

Table 5.2. *Producing or destroying documents*

When something has to be proved to be true, lawyers can put forward witnesses to give oral evidence or produce documents to support what their client says. Lawyers' use of oral evidence has limitations because of memory lapse, distinguishing fact from opinion and judging honesty. You may therefore think that proving truth from documents is easier, because what they 'say' is in writing and not subject to a person's memory or willingness to speak. But as we saw in Table 5.1 in relation to forged documents, they can record lies as well as truths. Documents can be forged or altered and can go 'missing' as effectively as any human memory.

Another problem with documentary evidence in litigation is that there are different rules across different parts of Greater China. In general terms, while a party's documents are discoverable in Hong Kong – even prior to legal action where such action is likely^a documents created just for the legal process in Hong Kong can be classed as 'privileged'. Client privilege does not exist in China (including Taiwan), but is nevertheless relevant for lawyers who hope to practise in international law firms coming from common law countries like the US and UK.

In this table, we discuss corporate documents that have nothing to do with state security and are not privileged, but are still unavailable to a court because they have gone missing for some reason. If such documents are genuinely lost, that is one thing. But when they are destroyed to keep secrets, that is another. And this destruction can remain a secret because the original *existence* of the documents was itself a secret. When that sort of destruction occurs in close connection with the court process, it generally means that lawyers are attempting to keep secrets from the courts. In Chapter 4 the comments of Judge Kessler of the US District Court were included to show that tobacco industry lawyers were involved in destroying documents in order to delay and frustrate court processes in that country. There have also been major cases elsewhere that showed the extent to which tobacco industry lawyers were prepared to go in order to deceive the courts.^b

Corporate document destruction – scenario

You are an in-house lawyer working for a major international oil and gas exploration company, Global Energy (GE), based in Taipei.

GE has for decades been drilling gas exploration wells across the Asia-Pacific region. It has also been aware since 1995 that the drilling process inevitably releases significant amounts of methane, which is a greenhouse gas with many times the greenhouse warming impact of carbon dioxide.

In approximately 2000, GE commissioned an internal expert report about these

Table 5.2. (*cont.*)

methane emissions. The report found that combined methane emissions from GE exploration and production gas wells, known as ‘fugitive emissions’, were so great that they were adding 3% annually to total global greenhouse emissions, and speculated that the negative health effects of these emissions on people everywhere would in future be capable of calculation, with 3% of global financial losses caused by climate change being attributed to GE operations. GE discussed the report at Board level but the records of that discussion were kept secret, as was the report.

Now, however, a group of Cartaret Islanders (a part of Papua New Guinea) have commenced legal action in Singapore against GE, claiming that their islands have been destroyed by rising sea levels and that GE’s methane emissions have contributed to the sea level rises. These islanders number in their thousands and their livelihoods and futures are rapidly being destroyed.

GE defends the legal action and you are assigned to the internal GE team to help prepare the company’s defence. You find the old report and Board minutes in GE’s archives, while researching the history of GE’s gas wells. You realize that the report and Board minute could be highly damaging to GE, with many billions at stake, and you tell your supervisor about the find. You are told to destroy the documents immediately, but you know your supervisor is nervous.

What should you do?

Virtue ethics

If some lawyers lose sight of the duties to the law and to the court then their duty to their clients can dominate. The virtue of *wisdom* tells us as lawyers that our proper first priority is to the court when an employer encourages us or insists upon finding a way to hide the past in the past. Particularly if we love *justice* and regardless of any rules of secrecy, would we not wish to see documents that will assist a court disclosed? And if you have *compassion* for parties to litigation who have suffered (exhibiting a relationship of care), your desire for *justice* may give us the *courage* to say to your employer or client ‘this document must be disclosed’. In doing so, you may also be showing *prudence* in your employer or client’s interests, since document destruction is now often criminalized, as well as offensive to virtue ethics.

Confucian teaching

A Confucian lawyer would be unimpressed by document destruction and deliberate hiding of retained documents because of their general respect for authority (which is inherently weakened by deceit and deception), except to the

Table 5.2. (*cont.*)

extent that they might owe a duty to a supervisor to protect them by concealing or destroying the documents, if that supervisor were also a member of their extended family or otherwise owed a specific hierarchical loyalty.

Consequentialism

As a consequentialist lawyer confronted with proposed document destruction, you might reason with your supervisor that the ‘greatest good for the greatest number’ rules out such destruction because the benefits of disclosure are greater for the Carteret Islanders than for GE. In addition, the adverse consequences of a cover-up can be deep and penetrating. The fact that your supervisor might then seek to fire you, or recommend that GE fire you, might not be a bad thing in the long run, since the consequences of continuing to work for such a company are likely to be adverse to you.

Kantian ethics

As a Kantian it will be very difficult for you to shake the reality that the fair judicial process requires document disclosure to work fairly. This is responsible lawyering. Of course, your internal team culture at GE might only superficially agree with this and your supervisor may pressure you not to get in the way. GE’s zealous approach may be reminiscent of that identified by Judge Rakoff in Chapter 2, and it may characterize the proposed document destruction as ‘arguably legal’, on the basis that the report was only speculative and the minutes were never ‘proper’ minutes because they were never formally adopted by the Board. Your supervisor also suggests that you are not working in a law firm and whatever ethical obligations apply to law firms, they don’t apply to lawyers like you.

If your supervisor also argues that destroying the documents is merely good file housekeeping and is intended to ensure that GE’s records are not too numerous or inaccessible, you ought to be particularly wary. These arguments would show that GE is desperate.

As a Kantian, you will need to be on guard and identify this sort of pressure for what it is – an effort to subvert fairness and undermine the ability of the courts to do justice.

Applicable law and conduct rules – hiding or destroying documents

PRC	HKSAR	Taiwan
All China Law Association, <i>Rules on the Handling of Criminal Cases by</i>	Law Society of Hong Kong, <i>Professional Guide</i> 2013, APPENDIX to PRINCIPLE 5.23	Taiwan Bar Association <i>Code of Ethics for Lawyers</i> , 2009,

Table 5.2. (*cont.*)

<p><i>Lawyers</i>, 2017, Article 9: ‘Where a lawyer accepts representation, the law firm shall undergo the following formalities: ... (3) The law firm shall ... keep the original documents or copies for future reference.’</p> <p>All China Law Association, <i>Code of Profession Conduct for Lawyers</i>, 2018, Article 40: A lawyer shall scrupulously retain the originals of evidentiary documents, objects, photographic plates of audio-visual recordings and other materials provided by clients or parties.</p> <p>Article 62: ‘After rescinding the entrustment relationship with a client, a law firm</p>	<p>CIRCULAR 12-475 – 25 June 2012</p> <p>2. Retention of Old Files The following are guidelines on the minimum retention period of old files: Conveyancing – 15 years Tenancy – 7 years from expiration of the tenancy agreement General files – 7 years Criminal cases – 5 years^c from the expiration of any appeal period.</p> <p>8. Destruction of Old Files The responsibility for the decision to destroy a file remains with individual practitioners.</p> <p>The Law Society recommends that once the retainer is terminated all documents, which belong to the client, should be returned to the client.</p> <p>The failure to do so may cause future difficulties as original documents, such as deeds, guarantees or certificates which belong to the client should not be destroyed without the express written permission of the owner.</p> <p>Upon expiration of the appropriate retention period for closed files, members should ensure the files are destroyed in a secure manner by engaging a suitable commercial provider.</p>	<p>Article 38: ‘A lawyer shall set up files for the matters he/she has accepted and safe keep the filed evidences for two years after the termination of the mandate relationship.’</p>
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shall return to any party originals of materials . . . and may retain photocopies on file.’	[Note: In certain circumstances, a court can order that documents be withheld from discovery (though not destroyed), on the grounds that production would be injurious to the public interest. See Hong Kong SAR, <i>The Rules of the High Court</i> , 1988, Order 24, r15.]
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Conclusion in relation to the retention of corporate documents

The limits set by the conduct rules are appropriate having regard to general morality. Each of the legal systems in Greater China provide for retention of documents, and in the PRC, this obligation is indefinite in criminal cases. None of virtue ethics, Confucian teaching, consequentialism or Kantian ethics are sympathetic to the destruction of material documents.

In-house lawyers in Greater China should also have ethical obligations even though the latter may not be identical to those obligations of lawyers in private practice. In this corporate commercial context, responsible lawyering is appropriate and zealous advocacy has no legitimate role.

^a See, for example, *Malayan Banking Berhad, Singapore Branch v. Legend Six Holdings Ltd and Another* [2020] HKCFI 990.

^b See, for example, *McCabe v. British American Tobacco Australia Services* [2002] VSC 73. The case aired allegations against an Australian firm, Clayton Utz, which acted for the tobacco company. These allegations were subsequently rejected by the courts, but the firm later announced that it would cease acting for tobacco companies and that it had appointed former [Australian] High Court Chief Justice Sir Anthony Mason to head a ‘professional excellence committee’. See further Adrian Evans, *Assessing Lawyers’ Ethics*, Cambridge University Press, Melbourne, 2007, 9.

^c See, in particular, Law Society of Hong Kong, Revised Practice Direction P, September 2018, at Revised Practice Direction P | Hong Kong Lawyer (hk-lawyer.org).