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Document Destruction Policies Should be Suspended if a Federal Government Investigation *Could* Occur

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Due to the increasing number of federal government investigations and the broad wording of new, yet uninterpreted, federal law, it is important that, if an organization has any reason to think it might be investigated, the organization suspend its document destruction policy.

Several recent high-profile cases have taught large companies (both public and private) and their lawyers important lessons about document retention, particularly if litigation or a government investigation of any kind is foreseeable. Indeed, had 18 USC § 1519 been enacted when Arthur Andersen was indicted, the reversal of its conviction for obstruction of justice in January 2005 may have been less likely.[i] That statute had its genesis as part of the Sarbanes-Oxley Act reform. It provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

No reported decision has yet interpreted that provision, but it essentially criminalizes the knowing destruction of any record in contemplation of a federal government investigation. Its scope, in document destruction cases, is likely to turn on courts' interpretations of the term "contemplation." In *Andersen*, notwithstanding a record indicating that the accounting firm knew from very early on that it was likely to "be in the cross hairs"[ii] of the government's investigation into Enron, the Court indicated that, for Arthur Andersen to be guilty of violating 18 USC § 1512(b)(2)(A) and (B),[iii] the government needed to show a nexus between the document destruction and Arthur Andersen's knowledge of the materiality of the documents to a particular government proceeding:

> The instructions also were infirm for another reason. They led the jury to believe that it did not have to find *any* nexus between the "persua [sion]" to destroy documents and any particular proceeding. In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1), which states that an official proceeding "need not be pending or about to be

> instituted at the time of the offense." It is, however, one thing to say that a proceeding "need not be pending or about to be instituted at the time of the offense," and quite another to say a proceeding need not even be foreseen. A "knowingly ... corrup[t] persaude[r]" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.[iv]

The wording of 18 USC § 1519 appears, however, to be broad enough to encompass Arthur Andersen's conduct. Yet, as one commentator observes, the *Andersen* decision may have preemptively limited the potentially broad reach of the statute:

> [T]he *Andersen* Court, in discussing the nexus requirement under § 1512(b), used the same term — "contemplation" — that appears in § 1519: the Court stated that a person who "does not have *in contemplation* any particular official proceeding does not violate the statute. In § 1519, Congress used "in contemplation of" to express the loosest connection between the destruction or alteration of a document on the one hand, and a federal matter or case on the other, that would suffice for a violation. Now the Court has used the same word to describe the *minimum* nexus that a jury must be instructed to find in order to convict under § 1512(b). The lower federal courts, in interpreting new § 1519, are likely to conclude that the new statute, like § 1512(b) in *Andersen*, includes a nexus requirement on which the jury must be instructed.[v]

The Supreme Court also intimated that 18 USC § 1519's broad net may not be appropriate given the many contexts in which it is proper and advisable to withhold information during an existing government investigation:

> "[P]ersuad[ing]" a person "with intent to ... cause" that person to "withhold" testimony or documents from a Government proceeding or Government official is not inherently malign. Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination, see U.S. Const., Amdt. 5, or a wife who persuades her husband not to disclose marital confidences, see *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).
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> Nor is it necessarily corrupt for an attorney to "persuad[e]" a client "with intent to ... cause" that client to "withhold" documents from the Government. In *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), for example, we held that Upjohn was justified in withholding documents that were covered by the attorney-client privilege from the Internal Revenue Service (IRS). See *id.*, at 395, 101 S.Ct. 677. No one would suggest that an attorney who "persuade[d]" Upjohn to take that step acted wrongfully, even though he surely intended that his client keep those documents out of the IRS' hands.[vi]

The foregoing notwithstanding, with government investigations on the rise and the broad, uninterpreted wording of 18 USC § 1519, both legal counsel and the organization should take several steps in the event of an actual or anticipated government investigation.

First, counsel should: (1) advise the organization to identify paper and electronic files that may be subject to subpoena and take steps necessary to preserve that information; (2) advise the organization to suspend existing document destruction policies; (3) be in regular contact with the persons directly responsible for gathering the information sought and be familiar with the process involved in retrieving responsive material; (4) contact employees to determine the responsive data that may be in their possession; and (5) ensure, with the organization's help, that intended assertions to the government about the completeness of production are accurate.

Second, when document retrieval clearly will be cumbersome, the organization should consider seeking outside help.

Third, both outside and internal counsel should ensure that the organization's document retention program is in compliance with applicable laws and regulations.

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[i] *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).
[ii] *Id.* at 701.
[iii] Those sections provided, in part:

> "Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to ... withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding ... shall be fined under this title or imprisoned not more than ten years, or both."

See id. at 703.
[iv] *Id.* at 707-708
[v] James Dabney Miller, *The* Andersen *Decision and Document Management Under Sarbanes-Oxley*, The Metropolitan Corporate Counsel, Vol. 13, No. 9, Sept. 2005.
[vi] *Id.* at 703-704 (footnote omitted).

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