AN ETHICAL GUIDE TO THE NON-DESTRUCTION OF EVIDENCE

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TABLE OF CONTENTS

I. INTRODUCTION

The defense attorney who destroys evidence will go directly to jail without passing "go". Should the government destroy evidence well . . . it may be justified if done in accordance with established lawful policy. Defense counsel must be quick to preserve evidence. Timely action may be the difference between a client's freedom and incarceration. This paper will focus primarily on the destruction of evidence by the government, consequences to counsel when evidence is improperly destroyed and the mechanics of evidence preservation.

II. DUE PROCESS AND THE DESTRUCTION OF EVIDENCE

Criminal defendants are to be afforded a meaningful opportunity to present a complete defense. To safeguard this right, the Supreme Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." [1] "The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor."[2] Moreover, a prosecutor is required to disclose to the defense favorable, material evidence even without a defense request.[3]

Criminal prosecutions must comport with prevailing notions of fundamental fairness under the Due Process Clause of the Fourteenth Amendment.[4] However, "Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed."[5] Additionally, fashioning remedies for the illegal destruction of evidence can pose troubling choices.[6] As stated by Justice Marshall, "when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing . . . the State's most probative evidence."[7]

The good or bad faith of the government is irrelevant when the State fails to disclose to the defendant material exculpatory evidence.[8] A different result is required when the government fails to "preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."[9] "Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[10]

The Court's rationale for applying a bad faith standard for failure to preserve evidence is premised on the "treacherous task" previously mentioned. Additionally, it is premised on the Court's "unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."[11]

In order to establish a due process violation from the government's failure to preserve evidence, a defendant must show that:

(1) government officials acted in bad faith;

(2) the evidence is material in showing the defendant's innocence; and

(3) there is no alternate means of demonstrating the defendant's innocence.[12]

A. GOVERNMENT BAD FAITH

"The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."[13] As one commentator noted, "under this definition, no police action amounting to destruction of evidence is in bad faith unless the police know the evidence is exculpatory and they purposely destroy it."[14] This rationale and definition permits the police to turn a blind eye to evidence that may be exculpatory by not performing tests on evidence that may lead to the discovery of exculpatory qualities.

Many agencies have policies concerning the destruction of evidence. Violation of the policies may create bad faith arguments. Courts have held

that destruction of evidence in accordance with an established procedure precludes a finding of bad faith absent other compelling evidence.[15] To overcome this hurdle, defense counsel should discover the particular procedure that an agency or government uses when destroying evidence. For example, the Code of Federal Regulations provides procedures for the destruction of marijuana.[16]

However, "while a showing the government did not follow standard procedure could provide some evidence of bad faith and create an inference, it does not syllogistically imply the presence of bad faith as a matter of deductive logic."[17] Additional evidence of bad faith must be provided. For instance, after defense counsel determines the government or agency's procedure for the destruction of evidence, counsel should promptly send a certified letter to the prosecutor advising him/her of the agency's procedure and the pending destruction of evidence. The letter should advise the prosecutor that defense counsel wants the evidence preserved. Counsel should follow up with a discovery motion requesting the evidence sought and a request that the evidence be preserved. Furthermore, counsel should subpoena the evidence directly from the agency. Should evidence be destroyed, in light of the above, defense counsel will be closer to a bad faith finding.[18]

B. DESTROYED EVIDENCE IS MATERIAL TO DEMONSTRATE DEFENDANT'S INNOCENCE

The Due Process Clause does not impose "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."[19] The government's constitutional duty to preserve evidence is limited to evidence that possesses "an exculpatory value which was apparent before the evidence was destroyed. . ."[20]

The United States Supreme Court held in *Arizona v. Youngblood*, that absent a showing of bad faith, the police do not violate the accused's due process rights by failing to preserve potentially exculpatory evidence.[21] The *Youngblood* case dealt with the state's failure to refrigerate clothing containing semen and the failure to perform tests on semen samples. As noted in an opinion prior to *Youngblood*:

> In a rape case, it is possible to test a sample of seminal fluid taken from the victim and compare it with samples of a defendant's saliva and blood. The results of such a test cannot positively identify a defendant as the perpetrator, but the test *can* conclusively exculpate an individual if the blood types do not match. This procedure is widely employed by law enforcement authorities, and has been accepted by a number of courts.[22]

Accordingly, at the time of *Youngblood*, test on semen could conclusively exclude a defendant as the semen donor. Therefore, semen could have exculpatory qualities that upon testing could be discovered.

The majority in *Youngblood*, in justifying its holding, capitalized on the fact that the unpreserved semen samples merely could have exculpated the Defendant.[23] However, since the semen was not tested, its exculpatory value was not apparent (i.e. police did not know the semen would exculpate defendant) before it was destroyed.[24]

C. NO ALTERNATIVE MEANS OF DEMONSTRATING DEFENDANT'S INNOCENCE.

The Supreme Court found in the *Trombetta* case, in addition to the evidence not being exculpatory, the defendant had an alternative means of demonstrating his innocence.[25] *Trombetta* involved the preservation of breath samples from an intoxilyzer. Although the sample was not preserved, the Court believed the defendant had alternate means of demonstrating his innocence.

In *Trombetta*, the defendant identified only a limited number of ways in which the Intoxilyzer in question might malfunction: Such malfunctions included faulty calibration, extraneous interference with machine measurements, and operator error.[26] The Court noted that defendant was perfectly capable of raising these issues without resort to preserved breath samples.[27]

Specifically, to protect against faulty calibration, the Court observed that the State gives drunk driving defendants the opportunity to inspect the machine used to test their breath as well as that machine's weekly calibration results and the breath samples used in the calibrations.[28] The Court stated that Defendant could have utilized this data to

impeach the machine's reliability.[29]

With regards to improper measurements, the parties in *Trombetta* identified only two sources capable of interfering with test results: radio waves and chemicals that appear in the blood of those who are dieting.[30] The Court noted that, "[f]or defendants whose test results might have been affected by either of these factors, it remains possible to introduce at trial evidence demonstrating that the defendant was dieting at the time of the test or that the test was conducted near a source of radio waves."[31]

Finally, as to operator error, the Court stated that the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the factfinder about whether the test was properly administered.[32]

III. CRIMINAL EXPOSURE FOR THE INTENTIONAL DESTRUCTION OF EVIDENCE

The destruction of evidence can result in both state or federal criminal prosecution. "A person commits an offense [against the State of Texas] if, knowing that an investigation or official proceeding is pending or in progress he alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility or availability as evidence in the investigation or official proceeding."[33] An "official proceeding" means, "any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant."[34] Such an offense is a third degree felony.[35] The crime of "Tampering with or Fabricating Physical Evidence" is a specific intent crime.[36] However, considering that defense counsel has been retained it would be hard to imagine a situation where defense counsel and the client do not know that an investigation or official proceeding is pending.

A person who destroys evidence can potentially face federal criminal prosecution. "Whoever * * * corruptly * * * endeavors to influence, obstruct, or impede, the due administration of justice" is obstructing justice.[37] As noted by the Fifth Circuit, "several courts have held that persons who destroy evidence relevant to judicial proceedings violate § 1503."[38] The destruction of evidence by the defendant alone comes under the omnibus clause of 18 U.S.C. § 1503.[39]

IV. ETHICAL VIOLATIONS[1]

The Texas Disciplinary Rules of Professional Conduct addresses the destruction of evidence. Specifically, the Rules state that:

> A lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.[40]

Additionally, prosecutor's have "special responsibilities" to:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[41]

Furthermore, "A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate."[42]

Professional misconduct includes acts or omissions by an attorney, individually or in concert with another person or persons, that violate one or more of the Texas Disciplinary Rules of Professional Conduct.[43] Destruction of evidence is a violation of Texas Disciplinary Rule of Professional Conduct 3.04(a).

Sanctions may be imposed for professional misconduct.[44] Such sanctions include:

1. Disbarment;
2. Resignation in lieu of disbarment;
3. Indefinite disability suspension;
4. Suspension for a term certain;

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[1] This section is not intended to be a detailed discussion of the procedure involved in a disciplinary action.

5. Probation or suspension;

6. Interim suspension;

7. Public reprimand; and

8. Private reprimand.[45]

Some sanctions are not available at certain stages of disciplinary proceedings. For example, an Investigatory Panel, upon a finding of just cause, may impose any sanction except for disbarment.[46] Conversely, an Evidentiary Panel may not impose a private reprimand.[47]

IV. EVIDENCE PRESERVATION TIPS

A. Law enforcement procedures regarding lawful destruction of evidence. Research the particular procedures of the law enforcement agency regarding destruction of evidence to determine the time frame for the destruction of evidence. This information will allow counsel to put the prosecutor on notice as to preserve evidence. Information on destruction of evidence can be found in the Code of Federal Regulations, and the Texas Administrative Code (for controlled substance 37 T.A.C. 13.161 et.seq.), or agency manuals.

For example, the Federal Bureau of Investigations' Legal Handbook for Special Agents states with regards to marking evidence of identification:

> "detailed notes should be made describing the articles found, the place they were found, the date found and the person who found them and the identifying mark on each. The original notes should be preserved in the investigative file of the case for use by the Agent when [he/she] is called upon to testify at the trial."[48]

Additionally, all photographs shown to any witnesses for the purpose of identifying the suspect, whether or not an identification was made, should be specifically identified and remain under the control of the field office or be otherwise recoverable, so that they will be producible, if necessary.[49]

Furthermore, the original handwritten notes of the agent conducting an interview of a subject, suspect, or witness, where the results of the interview may become the subject of court testimony, are to be retained.[50]

B. Subpoena power. There will be times that evidence needs to be preserved quickly. For instance, dispatch tapes are routinely recycled by law enforcement, as are the recordings of prison conversations. There is no time to waste on conventional discovery. Use subpoenas.

1. Federal Subpoena

Under the federal system, a subpoena may command a person to whom it is directed to produce books, papers and/or documents. Federal Rule of Criminal Procedure 17(c) further provides that the Court may direct that these articles be produced before they are offered into evidence. Accordingly, Rule 17(c) provides a procedure by which counsel can obtain documents or records prior to trial which are necessary for the presentation of the defense. This rule is not intended to be used as a discovery device, but rather as a means of obtaining evidence.[51]

Whether a subpoena will issue under this rule is at the discretion of the trial court. Justification for a subpoena for production prior to trial requires counsel to demonstrate that the subpoenaed materials are not available from any other source and that examination should not await trial. A court may quash or modify a subpoena if compliance would be unreasonable or oppressive.

In *U.S. vs. Nixon*, 418 U.S. 683 (1974), the Court determined that there are four (4) prerequisites to the pretrial production of documents:

1. Documents must be evidentiary and relevant;

2. Documents must not be otherwise procurable reasonably in advance of trial through due diligence;

3. Defendant must show that he is unable to properly prepare for trial without such production and inspection in advance of trial, and the failure to obtain such inspection may tend to unreasonably delay the trial; and

4. Application must be in good faith

and not as a "fishing expedition". Id at 699 to 700.

There is a procedure to issue a motion for a subpoena for witnesses or evidence out of the district. Federal Rule of Criminal Procedure 17(b) provides that the court shall order the issuance of a subpoena for service upon any witnesses on the *Ex Parte* application of a defendant, if the defendant makes two (2) showings. First, the defendant must make a satisfactory showing of financial inability to pay the fees of the witness. Secondly, the defendant must demonstrate that the presence of the witness is necessary to an adequate defense. Should the defendant so demonstrate, and the witnesses statement is relevant to any issue in the case, the request must be granted. However, if the statements are inherently incredible or the government shows, either by the introduction of evidence or from other matters already on the record, that the statements are untrue or the request is otherwise frivolous, then the Court may deny the request.[52]

Since there is nationwide service of process in federal criminal cases, counsel for an criminal defendant, upon an appropriate showing, may obtain the service of a subpoena upon a witness who is located outside the district where the prosecution is pending. It should be noted that the rule provides for a ex parte application for service of such a subpoena.[53]

The Sixth Amendment provides, "in all criminal prosecutions, the accused shall enjoy the right. . .to have compulsory process for obtaining witnesses in his favor."[54] The Fifth Circuit has "generally given district courts wide discretion in determining whether subpoenas should issue under Rule 17(b), but only 'within the limits imposed by the Constitution.'"[55] The compulsory process right is not absolute.[56] When requesting a court to subpoena a witness, a defendant has the duty to demonstrate the necessity of the witness's testimony.[57]

In *U.S. v. Soape*, the defendant subpoenaed long distance telephone records of the Sheriff's Department and of his former attorney.[58] The district court denied his subpoena requests. The appellate court upheld the district court's decision because the defendant did not make the threshold showing of necessity.

2. State Subpoena

The procedures for having a subpoena issued in Texas criminal proceedings is found in Chapter 24 of the Texas Rules of Criminal Procedure. "[A] subpoena authorizes a designated person to summon one or more persons to appear at a specified term of the court, or on a specified day, to testify."[59] "If a witness [has] in his possession any instrument of writing or other than desired as evidence, the subpoena may specify such evidence and direct that the witness bring the same with him and produce it in court."[60]

Only after the defendant, his attorney or the State's attorney has made an application in writing or by electronic means to the clerk for a subpoena for each desired witness shall the clerk or his deputy be required or permitted to issue a subpoena in any felony case pending in any district or criminal district court of [Texas] of which he is clerk or deputy.[61] The application shall state the name of each witness desired, the witness' location and vocation, if known, and that the testimony of the desired witness is material to the State or to the defense.[62] The application must be filed with the clerk.[63] "A court or clerk issuing a subpoena shall sign the subpoena and indicate on it the date it was issued, but the subpoena need not be under seal."[64]

A subpoena is served by:

1. Reading the subpoena in the hearing of the witness;
2. Delivering a copy of the subpoena to the witness
3. Electronically transmitting a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address of the witness; or
4. Mailing a copy of the subpoena by certified mail, return receipt requested, to the last known address of the witness.[65]

Certified mail may not be used to serve a subpoena if the applicant requests in writing that the subpoena not be served by certified mail, or if the proceeding for which the witness is being subpoenaed is set to begin within seven business days after the date the subpoena would be mailed.[66]

The officer having the subpoena shall make due return thereof, showing the time and manner of service, if served by reading the subpoena in the hearing of the witness or delivering a copy of the

subpoena to the witness.[67] If the officer delivers the subpoena by way of electronic transmittal or certified mail, the officer shall include the acknowledgment of receipt or the return receipt in the return.[68] If the subpoena is not served, the officer shall show in his return the cause of his failure to serve it.[69] If there is no acknowledgment of an electronically transmitted subpoena after a reasonable time, or a mailed subpoena is returned undelivered, the officer shall use due diligence to locate and serve the witness.[70] If the witness can not be found, the officer shall state the diligence he has used to find the witness, and what information he has as to the whereabouts of the witness.[71]

C. Deposition of Material Witnesses. Depose key witnesses for testimony preservation. Situations may necessitate taking the deposition of a witness prior to trial. Federal Rule of Criminal Procedure 15 provides that the court, upon motion of any party in a federal criminal case, may order the testimony of a witness taken by deposition. This order shall be made if the request is "due to exceptional circumstances." Rule 15 sets forth the procedure to be utilized in a pretrial deposition in a criminal case.[72]

The use of the prior record testimony in a criminal case requires that the proponent of the evidence show the present unavailability of the witness.[73] For instance, for the government to introduce the depositions of alien witnesses at trial, there must be proof or stipulation that the witnesses whose depositions were taken were unavailable. If this were not the case, it would be a violation of the confrontation clause of the Sixth Amendment. Even where the absent witnesses are beyond the courts jurisdiction and subpoena power at the time of trial, a deposition of material witness may be inadmissable at trial either because there were no extraordinary circumstances to justify the deposition, or because the government has not made a diligent effort to secure the witnesses' voluntarily return to testify.[74]

Counsel who represents material witnesses must be aware that Title 18 U.S.C. § 3144 provides that no material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can be adequately secured by deposition, and if further detention is not necessary to prevent a failure of justice.

D. Correspondence to prosecutor requesting informal discovery. This should be done shortly after charges are brought but before formal discovery commences. In addition to the requests below, the letter should advise the prosecutor of the destruction procedures of the particular agency. Some of what should be asked for are as follows:

1. Defendant Statements. Defendant should request disclosure of all copies of any written or recorded statements made by Defendant; the substance of any statements made by Defendant which the government intends to offer in evidence at trial; any response by Defendant to interrogation; the substance of any oral statements which the government intends to introduce at trial, and any written summaries of Defendant's oral statements contained in the handwritten notes of any government agent; any response to any *Miranda* warnings given to Defendant. Include all statements, whether oral or written regardless of whether the government intends to introduce those statements. Fed R. Crim. P. 16(a)(1)(A).

2. Arrest Reports, Notes and Dispatch Tapes. Defendant requests all arrest reports, investigator's, notes, memos from arresting officers, sworn statements, notes and dispatch or any other tapes that relate to the circumstances surrounding arrest or questioning. This request should include, but is not limited to, any rough notes, records, reports, transcripts or other documents in which statements of Defendant or any other discoverable material is contained. Fed R. Crim. P. 16(a)(1)(A); (B); (C), Fed R. Crim. P. 26.2 and 12(j) and *Brady vs. Maryland*, 373 U.S. 83

(1963).

3. **Scientific Test/Examination Reports.** Defendant requests the reports of all tests and examinations conducted upon the evidence, including but not limited to, [fingerprint analysis; drug testing, etc.] that is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or which are intended for use by the government as evidence in chief at the trial. Fed. R. Crim. P. 16(a)(1)(D).

4. **Brady Material.** Defendant requests all documents, statements, agent reports, and tangible evidence favorable to Defendant on the issue of guilt and/or which affects the credibility of the government's case. Impeachment as well as exculpatory evidence falls within *Brady's* definition of evidence favorable to the accused. This request specifically includes any information about out-of-court identifications of Defendant by percipient witnesses to this offense that may cast doubt on their reliability. *U.S. v. Bagley*, 473 U.S. 667 (1985); *U.S. v. Agurs*, 427 U.S. 97 (1976).

5. **Evidence Seized.** Evidence seized as a result of any search, either warrantless or with a warrant, is discoverable. Fed. R. Crim. P. 16(a)(1)(C)

6. **Request for Preservation of Evidence.** Defendant requests that all dispatch tapes, or any other physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest in this case be preserved. This request includes, but is not limited to, any samples used to run any scientific tests and any evidence seized from any third party. It is requested that the government question all the agencies and individuals involved in the prosecution and investigation of this case to determine if such evidence exists, and if it does exist, to inform those parties to preserve any such evidence.

7. **Tangible Objects.** Defendant requests the opportunity to inspect and copy as well as test, if necessary, all physical evidence, and tangible objects, including photographs, books, papers, documents, photographs, of building or places or copies of portions thereof which are material to the defense or intended for use in the government's case, or were obtained from, or belong to Defendant. Fed. R. Crim. P. 16(a)(2)(C).

8. **Evidence of Bias or Motive to Lie.** Defendant requests evidence that any prospective government witness is biased or prejudiced against Defendant, or has a motive to falsify or distort testimony. *Pennsylvania vs. Ritchie*, 480 U.S. 39 (1987).

9 **Impeachment Evidence.** Defendant requests evidence that any prospective government witness has engaged in any criminal act, whether or not it resulted in a conviction, and whether or not any witness has made a statement favorable to Defendant. *See* Fed R. Evid. 608, 609 and 613; *Brady vs. Maryland*, 373 U.S. 83 (1963).

10. Evidence of Criminal Investigation of Any Government Witness. Defendant requests evidence that any prospective witness is under investigation by federal, state or local authorities for any criminal conduct. *U.S. v Chitty*, 760 F. 2d 245 (2d Cir.) *Cert. Denied*, 474 U.S. 945 (1985).

11. Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling. Defendant requests evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective witness' ability to perceive, remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic.

12. Name of Witnesses Favorable to Defendant. Defendant requests the name of any witness who made an arguably favorable statement concerning Defendant. *Jackson vs. Wainwright*, 390 F 2d 388 (5th Cir. 1968), *Hudson vs. Blackburn*, 601 F 2d 785 (5th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980).

13. Statement Relevant to the Defense. Defendant requests disclosure of any statement that maybe relevant to any possible defense or contention that might be asserted. This includes in particular any statements made by witnesses about identifications of the perpetrators of this offense in general, and about Defendant in particular.

14. Jenck's Act Material. Defendant requests all material pursuant to the Jencks Act, 18 U.S.C. §3500, and Fed R. Crim. P. 26.2. These materials are producible after a witness testifies at a pretrial motion to suppress, Fed. R. Crim. P. 12(i), and after a witness testifies at trial. 18 U.S.C. §3500. Defendant specifically requests pretrial production of these statements so that the Court may avoid unnecessary recesses and delays for defense counsel to properly use any *Jencks* statements and prepare for cross-examination.

15. Giglio Information. Defendant requests all statements and/or promises, express or implied, made to any government witnesses, in exchange for their testimony in this case, and all other information which could arguably be used for the impeachment of any government witnesses. *Giglio vs. U.S.* 405 U.S. 150 (1972).

16. Government Examination of Law Enforcement Personnel Files. Defendant requests that the government examine the personnel files for evidence of perjurious conduct or other like dishonesty, or any other material relevant to impeachment, or any information that is exculpatory, for all witnesses, including testifying officers and agents who may have been controlling or contacting the confidential informant in this case.

F. Discovery; Formal Requests

Federal Rule of Criminal Procedure 16 governs discovery in criminal proceedings. All of the previous requests mentioned in the informal discovery letter should be included, as applicable, in a formal discovery request. But counsel should bear in mind that reciprocal discovery requests may be triggered by formal or informal discovery requests.[75]

If the defendant requests disclosure of Documents and tangible objects or reports of examinations and tests, upon compliance by the government, the

defendant shall permit the government, on request, to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.[76] When reports of examinations and tests prepared by a witness whom the defendant intends to call at the trial relate to that witness' testimony, they are producible to the Government upon its request after it has complied with defendant's request for similar material.[77]

Additionally, the defendant shall disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703 or 705 of the Federal Rules of Evidence upon requests by the government under the following circumstance:

(i) if the defendant requests a written summary of testimony that the government intends to use under Rules 702, 703 or 705 of the Federal Rules of Evidence and the government complies; or

(ii) if the defendant has given notice of intention to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt.[78]

The summary shall describe the witnesses' opinions, the bases and reasons for those opinions and the witnesses' qualifications.[79]

The government is not entitled to discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents, in connection with the investigation or defense of the case. Likewise, the government is not entitled to statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorney's, except as to scientific or medical reports.[80] Similarly, the government is not required to produce reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case except as provided by Federal Rule of Criminal Procedure 16.

Additionally, Rule 16 does not authorize the discovery or inspection of statements made by government witnesses or prospective government witness, except when the witness has testified on direct examination in the trial of the case.[81] Similarly, after a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney presenting the witness to produce, for the examination and use of the moving party, any statement of the witness that is in the possession of the party that called the witness and that relates to the subject matter concerning which the witness has testified.[82]

In the case of an alibi defense, upon written demand of the prosecutor stating the time, date, and place at which the alleged offense was committed, the defendant is required to provide to the government a written notice of the defendant's intention to offer a defense of alibi.[83] The notice must state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish the alibi.[84] The notice must be served within ten days of receipt of the government's demand.[85]

CONCLUSION

Destruction of evidence undermines the integrity of the judicial process, exposes the attorney to potential criminal prosecution, as well as civil lawsuits, and threatens the attorney's license to practice law. Conversely, effective advocacy demands that steps are taken to preserve evidence and place your opponent on notice to do the same.

1. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532 (1984) *citing United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446 (1982).

2. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

3. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976).

4. *Trombetta*, 467 U.S. at 484.

5. *Id.* at 486.

6. *Id.*

7. *Id.*

8. *Arizona Youngblood*, 488 U.S. 51, 57, 109 S.Ct. 333 (1988).

9. *Id.*

10. *Id.* at 58.

11. *Id.* at 58.

12. *United States v. Thompson*, 130 F.3d 676, 686 (5th Cir. 1997) *citing Arizona v. Youngblood*, 488 U.S. 51, 56 (1988).

13. *Youngblood*, 109 S.Ct. at 337.

14. Karen Carlson Paul, Note, Destruction of Exculpatory Evidence: Bad Faith Standard Erodes Due Process Rights, *Arizona v. Youngblood*, __ U.S. __, 109 S.Ct. 333 (1988), 21 Ariz. St. L. J. 1181, 1195 (1989).

15. See *California v. Trombetta*, 467 U.S. 479, 484, 104 S.Ct. 2528, 2532 (1984); *United States v. Deaner*, 1 F.3d 192, 200 (3rd Cir. 1993)(citations omitted).

16. 28 C.F.R. § 50.21.

17. *United States v. Deaner*, 1 F.3d 192, 200 (3rd Cir. 1993).

18. *see United States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996).

19. *Youngblood*, 488 U.S. at 58.

20. *Trombetta*, 467 U.S. at 489.

21. *Youngblood*, 488 U.S. at 58.

22. *Hillard v. Spalding*, 719 F.2d 1443, 1445 (9th Cir. 1983) citing *See, e.g., United States v. Kennedy*, 714 F.2d 968 (9th Cir. 1983); *Davis v. Pitchess*, 388 F. Supp. 105, 107-08 (C.D.Cal. 1974), *aff'd*, 518 F.2d 141 (9th Cir. 1974), *rev'd on other grounds*, 421 U.S. 482,

95 S.Ct. 1748, 44 L.Ed.2d 317 (1975); *Bowen v. Eyman,* 324 F. Supp. 339, 340 (D.Ariz. 1970); *People v. Nation,*26 Cal.3d 169, 604 P.2d 1051, 1054-55, 161 Cal.Rptr. 299 (1980); *State v. Bowen,* 104 Ariz. 138, 449 P.2d 603, 605, *cert. denied,* 396 U.S. 912, 90 S.Ct. 229, 24 L.Ed.2d 188 (1969); *People v. Kemp,* 55 Cal.2d 458, 359 P.2d 913, 924, 11 Cal.Rptr. 361, *cert. denied,* 368 U.S. 932, 82 S.Ct. 359, 7 L.Ed.2d 194 (1961); *see also* 65 Am.Jur.2d Rape § 61 (1972).

23. *Youngblood,* 488 U.S. at 56, n** ("The possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta.")*

24. *Id.* at 57, n** (". . . [T]he exculpatory value of the evidence must be apparent. Here, respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing; this evidence was simply an avenue of investigation that might have led in any number of directions.")

25. *Trombetta*, 467 U.S. at 490

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Tex. Penal Code § 37.09(a)(1).

34. Tex. Penal Code § 1.07(a)(33).

35. Tex. Penal Code § 37.09(c).

36. See Tex. Penal Code § 37.09(a).

37. 18 U.S.C. § 1503.

38. *United States v. Griffin*, 589 F.2d 200, 203 n3 (5th Cir. 1979).

39. *Id.*

40. Tex. Disciplinary. R. Prof. Conduct 3.04(a).

41. Tex. Disciplinary. R. Prof. Conduct 3.09(d).

42. Tex. Disciplinary. R. Prof. Conduct 3.09, cmt. 1.

43. Tex. R. Disciplinary P. 1.06(Q)(1).

44. Tex. R. Disciplinary P. 2.13, 2.17, 3.10.

45. Tex. R. Disciplinary P. 1.06(T).

46. Tex. R. Disciplinary P. 2.13.

47. Tex. R. Disciplinary P. 2.17.

48. Federal Bureau of Investigations, Legal Handbook for Special Agents, 5-8.

49. Federal Bureau of Investigations, Legal Handbook for Special Agents, 6-43

50. Federal Bureau of Investigations, Legal Handbook for Special Agents, 7-13

51. *U.S. v. Arditti*, 955 F.2d 331, 345-46 (5th Cir. 1992).

52. *U.S. v. Sims*, 637 F.2d 625 (9th Cir. 1980). Also see *U.S. v. Cruz Jiminez*, 977 F.2d 95, 103 (3rd Cir. 1992).

53. See *Thor v. U.S.*, 574 F.2d 215 (5th Cir. 1978).

54. U.S. CONST. amend. VI.

55. *United States v. Soape*, 169 F.3d 257, 268 (5th Cir. 1999).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Gentry v. State*, 770 S.W.2d 780, 785 (Tex. Crim. App. 1988); Tex. Crim. Proc. Code 24.01.

60. Tex. Crim. Proc. Code 24.02.

61. Tex. Crim. Proc. Code 24.03(a).

62. *Id.*

63. *Id.*

64. Tex. Crim. Proc. Code 24.01(d).

65. Tex. Crim. Proc. Code 24.04(a)(1)-(4).

66. Tex. Crim. Proc. Code 24.04(a)(4)(A)-(B).

67. Tex. Crim. Proc. Code 24.04(b).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Fed. R. Crim. P. 30(e); 18 U.S.C. §3503:

73. Fed. R. Evid. 804(a)(5); *Ohio vs. Roberts* 448 U.S. 56, 74-75,100 S.Ct. 2531, 2543 (1980).

74. *U.S. v Mann*, 590 F.2d, 361, 366 (1st Circuit 1978).

75. Fed. R. Crim. P. 16(b).

76. Fed. R. Crim. P. 16(b)(1)(A) & (B).

77. Fed. R. Crim. P. 16(b)(1)(B).

78. Fed. R. Crim. P. 16(b)(1)(C).

79. *Id.*

80. Fed. R. Crim. P. 16(b)(2).

81. *Id.*

82. Fed. R. Crim. P. 25.2.

83. Fed. R. Crim. P. 12.1(a).

84. *Id.*

85. *Id.*