DESTRUCTION OF EVIDENCE

Jamie S. Gorelick
Stephen Marzen
Lawrence Solum

ASPEN
PUBLISHERS

DESTRUCTION OF EVIDENCE

JAMIE S. GORELICK

Miller, Cassidy, Larroca & Lewin
Washington, D.C.

STEPHEN MARZEN

Arlington, Virginia

LAWRENCE SOLUM

Loyola Law School
Los Angeles, California

ASPEN
PUBLISHERS

1185 Avenue of the Americas, New York, NY 10036
www.aspenpublishers.com

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional assistance is required, the services of a competent professional should be sought.

—From a *Declaration of Principles* jointly adopted
by a Committee of the American Bar Association
and a Committee of Publishers and Associations

Published by Aspen Publishers, Inc.
www.aspenpublishers.com

Library of Congress Cataloging-in-Publication Data

Gorelick, Jamie.
Destruction of evidence / Jamie Gorelick, Stephen Marzen, Lawrence Solum.
p. cm.—(Trial practice library)
Bibliography: p.
Includes index.
ISBN 0-7355-4549-9
1. Evidence, documentary—United States. 2. Legal documents—destruction and reconstruction—United States. I. Marzen, Stephen. II. Solum, Lawrence. III. Title. IV. Series.
KF8947.G67 1989
347.73'64— 88-38157

Printed in the United States of America

10 9 8 7 6

DESTRUCTION OF EVIDENCE

FOREWORD

I became interested in the subject of destruction of evidence as a first-year law student 25 years ago. My Legal Methods instructor tortured the class with a problem in which a fellow raided a fraternity house, stole a silver punch bowl, and wound up home with it the next morning talking to his lawyer-father. The father says, "Son, you have to return it. It's not your property." The son, now sobered up, replies, "I guess you're right, Dad. I'll return it anonymously." The father looks at the punch bowl and sees his son's thumb print clearly etched on its polished silver surface. The question is, should the father suggest that the son wipe the thumb print off the bowl before returning it?

This was debated back and forth in terms of the ethics of destroying evidence. At one point the question was put to W. Barton Leach, our old curmudgeon Property teacher. He responded without the slightest hesitation, "Well, you wouldn't want to send them back a dirty punch bowl, would you?" He chuckled and winked. So there it was, ethics taught with a wink.

A quarter of a century later, as evidenced by this book—the first comprehensive treatment of the subject—that attitude seems to have changed. The law is growing teeth.

Lawyers work in the ethically dangerous domain between what they know to be true and what they think the other side can prove. They appreciate the difference between abstract dictates of the law and practical dictates of proof. With time and practice they become masters of point of view, comfortable with the ambiguity of truth, but somehow never comfortable with the temptation to alter the boundaries of the provable truth by spoliating evidence, altering the artifacts of history.

The contributors to this book treat the "spoliation" of evidence as risky business, as the name suggests. Destroying evidence risks the lawyer's reputation as well as the client's case. The lawyer worries, in the age of the copying machine, that destruction can never be reliably effective, and that the client who lies about destruction will be caught, with resulting embarrassment to all. As one contributor observes, "A document is rarely so sinister as its attempted destruction . . . . the attempt rarely succeeds." "Documents seemingly have nine lives. Somewhere a copy will linger." "Clients . . . must be made aware that their best friends and employees will not be willing to go to prison for them."

But the temptation is powerful for even the most honest, and the lawyer's ambivalence of this situation is exquisite. Another contributor observes that "the law imposes no duty to record evidence," and bemoans "the unpleasant task of producing . . . documents that are not required to be kept in the first place." With one eye on the practical and ethical reasons to steer clear of document destruction, he explains how to destroy documents effectively. Client companies must avoid destroying documents *because* the documents are relevant to pending or imminent litigation, but as long as they avoid that constraint (which means avoiding proof of it), efficiency dictates strategies of destruction. "A previously established document-management program may afford a good explanation for the unavailability of certain records." The rationale is simple: Since companies cannot keep everything, they should be advised to adopt retention and destruction policies that minimize legal exposure.

In pursuit of this goal the efficiencies of decentralized file management are sacrificed, and zealous employees become the enemy. "The most difficult obstacle to overcome in implementing a document-retention program is the tendency of employees to maintain personal files on matters for which they are responsible. Many employees contend that a central file system decreases their productivity because each time they need a file, they must request it or go and retrieve it." Other employees keep documents "for their own 'CYA' purposes, which is invariably dangerous." This contributor counsels that "any such program must be rigorously enforced by management, because just one 'packrat'—and they populate every company—can undermine the exercise."

To my mind, there are three possible approaches that a lawyer can take toward spoliation:

First, the "Ethical Minimalist" stance. When confronted with the temptation to spoliate, this lawyer makes a cost-benefit analysis, weighing the downside risk of his action against the potential gains. The minimalist tends to gauge his actions according to what the other side can prove instead of by substantive rules of right and wrong. Behavior is bad only if proved to be bad. Considerations of right and wrong enter the calculus only insofar as they relate to what the minimalist must pay if his spoliation is proved.

Second, the "Moralist" stance. The moralist believes in right and wrong first of all, and he behaves accordingly. In a conflict between self-interest and self-righteousness, the moralist will "do the right thing." Some of our greatest heroes were moralists, heroes for that very reason. The moralist does not concern himself with each situation and its peculiar facts. Thus, the lawyer who finds the sole copy of a killer document against his client and preserves it, regardless of the stage of litigation, and regardless of how

easy it would be to destroy it and how impossible it would be for an opponent to uncover the destruction, is probably a moralist.

Between the two extremes represented by the Ethical Minimalist on one hand and the Moralist on the other is the "Rule Utilitarian." This category best describes the composite moral outlook on the problem of spoliation of the lawyers who have authored this book. The Rule Utilitarian guides his behavior by generalizing the situations he faces and adopting a behavioral rule that best serves him over the long run. He justifies his commitment to a long run approach because it makes sense to follow rules rather than to be calculating costs and benefits afresh every time temptation arises. The Rule Utilitarian will adopt the best general approach for a lawyer in his situation. A tax lawyer, an antitrust lawyer, and a criminal prosecutor, for example, may reveal nuanced differences in approach depending on their perceptions of their differing situations. The Rule Utilitarian may justify his approach by a sense of moral right, stemming from both his personal and professional ideals. He is likely to feel that the Ethical Minimalist is too vulnerable to miscalculation, especially given the risks to the lawyer from destruction of evidence. But he is not as inflexible as the Moralist. In any given situation he might depart from his rule when the potential gains outweigh not only the immediately foreseeable costs but also the cost of foregoing the comfort of proceeding by rule.

The rule-utilitarian perspective of the authors of this book makes the book both useful and fascinating. They address the uncomfortable question of spoliation from the perspective of different legal situations, and their search for the best approach relates to these specific situations. We hear from the tax lawyer, confronted with clients who want not only to destroy documents that will cause them trouble in IRS investigations, but also to create documents (like backdated loan agreements) to explain the nontaxable nature of their income. We hear from the environmental lawyer, confronted with regulatory schemes that require clients to generate and keep all sorts of records. We see the criminal defense lawyer, the bankruptcy lawyer, the commercial litigator. All offer the wisdom of their practice, specific enough to inform the reader, keyed both to the law and to the realities of the adversary system, yet neither preachy nor insensitive.

This book will assist lawyers who feel pressures to destroy evidence. While they will find no ultimate comfort except that which comes from confronting one's own sense of professional identity, the book presents a clear picture of what the law is, what arguments against destruction can be made both to oneself and to one's client, and what the practice of lawyers who have faced and thought about destroying evidence has been.

I expect this to be an important and much cited book. It brings a shadowed subject out into the light of open debate. It frames the issues

and gathers the strands of authority on the various related aspects of the spoliation problem, including criminal statutes, reporting statutes, ethical rules, discovery sanctions, evidentiary sanctions, contempt, and tort liability. It supplies practical wisdom as well as academic analysis. By bringing the various lines of doctrine, authority, and practice together, the book in a sense creates the field, and will greatly facilitate its development.

Cambridge, Massachusetts
November 1988

CHARLES R. NESSON
Professor of Law
Harvard Law School

PREFACE

This treatise provides a comprehensive and systematic analysis of laws governing destruction of evidence and serves as a guide to the practical implications for lawyers in a variety of practice areas. Such an understanding of evidence destruction issues is critical in today's document-intensive litigation. During the course of our work, many litigators privately confided to us that, at some point in their careers, they suspected or were confronted with the fact that documents were deliberately destroyed by their clients or their opponents. Public confirmation of these suspicions was not hard to find.

Perhaps the most notable acts of destruction allegedly occurred in the preliminary stages of the investigation into the Iran-Contra affair. One Saturday morning, three Justice Department officials visited the office of Lt. Col. Oliver North to collect information for the President about arms sales to Iran. By noon they had found a five-page memorandum describing how proceeds from arms sales to Iran were funding operations by the Contras in Nicaragua.[1] In his testimony before Congress, North explained that he "intensified" his destruction of documents when he learned that Justice Department officials would be visiting him the next day[2] and continued to shred documents even while they were in his office.[3] When counsel to the Senate Select Committee suggested that one of the reasons North destroyed the documents "was to avoid the political embarrassment of having these documents be seen by the Attorney General's staff," North did "not deny that."[4] Later, in response to a question whether his role was to "shield" his superiors, North teasingly replied: "That is the part of any subordinate. Every centurion had a group of shields out in front of him, a hundred of them."[5] North added that he continued to work his office shredder for the next three days, at which time he was discharged from the National Security Council staff.[6]

Later testimony by North's secretary, Fawn Hall, revealed additional activity designed to alter the documentary record. According to Hall, on

[1] *See* Wash. Post, June 27, 1987, at A6; N.Y. Times, July 10, 1987, at A1, A7.

[2] N.Y. Times, July 8, 1987, at 6.

[3] N.Y. Times, July 10, 1987, at A9.

[4] *Id.*

[5] *Id.*

[6] *See* N.Y. Times, July 10, 1987, at A1, A7.

the day before the Justice Department officials were to arrive, North instructed her to sanitize four documents linking him to supplying money and weapons to the Contras.[7] Hall apparently did not have an opportunity to substitute the doctored documents, and after the affair became public and North was discharged, Hall feared that the false documents, which were still sitting on her desk, were about to be discovered.[8] To prevent this, she called North and signaled him to come to the office. When North and his attorney arrived, Hall stuffed papers into her boots and clothes and stole out of the office.[9]

Although the events of the Iran-Contra affair dramatize the importance of evidence-destruction issues, few people realize how narrowly a similar political drama was avoided 15 years earlier in Watergate. In a series of television interviews former President Richard Nixon reflected on the tape recordings that revealed his role in the cover up of the burglary of the Democratic National Headquarters and brought his administration to an ignominious end. In retrospect, Nixon believes, "I should have destroyed [the tapes] . . . If I had thought that they revealed criminal activities, I would have been out of my mind not to destroy them."[10]

A belief in salvation through evidence destruction is by no means confined to politicians. Businesses and individuals are exposed to the same pressures of prospective litigation and similarly succumb to the temptation to destroy incriminating evidence. For example, in a recent products liability action, a former staff attorney for A.H. Robins Co. testified that he destroyed perhaps hundreds of "legally damaging" documents linked to Robins' Dalkon Shield intrauterine birth-control device, which is the subject of thousands of products liability suits.[11] The attorney explained that he acted on the direct order of Robins' vice president and general counsel who "simply wanted them destroyed and destroyed quickly."[12] The documents allegedly revealed knowledge of defects in the Dalkon Shield by top corporate officers, knowledge which might increase the likelihood that punitive damages will be assessed against the company.[13]

Evidence destruction was apparently also an early issue in *Texaco v. Pennzoil,* a case that arose when Texaco foiled Pennzoil's bid for Getty

---

[7] *See* N.Y. Times, June 27, 1987, at A6; Time, June 22, 1987, at 22.

[8] *See* Time, June 22, 1987, at 22.

[9] *See id.*

[10] Time, Apr. 16, 1984, at 24.

[11] Nat'l L.J., Aug. 13, 1984, at 3, col. 1.

[12] *Id. See In re* A.H. Robins Co., "Dalkon Shield" IUD Products Liability Litigation, App. A to Brief in Opposition to Petition for a Writ of Certiorari, A.H. Robins Co. v. Theis, No. 84-1024; Nat'l L.J., June 10, 1985, at 3, 26; Nat'l L.J., Mar. 11, 1985, at 8; Wall St. J., Aug. 23, 1984, at 3, col. 1; Wall St. J., Aug. 20, 1984, at 8, col. 1.

[13] *See* Nat'l L.J., Sept. 3, 1984, at 3, 14, col. 1.

Oil and acquired Getty itself. At issue in the case was whether Getty and Pennzoil had a merger agreement that Texaco's subsequent takeover breached. Four days after Getty sued Pennzoil for a declaratory judgment that it was not liable to Pennzoil, and the morning before Pennzoil filed a counterclaim against Getty to enforce the merger terms, Getty Oil's secretary and general counsel threw into the garbage—in the presence of his attorney—handwritten notes of the key negotiating session.[14] Pennzoil's lawyers claimed that the general counsel illegally destroyed evidence; Getty's counsel maintained that "the notes were destroyed before the lawsuit was filed and, therefore, do[es] not constitute destruction of evidence."[15]

Other instances of evidence destruction underscore the importance of such issues. When IBM settled antitrust claims brought against it by Control Data Corporation, the settlement agreement required both sides to destroy "work product generated in support of the litigation," including a computer data base the U. S. government wanted for its separate antitrust suit against IBM.[16] The data base was destroyed[17] under the shadow of a pretrial order that broadly required IBM to "preserve and secure from destruction all documents, writings, recordings or other records of any kind whatsoever which relate in any way to electronic data processing."[18] The district judge held IBM "responsible" for the destruction, accused its attorneys of "unseemly behavior," and ordered IBM to help the Justice Department reconstruct the data base.[19]

Charges of evidence destruction were also raised in litigation involving an alleged share-buying scheme during Guinness P.L.C.'s $3.8 billion takeover of the Distillers Company. In that litigation, the personal assistant to the ousted Guinness chairman swore that he ordered her to "shred documents, destroy letters and erase names from office diaries" to conceal his involvement in the scheme, despite a company memorandum prohibiting the destruction of documentation concerning the Distillers bid.[20] Likewise, Toshiba's internal investigation into the sale of submarine technology to the Soviet Union revealed that employees were instructed "'to do what had to be done to get the business,'" and when the illegal sales were becoming public, "Toshiba Machines managers systematically combed their files, burning anything that raised too many questions about the true nature

---

[14] *See* Brill, *Getty Games,* Am. Law., Mar. 1984, at 1, 110.

[15] *Id.*

[16] *See* United States v. International Business Mach. Corp., 58 F.R.D. 556, 558 (S.D.N.Y. 1973); J. Stewart, The Partners 61 (1983).

[17] *See* J. Goulden, The Benchwarmers 898 (1974); J. Stewart, The Partners, at 61.

[18] United States v. International Business Mach. Corp., 58 F.R.D. at 557 n.1.

[19] *Id.* at 558–59.

[20] N.Y. Times, Apr. 13, 1987, at D1, D7.

of the deal."[21] In addition to ad hoc destruction, the practice of routine document destruction has become widespread.[22]

The growing popularity of document management programs makes it important to understand their legitimate scope and uses. Whether evidence is destroyed systematically or ad hoc, the activity clearly merits serious study.

Ironically, while evidence destruction is a growing concern, our research reveals that scholars, courts, and practitioners know surprisingly little about laws governing destruction of evidence. Legal opinions and existing scholarship almost invariably approach the problem from a narrow doctrinal perspective. For example, a judicial opinion discussing civil discovery sanctions is unlikely to consider the availability of relevant parallel developments in the law of evidence or the law of torts. The result is that legal restrictions on evidence destruction surface as isolated rules only tangentially related to the broad legal topics of civil procedure or evidentiary rules in which they appear. Absent a unified treatment of laws governing evidence destruction, practicing lawyers are hard-pressed to analyze these problems thoroughly and efficiently whether they arise in the course of litigation or counseling.

To fill this need, this treatise synthesizes the many doctrines regulating destruction of evidence. Our analysis presents a particular point of view—in favor of the regulation of destruction of evidence—while permitting the reader to draw his own conclusions from the case law as to the state of the law. We review the distinct bodies of law that have developed in the contexts of civil litigation, criminal prosecutions, and professional disciplinary proceedings. We consider the problems of counseling clients on the legality of routine document-management problems as well as those arising in litigation when evidence has already been destroyed. Our analysis, which is the result of four years of research and study, provides a comprehensive survey of the statutes and case law from all 50 states and the federal system.

Stephen Marzen and Lawrence Solum began this project as an investigation of document destruction in civil litigation under the direction of Professor Charles Nesson of the Harvard Law School. This early work led to the conclusion that civil discovery sanctions would benefit from an examination of document destruction in other contexts. Accordingly, an examination of civil discovery sanctions lead to the ancient spoliation inference and to emerging torts for spoliation of evidence. The work in civil litigation prompted further research into evidence destruction in criminal cases, including both criminal obstruction-of-justice statutes aimed at destruction perpetrated by criminal defendants as well as

[21] N.Y. Times, Sept. 10, 1987, at A1, D9.

[22] *See* Wall St. J., Sept. 2, 1987, at 1, 10.

the due process clauses which protect them from destructive acts by the state. At the same time we surveyed doctrines applicable to civil and criminal litigation, we studied the prescriptions contained in the law of professional responsibility.

As the project grew in scope, Jamie Gorelick joined the team to provide a critical practitioner's perspective to her coauthors' work, to contribute her own views on evidence destruction gleaned from her criminal and civil litigation practice, and to coordinate submissions by distinguished lawyers in a variety of other practice settings. Although as coauthors we did not necessarily agree as to the course the law should take, we did agree on the questions that should be asked and the sources and doctrines that should be drawn upon in answering those questions.

Obviously, in a work of this scope we have many people to thank for their comments and contributions. Victor Gold, Andrew Kaufman, and Charles Nesson provided extensive comments on earlier drafts. Four generations of research assistants at Loyola Law School—Anine DeCew, John Knox, Leslie Masters, Marci Merdler, Mike Nelson, Susan Poehls, and Patricia Synn—spent countless hours in research and other tasks. And the staff at Wiley Law Publications encouraged and supported us throughout the editorial process. Most importantly, we thank our spouses, Richard E. Waldhorn, Louise K. Epstein, and Nancy C. Brown, without whose support the project would never have been completed.

November 1988

JAMIE S. GORELICK
Washington, D.C.
STEPHEN MARZEN
Arlington, Virginia
LAWRENCE SOLUM
Los Angeles, California

CONTRIBUTORS

Peter M. Brody
Rogovin, Huge & Schiller
Washington, D.C.

Daniel S. Hapke, Jr.
General Dynamics Corporation
St. Louis, Missouri

Tama K. Kirby
Fowler, White, Gillen, Boggs,
Villareal & Banker, P.A.
Tampa, Florida

Bettina M. Lawton
Dechert, Price & Rhoads
Washington, D.C.

Scott D. Michel
Caplin & Drysdale, Chartered
Washington, D.C.

J. Brian Molloy
Piper & Marbury
Washington, D.C.

Kenneth Ross
Popham, Haik, Schnobrich &
Kaufman, Ltd.
Minneapolis, Minnesota

Susan D. Sawtelle
Piper & Marbury
Washington, D.C.

Jonathan D. Schiller
Rogovin, Huge & Schiller
Washington, D.C.

Thomas T. Steele
Fowler, White, Gillen, Boggs,
Villareal & Banker, P.A.
Tampa, Florida

Stephanie Wickouski
Lerch, Early, Roseman & Frankel
Bethesda, Maryland

Robert N. Weiner
Arnold & Porter
Washington, D.C.

SUMMARY CONTENTS

DETAILED CONTENTS