule, the court may order the party resisting discovery or his attorney to pay the other party all reasonable expenses caused by the resistance, including attorney fees.<sup>49</sup>

In *Societe Internationale Pour Participations Industrielles v. Rogers*,<sup>50</sup> the Supreme Court for the first time examined Rule 37(b)(2) sanctions for failure to comply with a production order. In that case, a Swiss holding corporation brought suit to recover assets seized by the United States under the Trading with the Enemy Act.<sup>51</sup> Upon the government's motion, the district court ordered the plaintiff to produce many Swiss banking

47. FED. R. CIV. P. 37(b) provides:

(b) Failure to Comply with Order.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that . . . 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 him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof . . . or dismissing the action or proceeding or any part 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 a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

48. FED. R. CIV. P. 37(d) authorizes monetary sanctions:

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails . . . (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court . . . [i]n lieu of any order or in addition thereto, . . . shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's 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.

Although the section does not expressly refer to requests for production under Rule 34(a), it is reasonable that such requests would come under the Rule 37(d) reference to Rule 34 and requests for inspection. No policy reasons indicate an exclusionary intent on the part of Congress and the same purpose is served by imposing economic sanctions for requests for production as for requests for inspection.

49. FED. R. CIV. P. 37(d).

50. 357 U.S. 197 (1958).

51. Trading With the Enemy Act, Pub.L. No. 65-91, § 5, 40 Stat. 415 (1917).



firm records. Swiss criminal law prohibited banking record disclosure, and the Swiss government later confiscated the records. The district court found no proof of collusion between the plaintiff and the Swiss government.<sup>52</sup> The district court, however, directed final dismissal of the action under Rule 37 for noncompliance with its production order.<sup>53</sup> Reversing, the Supreme Court found that Rule 37 should not be construed to authorize dismissal of a complaint due to the party's good faith inability to produce the evidence.<sup>54</sup>

In 1976, some eighteen years later, the Court affirmed a dismissal under Rule 37(b)(2) for the failure to comply with repeated discovery requests.<sup>55</sup> In *National Hockey League v. Metropolitan Hockey Club, Inc.*,<sup>56</sup> the district court dismissed a private antitrust action because the plaintiffs failed to answer crucial interrogatories. The interrogatories went unanswered for seventeen months despite the court's many extensions and admonitions.<sup>57</sup> The Supreme Court held that the district court did not abuse its discretion, as the Third Circuit found, because the district court exercised extreme patience in light of the plaintiff's indifference to the court's discovery orders.<sup>58</sup> The Court also recognized that lenity is a significant factor in imposing sanctions under Rule 37.<sup>59</sup> This consideration, the Court cautioned, must not "wholly supplant" other considerations embodied in Rule 37.<sup>60</sup>

More recently, the Court, in *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*,<sup>61</sup> reexamined the due process requirements of Rule 37.<sup>62</sup> The Court held that Rule 37(b) contains two standards which limit the district court's discretion to impose sanctions. First, any sanction must be "just."<sup>63</sup> This requirement represents the general due process restriction on judicial discretion and incorporates the *Societe Internationale* "willfulness" requirement.<sup>64</sup> Second, the sanction must

52. *Societe Internationale*, 357 U.S. at 201.

53. *Id.* at 201-02.

54. *Id.* at 211-12.

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

56. *Id.*

57. *Id.* at 640.

58. *Id.* at 643.

59. *Id.* at 642.

60. *Id.*

61. 456 U.S. 694 (1982).

62. *Id.* at 707.

63. *Id.*

64. *Id.* The Court found that Rule 37(b)(2)(A) embodies the standard established in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), referring to the due process limits on courts' discretion to impose sanctions. In *Hammond*, the Court held that it did not violate due process for a state court to strike the answer and render a default judgment against a defendant who failed to comply with a pretrial discovery order. The Court reasoned that such an order was permissible as an expression of

the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered . . . [T]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.

*Hammond*, 212 U.S. at 350-51.

be specifically related to the particular "claim" at issue in the order.<sup>65</sup> Thus, discovery sanctions arising from a party's willful disobedience must not be too harsh in relation to the party's behavior. They must also be related to the claim at issue in the discovery order. Courts may separately impose fines and award attorney fees.

#### TESTING THE TRADITIONAL APPROACHES

One recent federal case poignantly illustrates the shortcomings of orthodox approaches to the destruction of evidence. In *Friends For All Children v. Lockheed Aircraft Corp.*,<sup>66</sup> seventy Vietnamese orphans sought damages arising from a 1975 Vietnam crash of a Lockheed built and Air Force operated military transport plane. Before trial, the orphans' guardian *ad litem* asked the court to grant partial summary judgment and preliminary relief in the form of damages.<sup>67</sup> During exhaustive motion hearings, plaintiffs presented evidence and testimony supporting their contention that the defendant had engaged in the wholesale destruction of crash-related photographs, video tapes, and documents after the commencement of the litigation.<sup>68</sup> Plaintiffs argued that the destruction of evidence entitled the jury to draw an adverse inference at trial against the defendant in lieu of the destroyed evidence.<sup>69</sup>

Lockheed and the Air Force jointly investigated the crash and worked together to defend the suit.<sup>70</sup> Photographs taken by Air Force participants in the investigation were known to Lockheed through its close involvement in the accident investigation.<sup>71</sup> The district court found that Lockheed failed to safeguard the photographs by not requesting that Air Force officials preserve the evidence.<sup>72</sup> Air Force regulations required Air Force personnel to preserve evidence when requested.<sup>73</sup>

The defendant argued that the evidence must show bad faith or an "evil intent" on its part before the court imposes an adverse inference. The court agreed with the defendant and held that the plaintiff could not introduce evidence concerning the destruction of evidence at trial. The court recognized that Lockheed failed to take any precautions to assure preservation of the evidence. Nonetheless, the court found that the plaintiffs failed to demonstrate any evil intent or bad faith on the part of Lockheed officials.<sup>74</sup> The court further reasoned that the introduction of any adverse inference at trial would divert the jury's attention from the central issues in the case.<sup>75</sup>

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65. *Compagnie Des Bauxites*, 456 U.S. at 707.

66. 587 F. Supp. 180 (D.C. 1984).

67. *Id.* at 182.

68. *Id.*

69. *Id.*

70. *Id.* at 189.

71. *Id.*

72. *Id.* at 190.

73. *Id.* at 189.

74. *Id.* at 190.

75. *Id.* at 191.

The court's discussion in *Friends For All Children* does not reveal whether the Lockheed's attorneys advised against the preservation of evidence. Because statutory law does not prohibit the destruction or concealment of evidence in civil proceedings, ethical standards under the Model Code and Model Rules do not prevent an attorney from advising his client to destroy evidence; nor can courts hold the client criminally liable for the destruction of evidence.<sup>76</sup> Courts define "illegality" in terms of the destroying party's "evil intent" or "bad faith."<sup>77</sup> However, a person's "evil intent" or "bad faith" is difficult to show, especially when that person is likely to give a good faith explanation for his destruction of evidence. It is reasonable that a person who destroys evidence may also lie about his motives for destroying that evidence.

Although certain considerations advise against destruction,<sup>78</sup> these considerations may pale against the benefits. A client must honestly answer any question asked under oath concerning evidence destruction to avoid outright perjury.<sup>79</sup> But if the destroying party lends no indication that the destroyed evidence ever existed, the non-destroying party may not think to make such inquiry. *Friends For All Children* illustrates that even if the non-destroying party's knowledge is sufficient to make such inquiry, and the destroying party truthfully admits to destroying evidence, district courts cannot impose criminal sanctions in a federal civil proceeding.<sup>80</sup>

Courts must then rely on the adverse evidentiary inference. The adverse inference, however, may be rebutted in a number of ways. The non-producing party honestly may testify that the document was irrelevant,<sup>81</sup> or was destroyed long before litigation began.<sup>82</sup> Evidence that the destruction was routine business practice under a house-cleaning document disposal program likewise rebuts any adverse inference.<sup>83</sup>

The adverse inference actually encourages destruction of the most probative evidence. Even if the inference is given the same weight as the physical evidence itself, an evidentiary inference is unlikely to cause the

76. 18 U.S.C. § 1503 (1982).

77. See *Friends For All Children*, 587 F. Supp. at 190.

78. One commentator noted several considerations mitigating against advising destruction. When parties destroy evidence to prevent its use at trial, that destruction prevents the destroying party from introducing secondary evidence at trial to prove the document's contents. Federal Rule of Evidence 1002 accepts only the original writing to prove the contents of a writing. Further, any question asked of a client under oath concerning the destruction must be honestly answered to avoid perjury. The commentator points out that the answers will be as damaging as the actual contents of the destroyed evidence. Comment, *supra* note 4, at 1675.

79. *Id.*

80. See 18 U.S.C. § 1503 (1982).

81. See *Dronsten v. Mueller*, 103 Mo. 624, 633-35, 15 S.W. 967, 970 (1891) (The court reversed imposition of an adverse inference where the evidence demonstrated that the destroyed document was irrelevant.). See also, Comment, *supra* note 4, at 1677.

82. See *Berthold-Jennings Lumber Co. v. St. Louis R.R.*, 80 F.2d 32 (8th Cir. 1935) (The circuit court held that the destruction of waybills over a nine year period was not undertaken in bad faith.). See also, Comment, *supra* note 4, at 1677.

83. See *Coats*, 756 F.2d at 551.

same impact on a jury. Without other supporting evidence, the destruction may effectively prevent the non-destroying party from prevailing on his claim.

Rule 37 sanctions apply only to discovery abuses. The rule fails to impose a duty to preserve evidence before the initiation of suit when one may foresee the likelihood of litigation. *National Hockey League v. Metropolitan Hockey Club, Inc.*<sup>84</sup> demonstrates that courts consider discovery sanctions "just" only after repeated admonishments and many discovery extensions. Judges may only punish recalcitrant parties in those rare instances where parties exercise "flagrant bad faith" and "callous disregard" for discovery orders.<sup>85</sup> In *Friends For All Children*, the district court could not impose discovery sanctions because Lockheed did not refuse to comply with a discovery order; Lockheed simply was unable to provide the requested evidence.

A non-destroying party must depend upon the court's broad discretion to impose discovery sanctions; yet the "flagrant bad faith" standard requires judicial reluctance in imposing sanctions under Rule 37. Perhaps part of this reluctance acknowledges that Congress, by not specifically providing for such situations under the rule, really did not foresee that Rule 37 sanctions could apply in cases of evidence destruction.<sup>86</sup> For those situations which Congress intended to address under Rule 37, its sanctions serve as valuable tools in expediting discovery.<sup>87</sup> As a result, courts find themselves adrift, searching for another approach more closely tailored to destruction of evidence problems, whether destruction occurs before or after the commencement of discovery.

#### TORTIOUS SPOILIATION OF EVIDENCE

The latest legal development in destruction of evidence came in a 1984 California appellate court decision. *Smith v. Superior Court* established tort liability for parties intentionally destroying evidence in civil proceedings.<sup>88</sup> Courts have not extended the *Smith* holding to cases of evidence nondisclosure. Since 1984, the tort has gained increased recognition. In 1986, the Alaska Supreme Court adopted the tort,<sup>89</sup> and then in 1987 the tort was recognized by an Illinois appellate court.<sup>90</sup>

In *Smith v. Superior Court*, neither party disputed the underlying facts. In 1981, the left rear wheel and tire of Ramsey Sneed's vehicle took flight, crashing through Phyllis Smith's car windshield.<sup>91</sup> Abbott Ford,

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84. 427 U.S. 639 (1976).

85. *Id.* at 643.

86. In this regard, comments to Fed. R. Civ. P. 37 provide little assistance in determining Congressional intent. Because the Rule does not specifically deal with the evidence destruction problem, a strong argument may be made that Congress did not intend for the Federal Rules to cover this case.

87. See Irigoien, *Rule 37 Sanctions: Deterrents To Discovery Abuses*, 46 MONT. L. R. 95, 96 (1985).

88. *Smith v. Superior Court*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984).

89. *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska 1986).

90. *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312 (Ill. App. 1986).

91. *Smith*, 198 Cal. Rptr. at 831.

who sold the van to the defendant, had fitted the defendant's van with deep dish mag wheels. After the accident, the defendant's vehicle was towed to Abbott Ford for repairs. Abbott Ford agreed with plaintiff's counsel to safeguard certain physical evidence pending further investigation. Plaintiff's expert later asked Abbott Ford for the evidence to determine the accident's cause. The trial court found that Abbott Ford intentionally destroyed, lost, or transferred the physical evidence, making inspection by plaintiff's expert impossible.<sup>92</sup>

Plaintiff's second amended complaint contained a cause of action against Abbott Ford for the "Tortious Interference with Prospective Civil Action By Spoliation of Evidence."<sup>93</sup> Abbott Ford demurred, arguing that plaintiff failed to state a claim.<sup>94</sup> The California court acknowledged that California courts, like most other state courts, constantly recognize new torts. It recognized that the "progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action."<sup>95</sup> When it becomes clear that the plaintiff's interests are entitled to legal protection, "the mere fact that the claim is novel will not of itself operate as a bar to a remedy."<sup>96</sup>

The defendant argued that California's obstruction-of-justice statute preempted the plaintiff's action in tort.<sup>97</sup> The court observed that the objectives of civil actions are distinct from those of criminal actions. The distinction lies in the interests courts seek to protect.<sup>98</sup> A crime is an offense against the public for which the state seeks redress on the public's behalf. The state's interest is to punish the offender and deter future crime. While a civil action also seeks redress and may seek to deter future intentional harm, the interests are not congruent. A civil action is maintained by a private party seeking private, compensatory relief.<sup>99</sup> Many torts have correlates in penal laws; intentional homicide supports a civil action for wrongful death, a battery is both criminal and tortious, and theft is a tortious conversion as well as robbery.<sup>100</sup> Thus, it is not irregular for the law, on the same set of facts, to entertain both a criminal and a civil action. Because criminal law objectives are distinct from those of the civil law, the injured party and the state may separately vindicate their individual interests.

The *Smith* court conceded that the tort's damages are incapable of concrete estimation.<sup>101</sup> The uncertainty of damages, however, is an inherent problem in many civil actions. Damages lie in torts, such as libel, slander, and invasion of privacy, without concrete proof of economic or readily

92. *Id.*

93. *Id.*

94. *Id.* at 832.

95. *Smith*, 198 Cal. Rptr. at 832 (citing PROSSER AND KEETON ON THE LAW OF TORTS, § 1, at 3-4 (5th ed. 1984)).

96. PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 3-4 (5th ed. 1984).

97. *Smith*, 198 Cal. Rptr. at 833.

98. PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7 (5th ed. 1984).

99. *Id.*

100. *Smith*, 198 Cal. Rptr. at 834.

101. *Id.* at 835.

ascertainable harm.<sup>102</sup> Damages are properly awarded to those suffering legally recognizable injury.<sup>103</sup> In *Story Parchment Co. v. Paterson Parchment Paper Co.*,<sup>104</sup> the United States Supreme Court held that where the tort itself is incapable of positive estimation, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."<sup>105</sup>

In 1985, a California appellate court extended the *Smith* holding to the "negligent" spoliation of evidence.<sup>106</sup> In *Velasco v. Commercial Building Maintenance Co.*,<sup>107</sup> the court outlined six negligence action considerations: (1) the extent to which the destroying party *intended* to affect the non-destroying party by his actions; (2) the foreseeability of harm to the non-destroying party; (3) the degree of certainty that the non-destroying party suffered injury; (4) a proximate connection between the defendant's conduct and the injury suffered; (5) the "moral" blameworthiness of the destroying party's actions; and (6) the policy of preventing future harm.<sup>108</sup>

Courts and legislatures must remedy those wrongs over which they have authority. This is the most basic presumption underlying the *Smith* holding. However, the natural question remains: Where do courts derive the prerogative to adopt new torts? If courts possess such authority, is the adoption of the tort, when considered in relation to existing remedies, prudent and necessary?

#### ASSESSING THE TORT

##### *Judicial Authority To Recognize New Common Law Actions*

The law of torts seeks to allocate losses arising out of human interaction.<sup>109</sup> As the affairs of society grow more complex, the law must respond and adjust to losses occasioned by human activity.<sup>110</sup> Therefore, tort law cannot remain static; it is constantly developing.

Most fundamentally, due process requires that courts fashion remedies for acknowledged harm.<sup>111</sup> Dissenting opinions in cases of first impression argue that abrupt changes in the law should be accomplished only

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102. *Id.* at 836.

103. *Id.* at 835.

104. 282 U.S. 555 (1931).

105. *Id.* at 563.

106. *Velasco v. Commercial Bldg. Maintenance Co.*, 169 Cal. App. 3d 874, 215 Cal. Rptr. 504 (1985).

107. *Id.*

108. *Id.* at 506.

109. PROSSER AND KEETON ON THE LAW OF TORTS § 1 at 6 (5th ed. 1984).

110. *Id.*

111. See *Bush v. Lucas*, 462 U.S. 367 (1983). In *Bush*, the petitioner sought to establish a nonstatutory damages remedy for federal employees whose first amendment rights were violated. The Supreme Court declined the invitation, but quoted favorably from Blackstone's *Commentaries* for the proposition that it is the province of the judiciary to fashion an ade-

by legislatures.<sup>112</sup> The history of common law tort actions recognizes that responsibility resides with the judiciary to change and mature with society's advancing needs.<sup>113</sup> By not exercising their lawmaking power in response to redressible injury, courts abrogate their traditional common law function, even in a society regulated predominately by legislatures. Tracing the common law heritage to the present, Prosser recognized that:

[i]n earlier times the role of a court in weighing the various interests at stake and determining the rules of substantive law to be applied in resolving a case before the court was often described as one of finding applicable law, even when the decisive issue was one of first impression . . . . Although controversy continues over theories of judicial action, under currently prevailing views it is commonly recognized that in deciding issues of first impression, in tort law as elsewhere, courts are making new law. Courts are constrained by limitations that do not apply to lawmaking by legislatures, but where relevant legislation does not exist, courts must by necessity decide a controversy without legislative guidance. In doing so within a common law system in which each decision is precedent, they necessarily make law. Nor is it to be assumed that all claims of types not previously recognized have been rejected by precedent. Thus, the mere fact that a claim is novel does not defeat it.<sup>114</sup>

Destruction of evidence presents a modern problem worthy of judicial protection. The issue is one peculiarly appropriate for judicial resolution because evidence destruction undermines the proper function of the judicial process. Courts must consider all pertinent facts to reach a considered decision. Apart from detriment to the judicial process, evidence destruction also obstructs the non-destroying party's access to the courts. Undeniably, courts are faced with added litigation whenever they adopt a new action. Courts, however, are always able to set liability limits.

Though no Wyoming case directly deals with the problem of evidence destruction, one Wyoming case addresses the nondisclosure of evidence. In *Kath v. Western Media, Inc.*<sup>115</sup> majority shareholders sought indemnification from minority shareholders for liability arising out of an adverse judgment in Montana. Before trial, the majority and minority shareholders reached a settlement agreement. Wyoming counsel for the majority shareholders concealed a letter written by former counsel for both the minority and majority shareholders.<sup>116</sup> That letter revealed that the former

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quate remedy for every wrong capable of proof and over which a court has jurisdiction. *Id.* at 373. Blackstone wrote that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded . . . . [I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* at 373 n.10 (citing *Marbury v. Madison*, 1 U.S. (1 Cranch) 368, 378 (1803) (quoting 3 W. BLACKSTONE, COMMENTARIES \*23, \*109.)).

112. PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 18 (5th ed. 1984).

113. *Id.*

114. *Id.*

115. 684 P.2d 98 (Wyo. 1984).

116. *Kath*, 684 P.2d at 98-99.

lawyer favored the majority shareholders' interests in the prior litigation.<sup>117</sup> Imparted with this knowledge, the minority shareholders revoked the settlement agreement. The majority shareholders moved for an order compelling settlement.<sup>118</sup> The Wyoming Supreme Court reversed the district court's order upholding the settlement agreement.<sup>119</sup> Considering whether the majority shareholders' Wyoming counsel had a duty to disclose the contents of the letter to the district court and opposing counsel, the court relied upon Model Rule 3.3(a) and Model Code Rule 7-102(A).<sup>120</sup> The court held that by failing to disclose the letter's contents, the Wyoming lawyer breached his duty of candor to the court and opposing counsel.<sup>121</sup>

The *Kath* case may be criticized in several respects. First, even if the Model Rules were proper authority in Wyoming prior to their adoption in 1986, Model Rule 3.3(a) requires disclosure only when necessary to avoid a client's criminal or fraudulent act. The court improperly applied the rule in *Kath* because the majority shareholders engaged in no fraudulent activity. They sought a lawful right of indemnification against the minority shareholders. No court could impute their lawyer's conflict of interest as the action of the majority shareholders. Second, Model Code Rule 7-102(a) mandates disclosure when "by law," a lawyer is so required. While the court assumed that the lawyer had a *legal* duty to disclose evidence, the court did not clarify the origin of that duty. Traditionally, courts have defined this legal duty by reference to state obstruction-of-justice statutes. Like the federal obstruction-of-justice statute, the Wyoming provision seems only to apply in criminal cases. Further, the Code requires disclosure only when demanded "by law." The Code clearly envisions some cases in which the law will not require disclosure, such as those cases in which evidence is irrelevant or privileged. Neither the Code nor the *Kath* case excludes such situations from their potentially broad scope. Thus, even after the *Kath* case, Wyoming lawyers are faced with an uncertain and undefined legal duty to disclose evidence.

Guided by the California tort, the Wyoming court could begin to develop a meaningful body of substantive law concerning the destruction and nondisclosure of evidence. In the *Kath* situation, a jury could award damages for the majority shareholders' nondisclosure of evidence. In this way, the court could more closely tailor the remedy to the ethical violation.

### *The Traditional Versus Nontraditional Approaches*

In the broadest sense, courts can only assess the tort's efficacy by comparing the tort to the orthodox approaches to evidence destruction.

117. *Id.* at 98.

118. *Id.* at 98-99.

119. *Id.* at 102.

120. MODEL RULES, *supra* note 8, at Rule 3.3(a)(2) (states that a lawyer shall not knowingly "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client"); MODEL CODE, *supra* note 6, at DR 7-102(A)(3) (provides that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal").

121. *Kath*, 684 P.2d at 102.



The ethical rules' proscription against evidence destruction and concealment refer to federal or state obstruction statutes for their operational parameters, but no federal, and few state statutes address the destruction or concealment of evidence in civil cases. Consequently, an attorney may ethically and legally advise his client in a civil case to destroy or conceal evidence, although the attorney must reveal such destruction or concealment if the court inquires.<sup>122</sup> The current system requires a party to "confess" to an action that the law itself defines as lawful and ethical.

In contrast, the tort unmistakably defines evidence destruction as a civil offense. So defined, the court can openly and fairly impose a civil penalty. Because his action arises under tort law, the non-destroying party must only demonstrate by a preponderance that evidence was destroyed and an opposing party, or a person not party to the suit, destroyed the evidence. The tort therefore does not require the higher burden of proof demanded by the ethical rules and their criminal statute corollaries. To aid the jury's determination, the tort allows the jury to consider the damaging character of the evidence in assessing the destroying party's wilfulness.

Under the traditional approach, if the non-destroying party exposes evidence destruction, the court may impose an adverse evidentiary presumption against the destroying party in civil or criminal cases.<sup>123</sup> If the destroyed evidence represents only one piece in a long line of evidence, the impact of the presumption may be minor. Even if the presumption takes the place of significant evidence, the evidentiary inference may not impact the jury in the same way as the tangible evidence itself. The inference, therefore, provides inadequate deterrent value because destruction penalties are not as meaningful as the benefits of destruction.

The tort creates greater destruction consequences. Lawyers and their clients are placed on notice that the opposing party may sustain a damages action in addition to damages for the underlying suit. The tort encourages the opposing party to detect evidence destruction. In this respect, the damage uncertainty actually provides added deterrence. Uncertain damages prevent parties from balancing the potential evidence destruction costs against the primary suit liability costs if they preserve and reveal damaging evidence.

The indefinite nature of the tort's damages may concern some courts. No party sustains physical or emotional harm when evidence is destroyed. Rather, the injury is to the judicial process, which the court and the injured party have an interest in vindicating. Injuries cannot be ignored merely because they are incapable of market valuation. The law provides atonement for many noneconomic losses. A jury could never precisely assess damages accorded to pain and suffering, loss of consortium, or damage to one's personal reputation. Indeed, most damage appraisals are indefinite and imperfect estimates, but damage uncertainty does not mean

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122. Comment, *supra* note 4, at 1665.

123. *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240 (N.D. Ill. 1986).

that such losses should be exempt from consideration, even under an economic analysis. Intangibles have associational costs. At a minimum, the intangible item must be worth at least as much as it costs in terms of the party's sacrificed alternatives. If the destroying party forecloses the non-destroying party's ability to bring or defend his action, the injury equals damages on the underlying claim. Although the assessment is inexact, damages should also reflect the tort's punitive and deterrent policies.

Finally, Rule 37 sanctions are an effective deterrent to evidence destruction, but apply only to discovery abuses. As opposed to Rule 37 sanctions, tort liability attaches for the destruction of evidence whenever that evidence is pertinent to foreseeable litigation. Unlike Rule 37 sanctions, the non-destroying or injured party may initiate the tort remedy on his own accord, without relying on the court's broad discretion.

No approach, however, is without fault. The tort supports a greater basis for punitive damages than *Smith's* award of compensatory damages. *Smith* recognized that the tort serves two functions. First, it assures punishment for the intentional destruction of evidence. Second, it serves as a general deterrent in future cases.<sup>124</sup> Because punitive damage awards also serve the punitive and deterrence rationales, the tort's policies comport more with punitive damage awards.

It logically follows that an action for the "negligent" destruction of evidence will not support the punishment and deterrence rationales. Negligence damages seek to provide reparation for injuries, while damages inflicted with intent seek to punish as well as compensate. To maintain an action for negligence, the non-destroying party must establish the destroying party's *duty* to preserve evidence, but the ethical rules and their statutory corollaries fail to establish a duty to preserve evidence. In the absence of such duty, no action in negligence may be sustained for the destruction of evidence. Thus, for jurisdictions considering the tort, a more reasoned view counsels against extending the tort to cases of negligent destruction.

In contrast, the *intentional* destruction of evidence does not suffer from the same absence of duty. The court in *Smith* acknowledged that all parties have a right of access to the courts and the right to pursue their petition free from obstructionist tactics.<sup>125</sup> Parties who intentionally destroy evidence affirmatively seek to subvert the non-destroying party's action.<sup>126</sup> In negligence actions, parties negligently destroying evidence do not intend to preclude a party's right of action.

A remaining problem concerns tort liability in cases where the plaintiff destroys the defendant's exculpatory evidence. To date this question remains unanswered by the tort's exponents. Like plaintiffs, defendants are entitled to the tort's protections, perhaps as a counterclaim. This action should likewise afford a basis for punitive damages.

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

125. *Id.* at 837.

126. *Id.*

### *Constraints On The Tort's Application*

The non-destroying party under the tort acts as a "private attorney general," enforcing the judicial proscription against evidence destruction. One presumes that non-destroying parties have a pecuniary interest in detecting evidence destruction. This inducement, however, may sometimes be too appealing and may lead to actions for the destruction of irrelevant or minimally important evidence. Simply stated, destruction of irrelevant evidence or nominally important evidence should not sustain the same damage awards afforded to destruction of probative evidence.

The *Smith* holding implies that evidence must be relevant to an actual or reasonably foreseeable proceeding.<sup>127</sup> The relevance requirement, as under evidentiary principles, assures that damages are not awarded for the destruction of evidence having no connection with the suit.<sup>128</sup> The modest relevancy requirement of Rule 402 of the Federal Rules of Evidence, however, would permit tort actions for destruction of marginally important evidence.<sup>129</sup> Duplicative yet relevant evidence should not be treated in the same way as more probative evidence. By limiting the tort to instances of *intentional* spoliation of evidence, the tort operates only to impose damages for the destruction of significant evidence. Assuming that parties react rationally to the evidence confronting them, it is reasonable that only potentially damaging evidence is worth the risk of liability.

### CONCLUSION

Lawyers have a moral and ethical commitment to zealously protect the interests of their clients. Ethical rules rely on state and federal statutes to breathe life into the ethical proscription against evidence destruction. Upon the failure of those statutes, lawyers are allowed, and may have a responsibility, to advise their clients to destroy evidence. This paradoxical ordering of values leads attorneys to place their client's interests above all responsibility to the court or other parties.

Until courts adopt a more effective alternative, orthodox approaches will foster a perception of judicial tolerance for evidence destruction. As distinguished from these approaches, every injured party under the California approach acts to vindicate the evidence destruction prohibition. By exposing destroying parties to jury scrutiny, courts preserve the proper function of the judicial process while recompensing the injured party for actual loss. The California approach, therefore, ultimately accomplishes what the ethical rules set out to accomplish in the beginning, to preserve both parties' unobstructed access to the courts and to ensure a fair fight once litigation commences.

DRAKE D. HILL

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127. *See id.* at 829.

128. *Id.*

129. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." FED. R. EVID. 402.