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Document Retention and Destruction: Practical, Legal, and Ethical Considerations

John M. Fedders

Lauryn H. Guttenplan

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*John M. Fedders**
and
*Lauryn H. Guttenplan***

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* Partner, Arnold & Porter, Washington, D.C. Member of the District of Columbia and New York Bars. B.A., Marquette University, 1963; L.L.B., The Catholic University of America, 1966.
** Law Clerk to Judge Warren W. Eginton, U.S. District Court for Connecticut. A.B., Cornell University, 1977; J.D., Georgetown University, 1980.

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I. Introduction

Business enterprises are generating an increasing number of documents. The filing, storage, retrieval and eventual destruction of those documents are time-consuming and expensive, and may have civil and criminal ramifications. Because of the increasing volume of business records, the rising cost of documents retention, and the possible consequences of destruction, records management has become a senior management concern needing expert legal guidance.

Some corporations have chosen to search their files and destroy selected documents only when some event suggests a particular need to remove certain documents.[1] However, a survey has indicted that, in contrast to *ad hoc* search and destroy operations, a growing number of corporations have regular document retention-destruction programs and the retention period for the average record has become progressively shorter.[2]

Since antitrust cases are usually based primarily on documents, antitrust counsel advise the adoption of a regular records retention-destruction program under which entire categories of business documents are destroyed at the earliest practical time after creation without regard to the contents of any specific document.[3] Establishing the earliest practical time for destruction is difficult given business needs and the statutes and regulations which specify what records must be kept, who must keep them and for how long. Those responsible for drafting, instituting and administering a records retention program encounter various legal problems.

Whether a company has an *ad hoc* search and destroy operation or a regular records retention program, management and counsel must consider a federal criminal statutory scheme which renders the destruction of documents illegal if it interferes with judicial, administrative or legislative investigations or proceedings. Three obstruction of justice statutes[4] and numerous cases must be considered whenever a corporation wishes to destroy records (1) prior to learning of any investigation or proceeding in which the documents might be relevant, (2) after learning of relevant government inquiry but before being contacted by authorities, (3) in the course of voluntary cooperation with government authorities, or (4) after process requiring the production of documents has been served.

Although there is presently no federal statute that specifically provides criminal sanctions for the wrongful destruction of documents or physical evidence, pending Senate and House of Representative bills[5] proposing reform of the federal criminal laws include specific provisions relating to the destruction of documents and physical evidence. If enacted, the provisions would clarify ambiguities regarding the wrongful destruction of documents under the

1 R. Borow and S. Baskin, *The Internal Corporate Investigation: Destruction of Documents and Routine Record Retention Programs,* Prac. L. Inst. Seminar on The Internal Corporate Investigation, Course Materials at 209 (1980).

2 AMERICAN SOC'Y OF CORP. SECRETARIES, INC., SURVEY OF RECORDS RETENTION PRACTICES 2 (1971).

3 Baker, *The Control of Documents,* 48 ANTITRUST L.J. 35 (1979).

4 18 U.S.C. §§ 1503, 1505, 1510 (1976). The relevant portions of these sections are set out in notes 69-71, *infra.*

5 S. 1722, 96th Cong., 2d Sess. (1980); H.R. 6915, 96th Cong., 2d Sess. (1980).

present obstruction of justice statutes, establish when routine document destruction is a defense to criminal allegations, and impose stiffer penalties on those convicted of violations.

If a party to a civil proceeding has destroyed records, a negative inference may be drawn from that fact and exploited for its prejudicial value at trial. Principles of evidence enable an adverse, but rebuttable, inference to be drawn concerning the strength of a party's case if evidence was deliberately destroyed to prevent its use in litigation.[6]

Answering document destruction questions is often difficult. Counsel is confronted with a maze of laws requiring records maintenance and with obscure obstruction of justice statutes and case law prohibiting destruction that interferes with government investigations or proceedings. Determining the requirements of particular record maintenance regulations and determining whether an investigation or proceeding is foreseeable or pending are formidable tasks.

Although the A.B.A. Code of Professional Responsibility contains no single provision pertaining to destruction of evidence, it forbids recommending conduct which violates any law. Several ethical considerations and disciplinary rules read together establish that an attorney may not counsel a client to destroy records when such destruction would constitute a criminal offense. However, it is not unethical for an attorney to recommend destroying documents when the client may do so legally. Proposed Code revisions include specific rules forbidding lawyers from counseling the destruction of documents when they reasonably should know that the records are relevant to a pending or clearly foreseeable proceeding.[7]

This article discusses the practical, legal and ethical considerations involved in document destruction. The article also suggests procedures for drafting, instituting, and administering systematic records management programs.

II. Legal Requirements to Retain Documents

Federal, state, municipal and foreign laws specify what records must be kept, who must keep them and for how long. In many instances, particularly with reference to state, municipal and foreign jurisdictions, the statutes and regulations are either ambiguous or silent regarding the specific records a business must keep and the period they must be retained. Because determining the diverse requirements of multiple jurisdictions is difficult, counseling that a particular records retention schedule complies with legal requirements is precarious. If the retention schedule does not meet requirements and documents are prematurely destroyed, fines and other adverse consequences may result.

A. *Federal*

As of January 1980, there were over 1,300 federal statutes and regula-

6 *See* section V, part A, *Adverse Evidentiary Inference, infra.*

7 The relevant portions of these proposals are set out when they are discussed in the text, *infra.*

tions[8] requiring the retention of documents for periods of time ranging from seven days to permanently, with most requiring retention for three to five years. Many such laws leave retention periods unspecified or indefinite. For example, one tax regulation requires that tax records be preserved for as long as is necessary to compute liability and justify it to the government.[9]

Each new statute and regulation requiring document retention imposes new record-keeping burdens on the affected parties.[10] Authority to impose such burdens, which the Supreme Court of the United States upheld in 1940,[11] is based on the commerce clause of the Constitution. Federal record-keeping requirements fall into three categories: (1) statutes or regulations applicable to all United States businesses; (2) regulations applicable to regulated industries; and (3) regulations applicable to specific records of particular businesses.

Laws applicable to all United States businesses are exemplified by the record-keeping provisions of the Internal Revenue Code and the Fair Labor Standards Act.[12] Unregulated businesses subject to these provisions find compliance with them difficult, because the provisions often fail to specify retention periods or the classes of records to which they apply. In such circumstances, the requirements contained in schedules promulgated for regulated businesses may be useful as guides to reasonable retention periods, and a company's compliance with them in establishing retention periods may indicate its own good faith.[13]

Stringent regulations applicable to railroads, banks, public utilities and other regulated industries require companies to prepare and keep for several years a variety of records relating to their business.[14] Some agencies responsible for these regulations have codified their record-keeping requirements and

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8 *See Guide to Record Retention Requirements* (revised as of January 1, 1980), Special Edition of the FEDERAL REGISTER, for a digest of provisions relating to record-keeping requirements imposed by the various federal laws and agencies. *See also* CONTROLLERSHIP FOUNDATION, INC., CORPORATE RECORDS RETENTION, A GUIDE TO U.S. FEDERAL REQUIREMENTS (R. Wheelan, ed. 1958); Costello, *Records Washington Wants You to Keep,* 64 NATION'S BUSINESS 4 (Oct. 1976); *Your Business Records: A Simplified Guide to What Records You Must Keep and How Long You Must Keep Them* (Prentice-Hall 1977).

9 Treas. Reg. § 1.6001-1(a) (1980).

10 In Shapiro v. United States, 335 U.S. 1 (1948), Justice Frankfurter observed:

> Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume.

Id. at 51.

11 In United States v. Darby, 312 U.S. 100 (1940), the Court upheld the validity of the record-keeping requirements of the wage and hour provisions of the Fair Labor Standards Act. Justice Stone wrote:

> Since . . . Congress may require production for interstate commerce to conform to . . . [prescribed] conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement of records even of the intrastate transaction is an appropriate means to the legitimate end.

Id. at 125. The Court added in Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943), that the information sought must not be "plainly incompetent or irrelevant to any lawful purpose" of the agency. *Id.* at 509.

12 29 U.S.C. § 201-219 (1976).

13 CONTROLLERSHIP FOUNDATION, INC., *supra* note 8, at viii.

14 Domanico and Leverette, *Shared Project Studies: Revises Hospital Record Retention Policies,* 52 J. AM. HOSPITAL A. 133 (May 1978); Lagerstrom, *A Retention Program for Insurance Records,* 4 RECORDS MANAGEMENT Q. 19 (July 1970); Jensen and Larson, *Records Management for Pollution Abatement Programs, Meeting EPA Requirements,* 61 MANAGEMENT ACCOUNTING 37 (March 1980); Murphy and Murphy, *Keep Those Bank Records Under Control,* 160 BANKERS MAGAZINE 71 (Winter 1977); SMALL BUSINESS ADMINISTRATION, GUIDE TO RECORD RETENTION REQUIREMENTS FOR SMALL BUSINESS (1979).

published them in special bulletins. Specially regulated companies are also subject to the general federal requirements.

Regulations directed at limited categories of businesses requiring specific documents to be retained[15] are typified by the regulation requiring wool product manufacturers to keep for three years records of the various fibers used in their products.[16]

B. *State and Municipal*

Each of the 50 states and the District of Columbia have statutes and regulations which establish record-keeping requirements. These requirements are uniform in only a few areas.[17] In areas such as tax, unemployment and workmen's compensation, the requirements are especially diverse and extensive. Consequently, large corporations may find themselves compelled to review the laws of all 51 jurisdictions in order to ensure complete compliance. Because many state agencies have regulatory power, it is often difficult to determine specific record-keeping requirements without consulting local records or the agency staff. No state has digested its record-keeping laws and regulations as has the federal government, although there are several limited digests of state laws affecting document retention.[18]

Most municipalities in the United States have some record retention requirements, such as requirements that local businesses maintain sales records and various building and construction documents. There are no digests of such regulations.[19]

C. *Foreign*

All foreign laws regulating businesses include some record-keeping requirements.[20] However, in general they do not mandate maintenance of records to the extent that domestic laws do. Developed countries impose retention requirements on all businesses in at least the categories of taxation, labor, trade and commerce. Many developed countries also have requirements pertaining to particular industries or business activities, such as aeronautics,

15 D. Lee & J. Lee, Agribusiness Procedures and Records (McGraw-Hill 1979).

16 *Guide to Record Retention Requirements, supra* note 8, at 50.

17 There are several uniform state record-keeping laws, including the Uniform Preservation of Private Business Records Act, enacted by the states of Illinois, Maryland, New Hampshire and Oklahoma, and the Uniform Photographic Copies of Business and Public Records as Evidence Act, enacted in 47 states and the District of Columbia.

18 *See* Controllership Foundation, Inc., Corporate Records Retention, A Guide to Requirements of State Governments of the U.S. (R. Wheelan, ed. 1960). Although 20 years old, this 1,022 page volume contains the only thorough analysis of state laws and regulations which bear on record-keeping requirements, and may be a helpful starting point in canvassing the current laws. *See also* Records Controls, Inc., Retention and Preservation of Records With Destruction Schedules 37-48 (9th ed. 1977); N.J. State Chamber of Commerce, N.J. Business Record Retention Requirements (1970).

19 *See generally* Note, *Records Management in Government,* 12 Records Management Q. 44 (April 1978).

20 International Records Management Fed'n, International Records Retention Survey (1980); Controllership Foundation, Inc., Corporate Records Retention, A Guide to Canadian Federal and Provincial Requirements (R. Wheelan, ed. 1959); C. Jones, Britain and the Dominions: A Guide to Business and Related Records in the United Kingdom Concerning Australia, Canada, New Zealand and South Africa (G. K. Hall 1978); Aoki and Yamashita, *Development of Records Management in Japan,* 12 Records Management Q. 57 (April 1978); Tall, *Records Systems in Developing Countries and Organizations in the South Pacific,* 9 Records Management Q. 28 (July 1975).

agriculture, banking and drugs. Less developed countries have record-keeping requirements in taxation, trade and commerce, although few have requirements pertaining to particular industries or business activities. In many of the less developed nations it is difficult to determine specific record-keeping requirements without consulting local records or officials.

III. Document Retention-Destruction Programs

Some managements do not understand why the company must keep certain documents, what documents it must keep, where it must keep them and who must know where they are. On the other hand, because of the increased volume of corporate documents, the cost of their retention and the possible consequences of their destruction, senior managements have begun to recognize that exposure to civil and criminal liability, as well as great loss of time and money, may result from faulty and cumbersome records management.[21] These managements are directing their attention to storage of vital records on microfilm or microfiche, rather than of more expensive hard copy, and to disposal of other documents in accordance with retention-destruction programs.

Many records stored have no value, and those retained for legal or business purposes can be stored in an efficient fashion in locations where storage cost is less than the cost of office space. A cost can be placed on filing and storing records.[22] As a result, many companies are formulating their own records management programs to provide a cost-efficient and systematic approach to document retention and destruction.

Document retention-destruction programs vary in sophistication. Many enterprises have no routine program, but engage in document destruction from time to time when additional filing space is needed. These companies catalogue documents for either permanent retention or destruction at an unspecified time. Documents in the latter category are destroyed when a subsequent file audit reveals that additional space is needed, or that the documents are obsolete. Under this type of unorganized program, there is no attempt to assure that all copies of documents have been destroyed or that documents which must be maintained pursuant to applicable laws have been preserved.[23]

Some companies search their files and destroy sensitive documents only when some event (such as an internal investigation) suggests a particular need for their removal.[24] Other companies focus on retaining, digesting and cataloging documents in a way which minimizes storage and retrieval costs; their decisions regarding document destruction are *ad hoc* and intermittent. These com-

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21 Brekka, Rockwell and Brooks, *The Executive Viewpoint of Records Management,* 3 RECORDS MANAGEMENT Q. 5 (Oct. 1969); Schwartz, *Records Management Top Concern of Top Management,* 16 DATA MANAGEMENT 38 (Nov. 1978).

22 U.S. COMM'N ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV'T (HOOVER COMMISSION), TASK FORCE REPORTS, Appendix C (1949).

23 R. Borow and S. Baskin, *supra* note 1, at 212-13.

24 Block and Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel,* 35 BUS. LAW. 5 (1979); Fedders, *Corporate Criminal Responsibility—Conducting an Internal Investigation,* in 3 CRIMINAL DEFENSE TECHNIQUES, ch. 62 (Matthew Bender 1979); PARALLEL GRAND JURY AND ADMINISTRATIVE AGENCY INVESTIGATIONS (N. Kaplan, P. Friedman, R. Bennett & H. Trainor, eds.) (A.B.A. 1980).

panies might retain some documents in hard copy form, others on microfilm or microfiche, and still others in a computer retrieval system. Finally, a few document retention programs have as their sole purpose the gathering of documents supporting corporate compliance and accountability programs.

Most enterprises have an established document retention plan based upon both government record-keeping requirements and business needs. In such a program, requirements are established and administered to ensure that documents are filed in an appropriate place, the number of copies distributed is catalogued, and the documents are retrieved and destroyed on pre-established "pull" dates. Such a program involves the routine destruction, after a specified period of time, of categories of documents without reference to their specific content.[25] It is this type of program that antitrust advisors recommend companies adopt as part of "preventive maintenance" against antitrust exposure.[26]

The objective of a routine program is to ensure that: (1) documents that must be maintained in accordance with applicable laws and regulations are preserved as long as necessary; (2) documents necessary for the conduct of business are filed in a systematic manner and are accessible when necessary; (3) documents relevant to foreseeable or pending judicial, administrative, or congressional investigations or proceedings are identified and preserved; (4) documents that must be maintained permanently are catalogued and reduced to microfilm or microfiche for easy storing or access; and (5) all other documents are destroyed. Because significant time and manpower is required to organize document management programs and supervise their implementation, such plans are expensive and time-consuming.

A. *Selective Destruction Versus a Routine Destruction Program*

The decision whether to adopt a formal records management program or to rely on *ad hoc* destruction depends upon the particular needs and legal vulnerability of the enterprise.[27] If a company generates relatively few documents and even fewer which are sensitive in nature, its management may decide that the cost of a documents management program outweighs its potential benefits. On the other hand, if a corporation generates a plethora of documents, its management may decide that indiscriminate retention results in high storage costs and possible exposure to litigation. In such a case management will likely order routine destruction pursuant to a records management program, unless such a program would be ineffective given the company's

25 R. Borow and S. Baskin, *supra* note 1, at 212-16.

26 Baker, *supra* note 3, at 36-37; Toll and Bauer, *The Corporate Antitrust Audit—Establishing a Document Retention Program,* 19 PRAC. LAW. 5-15 (1973); Anderson, *Effective Antitrust Compliance Programs and Procedures (An Outline),* 18 BUS. LAW. 739 (1963); Whiting, *Antitrust and the Corporate Executive (pt. 2),* 48 VA. L. REV. 1 (1962); Beckstrom, *Destruction of Documents with Federal Antitrust Significance,* 61 NW. U.L. REV. 687 (1966) (suggesting a federal antitrust document retention statute); J. VAN CISE & C. DUNN, HOW TO COMPLY WITH THE ANTITRUST LAWS 340 (1954); Freedman, *Antitrust: The Education of a Client,* 17 BUS. LAW. 321 (1962); B. Lipson, *The Government Inquiry—Antitrust Compliance Programs: A Boon or Bane for the Business Client,* A.B.A. Nat'l Inst. on Antitrust Counseling and the Marketing Process, Course Materials at 513 (1980).

27 *See generally* R. Borow and S. Baskin, *supra* note 1, and Baker, *supra* note 3. *See also* J. Fedders, *Destruction of Corporate Documents and Records,* A.B.A. Nat'l Inst. on Defending Corporations and Their Officers in Parallel Proceedings, Course Materials at 294 (1980); M. Tierney, *Document Retention Program,* Prac. L. Inst. Seminar on The Internal Corporate Investigation, Course Materials at 247 (1980).

structure and the proliferation of copies of documents.[28] In deciding whether to adopt an *ad hoc* approach or a record retention program, management should weigh the flexibility which each approach provides. Management should be especially attentive to which approach provides greater leeway to destroy documents within the confines of legal restraints.

B. *Advantages and Disadvantages*

The advantages of a written document retention program which is uniformly complied with by all personnel include: (1) the elimination of the onerous expense of storage of irrelevant and obsolete documents; (2) a reduction in the burden and cost of retrieval of documents in response to business requests, government investigations or litigation; (3) a substantial reduction of legal risks flowing from documents, particularly those which are hastily drafted, erroneous or misleading; and (4) the avoidance of an adverse inference from the nonproduction of documents in litigation.[29]

The disadvantages of such a program include: (1) the expense of establishing and administering a program including the commitment of human and capital resources needed to assure compliance; (2) the inability to prove a fact affirmatively because documents have been destroyed; (3) a diminished flexibility of response to formal and informal requests for documents; (4) the adverse inferences arising from incomplete compliance with the program; (5) the adverse inferences arising from selective destruction outside the boundaries of the program (selective destruction appearing less corrupt without a program); and (6) other adverse legal effects, including the discoverability of the program.[30]

In the absence of a record retention program any destruction of documents is selective. Such destruction appears suspicious when viewed in retrospect. Document destruction which takes place routinely pursuant to a regular program is less likely to give rise to adverse inferences should such destruction later become an issue.[31]

C. *Drafting, Instituting and Administering a Program*

Establishing a documents management program is an expensive and time-consuming undertaking.[32] The preparation and adoption of a program is the responsibility of operating management; action by the board of directors is not

28 R. Borow and S. Baskin, *supra* note 1, at 215-16; B. Lipson, *supra* note 26.
29 M. Tierney, *supra* note 27, at 250.
30 *Id.*
31 *See* section V, Practical Considerations Relevant to the Destruction of Documents, *infra.*
32 Bishop, *Establishing a Records Management Program,* 88 THE OFFICE 213 (Oct. 1978); CONTROLLERSHIP FOUNDATION, INC., CASE STUDIES IN RECORDS RETENTION AND CONTROL (1957); Evans, *Records Retention Tips,* 11 INFORMATION & RECORDS MANAGEMENT 26 (Mar. 1977); Hatfield, *How to Establish an Effective Records Retention System,* 61 MANAGEMENT ACCOUNTING 55 (March 1980); Hill, *Guidelines to Record Retention,* 1 PERSPECTIVE 27 (Fall/Winter 1975); Klein and Watson, *The Whys and Hows of Record Retention,* 39 MORTGAGE BANKER 63 (April 1979); Oliva, *A Profile for Developing a Records Retention Program,* 12 RECORDS MANAGEMENT Q. 29 (April 1978); Simpson, *The Don'ts of a Good Records Management Program,* 9 RECORDS MANAGEMENT Q. 20 (Jan. 1975); Springer, *A Survey/Guide to Record Retention & Destruction,* 11 INFORMATION & RECORDS MANAGEMENT 23 (Mar. 1977); Wilds, *Making Records Retention Decisions,* 82 THE OFFICE 73 (Oct. 1975).

required. Management may hire records management consultants to undertake the necessary interviews and research and to draft the program.[33]

During the preparation process, those responsible for drafting and instituting the program meet with representatives of the company and each of its divisions or subsidiaries to obtain recommendations and comments. Some large companies, instead of preparing one program, have each profit center, division or subsidiary prepare its own program. Others create specific programs to deal with specific subjects—for example, an antitrust compliance program setting forth antitrust document retention policies and a product liability program establishing guidelines for retention of product quality and safety documents.[34]

The elements of a document management policy include statements of applicability, responsibilities, and minimal requirements.[35] The most complex aspects of establishing a program are listing categories of documents and determining periods of retention.[36] Some companies list by name each document to be retained or destroyed, while others prefer to list functional groups of documents. A comprehensive records program includes the following requirements:

(1) all records are retained for at least the minimum period stated in applicable statutes and regulations;
(2) all records affecting obligations of the company are retained for a period of time assuring their availability when needed;
(3) records are made and maintained substantiating compliance with relevant laws;
(4) document destruction occurs pursuant to a standard policy developed for business reasons so that the company cannot be accused of deliberately destroying records in anticipation of a specific problem;
(5) destruction procedures include a mechanism which permits management to halt the destruction of records (a) upon receipt of service of legal process requiring production of documents, (b) upon learning of a relevant government inquiry, or (c) during the course of voluntary cooperation with governmental authorities;
(6) vital records are identified and safeguarded;[37] and
(7) the privacy and security of records are appropriately assured.[38]

Once a program has been adopted, a policy and procedure manual is cir-

33 Professional records management consultants will study routines, establish centralized control of records, create indexes, draft record retention programs, conduct seminars and prepare manuals of procedures. A directory of professional records management consultants may be obtained from the Association of Records Managers and Administrators, Inc.

34 *Records Retention—The Lawyer's Role,* 9 THE LAWYER'S BRIEF 5-1, 5-21 (W. Hancock, ed. 1979).

35 *Id.* at 5-20.

36 *Id.* at 5-21 to 5-36. These pages contain a sample retention policy or procedure and a sample records retention guide including suggested retention periods for certain types of documents. *See also* Thomas Wilds Associates Inc., *Records Retention and Files Management,* Course Materials at ch. 2 (1980).

37 In addition to preserving records for legal and business needs, some enterprises are initiating archives where historical documents of enduring value are safeguarded. *See* T. SCHELLENBERG, MODERN ARCHIVES: PRINCIPLES AND TECHNIQUES (University of Chicago Press 1956); Cushman, *Using Business History,* 11 RECORDS MANAGEMENT Q. 5 (July 1977); Davidson, *Selling Management on Business Archives,* 3 RECORDS MANAGEMENT Q. 15 (July 1969); Kurtz, *Business Archives in the Corporate Function,* 4 RECORDS MANAGEMENT Q. 5 (April 1970); Matthews, *The Archives of The Coca-Cola Company,* 9 RECORDS MANAGEMENT Q. 9 (July 1975); Orgain, *Starting a Company Archives,* 8 RECORDS MANAGEMENT Q. 9 (Jan. 1974); Jaroslovsky, *Energy Department, Just 2½ Years Old, Has Own Historian,* Wall St. J., Aug. 26, 1980, at 1, col. 4.

38 *Records Retention—The Lawyers Role, supra* note 34, at 5-22.

culated to alert employees to the program's existence, the responsibilities it imposes on them, and the sanctions prescribed for noncompliance.[39] Evenhandedness and consistency are important if the program is to work effectively. Thus, in each department or location a committee or representative is designated to monitor the program, assure compliance with its timetables, and ascertain that destruction does not violate applicable law. In large corporations, the number of employees engaged in administering the program and performing related clerical duties may exceed several dozen, exclusive of secretaries.[40] The effectiveness of employee compliance with the program depends largely upon the extent of management's support for the program.

Canvassing Applicable Laws.—The first step in establishing a document management program is to analyze the statutes and regulations applicable to the corporation and each of its divisions and subsidiaries.[41] Each of the jurisdictions in which the corporation operates sets forth its own requirements regarding the records a business must keep and the period for which they must be retained. Management desiring to comply with these requirements often finds them both inconsistent and ambiguous. For example, there may be a subtle difference between a requirement specifying that records must be kept in perpetuity and one which provides only that records must be kept, or be kept as long as necessary. In order to determine what constitutes a reasonable period of retention, managers refer to requirements of other regulations applied to similar classes of records by other government agencies. However, these requirements are themselves often inconsistent or indeterminate, so that cautious management and counsel decide to keep records permanently. Such a decision is often unnecessary and, in view of the volume of paperwork incident to today's business operations, always costly.[42]

Organizing Documents.—Once a retention timetable has been established which comports with legal and business requirements, uniform organization of files must be undertaken. Categories of documents, defined by document type or organizational unit, must be established and each category must be assigned pull dates.[43] The filing system should be designed so that no sorting need be done on the pull date.

In order to establish complete control of records, the location of all document storage facilities must be ascertained.[44] Employees' personal files must not be overlooked, since corporate records are discoverable regardless of where the files containing them are located.[45] Thus if an employee's files contain documents relating to the corporation's business, they must be included in the

39 Hogan, *Office Management Manuals,* 14 RECORDS MANAGEMENT Q. 32 (April 1980).

40 Witt, *Role of Secretaries in Records Management,* 12 RECORDS MANAGEMENT Q. 40 (Jan. 1978).

41 Murray, *Legal Considerations in Records Management,* 12 RECORDS MANAGEMENT Q. 25 (Jan. 1978).

42 CONTROLLERSHIP FOUNDATION, INC., *supra* note 8, at iv.

43 The following include a survey of, or suggested retention periods for, certain common business papers: *Records Retention—The Lawyer's Role, supra* note 34, at 5-24 to 5-33; AMERICAN SOC'Y OF CORP. SECRETARIES, INC. 1979 RECORDS RETENTION 7-12 (1979); RECORDS CONTROLS, INC., *supra* note 18, at 51-77.

44 Cross, *Inventorying and Scheduling Records,* 7 RECORDS MANAGEMENT Q. 28 (April 1973); T. SCHELLENBERG, *supra* note 37, at 52-64.

45 McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment,* 53 IND. L.J. 55 (1977); Mahon, *Privileged Communications and Self-Incrimination,* 32 N.Y.U. INST. FED. TAX. 1251 (1974); Comment, *A Paper Chase: The Search and Seizure of Personal Business Records,* 43 BROOKLYN L.R. 489 (1976); Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination,* 18 U. CHI. L. REV. 687 (1951).

program. These and all other files and documents must then be indexed and classified; the indices and classifications must be kept current. Excluding the documents of even a single corporate office, division, subsidiary or employee from the program may prove almost worse than having no program.[46]

Storage and Retrieval.—Storage and retrieval of documents is vital to the success of a records management program. Although analysis of document storage and retrieval systems transcends the scope of this article, development of such a system requires a thorough understanding of forms management,[47] files and correspondence management,[48] filing equipment and office layout,[49] microfilm and microfiche systems,[50] reproduction control,[51] word processing,[52] information retrieval,[53] automated scheduling,[54] computer-records management[55] and records centers.[56]

Establishing "Pull" Dates.—The next step in the creation of a records management program is to specify retention schedules for each category of documents established.[57] Although statutorily specified retention periods are

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46 Baker, *supra* note 3, at 37.

47 Bubnash, *Obtaining Maximum Benefits from Forms Management,* 2 RECORDS MANAGEMENT Q. 15 (Jan. 1968); W. MAEDKE, M. ROBEK & G. BROWN, INFORMATION AND RECORDS MANAGEMENT 233-74 (Glencoe Press 1974).

48 T. SCHELLENBERG, *supra* note 37, at 79-93; Westington, *Case Records Filing System,* 10 RECORDS MANAGEMENT Q. 9 (April 1976).

49 Dunn, *Selection of Filing Equipment,* 10 RECORDS MANAGEMENT Q. 21 (July 1976).

50 Brown, *The Microfilm Feasibility Study,* 8 RECORDS MANAGEMENT Q. 32 (Oct. 1974); Brown, *Microforms,* 9 RECORDS MANAGEMENT Q. 32 (Jan. 1975); Brown, *Anatomy of Micrographics,* 9 RECORDS MANAGEMENT Q. 31 (April 1975); Brown, *COM Operations and Systems,* 9 RECORDS MANAGEMENT Q. 34 (July 1975); Brown, *Roll Microfilm Applications,* 9 RECORDS MANAGEMENT Q. 30 (Oct. 1975); W. MAEDKE, M. ROBEK & G. BROWN, *supra* note 47, at 363-414; Thomas Wilds Associates Inc., *supra* note 36, at ch. 4. Generally, any business record which would be admissible in court in its original form will be admissible if it is on microfilm. *See* 28 U.S.C. § 1732(b) (1976); *See also* Brereton, *The Admissibility in Evidence of Microfilm Records,* 59 A.B.A. J. 500 (1973); *Records Retention—The Lawyer's Role, supra* note 34, at 5-12; *Admissibility of Videotape Copies of Documents in Evidence,* 1 RECORDS MANAGEMENT Q. 29 (April 1967). Rev. Proc. 76-43, 2 C.B. 667 (1976) sets forth the conditions under which microfilm or microfiche will be considered books and records within the meaning of I.R.C. § 6001.

51 W. MAEDKE, M. ROBEK & G. BROWN, *supra* note 47, at 415-28.

52 Thomas, *Word Processing—A New Concept for Records Managers,* 10 RECORDS MANAGEMENT Q. 27 (April 1976).

53 Mackay, *Information Retrieval Systems,* 9 RECORDS MANAGEMENT Q. 22 (Jan. 1975).

54 Benedon, *Automated Scheduling/Records Center Operations,* 14 RECORDS MANAGEMENT Q. 18 (April 1980).

55 Grundman, *Records Management and the Computer,* 14 RECORDS MANAGEMENT Q. 14 (April 1980); Lorek, *The Computer Programmer—A Helpmate to the Records Manager,* 1 RECORDS MANAGEMENT Q. 16 (July 1967); Porter, *The Changing World of Information Management,* 14 INFORMATION & RECORDS MANAGEMENT 13 (May 1980); Seiberling, *Computer Package for Records Management,* 9 RECORDS MANAGEMENT Q. 13 (July 1975); Simon, *Fully Automated Records Management,* 29 J. SYSTEMS MANAGEMENT 6 (May 1978); Wright, *The Unfinished Symphony,* 6 RECORDS MANAGEMENT Q. 5 (Jan. 1972).

56 Benedon, *Features of New Records Center Buildings,* 1 RECORDS MANAGEMENT Q. 14 (Jan. 1967); W. MAEDKE, M. ROBEK & G. BROWN, *supra* note 46, at 292-320.

57 Andreassen, *Records Retirement: Retention, Scheduling and Storage,* 6 RECORDS MANAGEMENT Q. 21 (July 1972); Courtney, *A Blueprint for Record Retention Scheduling,* 14 INFORMATION & RECORDS MANAGEMENT 23 (Feb. 1980); Daskal, *Record Retention: What to Save, What to Toss,* 8 AGENCY SALES MAGAZINE 12 (Sept. 1978); Mitchell, *Records Retention Schedules,* 28 J. SYSTEMS MANAGEMENT 6 (Aug. 1977).

A records manager engages in a "records appraisal process" in established retirement periods. The process involves evaluation of two criteria, namely, value assessment and risk benefit assessment.

Value assessment involves evaluating the primary and secondary values of a given group of documents. The primary value of a group of records relates to the purpose for which they were created. Secondary value relates to uses of the records for purposes other than for which they were created. There are several kinds of subject values. Administrative and operational uses or values fall into the primary category, and fiscal, legal, research, historical or archival uses of values fall into the secondary category. In the process of appraisal of records to assess their values, the records manager identifies and defines the nature of each of these values and the point in time at which those values expire. Based upon reference activities and other factors, the records manager assesses the degree of usage of a group of records during each phase of their life cycle,

necessary starting points for establishing these schedules, the statutory periods may be lengthened based on business needs and common sense. Augmenting factors might include accepted business practice, storage space limitations, and the need for personal access to documents.[58] Pull or destruction dates should be established only after management and the affected departments have been surveyed for their recommendations.[59]

Administering the Program.—Administration of a records management program bears little resemblance to the toil of the file room clerk of past decades. Modern records managers are professionals,[60] able to communicate with counsel, management and employees of all levels. They are trained in management principles, program organization, forms design and control, micrographic technology and systems, systems analysis, word processing, and data processing.[61] Several universities and junior colleges have programs providing concentrated study in records management.[62]

D. *Waiver and Suspension*

After a records management program is implemented, business or legal reasons may arise for either waiving the pull dates of certain documents or suspending the entire program. For example, when an enterprise learns that the government is investigating its activities or receives a document demand or subpoena, it must suspend that portion of its destruction program affecting records relevant to the investigation or covered by the document request. An effective program includes a procedure for dealing with these contingencies.

Many programs have such a procedure. Upon receipt of a subpoena, preprepared memoranda or telexes are immediately sent to employees advising them not to destroy any documents. After counsel determines the scope of the

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namely, from their creation through their uses in an active office environment and until the expiration of their value or secondary purposes, at which time destruction can be contemplated if the records have no long-term value for research, historical or archival purposes. This concept of value assessment did not originate with the records management profession. It originated with the archival profession.

The second criterion of the records appraisal process is risk benefit assessment. Here the records manager attempts to assess the risks and benefits associated with records destruction. Legal and economic conditions are considered. Applicable laws and regulations pertaining to records retention are researched. If there are none, or if operational needs exceed government requirements, the records manager assesses the potential for the records being utilized in legal proceedings.

From a conceptual standpoint, the subject of record destruction cannot be approached by taking into account every conceivable contingency. If this approach were followed, the records manager would destroy few files. Economic and managerial considerations dictate that excessive amounts of money not be expended in storing records unnecessarily.

See T. SCHELLENBERG, *supra* note 37, at 26-32; T. SCHELLENBERG, THE MANAGEMENT OF ARCHIVES (Columbia University Press 1965).

58 *See* note 43, *supra.*

59 AMERICAN SOC'Y OF CORP. SECRETARIES, *supra* note 43, at 14.

60 Professional organizations of records managers include the Association of Records Managers and Administrators, Inc. and the International Records Management Federation. *See generally* Maedke, *Records Management Profession: Status and Trends,* 10 RECORDS MANAGEMENT Q. 42 (July 1976); McLellan, *Creating Management Awareness for a Records Management Profession,* 10 RECORDS MANAGEMENT Q. 10 (July 1976).

61 The Institute of Certified Records Managers certifies records managers by examination. The CRM certification is designed as a measure of professional competence in the records management field. *See* Robek, *Strategies for Passing the CRM Examination,* 12 RECORDS MANAGEMENT Q. 38 (Oct. 1978); Benedon, *Professional Status Through Certification,* 12 RECORDS MANAGEMENT Q. 30 (Jan. 1978).

62 *See* Association of Records Managers and Administrators, Inc. and the Institute of Certified Records Managers, *Directory of Educational Institutions Teaching Records Management,* 13 RECORDS MANAGEMENT Q. 41 (Oct. 1979); Bennett & Fujita, *Collegiate Education for Records Management—A Challenge for the 70's,* 5 RECORDS MANAGEMENT Q. 5 (Oct. 1971).

subpoena and the required file search, the record destruction program is reinstated for unrelated areas.

Compliance with waiver and suspension procedures is more difficult to enforce than compliance with any other aspect of a program. When documents have been subpoenaed and the destruction program has been suspended, employees must be made aware that requested documents must be produced and that destruction of such documents is forbidden. In order to protect the company, employees should be threatened with discharge if they destroy requested documents. If particular employees appear to have motives to destroy particular documents, immediate steps should be taken to secure those documents and ensure that the file search is conducted by reliable people. In some instances it may be wise to secure documents before giving notice of the subpoena or demand, particularly if management is aware that deliberate destruction might otherwise occur.

Waiver and suspension procedures are essential to any records management program, since without them it is impossible to interrupt a destruction program on short notice. The procedures should specify the business and legal grounds justifying waiver and suspension, the persons qualified to authorize waiver and suspension, and the method by which waiver and suspension may be secured, especially following receipt of a subpoena or investigative demand.[63]

Although a corporation's legal department is not ordinarily involved in administering a records management program, many programs provide that destruction schedules may not be waived or suspended without prior written approval of counsel. It is difficult to determine whether possible investigations or legal proceedings warrant suspension of a program, and this decision should be made only by counsel. For this and other reasons, many corporations assign one or two in-house lawyers as liaison with the records management department.[64]

On occasion counsel will be shown a document which could expose the corporation to liability if it became available to adverse parties. If the document is not yet scheduled for destruction under the terms of the program, management may advocate waiver of the program to allow the document to be promptly destroyed. The immediate consideration is whether there is a pending or foreseeable investigation or proceeding in which the document may be subpoenaed. If no such investigation is pending or foreseeable, counsel must review the ethical and legal considerations to determine whether destruction may be recommended. Finally, counsel must determine whether, if a proceeding is instituted after destruction, a negative inference may be drawn by reason of the earlier destruction of the document. Because of the risk involved in selective destruction, counsel will frequently advise that the document be retained and that a contemporaneous explanatory memorandum be placed in the file to dilute, if possible, the sensitive nature of the existing document.[65]

63 M. Tierney, *supra* note 27, at 251.
64 *Records Retention—The Lawyer's Role, supra* note 34, at 5-7.
65 Baker, *supra* note 3, at 42.

E. *Educational Programs*

Even a well-conceived records management program will be ineffective if it lacks management support and employee cooperation. Such support and cooperation will be fostered by a detailed education program at the time of the program's implementation and by periodic reminders to personnel of the program's importance.[66] Those using the system must be convinced of its value.

In educating corporate employees about a newly adopted records management program, emphasis should be placed on the fact that records dealing with corporate matters are in no way personal records. Employees should be warned against using words in their memoranda which cast conduct in an improper tone,[67] and especially against producing documents which contain false or inaccurate information. For many types of potentially troublesome documents, such as market studies, business plans and acquisition strategies, employees should be required to seek legal review during their preparation to ensure that they are not incriminating. Finally, employees should be told to consult with counsel when they find errors in a document which will not be destroyed soon, so that counsel may consider whether a corrective memorandum should be put in the files. A memorandum created before an investigation or litigation is initiated has greater probative value.

The effectiveness of any program can be undermined by employees squirrelling away corporate documents thinking the documents are their own. Many companies consider their program effective until they find, after receiving a subpoena, that there are duplicate copies of subpoenaed documents in an employee's personal file or at his home which the employee erroneously thought would not be discoverable. Employees must be educated that no document is personal if it concerns an employee's conduct in the course of corporate business.

IV. Legal Restraints on Destruction of Documents

A. *Federal Law: Obstruction of Justice*

Despite the abundance of laws and regulations requiring document retention, there is at present no federal statute that specifically provides criminal sanctions for the wrongful destruction of documents or physical evidence. Destruction of evidence has been prosecuted under the general "obstruction of justice" and "hindering law enforcement" statutes. These statutes create three mutually exclusive criminal offenses[68] for interfering with judicial, ad-

66 Gammie, *Records Management Training—Your Company Needs It,* 6 RECORDS MANAGEMENT Q. 18 (Oct. 1972); Russell, *Introducing New Employees to Records Management,* 3 RECORDS MANAGEMENT Q. 23 (Jan. 1969); Baker, *supra* note 3, at 44.

67 Antitrust advisers counsel that certain words in documents are often indicative of corporate activities that may have adverse antitrust significance: "destroy after reading," "for your eyes only," "aim to destroy all competition," "competitors will have no objections or will go along," "exploiting weaknesses of competitors," "plans to capture a specific market share," and "to you and to you alone, the price is below cost." *See* Loughlin, *The Naughty Words of Antitrust,* 54 A.B.A. J. 246, 247 (1968); Blundell, *Confused, Overstuffed Corporate Writing Often Costs Firms Much Time—And Money,* Wall St. J., Aug. 28, 1980, at 21, col. 4.

68 United States v. Mitchell, 372 F. Supp. 1239, 1251 (S.D.N.Y.) (statutes are, by their explicit terms, applicable to different government activities at separate chronological periods), *appeal dismissed sub nom.* Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973). Each of these statutes is the subject of a helpful annotation. *See* Annot., 20 A.L.R. Fed. 731 (1974) (section 1503); Annot., 18 A.L.R. Fed. 875 (1974) (section 1510); Annot. 8 A.L.R. Fed. 893 (1971) (section 1505).

ministrative or legislative investigations or proceedings. The statutes are 18 U.S.C. § 1503 (Influencing or Injuring Officer, Juror or Witness Generally),[69] 18 U.S.C. § 1505 (Obstruction of Proceedings Before Departments, Agencies, and Committees),[70] and 18 U.S.C. § 1510 (Obstruction of Criminal Investigations).[71] The three statutes describe offenses in broad and ambiguous terms, and consequently provide few standards for predicting whether particular conduct is criminally culpable.

The chief difference between the statutes lies in the nature and timing of the proceeding involved: section 1503 applies only to pending judicial actions; section 1505 applies only after administrative or legislative investigations or proceedings have commenced; and section 1510 applies prior to an initiated proceeding, penalizing interferences with the transmission of information to criminal investigators concerning illegal conduct.[72] Thus, the sections render culpable destruction of relevant documents (1) after learning of relevant government inquiry but before contact by authorities, (2) in the course of voluntary cooperation with government authorities, or (3) after process requiring production of the documents has been served.

1. Section 1503

Section 1503, the general obstruction of justice provision, does not deal explicitly with destruction of documents. However, the courts have construed the section to prohibit the willful destruction of documents occurring during an

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69 18 U.S.C. § 1503 (1976) provides that:

> Whoever corruptly, or by threats or force . . . endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . or corruptly or by threats or force . . . influences, obstructs, 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.

70 18 U.S.C. § 1505 (1976) imposes the same prohibitions as 18 U.S.C. § 1503 (1976) to:

> [A]ny proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress. . . .
>
> . . . .
>
> Whoever, with intent to avoid . . . or obstruct compliance . . . with any civil investigative demand . . . under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material . . . which is the subject of such demand; or
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> Whoever corruptly, or by threats or force . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

71 18 U.S.C. § 1510 (1976) provides:

> (a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator . . .
>
> . . . .
>
> Shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> (b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

72 D. Smaltz, *The Application of the Government's Traditional Weapons—Obstruction of Justice, Perjury and False Statements, Mail and Wire Fraud, and Conspiracy—to Corporations and Their Officers*, A.B.A. Nat'l Inst. on Defending Corporations and Their Officers in Parallel Proceedings, Course Materials at 110 (1980).

ongoing or pending judicial proceeding.[73] Beginning with the earliest judicial interpretations, the section has also been held applicable to grand jury proceedings.[74] The reported document destruction cases brought under section 1503 have almost all involved selective destruction of documents. When documents are destroyed routinely and there is no outstanding document request or subpoena, it is difficult to establish the necessary criminal intent.[75]

Two issues confront courts deciding the applicability of section 1503. First, what constitutes "due administration of justice"? Second, what conduct falls within the statute's scope?

Beginning with the earliest opinions interpreting section 1503 or its predecessors, the courts have inquired into what proceedings qualify as "due administration of justice."[76] They have concluded that only ongoing or pending judicial proceedings, conducted by either a federal court or its appendage, the grand jury, fall within the section's "due administration of justice" language.[77] Grand jury proceedings are considered pending once the grand jury is empanelled and subpoenas are issued;[78] federal court proceedings are considered pending once the complaint is filed.[79]

If a grand jury subpoena has not been issued or a complaint has not been filed, courts generally dismiss cases brought under section 1503.[80] The courts reason that a person unaware of the pendency of a proceeding could not have the requisite intent to obstruct justice.[81] Thus, the pendency requirement ensures that the accused has notice that any attempt to interfere with the proceeding will subject him to criminal sanctions.[82] The courts justify their literal interpretation of "due administration of justice" with the maxim that criminal statutes should be strictly construed.[83]

Although the substantive offense of obstruction of justice requires a pend-

73 United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956).

74 United States v. Grunewald, 233 F.2d 556 (2d Cir. 1956), *rev'd on other grounds,* 353 U.S. 391 (1957).

75 *See* D. Smaltz, *supra* note 72 at 114; Baker, *supra* note 3, at 38; Beckstrom, *supra* note 23, at 691; text accompanying notes 133-34 *infra.*

76 Pettibone v. United States, 148 U.S. 197, 197 (1893).

77 *Id.* at 207. *See also* United States v. Siegel, 152 F. Supp. 370 (S.D.N.Y. 1957), *aff'd,* 263 F.2d 530 (2d Cir.), *cert. denied,* 359 U.S. 1012 (1959); *accord,* United States v. Bonanno, 177 F. Supp. 106, 114 (S.D.N.Y.1959), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960). For recent opinions that presume grand jury functions are within the statute, *see* United States v. Campanale, 518 F.2d 352, 366 (9th Cir. 1975) (per curiam), *cert. denied,* 423 U.S. 1050 (1976); United States v. Ryan, 455 F.2d 728, 734 (9th Cir. 1972); United States v. Kahn, 366 F.2d 259 (2d Cir.), *cert. denied,* 385 U.S. 948 (1966); Shimon v. United States, 352 F.2d 449 (D.C. Cir. 1965).

78 United States v. Walasek, 527 F.2d 676 (3d Cir. 1975) (investigation assigned to regularly sitting grand jury, subpoena issued and immunity granted); United States v. Simmons, 444 F. Supp. 500 (E.D. Pa. 1978). *See also* Shimon v. United States, 352 F.2d 449 (D.C. Cir. 1965) (grand jury remains pending for purposes of § 1503 so long as it could have brought valid indictments, even if acting beyond its term). *Cf.* United States v. Ryan, 455 F.2d 728 (9th Cir. 1972) (grand jury no longer pending for § 1503 purposes when dismissed without knowledge of outstanding agency subpoenas and prior to commencing its own investigation).

79 United States v. Metcalf, 435 F.2d 754, 756 (9th Cir. 1970); *accord,* United States v. Scoratow, 137 F. Supp. 620 (W.D. Pa. 1956). *See also* United States v. Johnson, 605 F.2d 729, 731 (4th Cir. 1979) (judicial proceeding remains pending in district court until the disposition of any direct appeal which might result in a new trial); *accord,* United States v. Chandler, 604 F.2d 972, 976 (5th Cir. 1979). *See also* United States v. Verra, 203 F. Supp. 87, 89 (S.D.N.Y. 1962) (section 1503 condemns acts before, during, or after trial).

80 United States v. Simmons, 591 F.2d 206 (3d Cir. 1979) (mere agency investigations without any judicial component fail to constitute proceedings under § 1503); United States v. Ryan, 455 F.2d 728 (9th Cir. 1972) (no pending proceeding where grand jury was dismissed without knowledge of an outstanding agency subpoena, thus no § 1503 violation for document alteration).

81 Pettibone v. United States, 148 U.S. 197, 207 (1893).

82 *Id.*

83 Haili v. United States, 260 F.2d 744, 745 (9th Cir. 1958).

ing proceeding, otherwise punishable conduct which precedes pendency is not immune from prosecution. In *United States v. Perlstein,*[84] the Third Circuit affirmed convictions for conspiracy to obstruct justice even though the conspirators were not found guilty of the substantive crime of obstruction of justice. The court stated:

> While it is true that the obstruction can arise only when justice is being administered, that is to say when a proceeding is pending, there is nothing to prevent a conspiracy to obstruct the due administration of justice in a proceeding which becomes pending in the future from being cognizable under section 37 [antecedent of present conspiracy statute, 18 U.S.C. § 371].[85]

Even prior to this pronouncement, conspiracy to obstruct justice was regarded as an indictable offense at common law.[86]

The courts' inquiry into the nature of conduct prohibited by section 1503 has paralleled their inquiry into the meaning of the section's "due administration of justice" language. Some courts have applied the canon of *ejusdem generis,* inquiring whether the alleged obstructive act sufficiently resembled the acts enumerated in the statute to be embraced within the statute's general concluding language.[87] Jurisdictions adhering to this canon of construction limit violations of section 1503 to "conduct designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the Court."[88]

Other courts, led by the Second Circuit, have explicitly rejected application of the *ejusdem generis* principle.[89] These courts have broadly construed section 1503 to enlarge both the concept of "due administration of justice" and the methods of interference embraced by the section's final clause.[90] The Fifth and Eighth Circuits similarly view the statute's general conclusory language as

84 126 F.2d 789 (3d Cir.), *cert. denied,* 316 U.S. 678 (1942).

85 *Id.* at 796.

86 *See* State v. Cassatly, 93 N.J. Super. 111, 225 A.2d 141, 145 (App. Div. 1966) (common law crime of obstructing justice extends to knowingly interfering with lawfully conducted police investigation regardless of formal charge or commenced grand jury proceedings). *See also* Agnew v. Parks, 172 Cal. App. 2d 756, 766, 343 P.2d 118, 124 (1959) (concealing documentary evidence held common law crime of obstructing justice); People v. Tenerowicz, 266 Mich. 276, 253 N.W. 296, 299 (1934).

87 *Id.* at 746.

88 *Id.* (conduct designed to encourage a prisoner to escape from a penitentiary not punishable under § 1503); *see also* United States v. Metcalf, 435 F.2d 754 (9th Cir. 1970) (manner in which statute may be violated is limited to intimidating actions).

89 United States v. Rosner, 352 F. Supp. 915, 918-19 (S.D.N.Y. 1972), *appeal denied sub nom.* Rosner v. Bauman, 497 F.2d 919 (2d Cir. 1974).

90 *See, e.g.,* United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975) (conviction affirmed for concerted effort to persuade witness to remain silent to conceal a conspiracy), *cert. denied,* 429 U.S. 819 (1976). *Accord,* United States v. Fayer, 523 F.2d 661 (2d Cir. 1975); United States v. Turcotte, 515 F.2d 145, 150 (2d Cir. 1975) (conviction based on circumstantial evidence affirmed where defendants fabricated a story knowing of grand jury inquiry into the same matter), *cert. denied,* 423 U.S. 1032 (1975); United States v. Weiss, 491 F.2d 460 (2d Cir. 1974) (destruction, concealment or removal of documents sought by subpoena within § 1503), *cert. denied,* 419 U.S. 833 (1974); United States v. Cohn, 425 F.2d 881 (2d Cir. 1971) (concealment of information relevant and germane to grand jury's functions supports § 1503 conviction), *cert. denied,* 405 U.S. 975 (1972); Bosselman v. United States, 239 F. 82 (2d Cir. 1917) (statute violated by alteration of books material to grand jury inquiry); United States v. Rosner, 352 F. Supp. 915 (S.D.N.Y. 1972) (payment to obtain government documents in connection with pending criminal matter falls within § 1503), *appeal denied sub nom.* Rosner v. Bauman, 497 F.2d 919 (2d Cir. 1974); United States v. Siegel, 152 F. Supp. 370 (S.D.N.Y. 1957) (destruction of subpoenaed notes by an investigating grand jury constitutes an obstruction of justice), *aff'd,* 263 F.2d 530 (2d Cir.), *cert. denied,* 359 U.S. 1012 (1959); United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956) (willful destruction of unsubpoenaed correspondence by person with reason to believe that pending grand jury would order documents states a § 1503 offense).

an "omnibus provision," and hold that a broad range of obstructive activity falls within its terms.[91]

All the judicial interperetations of section 1503, including those which strictly construe the section, make clear that destruction of documentary evidence falls within the statute's ambit.[92] As the Fifth Circuit recently observed:

> Using threats to prevent a grand jury witness from testifying has the result of destroying evidence; so does the burning of transcripts of that testimony, and both acts obstruct the administration of justice. The use of threats against a witness falls under the specific language of section 1503, while the destruction of documents comes under the omnibus clause.[93]

The courts' expansive reading of section 1503 is in part attributable to their perception that the statute serves various goals. The Ninth Circuit, for example, has stated that section 1503 is designed both to protect participants in specific federal proceedings and to prevent miscarriages of justice.[94] Such broad objectives invite flexible interpretations of the statute and provide a convenient rationale for enlarging its scope beyond the parameters originally intended by Congress. When a third goal is added, that of fostering the proper administration of justice, the range of conduct a court may hold violative of section 1503 becomes boundless.[95]

Except for witnesses identified prior to a pending proceeding[96] and for agency actions that have "ripened" into judicial proceedings,[97] section 1503 does not apply regardless of the possible obstruction caused by destruction. If a party destroys a document before a judicial or grand jury proceeding has commenced, the party will probably be insulated from section 1503 liability. However, the party might still be subject to prosecution under section 1505, since this provision prohibits destruction during earlier stages of the administration of justice.

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91 *See, e.g.,* United States v. Griffin, 589 F.2d 200 (5th Cir. 1979) (perjury falls into omnibus provision of § 1503), *cert. denied,* 100 S. Ct. 48 (1980); United States v. Howard, 569 F.2d 1331 (5th Cir. 1978) (violating secrecy of grand jury proceeding by selling transcripts of confidential testimony is prohibited under omnibus clause of § 1503), *cert. denied,* 439 U.S. 834 (1978); United States v. Partin, 552 F.2d 621, 631 (5th Cir.) (omnibus clause aims at obstruction of justice itself, regardless of the means (including perjury) used to reach the result), *cert. denied,* 434 U.S. 903 (1977); United States v. Carlson, 547 F.2d 1346, 1359 n.13 (8th Cir. 1976) (§ 1503 proscribes the directing of threats against witnesses or otherwise impeding the administration of justice), *cert. denied,* 431 U.S. 914 (1977). *See also* D. Smaltz, *supra* note 72, at 118.

92 *See, e.g.,* United States v. Walasek, 527 F.2d 676 (3d Cir. 1975) (limits placed on § 1503 do not preclude a conviction for deliberately destroying documents sought by a subpoena returnable before a sitting grand jury); *accord,* United States v. Weiss, 491 F.2d 460 (2d Cir.), *cert. denied,* 419 U.S. 833 (1974); United States v. Siegel, 152 F. Supp. 370 (S.D.N.Y. 1957), *aff'd,* 263 F.2d 530 (2d Cir.), *cert. denied,* 359 U.S. 1012 (1959); United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956).

93 United States v. Howard, 569 F.2d 1331, 1334 (5th Cir. 1978).

94 United States v. Metcalf, 435 F.2d 754 (9th Cir. 1970).

95 Miller v. Hulsey, 347 F. Supp. 192, 196 (E.D. Ark. 1972).

96 For authority that once a witness is identifiable, any subsequent interference may violate § 1503 even *before* a judicial proceeding has commenced, *see* Hunt v. United States, 400 F.2d 306 (5th Cir. 1968) (fact that informer was expected to testify at a future proceeding, and had already provided information, sufficed to trigger § 1503 for interfering with a witness, despite absence of pending action), *cert. denied,* 393 U.S. 1021 (1969). *Cf.* United States v. Perlstein, 126 F.2d 789 (3d Cir. 1942) (prior to pending proceeding, interferences with witnesses are only punishable as conspiracies to obstruct justice, not substantive offenses).

97 United States v. Simmons, 591 F.2d 206 (3d Cir. 1979); *cf.* United States v. Ryan, 455 F.2d 728 (9th Cir. 1978) (although agency subpoenas were outstanding, court found no judicial proceeding under § 1503 where grand jury dismissed without knowledge of or involvement in agency investigation).

2. Section 1505

Section 1505 applies to the obstruction of agency and congressional proceedings. It also contains provisions relating to the Antitrust Civil Process Act,[98] which subjects to criminal liability anyone who destroys or otherwise conceals documents requested pursuant to a civil investigative demand.[99]

Courts have expressed various views as to the time at which an agency's activity first qualifies as a "proceeding" under section 1505: when the agency is notified of potential violations;[100] when pre-investigation begins;[101] when an informal inquiry begins;[102] or when a formal order is issued directing investigation to begin.[103] In general, however, the "proceeding" of section 1505 has been construed more broadly than the "proceeding" of section 1503. As one court explained:

> [T]he growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is much more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts . . . is not ruled as a nonproceeding simply because it is preliminary to indictment and trial.[104]

Consistent with this enlarged definition of "proceeding," the courts have read section 1505 to embrace a wide variety of conduct, including the destruction or concealment of documents. Thus, the Second Circuit has stated: "[Section] 1505 deals with the deliberate frustrations through the use of corrupt or false means of an agency's attempt to gather relevant evidence. The blatantly evasive witness achieves this effect as surely by erecting a screen of feigned forgetfulness as one who burns files."[105]

Although the vast majority of convictions under section 1505 involve conduct directed against witnesses, courts often assume and parties concede that document destruction falls within the sphere of prohibited activity.[106] For example, courts have invoked section 1505 to punish the destruction of documents relevant to congressional proceedings. In *United States v. Presser,*[107] a defendant was convicted of destroying records which he knew a Senate Select Committee would want because they "bore a reasonable relation to the subject matter of the [Committee's] inquiry."[108]

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98 15 U.S.C. § 1311-1314 (1976).

99 *See* Baker, *supra* note 3, at 38; D. Smaltz, *supra* note 72, at 123.

100 Rice v. United States, 356 F.2d 709, 714 (8th Cir. 1966) (filing of charges with NLRB adequate to trigger § 1505 despite absence of formal complaint).

101 United States v. Browning, Inc., 572 F.2d 720 (10th Cir. 1978). (Bureau of Customs' initial evaluation proceeding designated proceeding within § 1505 although only a prelude to criminal investigation), *cert. denied,* 439 U.S. 822 (1978).

102 *See, e.g.,* United States v. Fruchtman, 421 F.2d 1019, 1021 (6th Cir. 1970). (FTC preliminary staff investigation into corporate pricing practices held a proceeding), *cert. denied,* 400 U.S. 849 (1970).

103 United States v. Batten, 226 F. Supp. 492 (D.D.C. 1964), *aff'd,* (D.C. Cir.) (unpublished order), *cert. denied,* 380 U.S. 912 (1965).

104 United States v. Browning, 572 F.2d 720, 724 (10th Cir. 1978) *cert. denied,* 439 U.S. 822 (1978).

105 United States v. Alo, 439 F.2d 751, 754 (2d Cir. 1971).

106 *Id.*

107 187 F. Supp. 64 (N.D. Ohio 1960), *aff'd,* 292 F.2d 171 (6th Cir. 1961), *aff'd by an equally divided court,* 371 U.S. 71 (1962).

108 *Id. Cf.* United States v. Ryan, 455 F.2d 728, 734 (9th Cir. 1972) (government must prove records subpoenaed and subsequently destroyed were material to grand jury proceeding to support § 1503 conviction).

As under section 1503, document destruction is illegal under section 1505 provided there is a nexus between the conduct and the pending proceedings. Once an agency or congressional inquiry has commenced, potentially affected parties should refrain from destroying documents known or suspected to be relevant, whether or not a formal request has been issued. Unfortunately, cases decided under section 1505 do not provide the unambiguous guidelines provided by section 1503 cases. In trying to avoid culpability under section 1503, the boundaries are clear—once a complaint has been filed or a grand jury subpoena has been issued, destruction of pertinent documents constitutes an obstruction of justice. However, the uncertain scope of section 1505 prevents a confident determination of the time at which destruction becomes culpable. Thus, anyone who contemplates destroying documents before a proceeding begins must consider the possibility that a court may, by interpreting section 1505 flexibly, extend the section's coverage so as to render illegal obstructive conduct occurring while the proceeding is imminent or even reasonably foreseeable.

Although the cases suggest that an agency or the Congress must take focused action regarding a particular matter before a "proceeding" is deemed pending under section 1505, they provide little guidance as to how complete a party's knowledge that the proceeding is pending must be before destruction of documents violates the statute. A plausible, but perhaps unduly narrow, reading would permit a party to destroy records until he either personally receives notice of the proceeding or acquires knowledge of it through public channels. Even if he is aware of the proceeding, a party who neither knows nor suspects that documents are relevant may avoid liability if he destroys them in good faith, since the requisite criminal intent would be absent. However, a court might impute knowledge to the party (and consequently criminal intent) if it finds that the party should have known of the documents' relevance and of the proceeding's existence at the time he destroyed the documents.

As under section 1503, issuance of a formal demand for documents or for a witness's testimony is not a prerequisite to maintaining a section 1505 action. The section has been construed to be violated by falsification of records in anticipation of an agency or congressional subpoena,[109] and by intimidation of persons who the defendant knows are likely or actual witnesses.[110] Thus, if a party engages in obstructive conduct after being apprised of agency or congressional action, however informal or preliminary, he will likely be subject to sanction under section 1505.

A stricter reading of section 1505 would prevent any party who suspects that an agency or congressional investigation is under way, or who concludes from signals that such a proceeding is reasonably foreseeable, from destroying

109 United States v. Tallant, 407 F. Supp. 878 (N.D. Ga. 1975) (dictum), *aff'd,* 547 F.2d 1291 (5th Cir.), *cert. denied,* 434 U.S. 889 (1977). Once the agency subpoena has issued, falsification or destruction of documents falls squarely within the statute. *See* United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976).

110 Stein v. United States, 337 F.2d 14 (9th Cir. 1964) (statute prohibits corruptly influencing any person known to be an actual or probable witness to provide false information), *cert. denied,* 380 U.S. 907 (1965); *accord,* United States v. Batten, 226 F. Supp. 492 (D.D.C. 1964), *aff'd,* (D.C. Cir.) (unpublished order), *cert. denied,* 380 U.S. 912 (1965). *But see* Berra v. United States, 221 F.2d 590 (8th Cir. 1955) (unless defendant knows the party interfered with was an actual or likely witness, evidence to convict under § 1505 may be insufficient), *aff'd,* 351 U.S. 131 (1956).

potentially relevant documents. Since anyone may become the target of agency or congressional proceedings, such a strict reading would require parties to preserve all marginally significant documents. This would defeat the valid objectives of well-planned document management programs.

No court has construed the statute to prohibit the destruction of documents relevant to an investigation in no more than a purely speculative stage of the judicial, administrative or legislative process. Thus, absent concrete proceedings, there remains a great deal of flexibility to destroy documents. However, discretion is not unlimited, particularly where a signal, such as a letter, has been received indicating that an investigation is about to commence. Where the possibility of an inquiry exists, even though it may appear extremely remote, prudence dictates great caution before destroying relevant documents.

3. Section 1510

In 1967 Congress added a third obstruction of justice statute, section 1510, thereby compounding the difficulty of determining when documents may properly be disposed.[111] In order to close the loopholes in sections 1503 and 1505, section 1510 provides sanctions for obstructive conduct occurring *prior to* the commencement of judicial, administrative or legislative proceedings.[112] This expansive statute punishes interference with the transmission of information concerning criminal activity to federal investigators. No court has decided whether section 1510 covers the destruction of documents prior to a proceeding where the destruction is intended to obstruct the flow of information.

The Fifth Circuit has set forth three requirements for a section 1510 violation:

> (1) an act by the defendant of willfully endeavoring, by means of intimidation and threats of force, to prevent the communication of information relating to a violation of the federal criminal laws; (2) the action must have been taken to prevent the communication from being made to an individual authorized to conduct or engage in investigations of such violations; and (3) the knowledge by the defendant that the recipient or intended recipient of the information was a criminal investigator, as defined.[113]

111 D. Smaltz, *supra* note 72, at 126.

112 For a discussion of the legislative history of § 1510, *see* United States v. Koehler, 544 F.2d 1326, 1328 n.3 (5th Cir. 1977):

> House Report No. 658, dated September 21, 1967 [*reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 1760] explains the purpose of section 1510:
>
> > Sections 1503 and 1505 . . . prohibit attempts to influence, intimidate, impede, or injure a witness or juror in a judicial proceeding, a proceeding before a Federal agency, or an inquiry or investigation by either House of the Congress or a congressional committee. However, attempts to obstruct a criminal investigation or inquiry before a proceeding has been initiated are not within the proscription of those sections. The proposed legislation would remedy that deficiency by providing penalties for attempting to obstruct the communication to a Federal penal law, thus extending to informants and potential witnesses the protections now afforded witnesses and jurors in judicial, administrative, and congressional proceedings.

Case law relies on this legislative history. *See, e.g.,* United States v. San Martin, 515 F.2d 317 (5th Cir. 1975); United States v. Williams, 470 F.2d 1339 (8th Cir.), *cert. denied,* 411 U.S. 936 (1973); United States v. Cameron, 460 F.2d 1394 (5th Cir. 1972); United States v. Mitchell, 372 F. Supp. 1239 (S.D.N.Y.) *appeal dismissed sub nom.* Stand v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973).

113 United States v. San Martin, 515 F.2d 317, 320 (5th Cir. 1975).

Three parties are essential to a section 1510 offense: an investigator; a witness, source or informant; and a party who willfully endeavors to obstruct the communication of information.[114] Although the courts generally agree upon the essential requirements of a section 1510 violation, the knowledge requirement has received conflicting interpretations.[115]

The elements of section 1510 generally coincide with the requirements of the other obstruction statutes,[116] with one major exception: the point in time at which section 1510 is invoked. Section 1510 applies whenever a government investigator is conducting a search for information about illegal activities; it does not require a judicial, administrative or congressional proceeding.[117] After a formal investigation or proceeding has begun, obstructive conduct evidently falls beyond the scope of section 1510, and must be prosecuted under section 1503 or section 1505. One court of appeals, however, has held that conviction under section 1510 for conduct occurring subsequent to the original indictment is not foreclosed simply because a judicial trial has commenced.[118]

Because so few courts have construed section 1510, its limits are unclear. By analogous reasoning, however, a court is likely to find that deliberate destruction of documents violates section 1510 if it occurs before proceedings have begun and is intended to prevent the communication of incriminating information to government investigators. Thus, where agency or congressional action remains speculative, a court which dismisses an indictment under section 1505 might nevertheless find an offense under section 1510.

Although an agency inquiry does not qualify as a judicial proceeding under section 1503,[119] it may ripen into such a proceeding if agency officials apply for subpoenas, regardless of any direct grand jury involvement.[120] In such a case, destruction of documents could be prosecuted under section 1503 as well as under 1505.

From the perspective of the party destroying documents, the timing of his

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114 United States v. Cameron, 460 F.2d 1394 (5th Cir. 1972). The circuits disagree on the intended beneficiaries of the statutory protections. *See, e.g.,* United States v. Cuesta, 597 F.2d 903 (5th Cir. 1979) (designed to protect individuals, whether witness or informants, assisting federal investigation), *cert. denied,* 444 U.S. 964 (1979); *cf.* United States v. Fraley, 538 F.2d 626 (4th Cir. 1976) (primary subject of protection is transmission of words of prospective informant or witness, not investigator's safety).

115 *See, e.g.,* United States v. San Martin, 515 F.2d 317 (5th Cir. 1975) (government must prove defendant knew or reasonably believed recipient of threat had information she had furnished or would furnish investigators and that defendant threatened to prevent communication); United States v. Lippman, 492 F.2d 314, 317 (6th Cir. 1974) (defendant must have actual knowledge that intended recipient of information was federal criminal investigator), *cert. denied,* 419 U.S. 1107 (1975). *But see* United States v. Kozak, 438 F.2d 1062 (3d Cir. 1971) (requisite endeavor exists where defendant reasonably believed the informant would transmit the information, even absent proof defendant actually knew the informant had or would do so), *cert. denied,* 402 U.S. 996 (1971).

116 *See* United States v. Carleo, 576 F.2d 846 (10th Cir. 1978) (government must prove specific intent to obstruct justice), *cert. denied,* 439 U.S. 850 (1978); United States v. St. Clair, 552 F.2d 57 (2d Cir. 1977) (no requirement that same person seeking to obstruct also make misrepresentations to potential witness, since endeavor suffices) (citing legislative history of "misrepresentation" in H.R. REP. No. 658, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. Code Cong. & Adm. News 1760, 1762), *cert. denied,* 433 U.S. 909 (1977). *Cf.* United States v. Williams, 470 F.2d 1339 (8th Cir. 1973) (proof of proscribed conduct without scienter to obstruct passage of information will not sustain § 1510 conviction), *cert. denied,* 411 U.S. 936 (1973). *See also* United States v. Carzoli, 447 F.2d 774 (7th Cir. 1971) (immaterial whether victim actually feels threatened, since success is not required), *cert. denied,* 404 U.S. 1015 (1972).

117 United States v. Lippman, 492 F.2d 314 (6th Cir. 1974), *cert. denied,* 419 U.S. 1107 (1975).

118 United States v. Koehler, 544 F.2d 1326, 1330 (5th Cir. 1977).

119 United States v. Simmons, 591 F.2d 206 (3d Cir. 1979); *accord,* United States v. Ryan, 455 F.2d 728 (9th Cir. 1972) (investigating agencies not judicial arms of the government).

120 United States v. Simmons, 591 F.2d 206.

conduct is critical since at some point it ceases to be routine business behavior and raises the spectre of criminal liability. However, the timing of obstructive conduct is only one element, albeit a potentially dispositive one, of the obstruction offense.

The remaining elements of the three offenses should also be considered before disposing of documents, and warrant examination.

4. Elements of the Offense Under Sections 1503, 1505 and 1510.

Although the statutes do not enumerate all the elements of an obstruction of justice offense, the case law sets forth the requirements for a section 1503 violation.[121] These requirements have not yet been applied explicitly to destruction of documents cases brought under section 1505 or section 1510, but they undoubtedly apply to obstructive acts occurring during pending or ongoing criminal investigations or judicial, administrative or congressional proceedings. In 1978, the Third Circuit summarized section 1503's requirements as follows:

> A person who knows that a Federal Grand Jury is investigating certain possible violations of federal law, and who 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 . . . properly be convicted of obstruction of justice under 18 U.S.C. § 1503.[122]

The court found criminal culpability unaffected by the fact that the defendant induced another to destroy the incriminating letter rather than destroying it himself.[123] This refusal to distinguish between the party who performs the destructive act and the party who advises that the act be performed finds support in statutes, cases and ethical writings.[124] A lawyer consequently risks pros-

121 United States v. Haas, 583 F.2d 216, 220 (5th Cir. 1978) (although statute fails to require "knowledge" and "intent," both are essential elements), *cert. denied,* 440 U.S. 981 (1979). Because the statutes are silent, courts have held that indictments in the words of the statutes will state a claim, despite failure to allege elements necessary to prove the offense. *See, e.g.,* United States v. Tallant, 407 F. Supp. 878 (N.D. Ga. 1975) (unnecessary to allege intent), *aff'd* 547 F.2d 1291 (5th Cir.), *cert. denied,* 437 U.S. 889 (1977); United States v. Zolli, 51 F.R.D. 522, 526 (E.D.N.Y. 1970) (unnecessary to allege defendant's knowledge that person he endeavored to influence was witness). *Cf.* United States v. Haas, 583 F.2d 216 (5th Cir. 1978) (indictment need not contain specific words, but must recite facts and use language showing knowledge and intent), *cert. denied,* 440 U.S. 981 (1979); Knight v. United States, 310 F.2d 305 (5th Cir. 1962) (indictment need not allege defendant's success). *Accord,* United States v. Mitchell, 372 F. Supp. 1239, 1253 (S.D.N.Y.) (indictment need not allege means by which offense accomplished, but must contain elements sufficient to apprise defendant of charges), *appeal dismissed sub nom.* Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973).

122 United States v. Fineman, 434 F. Supp. 197, 202 (E.D. Pa. 1977), *aff'd mem.,* 571 F.2d 572 (3d Cir.), *cert. denied,* 436 U.S. 945 (1978).

123 *Id.*

124 *See, e.g.,* 18 U.S.C. § 2(b) (1976) and parallel state penal codes: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense . . . is punishable as a principal." *See also* Note, *Legal Ethics and the Destruction of Evidence,* 88 YALE L.J. 1665 (1979); Beckstrom, *supra* note 26. For a discussion of the ethical implications, *see* Shipman, *Professional Responsibilities of the Corporations Lawyer,* in PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS, 271-309 (A.B.A. Press 1978). The author states that "[i]f counsel believes that a plan, though arguably legal, is more likely than not illegal (as opposed to more likely than not legal), I seriously doubt that he has established a good faith shield to protect himself from aider and abettor liability in civil actions and to keep himself within his malpractice policy or its indemnification provision." *Id.* at 297. In a criminal setting, the burden of proof is on the government, once it has proven that a third person has endeavored to obstruct justice, to connect the defendant with the principal as aider and abettor. United States v. Hoffa, 349 F.2d 20, 40 (6th Cir. 1965), *aff'd,* 385 U.S. 293 (1966). Where an attorney's conduct would fall short of a criminal violation, ethical sanctions might be imposed.

ecution as a possible conspirator or aider and abettor if he recommends an act of destruction which is later found punishable. However, in no reported case has a lawyer been convicted for advising destruction of evidence unless his actions were so egregious as to leave no doubt of personal guilt. A lawyer may also run afoul of ethical obligations by allowing his client to commit an illegal act. As discussed in section VI of this article, the A.B.A. Code of Professional Responsibility has not proven an effective tool for guiding ethical conduct in this area.

Regardless of who destroys the documents, that person may not be convicted under any of the obstruction of justice statutes unless he is found to have possessed specific criminal intent.[125] This element of the offense has received extensive judicial analysis. The courts have divided on whether the defendant must specifically intend to obstruct justice,[126] or merely perform an act which he reasonably should know tends to impede the administration of justice.[127] The most recent judicial pronouncement adopts the latter view, declaring the defendant's intent irrelevant if the natural result of his effort interferes with judicial process.[128] In *United States v. Neiswender,* the Fourth Circuit stated that to satisfy the intent requirement "the defendant need only have knowledge or notice that success in his fraud would have likely resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one's acts."[129] The court noted that its "foreseeability" standard more effectively deters obstructive conduct.[130]

The implications of the *Neiswender* approach are troublesome. Eliminating any inquiry into the "subtleties of specific intent" drastically, and perhaps impermissibly, alters the nature of the offense. If the scienter requirement is removed, a person would be subject to criminal penalties for disposing of documents if (1) the person intended to commit the act of destruction, and (2) he should reasonably have foreseen that the conduct would thwart the process

125 The circuits generally agree that a corrupt purpose is an element of specific intent, but there is considerable variation as to whether the corrupt motive must be exclusive, predominant or may be inferred from the endeavor to obstruct justice. *See, e.g.,* United States v. Ogle, 613 F.2d 233, 239, 242 (10th Cir. 1979) (force or threats need not be used to establish corrupt endeavor, nor must there be evil purpose or fiendish motive); United States v. Baker, 611 F.2d 961, 968 n.3 (4th Cir. 1979) (attorney advising prosecuting witness against testifying may still violate § 1503 even where motive is to protect client and safeguard interests of witnesses); United States v. Howard, 569 F.2d 1331, 1336 n.9 (5th Cir. 1978) (section 1503 covers the conduct only if offending action was prompted, at least in part, by "corrupt" motive), *cert. denied,* 439 U.S. 834 (1978); United States v. Haldeman, 559 F.2d 31, 114 n.226 (D.C. Cir. 1976) (specific intent requires knowingly committing an act with a corrupt purpose), *cert. denied,* 431 U.S. 933 (1977); United States v. Fayer, 523 F.2d 661 (2d Cir. 1975) (whether defendant endeavored to act corruptly is mixed question of law and fact and trial judge probably misconstrued § 1503 to require predominant or exclusive corrupt motive; but to remand for findings of motive alone would violate double jeopardy clause); United States v. Cohen, 202 F. Supp. 587 (D. Conn. 1962) ("corruptly" includes any endeavor to influence a witness or to obstruct justice). The endeavor element renders § 1503 very similar to a criminal solicitation statute which does not require proof to support a charge of attempt. United States v. Fasolino, 586 F.2d 939 (2d Cir. 1978). *Accord,* United States v. Lazzerini, 611 F.2d 940 (1st Cir. 1979).

126 *See, e.g.,* Pettibone v. United States, 148 U.S. 197 (1893); Knight v. United States, 310 F.2d 305 (5th Cir. 1962); Ethridge v. United States, 258 F.2d 234, 235 (9th Cir. 1958).

127 *See, e.g.,* United States v. Johnson, 585 F.2d 119, 128 (5th Cir. 1978); United States v. Harris, 558 F.2d 366, 369 (7th Cir. 1977).

128 United States v. Neiswender, 590 F.2d 1269, 1274 (4th Cir.), *cert. denied,* 441 U.S. 963 (1979).

129 *Id.* at 1273. The Court of Appeals also approved the jury instruction that it is reasonable to infer a person intends the natural and probable consequences of acts knowingly done or undertaken. *Accord,* United States v. Ogle, 613 F.2d 233 (10th Cir. 1979).

130 *See* note 128 *supra. See also* United States v. Griffin, 589 F.2d 200 (5th Cir. 1979) (government must charge and prove that consequences of false testimony impeded justice), *cert. denied,* 100 S. Ct. 48 (1980).

of justice. Ultimate liability would depend on whether a proceeding ensued and the relevancy of the document to the proceeding. Although no court has imposed criminal sanctions absent proof of specific intent, the Supreme Court declined the opportunity to clarify the intent requirement by denying certiorari in *Neiswender*.

Success is not at present a required element of an obstruction offense.[131] The corrupt endeavor alone, regardless of it results, constitutes the offense.[132] The rationale for this position appears to be that even a person who fails in his attempt to obstruct the process of justice has sufficiently compromised the integrity of the process to warrant criminal sanction. This position is questionable, since a person whose obstructive efforts are thwarted sufficiently early fails to interfere with the "due administration of justice." Yet, even in cases where the obstructive efforts have been stymied, the courts have punished the attempt either as a substantive offense or as a conspiracy to defraud the United States.[133]

Occasionally, trial courts instruct juries to consider all circumstantial evidence in determining specific intent.[134] A person whose intentions are ambiguous is more likely to be convicted under such an instruction, particularly if he destroyed documents selectively rather than pursuant to a routine program. Circumstances which might increase the likelihood that a jury will find criminal intent include hiring outside counsel to conduct an internal investigation, irregularly searching files, selectively destroying confusing or misleading documents, and destroying documents after receipt of cues from an agency or congressional committee. Although none of these actions by itself suffices to establish an intent to obstruct justice, in the aggregate they may create the impression that such intent exists.[135]

B. *Federal Law: Collateral Charges*

Destruction of documents may be prosecuted not only under the general obstruction of justice statutes but also under statutory provisions criminalizing conspiracy,[136] contempt of court,[137] false statements,[138] and misprision of

131 *See, e.g.*, United States v. Ogle, 613 F.2d 233 (10th Cir. 1979); United States v. Baker, 611 F.2d 961 (4th Cir. 1979); United States v. McCarty, 611 F.2d 220 (8th Cir. 1979), *cert. denied*, 100 S. Ct. 1319 (1980); United States v. Shoup, 608 F.2d 950 (3d Cir. 1979); United States v. Jackson, 607 F.2d 1219 (8th Cir. 1979), *cert. denied*, 100 S. Ct. 1032 (1980); United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976); United States v. Cioffi, 493 F.2d 1111 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974). Since success is not an element, it is no defense that the endeavor failed. *See* United States v. Fasolino, 586 F.2d 939 (2d Cir. 1978) (*citing* United States v. Russell, 255 U.S. 138, 143 (1921); W. LaFave & A. Scott, Jr., Handbook on Criminal Law § 58 (1972).

132 *But see* United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956) (success may aggravate the offense).

133 *See, e.g.*, United States v. Shoup, 608 F.2d 220 (8th Cir. 1979) (defendant still guilty of endeavor to obstruct justice and conspiracy despite fact that prior to releasing his distorted report, U.S. Attorney became aware and withheld report from pending grand jury).

134 *See, e.g.*, United States v. White, 557 F.2d 233 (10th Cir. 1977). *See also* United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (proper to charge jury to consider all circumstances surrounding obstruction charge in determining specific intent), *cert. denied*, 431 U.S. 933 (1977).

135 For a general discussion of suppression of evidence by the prosecution *see* Comment, *Judicial Response to Governmental Loss or Destruction of Evidence*, 39 U. Chi. L. Rev. 542 (1972). *See also* American Friends Service Committee v. Webster, 485 F. Supp. 222 (D.D.C. 1980).

136 18 U.S.C. § 371 (1976).

137 18 U.S.C. § 401 (1976).

138 18 U.S.C. § 1001 (1976).

felony.[139] Prosecution is also possible under the Federal Trade Commission Act,[140] which criminalizes mutilation, alteration or other falsification of certain documentary evidence.

1. Section 371: Conspiracy

Actions brought under the obstruction statutes for destruction of documents are often accompanied by charges of conspiracy to defraud the United States.[141] Under section 371 any conspiracy to defraud or commit an offense against the United States is rendered illegal.[142] A conspiracy exists only if there is (1) an agreement, (2) an overt act by one of the conspirators in furtherance of the conspiracy's objectives, and (3) an intent on the part of the conspirators to defraud the United States.[143]

The Department of Justice has brought conspiracy charges against persons who selectively destroy corporate records after a subpoena has been issued.[144] It is especially likely to bring such charges when the obstruction has been thwarted or an essential element of the substantive offense is missing. Yet conspiracy charges are difficult to prove, and may unnecessarily complicate the prosecution's task since conspiracy requires proof of three elements while obstruction only requires proof that a single person acted deliberately to obstruct justice.

2. Section 401: Contempt

Courts have held parties in criminal contempt for destruction of documents amounting to an obstruction of justice. Section 401[145] allows the courts to punish anyone who disobeys court orders, including subpoenas and grand jury subpoenas.[146]

Many jurisdictions regard section 401 and section 1503 as parallel con-

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139 18 U.S.C. § 4 (1976).

140 15 U.S.C. § 50 (1976).

141 *See* Baker, *supra* note 3, at 38.

142 18 U.S.C. § 371 (1976) (Conspiracy To Commit Offense or To Defraud United States) provides that:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

143 United States v. United States Gypsum Co., 438 U.S. 422, 443 n.20 (1978) (*citing* W. LaFave & A. Scott, Jr., *supra* note 131 § 61, at 464-65 (1972); United States v. Shoup, 608 F.2d 950 (3d Cir. 1979); United States v. Bonanno, 177 F. Supp. 106 (S.D.N.Y. 1959), *rev'd on other grounds sub nom.* United States v. Buffalino, 285 F.2d 408 (2d Cir. 1960).

144 United States v. Treadway, Crim. No. 3-77-308 (N.D. Tex. Sept. 13, 1977); United States v. Turen, Crim. No. 74-172 (D.N.J. May 16, 1974).

145 18 U.S.C. § 401 (1976) (Power of Court) provides that:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of it authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

146 *See generally* R. Borow and S. Baskin, *supra* note 1, at 231-33; Baker, *supra* note 3, at 39.

tempt statutes since they derive from the same congressional act. The statutes differ in significant respects, however. The obstruction statute concerns out-of-court conduct, and requires an indictment and trial. The contempt statute concerns in-court conduct and conduct in defiance of court orders,[147] and permits summary punishments when the government chooses not to prosecute the conduct.[148] Despite these differences, the two offenses often overlap, enabling the government to proceed under either or both statutes.

Contempt is committed when a court orders documents produced and a party defies the order by deliberately destroying the requested documents. Obstruction of justice is committed when a party pursues "affirmative conduct," such as destruction, concealment or removal of documents, regardless of where that conduct occurs. In one document destruction case, the Third Circuit found convictions for violations of both statutes permissible, if not appropriate.[149]

The government may, however, elect to proceed under both statutes for a single offense. The mere fact that a statutory provision punishes certain conduct does not render that provision the exclusive mode of punishment unless the provision so requires.[150] The courts have found nothing in the legislative history of section 401 indicating a congressional intent to prohibit prosecutions under section 1503 even of conduct clearly punishable as contempt.[151] On the contrary, statements of legislative purpose indicate that section 401 was enacted to curb the contempt power of federal courts.[152] To prohibit the government from proceeding concurrently under parallel statutes, such as section 401 and 1503, would thus contravene congressional intent.

The contempt sanction of section 401(3) is available for punishing deliberate destruction of subpoenaed documents regardless of where the destructive act occurred. However, absent lawful process, section 401(1) may be invoked only against misconduct occurring in or near a courthouse. This

147 *See, e.g.,* United States v. Simmons, 591 F.2d 206 (3d Cir. 1979); United States v. Howard, 569 F.2d 1331 (5th Cir.) *cert. denied,* 439 U.S. 834 (1978); United States v. Harris, 558 F.2d 366 (7th Cir. 1977); United States v. Walasek, 527 F.2d 676 (3d Cir. 1975); United States v. Essex, 407 F.2d 214 (6th Cir. 1969).

148 United States v. Howard, 569 F.2d 1331, 1336 (5th Cir.), *cert. denied,* 439 U.S. 834 (1978). *See also* Kuhns, *The Summary Contempt Power: A Critique and a New Perspective,* 88 YALE L.J. 39 (1978).

149 United States v. Walasek, 527 F.2d 676, 680 (3d Cir. 1975). If the subpoenaed party were also a witness he might risk immediate confinement under 28 U.S.C. § 1826(a) (1976), which states that:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such times as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions,
>
> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

150 Nye v. United States, 313 U.S. 33, 49 (1941); Pettibone v. United States, 148 U.S. 197 (1893); *Ex parte* Savin, 131 U.S. 267 (1889); United States v. Harris, 558 F.2d 366 (7th Cir. 1977) United States v. Walasek, 527 F.2d 676, 680 (3d Cir. 1975); United States v. Zouras, 497 F.2d 1115, 1121 n.16 (7th Cir. 1974); United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973).

151 United States v. Harris, 558 F.2d 366 (7th Cir. 1977); United States v. Walasek, 527 F.2d 676, 680 (3d Cir. 1975); United States v. Essex, 407 F.2d 214 (6th Cir. 1969).

152 United States v. Harris, 558 F.2d 366 (7th Cir. 1977) (*citing* United States v. Essex, 407 F.2d 214 (6th Cir. 1969)).

geographic limitation severely restricts the contempt power as a penalty for document destruction, since such conduct is unlikely to be pursued in close proximity to a court.[153] However, on rare occasions outside the document destruction context, the courts have relaxed the physical proximity requirement, and sustained contempt of court convictions for out-of-court conduct even where no court order had been issued.[154]

In another extension of the contempt power, courts have punished those who either refuse to respond to questions concerning destruction of documents or who respond falsely.[155] Had defendants in these cases destroyed the documents to avoid compliance with an outstanding subpoena, section 401(3) would have been violated. Even without the subpoena, it is arguable that such conduct constitutes contempt whether committed in a courtroom, before a congressional committee or during informal communications with a judge.

An unresolved question is whether misleading replies concerning the underlying prohibited act constitute obstruction of justice as well as contempt of court. A compelling argument can be made that a company which falsely states that it has destroyed documents obstructs justice to the same extent as if it had actually destroyed them, since the documents are equally unavailable in either case. Until recently the courts uniformly rejected this argument, holding that the language of the obstruction and contempt statutes did not apply to merely rendering false statements.[156] In 1979, however, the Fifth Circuit held perjury to be included within the omnibus clause of section 1503.[157] Thus, the courts are currently split on whether perjury alone will sustain a conviction for obstructing justice.

It is unsettled whether a company may be prosecuted under the obstruction statute for completely refusing to answer formal or possibly informal inquiries concerning document destruction. While such silence may qualify as contemptuous conduct, fifth amendment problems arise in classifying silence as an affirmative act of interference. Several courts have held section 1503 to be violated when the defendant went beyond suggesting that a witness invoke the fifth amendment and engaged in concerted, corrupt efforts to persuade the witness to remain silent.[158] Thus, while a person who invokes the fifth amend-

153 *See* Nye v. United States, 313 U.S. 33 (1941); *accord,* Millinocket Theatre, Inc. v. Kurson, 39 F. Supp. 979 (D. Me. 1941) (district court found it lacked authority to punish for criminal contempt where accused instructed secretary to destroy documents after learning his deposition would be taken, but before formal process issued). For another limitation on the scope of the contempt power, *see* International Union (UAW) v. NLRB, 459 F.2d 1329, 1338-39 (D.C. Cir. 1972) (adverse inference rule is available to court where enforcement of a contempt order would be both awkward and expensive).

154 United States v. Friedman, 445 F.2d 1076, 1078 (9th Cir.) (defendants convicted under § 401 for possessing and disclosing unreleased grand jury transcripts despite contempt perpetrated out of court), *cert. denied,* 404 U.S. 958 (1971). Presser v. United States, 284 F.2d 233 (D.C. Cir. 1960) (union official convicted for contempt for refusal to answer Senate Committee question concerning his destruction of documents subsequent to receiving Committee's subpoena), *cert. denied,* 365 U.S. 816 (1961).

155 Presser v. United States, 284 F.2d 233 (D.C. Cir. 1960), *cert. denied,* 365 U.S. 816 (1961).

156 "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore, it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process." *In re* Michael, 326 U.S. 224, 227 (1941) (Black, J.). *See also,* United States v. Essex, 407 F.2d 214 (6th Cir. 1969) (false testimony alone will not amount to contempt of court or obstruction of justice). *Accord,* Nye v. United States, 313 U.S. 33 (1941); *Ex parte* Hudgings, 249 U.S. 378 (1919); United States v. Goldstein, 158 F.2d 916 (7th Cir. 1947); United States v. Campbell, 350 F. Supp. 213 (W.D. Pa. 1972).

157 United States v. Griffith, 589 F.2d 200 (5th Cir. 1979), *cert. denied,* 100 S. Ct. 48 (1980).

158 *In re* Taylor, 567 F.2d 1183, 1192 n.8 (2d Cir. 1977); United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); United States v. Fayer, 523 F.2d 661 (2d Cir. 1975); United

ment and refuses to testify concerning destruction of documents is answerable only for contempt, an attorney who corruptly advises that person not to respond to questions about document destruction risks prosecution under both the obstruction and the contempt statutes.

3. Section 1001: False Statements

The general false-statements statute[159] concerns prosecution for false statements to the government. Although this statute has not been applied to destruction of documents, one author suggests it could be so used, particularly if a party fails to answer an antitrust civil investigative demand correctly in explaining how his documents have been destroyed.[160]

4. Section 4: Misprision of Felony

The government has brought actions for conduct that obstructs justice under section 4,[161] the misprision of felony statute.[162] This provision criminalizes concealment of a felony, and does not require that an investigation or proceeding be pending. To obtain a conviction under section 4 the government must prove that: (1) the principal has committed the felony alleged; (2) the accused had full knowledge of the fact of the crime; (3) the accused failed to disclose the crime to authorities; and (4) the accused affirmatively concealed the crime by suppressing evidence, intimidating witnesses or committing perjury.[163] The Fifth Circuit has held that no misprision of felony occurs when the defendant failed to report a felony but did not engage in a positive act of concealment.[164] Some appellate courts imply that the party's intent determines whether concealment occurred.[165] In the destruction of documents context, the existence of a routine destruction program would seem to indicate an intent to eliminate obsolete records rather than an intent to conceal a felony. The misprision of felony statute is rarely enforced, and repeated proposals have been made to repeal it.[166]

States v. Cioffi, 493 F.2d 1111 (2d Cir.), *cert. denied,* 419 U.S. 917 (1974); Cole v. United States, 329 F.2d 437 (9th Cir.), *cert. denied,* 377 U.S. 954 (1964). *See also* United States v. Schwartzbaum, 527 F.2d 249 (2d Cir. 1975), *cert. denied,* 424 U.S. 942 (1976); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975) (per curiam), *cert. denied,* 423 U.S. 1050 (1976); United States v. Marionneaux, 514 F.2d 1244 (5th Cir. 1975).

159 18 U.S.C. § 1001 (1976) (Statements or Entries Generally) provides that:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

160 Baker, *supra* note 3, at 39.

161 18 U.S.C. § 4 (1976) (Misprision of Felony) provides that:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

162 *See* Baker, *supra* note 3, at 39; B. Lipson, *supra* note 26.

163 United States v. Hodges, 566 F.2d 674 (9th Cir. 1977); Sullivan v. United States, 411 F.2d 556 (10th Cir. 1969); Neal v. United States, 102 F.2d 643 (8th Cir. 1939), *cert. denied,* 312 U.S. 679 (1941).

164 United States v. Johnson, 546 F.2d 1225 (5th Cir. 1977).

165 *See, e.g.,* United States v. King, 402 F.2d 694 (9th Cir. 1968).

166 Both the ALI Model Penal Code and the United States National Commission on Reform of Federal Criminal Laws FINAL REPORT proposed replacing the misprision offense with hindering law enforcement and aiding consummation of crime provisions. MODEL PENAL CODE § 242.3 (Proposed Official Draft 1962); FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS §§ 1303-1304 (1971).

C. *State Law*

Many of the states which have enacted legislation dealing with destruction of documents or tampering with physical evidence impose requirements more stringent than those found in the federal obstruction statutes.[167] Other states' provisions simply parallel the federal laws.[168]

The Model Penal Code provision, enacted in several states with slight variations, makes document destruction a misdemeanor where a person "believing that an official proceeding or investigation is pending or is about to be instituted . . . alters, destroys, conceals or removes any records, document or thing with purpose to impair its verity or availability in such proceeding or investigation."[169] New York's statutory language is similar, except that the proscribed conduct is a felony.[170] Other states criminalize only the destruction of physical evidence admissible in another's trial for a public offense,[171] leaving unaffected destruction of documents relevant to proceedings and investigations by agencies, grand juries or legislative committees.[172] Several states go beyond the Model Code by emphasizing a person's intent rather than the timing or nature of the proceeding. These states criminalize document destruction if the person who destroys the documents does so with the intent to hinder the administration of law,[173] to injure or defraud,[174] to prevent production,[175] or to impair the verity, legibility, or availability of the documents.[176]

The states classify document destruction from a misdemeanor (including aggravated and gross)[177] to various grades of felony.[178] Some, including Arkansas and Missouri, punish as a felony destruction which obstructs the prosecution or defense of a felony, while punishing as a misdemeanor other tampering with physical evidence.[179] Perhaps the broadest statute, enacted in Nevada, states that "every person who, with the intent to hinder the administration of the law or to prevent the production thereof *at any time,* . . . shall willfully destroy . . . any book, paper . . . or thing"[180] is guilty of a gross misdemeanor.

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167 For a discussion of the state statutes *see* Note, *supra* note 118, at 1671-72.

168 *See, e.g.,* R.I. GEN. LAWS § 11-32-3 (Supp. 1979); KAN. STAT. ANN. § 21-3816 (1974).

169 MODEL PENAL CODE § 241.7 (Proposed Official Draft 1962). *Cf.* FLA. STAT. § 918.13(A) (1973) (third-degree felony for person who *knows* proceeding is pending or about to be and destroys).

170 N.Y. PENAL LAW § 215.40(2) (McKinney 1975). *See* People v. Nicholas, 70 A.D.2d 804, 417 N.Y.S.2d 495 (1979) (tampering with evidence charge valid where defendant allegedly moved dead body despite absence of proceeding pending with reference to the body), *rev'g* 93 Misc. 2d 1037, 403 N.Y.S.2d 683 (1978). *Cf.* CAL. PENAL CODE § 135 (West 1976) (misdemeanor for person who, knowing document is about to be produced in evidence, destroys to prevent availability). *See also* People v. Superior Court of Santa Clara County, 53 Cal. App. 3d 40, 125 Cal. Rptr. 504 (1975) (criminal offense to destroy or conceal evidence).

171 *See, e.g.,* IOWA CODE ANN. § 719.3(1) (West 1979).

172 *See, e.g.,* FLA. STAT. § 918.13(1)(A) (1973).

173 NEV. REV. STAT. § 199.220 (1979).

174 MINN. STAT. ANN. § 609.63(1)(7) (West 1964) (forgery provision (including document destruction) imposes either prison sentence of no greater than three years or fine or both).

175 IND. CODE ANN. § 35-44-3-4(b)(1) (Burns 1979); ALASKA STAT. § 11.56.610(A)(1) (Supp. 1978) (effective Jan. 1, 1980).

176 MO. ANN. STAT. § 575.100 (West 1979); ARK. STAT. ANN. § 41-2611 (Bobbs-Merrill 1977).

177 *See, e.g.,* IND. CODE § 35-44-3-4(b)(1) (1980 Supp.) (Class A misdemeanor); IOWA CODE ANN. § 719.3(1) (West 1979) (aggravated misdemeanor); NEV. REV. STAT. § 199.220 (1979) (gross misdemeanor).

178 FLA. STAT. ANN. § 918.13(1)(1) (West 1973) (third-degree felony); MO. ANN. STAT. § 575.100 (Vernon 1979) (Class D felony); N.Y. PENAL LAW § 215.40(2) (McKinney 1975) (Class E felony); ALASKA STAT. § 11.56.610 (A)(1) (1979) (Class C felony).

179 MO. ANN. STAT. § 575.100 (Vernon 1979) (Class D felony, Class A misdemeanor); ARK. STAT. ANN. § 41-2611 (1977) (Class D felony, Class B misdemeanor).

180 NEV. REV. STAT. § 199.220 (1979) (emphasis added).

D. *Provisions of the Proposed Federal Criminal Codes Applicable to the Destruction of Documents*

Because of criticism of sections 1503, 1505 and 1510,[181] Senate and House of Representatives bills proposing reformation of the federal criminal code include provisions which specifically define obstruction of justice and hindrance of law enforcement offenses. These provisions are applicable to the wrongful destruction of documents, and are analyzed below.

1. Status of Senate and House Bills Proposing Code Reformation

In 1966, Congress established the National Commission on Reform of Federal Criminal Laws (National Commission). After conducting a three and one-half year study of potential federal criminal code reforms, the National Commission submitted a final report to Congress.[182]

During the next nine years, various versions of a new federal criminal code were introduced in the Senate and House. The Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee and the full Committee held extensive hearings on various versions of the code.[183] The Subcommittee on Criminal Justice of the House Judiciary Committee held a series of informal briefing sessions followed by formal hearings.[184]

Despite the time and resources devoted to preparing and considering the various proposals, the bills introduced in the 93d and 94th Congresses failed to obtain support sufficient for passage in either House.[185]

When the 95th Congress convened, several members of the Senate and House Judiciary Committees and officials of the Department of Justice reached an agreement to develop a commonly acceptable version of a new criminal code. The agreement provided that particular code reform proposals which might result in protracted disputes would be put aside until the overall bill was passed. The troublesome reform proposals would be introduced separately at a later date. The result of this agreement was introduction of S. 1437 in the Senate and H.R. 6869 in the House. In January 1978, the Senate passed S. 1437 by a vote of 72 to 15. The 95th Congress ended without passage of a code bill in the House.

In the 96th Congress, a criminal code bill substantially similar to S. 1437, modified to negate some of the objections leveled against S. 1437, was introduced into the Senate as S. 1722. In December 1979, the Senate Judiciary Committee, by a 13-1 vote, ordered favorably reported a modified version of S.

181 *See* WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1970) [hereinafter cited as WORKING PAPERS].

182 FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1971) [hereinafter cited as FINAL REPORT].

183 Since February, 1971 the Senate has held 47 days of hearings on code reformation, producing a total of some 11,000 pages; over 200 witnesses have testified and six different bills have been considered.

184 In the 95th and 96th Congresses, the House Judiciary Subcommittee has held 37 days of hearings and 145 drafting sessions, resulting in 6,000 pages of testimony and debate. Over 135 witnesses have testified and six different bills have been considered.

185 The principal bill introduced in the 94th Congress, S. 1, was subject to widespread attack from the business community and interest groups concerned with invasions of civil liberties. Massachusetts Senator Edward Kennedy, one of the sponsors of S. 1722 (96th Cong., 1st Sess., 1979), the current Senate bill, was a leader in the fight to defeat S. 1.

1722. On January 17, 1980, S. 1722 was reported to the full Senate. Floor debate on this bill is anticipated during the fall of 1980. Because of the overwhelming support for S. 1437, S. 1722 is expected to be approved by the Senate.

The House version of a new criminal code was introduced as H.R. 6233. After extensive markup sessions, the bill was reported out of the House Judiciary Subcommittee by an 8-1 vote in March 1980 as H.R. 6915. Four months later, the House Judiciary Committee, by a 20-11 vote, ordered favorably reported a modified version of H.R. 6915. On September 25, 1980, H.R. 6915 was reported to the full House. Floor debate on the bill is expected in the fall of 1980.

S. 1722 and H.R. 6915 contain equivalent provisions applicable to destruction of, or tampering with, physical evidence. Both bills create independent offenses for coercing and bribing third persons to violate these principal provisions. Both bills include "catch-all" obstruction of justice provisions which could, but probably will not, be applied to the destruction of documents.

The provisions in the two bills applicable to document destruction differ in several respects. The House bill defines offenses more restrictively than the Senate bill, and requires a somewhat higher standard of culpability for tampering with physical evidence. In addition, the House bill more narrowly circumscribes the commonly employed preclusions of defenses based on nonadmissibility of evidence and nonexistence of a pending or likely proceeding. Finally, the number of circumstances which must be demonstrated for a conviction under some of the House provisions exceeds those required by parallel Senate provisions. These differences warrant independent analysis of each bill.

2. Provisions Applicable to Document Destruction in S. 1722

a. *Section 1325: Tampering with Physical Evidence*

Section 1325[186] is the principal provision in S. 1722 directed at the destruction of physical evidence. As introduced, section 1325 was identical to its predecessor in the bill passed by the Senate in the 95th Congress. The provision made altering, destroying, mutilating, concealing, or removing a document with the intent to impair its integrity or its availability for use in an of-

186 Section 1325 (Tampering with Physical Evidence) as contained in S. 1722 (96th Cong., 1st Sess., 1979) and reported out of the Senate Judiciary Committee reads as follows:

(a) Offense. A person is guilty of an offense if, knowing an official proceeding is pending or likely to be instituted, he alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in an official proceeding.

(b) Proof. In a prosecution under this section, evidence that the record, document, or other object was destroyed pursuant to a destruction program gives rise to a presumption that the destruction was not with intent to impair its integrity or its availability for use in an official proceeding.

(c) Defense Precluded. It is not a defense to a prosecution under this section that the record, document, or other object would have been legally privileged or would have been inadmissible in evidence.

(d) Grading. An offense described in this section is a Class E felony.

(e) Jurisdiction. There is federal jurisdiction over an offense described in this section if the official proceeding is or would be a federal official proceeding.

ficial proceeding a Class E felony.[187] The provision contained only one express *actus reus* element—impairment of physical evidence—and only one *mens rea* element—the intent to impair the integrity or availability of the physical evidence for use in any official proceeding. The provision explicitly precluded two conceivable affirmative defenses: that an official proceeding was not pending or about to be instituted, and that the documents were legally privileged or otherwise inadmissible in evidence. Finally, the provision limited federal jurisdiction to cases when the official proceeding involved "is or would be a federal official proceeding."[188]

In response to criticisms of the original section, several important changes were made to section 1325 during Committee markup. Representatives of the business and legal communities testified that the original section provided insufficient protection for organizations and individuals conducting regular document destruction programs. The Business Roundtable argued that, because of the massive volume of "normal" document destruction in the business world, destruction of documents is an inherently ambiguous activity.[189] The American Bar Association argued that an actor's purpose in destroying documents should be illegitimate only if he reasonably believed that an official proceeding is pending or about to be instituted.[190] These groups urged that section 1325 be modified to require such belief as an element of a violation.[191] This suggested revision mirrored the National Commission's proposal which was designed to reduce the possibility of "dangerously unfair speculation concerning defendant's purpose in destruction cases."[192]

Persuaded by these criticisms, the Judiciary Committee amended section 1325 to require as a second *mens rea* element that the defendant know an official proceeding is either pending or likely to be instituted. The Committee amended the section in two other respects to achieve consistency with this new element. First, it removed the provision precluding the defense that an official proceeding was not pending or about to be instituted. Since under the amendment the defendant's knowledge of the existence of an official proceeding is an essential element, the fact that such a proceeding is not pending or likely is a legitimate defense. Second, the Committee amended the section to provide that where evidence is destroyed pursuant to a destruction program, a presumption exists that the actor did not have the requisite intent to impair the integrity or availability of the evidence. This presumption forces the government to prove

187 Section 2301(b)(5) provides that conviction for a Class E felony may result in imprisonment for a period not to exceed two years. Section 2101(b)(1) authorizes a term of probation for felony convictions of not less than one nor more than five years. Section 2103(b) sets out the various discretionary conditions that could be imposed pursuant to a sentence of probation, including payment of a fine according to the provisions of chapter 22. Section 2201(b) authorizes a fine not to exceed $1,000,000 for an organization convicted of a felony and not more than $250,000 for an individual. Section 2001(c) provides that an organization found guilty of an offense shall be sentenced to a term of probation as authorized by chapter 21 and/or a fine as authorized by chapter 22. Chapters 20 through 23 should be consulted for an analysis of the sentencing process in the proposed code.

188 S. 1722, 96th Cong., 1st Sess. § 1325(e) (1979).

189 *See Reform of the Federal Criminal Laws: Hearings on S. 1722 and S. 1723 Before the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. 10,078 (1979) [hereinafter cited as *1979 Hearings*] (Statement of Irving S. Shapiro on behalf of the Business Roundtable).

190 *See id.* at 9978 (testimony of George Freeman on behalf of the A.B.A. Corporation, Banking and Business Law section); *see also* Note, *Report on Proposed Federal Criminal Code,* 34 Bus. Law. 725, 790 (1979).

191 *See 1979 Hearings, supra* note 189.

192 I WORKING PAPERS, *supra* note 181, at 575.

that an illegitimate purpose underlies what is otherwise an inherently ambiguous activity.[193] The amendment was in response to testimony that document destruction is an integral component of "normal" business activity and that safeguards are required to ensure that innocent impairment of physical evidence is not criminalized.[194]

As reported out of the Senate Judiciary Committee, section 1325 contains only one *actus reus* element, the tampering with physical evidence. However, three interrelated *mens rea* elements must accompany the unlawful conduct. The *mens rea* components are designed to restrict prosecutions to occasions where the destruction of documents was intended to thwart an official proceeding.[195]

The first *mens rea* which must accompany tampering with physical evidence is specific *intent*[196] to impair the integrity or availability of the evidence for use in a judicial proceeding; the second is *knowledge*[197] that an official proceeding is pending or likely to be instituted. Proof of these two mental states would ordinarily not occur by independent means. For example, establishing knowledge of a pending or likely proceeding would go a long way toward proving the requisite intent to disrupt an official proceeding.

The third *mens rea* element is implied in section 1325. Although the section does not specifically prescribe a culpability standard with respect to physically tampering with evidence,[198] section 303(b) states that if an element of an offense is described without requiring a specific state of mind, the state of mind with respect to that conduct must be "knowing." Thus, the *mens rea* applicable to tampering with evidence requires that the offender be aware he was destroying or tampering with a particular document. Proof of this "knowing" state of mind is dependent on proof of the other *mens rea* elements. For example, proof that an actor knew of an ongoing official proceeding would suggest that the actor was "aware" he was destroying or tampering with a particular document when he acted.

The greatest uncertainty regarding the elements of a section 1325 offense concerns whether the presence of a pending or likely official proceeding is required. Section 1325(a) literally requires only knowledge of a pending or likely proceeding. Since section 302 defines knowledge as awareness or belief that a circumstance exists, the precise wording of section 1325 evidently requires only that the actor believe a proceeding is pending or likely in order to commit an offense, regardless of whether his belief is justified.

However, the Judiciary Committee has interpreted section 1325 as requiring that a proceeding in fact be pending or likely. The Senate Report on S. 1722 states that "[i]t is the intent to impair the ultimate availability for use of

193 *Report of the Senate Comm. on the Judiciary to Accompany S. 1722,* S. REP. No. 553, 96th Cong., 2d Sess. 336 (1980) [hereinafter cited as *Senate Report on S. 1772*].

194 *See 1979 Hearings, supra* note 189, at 9979 (testimony of George Freeman).

195 *See* I WORKING PAPERS, *supra* note 181, at 575-76.

196 Under § 302(a)(2) a person's state of mind is "intentional" with respect to a result of his conduct if it is his conscious objective or desire to cause the result. Feinberg, *Toward a New Approach to Proving Culpability:* Mens Rea *and the Proposed Federal Criminal Code,* 18 AM. CRIM. L. REV. 123 (1980).

197 Section 302(b) provides that a person's state of mind is "knowing" with respect to an existing circumstance if he is aware or believes that the circumstance exists. Feinberg, *supra* note 196 at 132.

198 *See Senate Report on S. 1722, supra* note 193, at 336.

the object in a proceeding that is in being or likely to be instituted that is the focus of this section.''[199] The Senate Report goes on to specify that document destruction will not violate the section unless the actual pendency or likelihood of a proceeding is proven.[200]

Distinguishing between proof of knowledge of a proceeding and proof of the existence of a proceeding may exalt form over substance, since it is difficult to prove the former without proving the latter. As the National Commission noted, ''proof of belief will usually depend on what actually fostered the belief—a proceeding, pending or contemplated.''[201] Thus, proof of the existence of a pending or likely proceeding would ordinarily form the basis for demonstrating the actor's knowledge of that proceeding.

However, in some circumstances the additional requirement of proving the existence of a proceeding might be significant. For example, if an actor's attorney mistakenly advises that an official proceeding is likely, the actor might destroy documents under this assumption.[202] Under the Senate Report's formulation, this behavior would not appear culpable because there is, in fact, no pending or likely proceeding. Under the literal terms of the provision, however, the behavior would be culpable since at the time it occurred the actor believed a proceeding was likely to be initiated. Thus, potential violators are granted less protection under a literal interpretation of the statute than under the Judiciary Committee's interpretation.

Subsection (b) of section 1325 creates a presumption that document destruction occurring in the ordinary course of business pursuant to a ''regular'' destruction program has a legitimate purpose. A party who destroys documents under these circumstances is presumed not to have the requisite specific intent to prevent the documents' use in an official proceeding.[203] This provision should bar successful prosecutions where records have been destroyed pursuant to a ''regular'' program. Specific intent to hamper an official proceeding is an essential element of a section 1325 violation, and as such must be proved beyond a reasonable doubt.[204] If a presumption exists that such a specific intent did not accompany document destruction because it was done pursuant to a regular destruction program, it would appear virtually impossible to prove the requisite specific intent beyond a reasonable doubt.

The version of section 1325 reported out of Committee precludes only one defense. Section 1325(c) provides that the fact that evidence tampered with would have been legally privileged or inadmissible is not a defense. This preclusion effectively overrules *Neal v. United States,*[205] which held that concealing relevant items had not hindered law enforcement because the evidentiary nature of the items had not been established.[206] The preclusion is intended to

199 *Id.* By way of example, the Senate Report states that destruction of records to avoid execution of a search warrant or other process, or to avoid an audit which was likely to lead to an official proceeding, would most likely be condemned under the section.
200 *Id.* at 337.
201 I WORKING PAPERS, *supra* note 181, at 575.
202 *Cf. 1979 Hearings, supra* note 189, at 9979 (testimony of George Freeman).
203 *Senate Report on S. 1722, supra* note 193, at 337.
204 *In re* Winship, 397 U.S. 358 (1970).
205 102 F.2d 643 (8th Cir. 1939), *cert. denied,* 312 U.S. 679 (1941).
206 *See* notation on *Neal* in discussion of § 1311(c) in *Senate Report on S. 1722, supra* note 193, at 297. *See also*

ensure that all determinations as to the existence of a legal privilege or the admissibility of evidence are made by a judge in the courtroom rather than by a private party considering whether to destroy particular documents.[207] The essence of the offense is intentionally destroying evidence to make it unavailable to the government; it is irrelevant that other lawful means such as privilege or inadmissibility may render the evidence unavailable to the government.[208]

The preclusion of the defense of inadmissibility apparently extends to a defense based solely on the nonmateriality of the evidence tampered with. In hearings before the Senate Judiciary Committee, representatives of the American Bar Association argued that the scope of section 1325(c) is too great because it literally precludes the defense that the documents destroyed were immaterial and irrelevant to the proceeding.[209] The Committee was asked to amend the section to preclude only the defense that the documents destroyed were legally privileged. The Committee, however, left the expansive preclusion intact, presumably so that the prosecution could focus on the defendant's tampering with evidence rather than on questions of evidence admissibility, including materiality or relevance. This issue may be of little practical significance, since proof that the defendant intended to interfere with a pending or likely proceeding requires proof that the evidence he tampered with was material to that proceeding.

Section 1325(d) provides federal jurisdiction over the offense if the official proceeding involved is or might become a federal official proceeding. The term "official proceeding" is broadly defined in section 111 to include any proceeding

> [c]onvened pursuant to lawful authority, or a portion of such a proceeding, that is or may be heard before (a) a government branch or agency; or (b) a public servant who is authorized to take oaths, including a judge, a chairman or a Member of Congress authorized by a legislative committee or subcommittee, a bankruptcy judge, an administrative law judge, a hearing examiner and a notary.[210]

Thus, "official proceeding" embraces not only grand jury proceedings and criminal trials but civil proceedings before federal administrative or regulatory agencies as well.[211]

Section 1325's description of its federal jurisdictional base is consistent with S. 1722's general approach of drafting offenses solely in terms of the requisite conduct and mental state, then detailing separately the circumstances which create federal jurisdiction over such offenses.[212] Thus, an offense occurs

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1979 Hearings, supra note 189, at 10177 (statement of John Shattuck on behalf of the American Civil Liberties Union).

207 *See Legislation to Revise and Recodify Federal Criminal Law: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 95th Cong., 1st & 2d Sess. 143-44 (1978) (statement of Department of Justice).

208 *Id.* at 144.

209 *1979 Hearings, supra* note 189, at 9977-78 (testimony of George Freeman).

210 S. 1722, 96th Cong., 1st Sess. § 1325(d) (1979).

211 *See* Note, *supra* note 190, at 790.

212 *See Senate Report on S. 1722, supra* note 193, at 30; I WORKING PAPERS, *supra* note 181, at 578.

under 1325(a) if a person tampers with physical evidence with intent to impair its integrity or its availability for use in an official proceeding. Federal jurisdiction over the offense exists under section 1325(d) if the official proceeding is a federal official proceeding.

b. *Section 1323: Tampering with a Witness, Victim or an Informant*

Two components of section 1323,[213] neither of which was revised during the Committee markup, are applicable to the destruction of documents. First, subsection (a)(1)(B)(ii) criminalizes the use of force, threat, intimidation, or

213 Section 1323 (Tampering With a Witness, Victim or an Informant) as contained in S. 1722 (96th Cong., 1st Sess., 1979) and reported out of the Senate Judiciary Committee reads as follows:

(a) Offense. A person is guilty of an offense if he—

(1) uses force, threat, intimidation, or deception with intent to—

(A) influence the testimony of another person in an official proceeding; or

(B) cause or induce another person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) engage in conduct constituting an offense under section 1325 (Tampering With Physical Evidence);

(iii) evade legal process summoning him to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) absent himself from an official proceeding to which he has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer of information relating to an offense or a possible offense;

(2) with intent to annoy, harm, or injure another person, hinders, delays, prevents, or dissuades—

(A) a witness or a victim from attending or testifying in an official proceeding; or

(B) a witness, victim, or a person acting on behalf of a victim, from—

(i) making a report of an offense or a possible offense to a judge, a law enforcement officer, a probation officer, or an officer of a correctional facility;

(ii) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted or assisting in such prosecution or proceeding; or

(iii) arresting, or causing or seeking the arrest of, a person in connection with an offense; or

(3) does any other act with intent to influence improperly, or to obstruct or impair, the—

(A) administration of justice;

(B) administration of a law under which an official proceeding is being or may be conducted; or

(C) exercise of a legislative power of inquiry.

(b) Definitions. . . .

(c) Affirmative Defense. It is an affirmative defense to a prosecution under subsection (a)(1)(A) that the conduct engaged in to threaten or to intimidate consisted solely of lawful conduct and that the defendant's sole intention was to compel or induce the other person to testify truthfully.

(d) Defense Precluded. It is not a defense to a prosecution under this section that—

(1) an official proceeding was not pending or about to be instituted; or

(2) the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence.

(e) Grading. An offense described in this section is—

(1) a Class D felony in the circumstances set forth in subsection (a)(1); and

(2) a Class E felony in the circumstances set forth in subsection (a)(2) or (a)(3).

(f) Jurisdiction. There is federal jurisdiction over an offense described in this section if—

(1) the official proceeding, offense, or prosecution is or would be a federal official proceeding, offense, or prosecution;

(2) the officer is a federal public servant and the information or report relates to a federal offense or a possible federal offense.

(3) the administration of justice, administration of a law, or exercise of a legislative power of inquiry relates to a federal government function;

(4) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

(5) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense or in the distribution of the proceeds of the offense.

deception with intent to induce another person to engage in conduct constituting an offense under section 1325. Because the subsection contains no provision concerning the actor's state of mind, culpability depends upon "knowledge" or awareness of the nature of the conduct.[214] The offender must intend to induce the third party to violate section 1325. However, there is no requirement of proof that the defendant knew the third party's conduct would violate section 1325.[215] Section 303(d)(1)(A)[216] provides that proof of knowledge that particular conduct constitutes a specific statutory offense is not ordinarily required. Thus, under section 1323 the offender must simply intend that the third party engage in conduct that violates section 1325.

Unlike section 1325, section 1323 precludes the defense that an official proceeding was not pending or about to be instituted. The National Commission concluded that inducing another person to tamper with evidence is not as ambiguous an act as destroying one's own records or documents.[217] Therefore, the offender's belief in the existence of a pending or likely proceeding is not necessary for proving the requisite illegitimate purpose.[218] Section 1323(d) does, however, contain the defense preclusion of section 1325 relating to privilege and admissibility of evidence.

Second, section 1323(a)(3) contains a general residual clause rendering a person guilty of an offense if he "does any other act with intent to influence improperly, or to obstruct or impair, the administration of justice, the administration of a law under which an official proceeding is being conducted, or the exercise of a legislative power of inquiry."[219] The provision derives from the general residual clauses concerning the obstruction of the administration of justice found at the end of 18 U.S.C. §§ 1503 and 1505.[220] This broad clause could be applied to the destruction of evidence specifically proscribed in section 1325, even though it contains fewer required elements for conviction than does section 1325. Unlike section 1325, section 1323(a)(3) requires only that the defendant specifically intend to obstruct or impair the administration of justice, not that he know of a pending or likely proceeding or that such a proceeding actually exist.

However, two considerations suggest that the courts will likely not allow section 1323 to reach destruction of documents that could not be prosecuted under section 1325. First, the existing generalized statutes from which the residual clause derives have been narrowly construed by the courts.[221] The rationale for such narrow interpretations, that criminal statutes do not authorize broad prosecutorial discretion to determine what constitutes a crime,[222] appears equally applicable to the residual clause in section 1323.

Second, the Senate Report states that the residual clause was included to proscribe only obstructions of justice not otherwise covered in the Code:

214 S. 1722, 96th Cong., 1st Sess. § 303(b) (1979).
215 *See Senate Report on S. 1722, supra* note 193, at 332 n.47.
216 S. 1722, 96th Cong., 1st Sess. § 303(d)(1)(A) (1979).
217 I WORKING PAPERS, *supra* note 181, at 575.
218 *See* Note, *supra* note 190, at 790.
219 S. 1722, 96th Cong., 1st Sess. § 1323(a)(3) (1979).
220 *Id.* at 330. 18 U.S.C. §§ 1503 and 1505 are set out in notes 69-70 *supra.*
221 *See, e.g.,* Falk v. United States, 370 F.2d 472 (9th Cir. 1966), *cert. denied,* 387 U.S. 926 (1967); Haili v. United States, 260 F.2d 744 (9th Cir. 1958).
222 I WORKING PAPERS, *supra* note 181, at 568.

> The purpose of preventing an obstruction . . . of justice cannot fully be carried out by a simple enumeration of the commonly prosecuted obstruction offenses. There must also be a protection against the rare type of conduct that is the product of the inventive criminal mind and which also thwarts justice.[223]

Thus, the residual clause does not apply to the "commonly" prosecuted obstruction of justice offense of tampering with physical evidence specifically enumerated elsewhere in the Code. Accordingly, a court would be unlikely to authorize use of section 1323(a)(3) as a prosecutorial tool against the destruction of documents.

Federal jurisdiction under section 1323 would usually stem from the underlying section 1325 violation that the actor intends to induce. If the official proceeding that the actor intends to affect is a federal one, the jurisdictional requirement would be met.

A section 1323 violation is a Class D felony punishable by up to five years in prison. Section 1323's higher penalty evidences the drafters' belief that coercing a third party to tamper with evidence is a more serious offense than personally destroying documents.[224]

c. *Section 1322: Corrupting a Witness or an Informant*

Section 1322[225] generally parallels section 1323, but in subsection

223 *Senate Report on S. 1722, supra* note 193, at 330.

224 *Id.* at 337.

225 Section 1322 (Corrupting a Witness or an Informant) as contained in S. 1722 (96th Cong., 1st Sess., 1979) and reported out of the Senate Judiciary Committee reads as follows:

(a) Offense. A person is guilty of an offense if he—

(1) offers, gives, or agrees to give to another person, or solicits, demands, accepts, or agrees to accept from another person, anything of value for or because of any person's—

(A) testimony in an official proceeding;

(B) withholding testimony, or withholding a record, document, or other object, from an official proceeding;

(C) engaging in conduct constituting an offense under section 1325 (Tampering With Physical Evidence);

(D) evading legal process summoning him to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(E) absenting himself from an official proceeding to which he has been summoned by legal process; or

(2) offers, gives, or agrees to give anything of value to another person for or because of any person's hindering, delaying, or preventing the communication to a law enforcement officer of information relating to an offense or a possible offense.

(b) Defense Precluded. It is not a defense to a prosecution under this section that—

(1) an official proceeding was not pending or about to be instituted;

(2) the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence; or

(3) the defendant, or other recipient or proposed recipient of the thing of value, by the same conduct also committed an offense described in section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft).

(c) Grading. An offense described in this section is a Class E felony.

(d) Jurisdiction. There is federal jurisdiction over an offense described in this section if—

(1) the official proceeding is or would be a federal official proceeding;

(2) the law enforcement officer is a federal public servant and the information relates to a federal offense or a possible federal offense;

(3) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

(4) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

(a)(1)(C) condemns bribing another person to engage in a section 1325 offense. Section 1322 was not revised during Committee markup.

Section 1322(a)(1) defines culpable conduct as offering, giving or agreeing to give to another person, or agreeing to accept, anything of value to engage in at least one of five acts. Included among these acts is engaging in conduct that would constitute an offense under section 1325.[226] Since no culpability standard is designated, the prosecution must prove that the defendant had "knowledge" of the nature of his activity.[227] It must also be established that what is offered, given or demanded is "anything of value."[228] "Anything of value" is defined broadly in section 111 to include "any direct or indirect gain or advantage."

Section 1322 contains the same defense preclusions as section 1323 concerning inadmissibility of evidence and official proceedings not pending. As in section 1323, section 1322's proscribed conduct, bribing another person to destroy documents, is not as inherently ambiguous as personally destroying evidence.

The jurisdictional base of section 1322 is identical to that in section 1323. If the obstructive conduct effectuated by the bribery would involve a federal official proceeding, federal jurisdiction may be asserted.

d. *Section 1311: Hindering Law Enforcement*

Section 1311[229] is the final section in S. 1722 relating to the destruction of

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226 The fact the conduct is in violation of § 1325 requires no proof of culpability.

227 S. 1722, 96th Cong., 1st Sess. § 303(b) (1979).

228 *See Senate Report on S. 1722, supra* note 193, at 325. Section 303(b)(2) clarifies that the state of mind with regard to an existing circumstance required for culpability is that of "recklessness." Thus, the defendant must have been aware of the risk that he was providing something of value, yet disregarded that risk.

229 Section 1311 (Hindering Law Enforcement) as contained in S. 1722 (96th Cong., 1st Sess., 1979) as reported out of the Senate Judiciary Committee reads as follows:

> (a) Offense. A person is guilty of an offense if he—
>
> (1) interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of another person, knowing that such other person has committed a crime, or is charged with or being sought for a crime, by—
>
> (A) harboring the other person or affirmatively concealing him or his identity;
>
> (B) providing the other person with a weapon, money, transportation, disguise, or other means of avoiding or minimizing the risk of discovery or apprehension;
>
> (C) warning the other person of impending discovery or apprehension; or
>
> (2) intentionally interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of another person, knowing that such other person has committed a crime, or is charged with or being sought for a crime, by altering, destroying, mutilating, affirmatively concealing, or removing a record, document, or other object; or
>
> (3) aids another person to secrete, disguise, or convert the proceeds of a crime or otherwise to profit from a crime.
>
> (b) Affirmative Defense. It is an affirmative defense to a prosecution under subsection (a)(1)(C), and to a prosecution under any section incorporating by reference the provisions of subparagraph (C) of subsection (a)(1), that warning was made solely in an effort to bring the other person into compliance with the law.
>
> (c) Defense Precluded. It is not a defense to a prosecution under this section that the record, document, or other object would have been legally privileged or would have been inadmissible in evidence.
>
> (d) Grading. An offense described in this section is—
>
> (1) a Class D felony if the other person's crime is a Class A, B, or C felony, and the actor knows the general nature of the crime or is reckless with regard to the general nature of the crime;
>
> (2) a Class E felony if—
>
> (A) the other person's crime is a Class D felony, and the actor knows the general

documents. In general, section 1311 proscribes assisting others to either avoid apprehension or prosecution or to profit from the fruits of their crimes.

The original section 1311(a)(1)(D) related to the destruction of documents. The subsection made it an offense to interfere with, delay or prevent the discovery, prosecution or conviction of another person, knowing such other person had committed a crime or was being sought for a crime, by "altering, destroying, mutilating, concealing, or removing a record, document or other object." This provision was criticized as providing an insufficient standard of culpability regarding actual tampering with evidence, since it required mere awareness or "knowledge" that destruction of documents would hinder apprehension of a fugitive. Several groups testified that a higher level of culpability should be required to protect potential violators,[230] because document destruction is an inherently ambiguous activity when performed as part of an ongoing records management program.

Persuaded by these comments, the Judiciary Committee revised the provision to require proof of an "intentional" state of mind. The amended provision requires proof that the defendant "intentionally" interfered with law enforcement by destroying documents. Under revised section 1311(a)(2), the defendant must intend by the act of destruction to interfere with or otherwise hinder the apprehension or prosecution of a fugitive.[231]

As presently written, section 1311(a)(2) generally parallels section 1325 but applies to actions hindering law enforcement efforts as opposed to those interfering with a pending or contemplated official proceeding. The prohibited conduct (altering, hiding, or destroying physical evidence) is the same. Three states of mind must accompany this conduct. First, the offender must "know" that the third party assisted by the destruction of documents has committed, is charged with or is being sought for a crime.[232] Second, as noted above, the offender must specifically intend to interfere with the apprehension or prosecution of a fugitive by destroying documents. Third, since no specific culpability level is enumerated with respect to the proscribed conduct, the defendant must "know" or be "aware" that he has destroyed a document.

Two existing circumstances are also elements of the offense. First, the destruction of documents must interfere with, hinder or otherwise delay the apprehension or prosecution of a third person.[233] Second, according to the Senate

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nature of the conduct constituting such crime or is reckless with regard to the general nature of such conduct; or

(B) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; and

(3) a Class A misdemeanor in any other case.

(e) Jurisdiction. There is federal jurisdiction over an offense described in this section if the crime that the other person has committed, is charged with, is being sought for, or is seeking to profit from, is a crime over which federal jurisdiction exists.

230 *See, e.g., 1979 Hearings, supra* note 189, at 10177 (testimony of John Shattuck on behalf of the American Civil Liberties Union).

231 *See Senate Report on S. 1722, supra* note 193, at 295; Staff of Senate Judiciary Committee, *Memorandum on Federal Criminal Code Reform Act of 1979* at 19 (1979) (unpublished memorandum in Senate Judiciary Committee library).

232 This requirement was criticized during hearings because of the "unfairness" of requiring that a layman decide whether a person has "committed a crime" when the person is not so charged or sought by law enforcement officers. *See 1979 Hearings, supra* note 189, at 10079 (testimony of Irving S. Shapiro). The Judiciary Committee rejected this argument and the language was left intact.

233 *See Senate Report on S. 1722, supra* note 193, at 298.

Report, the person being assisted must have committed a crime or be charged with a crime.[234] This second requirement is not apparent in the statutory language, which merely requires "knowledge" or a belief that an individual has committed or is being sought for a crime.

Subsection (2) contains the same defense preclusion as does section 1325; it is not a defense that a destroyed document would have been privileged or inadmissible in evidence.

If the crime the third person has committed, is charged with or is being sought for is a crime over which federal jurisdiction exists, federal jurisdiction may be asserted over the subsection (2) offense. The accused need not know that the assisted party committed a federal crime; the fact that the crime committed was a federal offense is enough for jurisdictional purposes.

The offense is graded according to the severity of the underlying offense and the defendant's culpability with respect to the details of the crime. If the crime with which the assisted person has been charged is a Class A, B, or C felony, and the actor knew the nature of the conduct constituting the crime, the offense of the aider is a Class D felony punishable by up to five years in prison. If the underlying crime is a Class D felony or if the aider committed the subsection (a)(2) offense in exchange for something of pecuniary value, the offense is a Class E felony punishable by up to two years in prison. In all other cases, the subsection (a)(2) offense is a Class A misdemeanor.

3. Provisions Applicable to Document Destruction in H.R. 6915

Because the House bill generally contains sections which parallel the provisions of S. 1722, this discussion focuses on differences in the House provisions relevant to the destruction of documents.

a. *Section 1725: Tampering with Physical Evidence*

Section 1725[235] is the principal provision in H.R. 6915 applicable to the

234 *Id.* at 295.

235 Section 1725 (Tampering with Physical Evidence) as contained in H.R. 6915 (96th Cong., 2d Sess., 1980) and reported out of the House Judiciary Committee reads as follows:

> (a) Whoever, with intent to impair the object's integrity or availability for use in an official proceeding that is pending, knowingly alters, destroys, or mutilates a record, document, or other object, or engages in any act and thereby conceals such an object, or attempts to do so, commits a class E felony.
>
> (b) It is an affirmative defense to a prosecution under this section that the record, document, or object would not have been material to the official proceeding.
>
> (c) Except as provided in subsection (b) of the section, it is not a defense to a prosecution under this section that the record, document, or other object would have been legally privileged or would have been inadmissible in evidence.
>
> (d) As used in this section, the term "to conceal" used with respect to a document, record, or other object, does not include an express refusal to relinquish possession of, or reveal the contents of, such document, record, or object.
>
> (e)(1) For the purposes of this section, a falsification, omission, concealment, forgery, alteration, or other misleading matter is material, regardless of the admissibility of the statement or object under the rules of evidence, if—
>
> (A) in a grand jury proceeding, such misleading matter has a natural tendency to influence, impede, or dissuade the grand jury from pursuing such grand jury's investigations; or
>
> (B) in any other proceeding, such misleading matter is capable of influencing the person to whom such misleading matter is presented on the issue before such person.

destruction of documents and parallels section 1325 of S. 1722. As originally introduced, section 1725 made it a crime to knowingly destroy or conceal physical evidence with intent to impair the object's integrity or availability for use in an official proceeding pending or about to be initiated. The object's inadmissibility in evidence was precluded as a defense unless the object would not have been material to the official proceeding. The provision underwent two important changes during Subcommittee markup. First, subsection (d) was added to emphasize that documents are not "concealed" by parties who expressly refuse to relinquish possession of them. This provision responded to concerns of the press that a refusal to furnish documents revealing informants' identities would be criminalized even if the documents' existence were openly acknowledged. Second, subsection (a) was amended to delete the phrase "or about to be initiated." Thus, destruction or concealment of evidence is criminalized only if it occurs while an official proceeding is pending.

Section 1725 as reported out of Committee involves substantially the same offense elements as section 1325 of S. 1722. Both sections proscribe altering, destroying, or mutilating physical evidence with intent to impair its integrity or its availability for use in an official proceeding. Like S. 1722, H.R. 6915 provides that where no state of mind is specified for violative conduct, "knowing" is the required culpability level. Thus, the defendant must "know"[236] he has tampered with evidence.

A pending proceeding is an existing circumstance that must be demonstrated. According to section 302(b), the state of mind required regarding existing circumstances is the same as the state of mind required for the conduct. Therefore, the offender must be shown to have "known" a proceeding was pending.

The only major difference in the elements of the offense under section 1725(a) and section 1325(a) concerns the stage of the proceeding present and known to the defendant. Section 1325(a) requires that a proceeding be pending or likely to exist, while section 1725(a) requires that a proceeding be pending.

Like section 1325, section 1725(c) precludes the defenses of legal privilege and inadmissibility of evidence. Unlike section 1325, however, section 1725(b) specifically excepts from this preclusion the defense that the evidence would not have been material to the proceeding. Subsection 1725(e) defines materiality in terms of its natural tendency to influence or impede a grand jury investigation, or its capability to influence the person to whom the evidence would have been presented. Materiality is a question of law to be determined by the judge.

The jurisdictional base provided in section 1725 resembles that provided in section 1325 of S. 1722. The offense is a Class E felony punishable by imprisonment of up to 18 months.

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(2) Whether a matter is material under the circumstances is a question of law.

(f) There is Federal jurisdiction over an offense under this section if the official proceeding is or would be a Federal official proceeding.

236 "Knowing" is defined in § 301(c) as "awareness" or "firm belief" that a circumstance exists. *See* Feinberg, *supra* note 196.

b. *Section 1723: Tampering with a Witness or an Informant*

Section 1723[237] parallels section 1323(a)(1)(B)(ii) of S. 1722. The original section made it a crime to use force, threat, intimidation or fraud with intent to induce another person to engage in conduct constituting an offense under section 1725. It did not require that the offender "know" that the third party's conduct violated section 1725, but only that he intend to induce the destruction of records and that the destruction constituted a section 1725 violation. However, the provision was changed during Subcommittee markup to provide that the offender must have the "conscious objective" of causing the third party to violate section 1725. It is more difficult to prove such intent than it is to prove that the offender simply intended conduct which constituted a section 1725 violation.

As presently written, section 1723(a)(2)(B) proscribes using force, threat, fraud or deception if that conduct is accompanied by two *mens rea* elements: the offender must "know" or be aware that he is employing force or deception, and he must specifically "intend" to induce a section 1725 violation through the use of such force or deception.

Section 1723 contains neither of the defense preclusions contained in section 1323 of S. 1722. Thus, an offender could assert the affirmative defense that (1) an official proceeding was not pending or likely to be instituted, or (2) the documents destroyed would be privileged or inadmissible in evidence.[238]

Section 1723's jurisdictional base is identical to that in section 1323 of S. 1722. The offense is a Class D felony, punishable by up to 40 months' imprisonment, thus echoing the Senate's sentiment that coercing a third party to destroy evidence is a more serious crime than personally destroying documents.

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237 Section 1723 (Tampering with a Witness or an Informant) as contained in H.R. 6915 (96th Cong., 2d Sess., 1980) and reported out of the House Judiciary Committee reads as follows:

> (a) Whoever knowingly uses physical force, threat, intimidation, or fraud with intent to—
>
> (1) influence the testimony of another person in an official proceeding; or
>
> (2) cause or induce another person to—
>
> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
>
> (B) violate section 1725 (relating to tampering with physical evidence), 1732 (relating to failing to appear as a witness), 1733 (relating to refusing to produce information), or 1734 (relating to refusing to testify) of this title; or
>
> (C) evade legal process summoning that other person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer of information relating to an offense or a possible offense;
>
> commits a class D felony.
>
> (b) It is an affirmative defense to a prosecution under subsection (a)(1) of this section that the threat or intimidation consisted solely of lawful conduct and that the defendant's sole intention was to compel or induce the other person to testify truthfully.
>
> (c) There is Federal jurisdiction (including extraterritorial Federal jurisdiction) over an offense under this section if—
>
> (1) the official proceeding is or would be a Federal official proceeding; or
>
> (2) the law enforcement officer is a Federal public servant and the information relates to a Federal offense or a possible Federal offense.

238 It is difficult to perceive the rationale for the failure to preclude the latter defense since it is precluded in § 1725 except with respect to a claim of nonmateriality. Perhaps, the Subcommittee felt the defense preclusion would be redundant because the offender must intend to cause a § 1725 violation and the defense is precluded in that section. If this is accurate, it is not clear from the language of the provision.

c. *Section 1729: Obstruction of Official Proceedings by Fraud*

Section 1729[239] parallels the residual provision of section 1323(a)(3) in S. 1722. The original section 1729, introduced in H.R. 6233, made it an offense to knowingly employ fraud in order to impair an official proceeding. This provision was modified in significant respects during Subcommittee markup as a result of criticism that the original provision could be used to criminalize legitimate activity. As modified, section 1729 provides that the offender must intentionally obstruct the due administration of justice in a judicial proceeding, the due administration of the law under which an official proceeding is being conducted, or the due exercise of power of inquiry conducted by either House of Congress. In response to testimony that the original provision might be applied against a defendant or attorney who merely presented a legitimate defense or preserved a valid interest,[240] two affirmative defenses were explicitly recognized: first, the actor was an attorney and his conduct constituted an ethical representation of the client's interests; and second, the defendant's conduct was an assertion of constitutional rights.

Except for these two affirmative defenses, section 1729 parallels the residual clause in S. 1722, section 1323(a)(3), and is applicable to the destruction of documents. Although the term "fraud" is not defined in H.R. 6915, it could include the impairment of physical evidence.[241] However, the courts will not likely allow section 1729 to be used to reach the destruction of documents not meeting the requirements of section 1725. Section 1729 is obviously intended to reach forms of obstructing justice not specifically enumerated elsewhere in the Code.

d. *Section 1721: Witness Bribery and Graft*

Section 1721[242] parallels, in pertinent part, section 1322(a)(1)(C) of S.

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239 Section 1729 (Obstruction of Official Proceedings by Fraud) as contained in H.R. 6915 (96th Cong., 2d Sess., 1980) and reported out of the House Judiciary Committee reads as follows:

(a) Whoever knowingly uses fraud and thereby intentionally obstructs or impairs the due administration of justice in a judicial proceeding, the due administration of the law under which an official proceeding is being conducted, or the due exercise of the power of inquiry under which an inquiry is being conducted by either House of Congress or any committee of Congress, or attempts to do so, commits a class D felony.

(b) It is a defense to a prosecution for an offense under this section that—

(1) the actor was an attorney, and the conduct in which the actor engaged constituted an ethical representation of a client's interests; or

(2) the conduct in which the actor engaged was the assertion of the actor's constitutional rights.

(c) There is Federal jurisdiction (including extraterritorial Federal jurisdiction) over an offense under this section if the official proceeding is a Federal official proceeding.

240 *See, e.g., 1979 Hearings, supra* note 189, at 10416 (position paper of Federal Public and Community Defenders).

241 *Id.*

242 Section 1721 (Witness Bribery and Graft) as contained in H.R. 6915 (96th Cong., 2d Sess., 1980) and reported out of the House Judiciary Committee reads as follows:

(a) Whoever knowingly—

(1) offers, gives, or agrees to give anything of value to another person, with intent to influence or reward such other person with regard to such other person's—

(A) testimony in an official proceeding;

(B) withholding testimony, or withholding a record, document, or other object, from an official proceeding;

(C) violating section 1725 (relating to tampering with physical evidence), 1731

1722. As originally introduced, section 1721(a)(1)(C) and (a)(2)(A) proscribed persons from offering or accepting anything of value with the intent to reward a third person for or because of that person's engaging in conduct constituting an offense under section 1725. Subsection (a)(1)(C) was revised during Subcommittee markup to require that the offender intend to influence the third person to "violate" section 1725. This revision is identical to the markup change made to section 1723(a)(2)(B); both changes raise the degree of culpability that must be proven. Instead of requiring only that the defendant intend to bribe a third person to commit acts violative of section 1725, the provision now requires that the defendant specifically intend the third person to destroy evidence in violation of that section. As a result of this revision, it is considerably more difficult to prove that document destruction violates section 1721 than that it violates section 1322 of S. 1722. Although most of the requirements of the two sections are identical, the *mens rea* requirement of section 1721 is stricter than that of section 1322.[243]

Like section 1322, section 1721 precludes the two defenses of lack of a pending official proceeding and inadmissibility of evidence, and requires the presence of a federal official proceeding in the underlying section 1725 offense for federal jurisdiction to exist. The offense is a Class C felony, punishable by up to 80 months' imprisonment, as contrasted with the Class E status provided section 1322 offenses.

e. *Section 1711: Hindering Law Enforcement*

Section 1711,[244] which was not significantly changed during Subcommit-

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(relating to criminal contempt), 1732 (relating to failing to appear as a witness), or 1733 (relating to refusing to produce information) of this title; or

(D) evading legal process summoning such other person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(2) solicits, accepts, or agrees to accept from another person anything of value—

(A) because of the actor's engaging in conduct specified in subsection (a)(1)(A) through (a)(1)(D) of this section; or

(B) that is given with the specific intent described in subsection (a)(1) of this section;

commits a class C felony.

(b) It is not a defense to a prosecution under this section that—

(1) an official proceeding was not pending or about to be instituted; or

(2) the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence.

(c) There is Federal jurisdiction (including extraterritorial Federal jurisdiction) over an offense under this section if the official proceeding is or would be a Federal official proceeding.

243 Section 1322 only requires that the defendant has the purpose of causing conduct that is independently found to violate § 1325.

244 Section 1711 (Hindering Law Enforcement) as contained in H.R. 6915 (96th Cong., 2d Sess., 1980) and reported out of the House Judiciary Committee reads as follows:

(a) Whoever, if a crime has been committed and another person is charged with or being sought for a crime, knowingly—

(1) harbors that person, or engages in any act and thereby conceals that person;

(2) provides that person with a weapon, money, transportation, disguise, or other means of avoiding or minimizing the risk of discovery or apprehension;

(3) warns that person of impending discovery or apprehension; or

(4) alters, destroys, or mutilates, a record, document, or other object or engages in any act and thereby conceals such an object;

and thereby intentionally interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of that person, shall be punished as provided in subsection (b) of this section.

(b) An offense under this section is—

(1) a class D felony if the other person's crime is a class A, B, or C felony, and the actor is

tee or Comittee markup, parallels section 1311(a)(2) of S. 1722. The two provisions prohibit identical conduct: the defendant must intentionally hinder law enforcement efforts to apprehend or prosecute a third person by altering, mutilating, concealing or destroying documents. The only potential discrepancy between the two provisions concerns the existing circumstance requirement that the third person must actually have committed a crime. Section 1311 of S. 1722 requires the defendant to "know" that the person he aids has committed, is charged with, or is being sought for a crime. The Senate Report on S. 1722 states that this language implicitly requires the existing circumstance that the third person has committed, is charged with, or is being sought for a crime. Under the latter two circumstances, a defendant who destroys documents could be convicted even if the person he aids never committed a crime.[245] Section 1711(a), on the other hand, expressly provides that the third person must actually commit a crime for the person who aids him to be criminally liable. Under this section, an offense exists only "if a crime has been committed and another person is being charged with or sought for" the crime.[246]

Like section 1311 of S. 1722, section 1711 precludes the defense that the destroyed documents would have been privileged or inadmissible. Unlike section 1725, section 1711 does not limit this preclusion so as to prevent its extension to a defense based on nonmateriality of destroyed documents. This difference may be attributable to section 1711's existing circumstance requirement that the defendant's conduct actually interfere with or hinder a fugitive's discovery or apprehension. Evidence that a concealed or destroyed document was not material to the discovery or apprehension of the person sought tends to defeat the existing circumstance element. Nonmateriality may thus be a simple defense because it negates an essential element of the crime.[247]

The grading scheme and jurisdictional basis for section 1711 are virtually identical to those in section 1311 of S. 1722.

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reckless with regard to the general nature of the crime;

(2) a class E felony if—

(A) the other person's crime is a class D felony, and the actor is reckless with regard to the general nature of such conduct; or

(B) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; and

(3) a class A misdemeanor in any other case.

(c) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance that the other person's crime is of a given class.

(d) As used in this section, the term "to conceal" used with respect to a document, record, or other object, does not include an express refusal to relinquish possession of, or reveal the contents of, such document, record, or object.

(e) It is an affirmative defense to a prosecution for an offense under subsection (a)(3) of this section, that warning was made solely in an effort to bring the other person into compliance with the law.

(f) It is not a defense to a prosecution under this section that the record, document, or other object would have been legally privileged or would have been inadmissible in evidence.

(g) There is Federal jurisdiction (including extraterritorial Federal jurisdiction) over an offense under this section if the crime for which the other person is charged or being sought is a crime over which Federal jurisdiction exists.

245 Of course, if the third party is being sought for or is being charged with a crime, it is likely that a crime has been committed.

246 H.R. 6915, 96th Cong., 2d Sess. § 1711(a) (1980).

247 *1979 Hearings, supra* note 189, at 10412 (testimony of Federal Public and Community Defenders).

4. Prospects for Passage in the 96th Congress

Floor debate in the Senate and House on S. 1722 and H.R. 6915 will soon commence. It is uncertain whether the bills will pass the Senate and House and whether the differences in the bills can be resolved by a Senate-House panel before the close of the 96th Congress. The two bills differ in significant respects, and several controversial amendments are planned in both the Senate and the House. Also, both bills continue to receive criticism. The American Civil Liberties Union has said that S. 1722 favors law enforcement and that parts of H.R. 6915 threaten civil liberties.[248] The Department of Justice has criticized H.R. 6915 for restricting federal efforts to combat public corruption.[249] The bill's provisions regarding sentencing, bail and white-collar crime have also been criticized.[250]

The provisions of S. 1722 and H.R. 6915 applicable to wrongful destruction of documents are noncontroversial. No amendments relating to these provisions have been proposed in either the Senate or the House, and no proposed revisions are expected. Whether a new federal criminal code is enacted in 1980 may depend on whether the "lame duck" session of the 96th Congress is willing to devote the time necessary to resolve the differences between the two bills after the November 1980 elections.

V. Practical Considerations Relevant to the Destruction of Documents

A. *Adverse Evidentiary Inference*

Criminal obstruction of justice statutes have been applied in the destruction of documents context almost exclusively against parties who destroy relevant documents during judicial, administrative or congressional investigations or proceedings. On a few occasions, courts have held destruction of relevant documents during civil litigation violative of section 1503 or its predecessor.[251]

Although criminal prosecution for destruction of documents is a potent weapon, parties in civil proceedings often exploit the conduct for its prejudicial value at the civil trial, rather than initiate a separate criminal action. Principles of evidence enable civil litigants to reap practical benefits at trial as a result of destruction of relevant documents by opposing parties. An adverse but rebuttable evidentiary inference may be drawn concerning the strength of a party's

248 *Hill Unit Clears Criminal Code Overhaul,* Washington Post, July 3, 1980, at 2, col. 1; *Revamp of U.S. Criminal Code This Year Seen Still Alive As House Panel Votes Bill,* Wall St. J., July 3, 1980, at 4, col. 5. Pear, *Crime Bill Challenged By Conservative Republicans,* N.Y. Times, Sept. 25, 1980, at A-18, col. 1.

249 *Id.*

250 *Making the Crimes Fit the Times,* TIME, Apr. 28, 1980, at 65, col. 1.

251 *See, e.g.,* Wilder v. United States, 143 F. 433 (4th Cir. 1906), in which the court held:

> The contention that a violation of section 5399 [predecessor to 1503], consisting of obstructing the administration of justice in a civil litigation, between private citizens in a federal court, is not an offense against the United States, need not be discussed at any length. One of the sovereign powers of the United States is to administer justice in its courts between private citizens. Obstructing such administration is an offense against the United States, in that it prevents or tends to prevent the execution of one of the powers of the government.

Id. at 440. *Accord,* Sneed v. United States, 298 F. 911, 912 (5th Cir. 1924) (offer to bribe juror during civil proceeding impeded the administration of justice); *cf.* Miller v. Hulsey, 347 F. Supp. 192 (E.D. Ark. 1972) (section 1503 does not create a civil cause of action in favor of federal witnesses discharged from jobs by private employers as retaliation).

case if the party deliberately destroyed evidence to prevent its use in litigation.[252] As Judge Learned Hand explained: "When a party is once found to be fabricating, or suppressing documents, the natural, indeed inevitable conclusion is that he has something to conceal, and is conscious of guilt."[253] The adverse inference arises only if the destructive act was accompanied by intentional conduct indicating fraud and a desire to suppress truth.[254] The inference may be rebutted upon a showing of the absence of evil intent or bad faith.[255]

An effective tactic to rebut the adverse inference is to demonstrate that the destruction was part of a regular records management program.[256] Even though a principal reason for adopting a program may be to keep sensitive documents from investigations or official proceedings, a pre-existing program is not intended to thwart a particular proceeding. In deference to the legitimate purposes served by records management programs, courts allow routine destruction to rebut the adverse inference. Courts are intolerant, however, when the destroying party fails to offer a compelling reason for selective destruction occurring outside the ordinary course of business and particularly during litigation.[257] If no such reason exists, any adverse inference may be countered by demonstrating that the documents have no relevance to the proceeding.[258] However, the closer in time to a proceeding that destruction occurs, the more pertinent the destroyed records are to the case, and the more difficult is proof of inadvertent, good faith destruction. The adverse inference may also be rebutted by showing the documents were destroyed either in reliance on the advice of counsel[259] or by accident.[260]

The adverse inference is strongest when documents are selectively destroyed, since by its nature *ad hoc* destruction suggests corrupt intent. An *ad hoc* destruction program instituted contemporaneously with the start of a pro-

252 *See* 2 WIGMORE ON EVIDENCE § 291, at 221 (1979) (maxim of *omnia praesumunter contra spoliatorem*).

253 Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha, 102 F.2d 450, 453 (2d Cir. 1939).

254 Berthold-Jennings Lumber Co. v. St. Louis R.R., 80 F.2d 32, 42 (8th Cir. 1935) (intentional destruction of waybills over nine years old not fraudulent), *cert. denied,* 297 U.S. 715 (1936).

255 *Id.*

256 *See, e.g.,* Vick v. Texas Employment Commission, 514 F.2d 734, 737 (5th Cir. 1975) (no adverse inference from routine destruction provided no bad faith and well in advance of interrogatories seeking information from records); Wong v. Swier, 267 F.2d 749, 759 (9th Cir. 1959) (inference overcome by evidence providing satisfactory explanation, even where actual tampering occurred); INA Aviation Corp. v. United States, 468 F. Supp. 695 (E.D.N.Y. 1979) (refusal to draw negative inference where destruction in accordance with routine record retention program or unintentional), *aff'd,* 610 F.2d 806 (2d Cir. 1979); Millinocket Theatre, Inc. v. Kurson, 39 F. Supp. 979, 980 (D. Me. 1941) (destruction part of regular routine). *See also* R. Borow & S. Baskin, *supra* note 1, at 241-46; *Records Retention—The Lawyer's Role, supra* note 34, at 5-3.

257 *See, e.g.,* Cecil Corley Motor Co., Ind. v. General Motors Corp., 380 F. Supp. 819, 859 (M. D. Tenn. 1974) (strongest adverse inference drawn not only when documents destroyed while litigation pending, but while litigation being contemplated); Woolner Theatres, Inc. v. Paramount Pictures Corp., 333 F. Supp. 658, 661 (E.D. La. 1970) (destruction of basic records after time lapse and for legitimate reason is regular business practice, but destruction out of regular course of business may be fraudulent).

258 *In re* Casket Mfrs. Ass'n of America, 52 F.T.C. 958, 970 (1956) (no inference drawn from destruction absent showing that mass of documents related to subject matter of case); Drosten v. Mueller, 103 Mo. 624, 15 S.W. 967 (1891) (reversing application of adverse inference because facts showed destroyed document was irrelevant to plaintiff's case).

259 *See, e.g., In re* Eno's Will, 196 A.D. 131, 187 N.Y.S. 756 (1921) (no adverse inference where letters were burned on advice of a lawyer).

260 *See, e.g.,* Universe Tankships, Inc. v. United States, 388 F. Supp. 276 (E.D. Pa. 1974) (no adverse inference where destruction showed mere negligence); Allen v. Commissioner, 117 F.2d 364 (1st Cir. 1941) (no adverse inference where business records were destroyed by hurricane and flood).

ceeding may permit a jury to infer that the destruction was intended to thwart the proceeding.[261] However, a company that adheres to an established records management program may be able to convince a jury that the potential relevance of the documents had been innocently overlooked in the course of other business. This attempted rebuttal may prove unsuccessful unless the defendant company curtails its routine program after learning of documents' relevance to foreseeable or pending investigations or proceedings.[262] The interruption of the routine program in such circumstances is vital to the success of the rebuttal, since a company may be held culpable for its failure to stop an act which it has a legal duty to prevent.[263]

The trial judge will usually instruct the jury that failure to produce evidence under one's control may indicate such evidence is unfavorable.[264] The decision to draw the adverse inference is for the jury.[265] The adverse inference is a permissible and not a mandatory presumption.

B. *Other Considerations*

An interesting but still unanswered question was raised in the early 1960's by a letter from the Department of Justice's Antitrust Division to General Motors Corp. (GM), informing GM that it was under investigation. The letter directed GM, which had previously established a routine destruction program, to suspend destruction of documents which it reasonably believed the grand jury might request.[266] The district court refused to quash the letter upon GM's motion, on grounds that it was not a court order. The court did not address the question whether GM had an affirmative duty to halt the destruction program. It also refused to issue a prospective protective order enabling the corporation to avoid producing the documents once the subpoena issued. The court did,

261 R. Borow and S. Baskin, *supra* note 1, at 236.

262 Failure to stop a regular retention program may appear less corrupt than the taking of affirmative steps to destroy records. An enterprise might argue that its failure to stop destruction resulted not from an intent to interfere with a proceeding, but rather because its business structure delayed communication of the existence of a relevant proceeding to those responsible for the record management program. *Id.* at 237-38.

263 *See* W. LaFave & A. Scott, Jr., *supra* note 131 § 26 (1972).

264 For a sample jury instruction, see 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 72.17 (3d ed. 1977) (Failure to Provide Available Evidence): "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."

265 *See, e.g.,* Carr v. St. Paul Fire & Marine Insurance Co., 384 F. Supp. 821, 831 (W.D. Ark. 1974) (proper for jury to consider effect of destroyed record in determining actual facts, though the court did not know why destruction occurred); Wong v. Swier, 267 F.2d 749 (9th Cir. 1959) (weight to be given tampering or suppression of evidence is for jury to decide); 21 C. Wright & K. Graham, Jr., Federal Practice and Procedure § 5124 (1977) (destruction of documents gives rise to permissible adverse inference, not mandatory presumption); *cf.* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979) (proper for trial judge to instruct jury that expert witness' participation in concealing documents is relevant to credibility), *cert. denied,* 100 S. Ct. 1016 (1980); *see also* the decisions of the lower courts in *Berkey Photo* at 74 F.R.D. 613, 614 n.4 (S.D.N.Y. 1977) and 457 F. Supp. 404 (S.D.N.Y. 1978). *Contra,* Bird Provision Co. v. Owens Country Sausage, Inc., 379 F. Supp. 744, 751 (N.D. Tex. 1974) (court may draw adverse inference against party that destroys, alters or fabricates evidence), *aff'd,* 568 F.2d 369 (5th Cir. 1978); A.C. Becken Co. v. Genex Corp., 199 F. Supp. 533, 544 (N.D. Ill. 1961) (destruction during pending litigation itself constitutes an admission that documents are damaging to party's case), *aff'd,* 314 F.2d 839 (7th Cir.), *cert. denied,* 375 U.S. 816 (1963). *But see* International Union (UAW) v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972) (NLRB's failure to apply adverse inference against company that had refused for seven years to produce requested documents held reversible error).

266 *In re* Grand Jury Investigation (General Motors Corp.), 31 F.R.D. 1 (S.D.N.Y. 1962). *See also* R. Borow and S. Baskin, *supra* note 1, at 235; Beckstrom, *supra* note 26, at 704 n.56; Toll and Bauer, *supra* note 26, at 26.

however, warn the government that failure to issue timely subpoenas informing GM of the documents believed to be relevant would "increase substantially [the government's] burden under 18 U.S.C. § 1503 should it undertake a prosecution."[267] An investigation had commenced in the GM case, so that even if the letter proved ineffective to halt GM's regular destruction program, it nevertheless placed GM on notice of a pending agency investigation. Destruction of relevant documents after receipt of the letter would have raised the possibility of section 1505 or contempt penalties.[268]

It is less clear whether an agency contemplating an investigation has authority to mail form letters to all enterprises in a particular industry asking them to temporarily halt their destruction programs. Those defying the request might not only risk creating an adverse inference, but might also risk criminal sanctions. More likely, however, such sweeping conduct would be found to exceed the agency's authority, or possibly to constitute an abuse of administrative discretion. Nevertheless, since the letter would apprise the enterprises of an imminent or contemplated proceeding, it could serve a collateral purpose. If an enterprise receiving the letter subsequently destroyed documents and was prosecuted for obstructing justice or for contempt, the letter could be admitted as evidence showing that the enterprise had knowledge of a foreseeable proceeding.

Other consequences of documents destruction merit consideration. Under certain circumstances, the Federal Rules of Evidence prevent a party who inexcusably destroys an original document from using secondary evidence to prove its contents.[269] This rule may harm parties who dispose of original documents which subsequently become helpful to their case.

The "Best Evidence Rule" does not preclude opposing parties from using secondary evidence to prove the incriminating content of the original documents. Nor does the rule exclude secondary evidence where the destroying party, acting deliberately, had an erroneous impression regarding the consequences of the conduct.[270] The destroying party is barred from the use of secondary evidence only when the destruction rendering the original unavailable occurred without a valid excuse.[271] Such an excuse is provided by the existence of a routine destruction program.

Despite the advantages of records management programs, some commentators have argued that routine destruction programs may do more harm than good.[272] If a document containing exculpatory evidence is destroyed, an enterprise faces additional obstacles to introducing its contents into evidence. The

267 31 F.R.D. at 2.

268 *See* United States v. White, Crim. No. 78-00257 (D.D.C. June 2, 1978).

269 FED. R. EVID. 1004(1). *See also* Sellmayer Packing Co. v. Commissioner, 146 F.2d 707, 711 (4th Cir. 1944). For other consequences, *see* Cecil Corley Motor Co., Inc. v. General Motors Corp., 380 F. Supp. 819 (M.D. Tenn. 1974) (where plaintiff destroyed records he must be given the burden of proof). *See generally* note 45 *supra.*

270 Schroedl v. McTague, 256 Iowa 772, 129 N.W.2d 19, 23 (1964) (secondary evidence admissible to prove contents of letters when plaintiffs destroyed originals, because letters were written over period of time and plaintiff did not ordinarily keep old letters).

271 *See* 5 WEINSTEIN'S EVIDENCE ¶ 1002, at 1002-1 to 1002-19 (1978 & Supp. 1979) (reasons for best evidence rule include prevention of fraud, susceptibility of secondary evidence to human and mechanical error, and importance of exact words).

272 R. Borow and S. Baskin, *supra* note 1, at 245; Baker, *supra* note 3, at 36; *Beckstrom, supra* note 26, at 687; Ellwood, *The Problem of Old Files,* 44 LAW INST. J. 336, 340-41 (1970) (Australian periodical).

business records exception to the Hearsay Rule allows a document recorded during the ordinary course of business to be admitted at trial as substantive evidence of the event.[273] This exception, which obviates the need to lay a foundation or to call as a witness the employee who recorded the information, is of no help if the tangible record of the event has been destroyed.

VI. A Lawyer's Ethical Considerations in Counseling Destruction of Documents

A. *A.B.A. Code of Professional Responsibility*

Criminal prosecution remains the most severe sanction against either deliberately destroying relevant documents or knowingly counseling such destruction. Nevertheless, ethical penalties are occasionally imposed, and an attorney advising the destruction of documents must consider the implications of the A.B.A. Code of Professional Responsibility (the Code).[274] Although the Code contains no single provision pertaining to alteration or destruction of evidence, several ethical considerations and disciplinary rules provide in the aggregate a scheme of ethical limitations on counseling document destruction.[275]

At a minimum, an attorney may not advise a client to destroy evidence when such destruction would constitute a criminal offense.[276] Criminal behavior is irrefutably unethical. On the other hand, an attorney may advise a client to destroy documents when the client may do so legally. The complicated questions arise when an attorney advises the client to perform an arguably illegal act. Often, the duty to obey the law clashes with ethical mandates or privileges, leaving the attorney in a dilemma. Unfortunately, the Code offers little guidance to attorneys confronting this dilemma since its provisions are general and are inadequate in their treatment of difficult situations. Furthermore, although bar opinions or records of disciplinary actions might normally serve to establish more specific standards of conduct, they fail to do so in this area. The few reported disciplinary proceedings against attorneys tampering with evidence typically involved egregious criminal conduct.[277]

The Code's general provisions[278] and disciplinary rules[279] prohibit counsel from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. In conjunction with Canon 1, DR 7-102(7) provides that a lawyer shall not counsel or assist his client in conduct known to be illegal or fraudulent. If

273 FED. R. EVID. 803(6). *See also* 4 WEINSTEIN'S EVIDENCE ¶ 803(6), at 803-148 to 803-180 (1978).

274 ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter cited as ABA CODE] (replacing ABA CANONS OF PROFESSIONAL ETHICS (1908)). The Code has been adopted or followed in every state.

275 *See* Note, *supra* note 124.

276 *See* ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINION No. 1057 (1968) (disposition of evidence given lawyer by client; ethical requirement to operate within legal bounds requires attorney to comply with state statutes prohibiting suppression of evidence by not advising unlawful destruction).

277 *See, e.g., In re* Glass, 59 A.D.2d 248, 399 N.Y.S.2d 6 (1977) (attorney pleading guilty to conspiracy to obstruct justice also disbarred, sentenced to two years' probation and $5,000 restitution); *accord,* Cin. Bar Ass'n v. Leggett, 176 Ohio St. 281, 27 Ohio Op. 2d 196, 199 N.E.2d 590 (1964) (attorney convicted for advising the burning of records relevant to grand jury investigation, also suspended from practicing law indefinitely).

278 ABA CODE CANON 4.

279 ABA CODE Disciplinary Rule 1-102(A)(4) [Disciplinary Rules hereinafter cited as DR].

the client is involved in such activity, counsel's duties are delineated in Canon 7, which distinguishes past frauds from continuing and future illegal activity.[280]

Under a literal reading of the pre-1974 Code, a lawyer learning of his client's past fraudulent conduct was obliged to disclose the conduct if the client refused to rectify the fraud.[281] In 1974 the Code was amended to provide that a lawyer who obtained information establishing that his client had engaged in fraudulent conduct was not obliged to disclose the fraud if the information was protected as a privileged communication.[282] However, if the lawyer received the incriminating information in the form of a secret or confidential communication not protected by privilege, the Code appeared to mandate disclosure. This subtle distinction required the lawyer to determine whether the information was privileged in order to determine whether to reveal the fraud. Since the scope of privilege is a question of law, not ethics,[283] the Code appeared to force counsel to perform a judicial function.

The A.B.A. Professional Ethics Committee resolved this dilemma in a 1975 opinion. The Committee subordinated the lawyer's obligation to disclose past frauds to his duty[284] to preserve client secrets and confidences.[285] Essentially, "secrets" and "confidences" were encompassed within the attorney-client privilege.

Under the current ethical rules, an attorney who receives privileged information that his client has engaged in fraudulent conduct is not ethically obligated to disclose the information. However, the fact that an attorney is not required to disclose the misconduct does not license him to destroy records of past impermissible activities. Although the Code does not establish any affirmative duty to disclose, it does provide that a lawyer should not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal."[286] This

280 ABA CODE Ethical Considerations 7-3, 7-5. For discussions of the conflicting duties regarding client frauds, *see, e.g.*, Gruenbaum, *Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility,* 67 GEO. L.J. 991 (1979); Hoffman, *On Learning of a Corporate Client's Crime of Fraud—The Lawyer's Dilemma,* 33 BUS. LAW. 1389 (March 1978 Special Issue); Shipman, *supra* note 124; Morgan, *The Evolving Concept of Professional Responsibility,* 90 HARV. L. REV. 702 (1977); Note, *Client Fraud and the Lawyer—An Ethical Analysis,* 62 MINN. L. REV. 89 (1977); J. Fedders, *Investigative Counsel's Vulnerability,* Prac. L. Inst. Seminar on The Internal Corporate Investigation, Course Materials at 209 (1980).

281 ABA CODE DR 7-102(B)(1), in its original form, stated:

> (B) A lawyer who receives information clearly establishing that:
>
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

282 The 1974 Code amendment provides that an attorney's duty to report frauds committed by a client against a third party does not apply where it would require violating the rule of confidentiality stated in ABA CODE CANON 4 (lawyer should preserve secrets and confidences of clients). Since the rule of confidentiality prohibits disclosing anything of embarrassment to the client, the amendment "eviscerated the duty to report fraud." G. HAZARD, ETHICS IN THE PRACTICE OF LAW 27 (1978).

283 *See* FED. R. EVID. 501 (questions of privilege governed by common law, absent Supreme Court rule, federal statute or constitutional provision). For a comprehensive discussion of the historical evolution of the attorney-client privilege *see* Hazard, *An Historical Perspective on the Attorney-Client Privilege,* 66 CALIF. L. REV. 1061 (1978).

284 ABA CODE DR 4-10.

285 ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINION No. 341 (1975) (1974 amendment should be extended to protect secrets and confidences of client from disclosure without regard to whether they would be protected under attorney-client privilege).

286 ABA CODE DR 7-102(A)(3); *accord, id.,* Ethical Consideration 7-27.

provision reaffirms the general rule that a lawyer should not counsel or assist his client in conduct the lawyer knows is illegal.[287]

Different duties apply when counsel learns that his client is currently engaged in or is contemplating fraudulent conduct. Confidential communications made to counsel to secure assistance in committing future criminal acts are not privileged.[288] Although ample legal precedent supports this strict proposition, the ethical rules are more lenient. When a client personally pursues or insists that his lawyer pursue an illegal course of conduct, the Code allows but does not compel the lawyer to reveal the client's intention to commit the crime.[289]

Although a lawyer is free to conceal his client's illegal conduct, he may risk exposure to personal liability if he does so. If the client is eventually prosecuted, the lawyer might be charged as a participant in the illegality if he knew of the misconduct but took no preventive action. The attorney-client privilege would not protect counsel since knowledge of the client's criminal intentions abrogates the privilege. Yet disclosure of the information is an undesirable course of action because it might divulge client confidences, which is independently improper.[290] The Code allows counsel in this position to withdraw from the representation with the court's permission.[291]

The Code also regulates an attorney's conduct once a trial has commenced.[292] No disciplinary rule specifically prohibits counsel from destroying relevant evidence, although such conduct would clearly be culpable. DR 7-102(A)(6) prohibits a lawyer from participating in the creation or preservation of evidence which he knows to be false, but this rule probably does not extend to document tampering. Canon 7, however, when read in conjunction with the Code's prohibition against concealing that which he is "required by law to reveal,"[293] such as subpoenaed documents, may sanction an attorney

287 ABA CODE DR 7-102(A)(7). The existence and scope of counsel's affirmative duty to disclose information received from clients is the subject of extensive commentary, particularly in connection with criminal prosecutions, where counsel is privy to the location of concealed evidence. *See, e.g.*, LAWYERS ETHICS 145-82 (A. Gerson, ed., Transaction Books 1980); Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921; Callan and David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in Our Adversary System*, 29 RUTGERS L. REV. 332 (1976); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Comment, *In re* Ryder: *Can An Attorney Serve Two Masters?*, 54 VA. L. REV. 145 (1968); Patterson, *The Limits of the Lawyer's Discretion and the Law of Legal Ethics: National Student Marketing Revisited*, 1979 DUKE L.J. 1251. For the rare occasions where attorneys have been subject to ethical sanctions for failure to disclose information see, *e.g.*, Harkin v. Brundage, 13 F.2d 617, 620 (7th Cir. 1926) (failure to inform court of proceedings in second jurisdiction may lead to disbarment), *rev'd on other grounds*, 276 U.S. 36 (1928); Sullins v. State Bar, 15 Cal. 3d 609, 542 P.2d 631, 125 Cal. Rptr. 471 (1975) (suspension for requesting higher contingency fee to represent executor of estate without disclosing beneficiaries' withdrawal four years earlier), *cert. denied*, 425 U.S. 937 (1976); Florida Bar v. Beaver, 248 So. 2d 477 (Fla. 1971) (suspension for advising client to conceal assets during divorce proceedings).

288 *See, e.g., In re* Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979); *In re* Murphy, 560 F.2d 326, 337 (8th Cir. 1977); United States v. Calvert, 523 F.2d 895, 909 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); United States v. Billingsley, 440 F.2d 823, 827 (7th Cir.), *cert. denied*, 403 U.S. 909 (1971). *See also* Clark v. United States, 289 U.S. 1, 15 (1933) (Cardozo, J.) ("The privilege takes flight if the relation is abused."); Hazard, *supra* note 283, at 1063 n.6 (abrogation of privilege for intended crimes dates back to The Queen v. Cox & Railton, 14 Q.B. 153 (1884)).

289 ABA CODE DR 4-101(C)(3) states: "A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime."

290 ABA CODE DR 4-101(B)(1).

291 ABA CODE DR 2-110(C)(1)(b) and (c). Subsection (b) permits withdrawal where the client "seeks to pursue an illegal course of conduct," while subsection (c) allows withdrawal if the client "insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules."

292 ABA CODE CANON 7 (attorney should represent client zealously within the bounds of law).

293 ABA CODE DR 7-102(A)(3).

who advises a client to dispose of subpoenaed documents. As the duty to disclose incriminating evidence continues to evolve, the range of evidence counsel is "required by law to reveal" will likely expand beyond that which is subpoenaed or requested in discovery.

A lawyer whose client informs him of an intention to destroy subpoenaed documents should take all responsible steps to dissuade the client from such action. If counsel learns that the client or one of its employees destroyed relevant documents after receipt of a subpoena, counsel must either report the destruction to the court or withdraw from the representation. As a practical matter, if the client is a corporation and the destruction was undertaken by an employee, counsel should first report the destruction to senior management and then to the court and opposing counsel. Counsel then continues the representation at a disadvantage due to the adverse inference that may be drawn from the destruction, and the employee is terminated.

B. *A.B.A. Commission on Evaluation of Professional Standards Draft Model Rule 2.5; Alternative Proposals*

In the past decade there has been a continuing inquiry into the meaning of professionally responsible conduct. The inquiry has led to reconsideration of the Code and to the appointment of an A.B.A. Commission on Evaluation of Professional Standards (the Commission) which published in 1980 a discussion draft of Model Rules of Professional Conduct (Model Rules).[294] The Model Rules constitute a comprehensive reformulation of A.B.A. Code of Professional Responsibility, and are presently undergoing thorough examination by the legal profession and the public.

Recognizing that the present Code lacks any specific provision regarding alteration or destruction of evidence, the Commission drafted Model Rule 2.5: "A lawyer shall not advise a client to alter or destroy a document or other material when the lawyer reasonably should know that the material is relevant to a pending proceeding or one that is clearly foreseeable."[295] The Model Rule does not require a lawyer to foresee all possible uses of documentary material and a lawyer may still give advice concerning a records destruction program.

The term "clearly foreseeable" requires clarification. "Clearly foreseeable" proceedings should be limited to those involving a specific con-

294 ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, DISCUSSION DRAFT OF MODEL RULES OF PROFESSIONAL CONDUCT (Jan. 30, 1980) [hereinafter cited as MODEL RULES].

295 The Commission's comment to Model Rule 2.5 states:

> Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if a person alters or destroys material that could be demanded by an opposing party. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. In any event, it is improper for a lawyer to advise a client deliberately to take steps that impair the legal rights of others.
>
> The Rule applies to evidentiary material generally, including computerized information. The Rule does not require a lawyer to foresee all possible uses of material and does not preclude advice about a general policy concerning retention of records. It does preclude a lawyer from suggesting the destruction or falsification of specific material whose relevance can be foreseen in pending or clearly foreseeable litigation. It also prohibits a lawyer from turning over such material at the client's direction when the client plainly intends to destroy it.

troversy between parties, and should exclude proceedings which are only a possibility and "might" be foreseeable.[296] By including "clearly foreseeable as well as pending proceedings, the rule would impose superior ethical requirements on counsel.

Whether a proceeding is "clearly foreseeable" is a question upon which reasonable counsel might differ. If a potential claimant has manifested to management or counsel an awareness of or a present intention to assert a possible claim, a proceeding is "clearly foreseeable." Furthermore, even though no claimant has manifested such an awareness or intention, a proceeding is "clearly foreseeable" if an event occurs upon which a claim could be premised and which involves a catastrophe, accident or similar occurrence, such as an airplane crash, so open and notorious that past experience would dictate that one or more claims are reasonably likely to be asserted. However, it is questionable whether a proceeding is "clearly foreseeable" if no claimant manifests an awareness of, or present intention to assert, a possible claim following required public disclosure acknowledging the existence of possible claims arising out of an event or set of circumstances.

Under Model Rule 2.5 the actual knowledge requirement is replaced with the objective standard of foreseeability, thereby subjecting an attorney to disciplinary action despite his lack of personal knowledge.[297]

Two professional organizations have proposed alternative rules of professional conduct in response to the Model Rules. The National Organization of Bar Counsel (N.O.B.C.) objects to the Commission's proposed changes in the format of the Code[298] and advocates revision of the Code without abandonment of its present form and style. The N.O.B.C. would replace current DR 7-102(A)(3)[299] with a provision stating that a lawyer shall not "improperly obstruct another party's access to evidence, destroy, falsify or conceal evidence, or use illegal methods of obtaining evidence."[300] The N.O.B.C. would also add a new subsection to DR 7-102 prohibiting a lawyer from "[a]dvis[ing] a client to alter or destroy material evidence when the lawyer knows or should know that the material may be relevant evidence in a pending

296 Members of one committee commenting on Model Rule 2.5 believed that it "should include a further affirmative obligation on the lawyer to advise a client not to destroy such documents where there is a proceeding already pending," but the entire committee did not adopt this requirement. *Id.*

297 The Committee on Professional and Judicial Ethics of The Association of the Bar of the City of New York suggests that the comment to Draft Model Rule 2.5 requires qualification. It observes that "[t]he first sentence of the Comment refers to documents 'essential to establish a claim or defense,' but the third sentence refers to 'material that could be demanded by an opposing party.' The latter standard appears to require a lawyer to anticipate the kinds of broad and frequently tangential discovery demands which can be made under discovery rules like Rules 26 and 34 of the Federal Rules of Civil Procedure. The Committee's view is that the standard of 'relevant' within the meaning of the Rule should be similar to that contained in the first sentence of the Comment and thus embrace only documents that the lawyer can reasonably foresee are clearly relevant to the issues in a pending proceeding or in a proceeding that is clearly foreseeable." THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE REPORTS COMMENTING ON THE JANUARY 30,1980 DISCUSSION DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT OF THE ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS 32 (July 1980).

298 NATIONAL ORGANIZATION OF BAR COUNSEL, REPORT AND RECOMMENDATIONS ON STUDY OF THE MODEL RULES OF PROFESSIONAL CONDUCT TO THE ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS 6 (Tent. Draft 1980).

299 "[A] lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal."

300 NATIONAL ORGANIZATION OF BAR COUNSEL, *supra* note 290, Subsection (A)(3) of proposed rule DR 7-102 (Representing a Client Within the Bounds of the Law) at 52-57.

proceeding or a proceeding that is reasonably foreseeable."[301] The N.O.B.C.'s proposed "reasonable foreseeability" standard would be more restrictive than the Commission's "clear foreseeability" standard, since many "reasonably" likely proceedings would not be "clearly" likely. The N.O.B.C. proposal would thus require great diligence in ascertaining whether proceedings are "reasonably foreseeable" and whether specific documents "may be relevant evidence." The N.O.B.C.'s proposal would likely prevent counsel from ever recommending *ad hoc* destruction of business records, since in today's litigious environment a variety of proceedings are "reasonably foreseeable."

The Roscoe Pound-American Trial Lawyers Foundation (the Foundation) considers the Model Rules to make few improvements over the Code and considers the Model Rules inferior to the Code in several significant respects. The Foundation-appointed Commission on Professional Responsibility has prepared and circulated for comment a new draft code.[302] Several of its proposed rules present in the aggregate a vague scheme of ethical limitations on counseling document destruction. The Foundation's draft code includes one provision, Rule 3.5, directly relevant to counseling the destruction of documents. Rule 3.5 follows the Code's approach, providing that a lawyer "shall not knowingly participate in unlawfully concealing or destroying evidence, or discourage a witness or potential witness from talking to counsel or another party."[303]

The Foundation thus considers the legal and ethical obligations of counsel regarding document destruction to be coextensive, whereas the Commission and N.O.B.C. regard counsel's ethical obligations as exceeding present legal requirements.

VII. The Nixon Tapes: An Illustration

The difficulties of interpreting the legal and ethical standards relating to the destruction of relevant documents prior to their subpoena are illustrated by examining the consequences that would have resulted if President Richard Nixon had destroyed the tapes[304] after their existence was revealed on July 16, 1973 but before they had been subpoenaed by the Senate Select Committee on Presidential Campaign Activities on July 23, 1973.[305] Could the President have destroyed the tapes without legal consequences prior to July 23? Would the President's counsel have violated professional ethical standards if he had recommended destruction prior to that date?

The question of culpability under the present obstruction of justice statutes would have depended both on the time the tapes were destroyed and the intent of the person destroying them. Clearly, to have intentionally

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301 *Id.* at 53.

302 COMMISSION ON PROFESSIONAL RESPONSIBILITY OF THE ROSCOE POUND-AMERICAN TRIAL LAWYER FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT (Public Discussion Draft, June 1980).

303 *Id.* at 207.

304 WATERGATE: CHRONOLOGY OF A CRISIS, 1 CONG. Q. 192 (1973). The existence of a secret system to record conversations in the White House and Executive Office Building during the Nixon administration was revealed on July 16, 1973.

305 *Id.* at 210. The special prosecutor's April 18, 1974 subpoena for the tapes was upheld in United States v. Nixon, 418 U.S. 683 (1974).

destroyed or to have counseled destruction of the tapes after they were subpoenaed on July 23 would have constituted either criminal contempt or obstruction of justice, as well as a violation of the Code of Professional Responsibility by counsel. Liability for intentional destruction of the tapes at any time before July 23, however, would have depended upon whether the tapes were relevant to a judicial, administrative or congressional investigation or proceeding and upon the actor's belief or knowledge about the possibility of legal action. Was the actor's intent "corrupt"? The ethical implications for counsel would have depended upon these legal consequences since advising the President to destroy the tapes would not have been unethical so long as such destruction was not illegal.

One commentator suggests that if "there was a period when destruction was legal, it was probably prior to March 26, 1973, the date when the grand jury that indicted the original seven Watergate defendants reconvened to consider new charges."[306] However, a member of the special prosecutor's staff believes that issuance of a subpoena, not just empanelment of the grand jury,[307] was necessary to render destruction illegal. Former Attorney General Richard Kleindienst is reported to have said President Nixon was "stupid" not to have burned the tapes. Another attorney has said that he would have defended the President by "burning" the tapes; still others have suggested that they would have had no ethical compunctions about advising destruction of the tapes.[308]

Whether an adverse evidentiary inference could have been drawn in a civil proceeding from the destruction of the tapes would have depended on whether the tapes were deliberately destroyed to prevent their use in litigation. The adverse inference could only have arisen if the destruction were accompanied by intentional conduct indicating fraud and a desire to suppress truth. Obviously, arguments could have been made to rebut the negative inference.

Whether criminal liability could have been imposed for the intentional destruction of the tapes had the tampering with physical evidence provisions in S. 1722 and H.R. 6915 been law is also uncertain. Section 1325 of S. 1722 requires the *actus reus* element of tampering with physical evidence and three interrelated *mens rea* elements, namely, a specific intent to impair the "integrity" or "availability" of the evidence for use in an official proceeding, knowledge that an official proceeding is "pending or likely to be instituted," and an awareness of tampering with a particular document. The parallel provision in H.R. 6915, section 1725, establishes a narrower standard for culpability, criminalizing destruction only if done with the intent to impair use of evidence "in an official proceeding that is pending." Under either provision, it may have been illegal to have intentionally and knowingly destroyed the tapes after the grand jury that indicted the original seven Watergate defendants reconvened on March 26.

Would counsel have violated any of the three proposed ethical standards relating to destruction of evidence by recommending destruction of the tapes after March 26 or July 16 but before July 23? The answer depends upon which

306 Note, *supra* note 124, at 1665 n.3.
307 R. BEN-VENISTE, STONEWALL 112 (1977).
308 Note, *supra* note 124, at 1665 n.4.

standard is applied. The N.O.B.C.'s proposed rule, forbidding counsel from advising destruction of material that "may be relevant evidence in a proceeding that is reasonably foreseeable," would have prohibited destruction of the tapes any time after March 26. The "clearly foreseeable" test in the Commission's Model Rule 2.5 also would have been violated by destruction after July 16, and possibly as early as March 26. Whether the Foundation's proposed ethical standard relating to destruction of evidence would have been violated by destruction prior to July 23 would depend on whether the conduct was unlawful, since this standard regards counsel's legal and ethical obligations as coextensive.

VIII. Conclusion

In light of the expanding legal requirements imposed on business entities to retain documents for various periods of time, an increasing number of companies have recognized the practical and legal necessity of a comprehensive records management program. As business documents proliferate, the adoption and proper administration of such a program have become essential to the cost-efficient operation of a company and to the avoidance of practical, legal and ethical difficulties.

Companies which adopt records management programs, however, confront difficult legal and ethical questions regarding, first, continuing *ad hoc* search and destroy operations, and second, the timing of suspensions of routine document destruction programs in the face of "reasonably" or "clearly" foreseeable or pending investigations or proceedings. Beyond doubt, federal criminal statutes and the Code of Professional Responsibility are violated if management and counsel agree to destroy relevant documents after process requiring their production has been served. Furthermore, great risk of violation arises if management and counsel agree to destroy relevant documents in the course of voluntary cooperation with government authorities, or upon learning indirectly of relevant government inquiry. Many other actions by management and counsel, both intentional and inadvertent, give rise to the possibility of criminal and ethical sanctions.

For these reasons, what once was a simple business decision to destroy obsolete or seemingly inconsequential documents has become a senior management concern deserving serious and thoughtful attention. Lawyers must be prepared to assist business clients in responding to the continually enlarging sphere of difficulties surrounding the destruction of documents. The possible legal, practical and ethical consequences of document destruction are vast, and the issue of records management may soon occupy an important place at every level of every business enterprise. As sophisticated solutions emerge to resolve filing, storage and retrieval problems, new difficulties will arise requiring prompt resolution. Because the issues are only now being addressed, the area of records management is certain to remain a challenging and salient topic so long as businesses continue to generate massive numbers of documents.