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Arthur Andersen's Victory Too Little, Too Late – What Lessons Others Can Take From *Arthur Andersen LLP v. United States*

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In unanimously overturning Arthur Andersen's criminal conviction for its destruction of documents shortly before the collapse of Enron, the U.S. Supreme Court has also confirmed that document retention policies – even those created in part to keep information from getting into the hands of others (including government) – are common in business and that it is not wrongful for a manager to instruct employees to comply with a valid retention policy. *Arthur Andersen LLP v. United States*, Slip Op. No. 04368, (U.S. May 31, 2005). The Court's decision is quite narrow. It focused on an erroneous jury instruction construing the single statute under which Arthur Andersen was indicted. The decision did not reach whether Arthur Andersen's actions were, in all respects, proper in the circumstances, nor define what constitutes a valid retention policy.

The decision itself was not particularly surprising. During argument, Justice Kennedy described the government's approach as "a sweeping position that will cause problems for every business in this country." As reported in The New York Times, the government's position reminded Justice Kennedy of "the old Army rule: make two copies of everything that you throw out." *N.Y. Times*, April 28, 2005, C-1. Thus, in rejecting this position, the Court's decision can be seen as a beacon of common sense.

The steps to energize a lazy retention policy as the Enron story unfolded.

Arthur Andersen's document retention policy was to maintain a central engagement file containing final work papers that fully and accurately documented their audit conclusions, and to discard any unnecessary drafts or notes. The Government, however, introduced evidence that many employees were unaware of the policy and that compliance with the policy was spotty, particularly among the Enron engagement team. *See* Brief for Respondent United States ("Resp. Br."), *reprinted at* 2005 WL 738080, at *5 (March 29, 2005). The Government argued that Arthur Andersen used its document retention policy as a guise to undertake a massive shredding campaign as regulators zeroed in on Enron (Resp. Br. at 2005 WL 738080, at *4).

Further, Arthur Andersen's document retention policy contained several provisions that forbid destruction of any document related to any subpoena, litigation, professional investigation, or governmental investigation, that was threatened or judged likely to occur. Slip Op. at 3, n.4. The Government, however, presented evidence at trial suggesting that Arthur Andersen, Enron's auditing firm at the time, understood it would be subject to some SEC inquiry, including:

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- Shortly after a *Wall Street Journal* article appeared suggesting improprieties at Enron, Arthur Andersen formed a "crisis-response" team, which included Nancy Temple, an in-house lawyer;
- On October 8, Arthur Andersen retained outside counsel to represent it in any litigation that might arise from the Enron matter;
- Ms. Temple took notes on October 9, 2001, which included the statement that some investigation by the SEC was "highly probable;"
- On October 12, 2001, Ms. Temple entered the Enron matter into her computer as a "government/regulatory investigation;"
- Enron informed Arthur Anderson on October 19, 2001, that the SEC had opened an investigation of Enron in August; the same day Ms. Temple circulated a copy of the document retention policy and followed up by urging that "everyone '[m]ake sure to follow the [document] policy;'" and
- On October 26, 2001, one of Arthur Andersen's senior partners sent an e-mail containing a *New York Times* article about Enron's problems with the SEC. The e-mail stated that Arthur Andersen would be "in the cross-hairs" and that the SEC would be tough on Arthur Andersen.

Despite these indications of an SEC investigation which might ensnare Enron's auditors, as well as the misgivings of some of its partners, the government contended that Arthur Andersen encouraged its employees to shred documents right up until it received a subpoena from the SEC, circumstances which the court below characterized as a "sudden instruction to institute or energize a lazy document retention policy." *U.S. v. Arthur Andersen*, 374 F.3d 281, 297 (5th Cir. 2004). Thus, the SEC served the company with a subpoena on November 8, 2001; on November 9, 2001, the secretary for the lead partner on the Enron engagement team, David Duncan, sent an e-mail stating "Per Dave – No more shredding. . . . We have been officially served for our documents." Slip Op. at 5.

Current best practices require more than suspending destruction of documents only after a company is served with process or a subpoena. A company should mandate the suspension of ordinary destruction practices for any litigation, governmental investigation, or audit that the company reasonably anticipates. *See* Sedona Conference Working Group Series, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, comment 5a, p. 40 (September 2004 Public Comment Draft). The company's document retention program should have a process for determining whether a duty to preserve records has been triggered, and the company should identify individuals with the authority to suspend the company's normal destruction procedures. *Id.* at comments 5b, 5c.

The Court's focus on the *mens rea* instruction.

The Supreme Court did not delve into the specific retention policy issues that have enormous interest in business today as a result of recent verdicts resulting in part from document spoliation (*e.g.*, $29 million against UBS Warburg in April and $1.45 billion against Morgan Stanley in May). Rather, the Court's opinion focused on a single phrase –

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"knowingly … corruptly persuad[ing]" – in the single witness tampering statute under which Arthur Andersen was indicted. 18 U.S.C. § 1512(b)(2). The Court found that the jury instructions requested by the government and given by the trial court essentially read "dishonesty" out of the statute:

> The[] changes [requested by the government] were significant. No longer was any type of "dishonest[y]" necessary to a finding of guilt, and it was enough for [Arthur Andersen] to have simply "impede[d] the Government's factfinding ability." Slip Op. at 10.

The Court also found the instructions given were erroneous for another reason, namely, 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." (Emphasis in original.) Relying on an earlier decision in which it had ruled that, if a defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct justice, the Court ruled:

> A "knowingly … corrup[t] persuade[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. Slip Op. at 11.

Limited practical impact of the Court's decision.

The practical effect of the Court's decision is likely to be limited. Since the Enron debacle, Congress has enacted Sarbanes-Oxley, which included two specific provisions (sections 802 and 1102 of that Act) which speak directly to destruction of records in connection with Federal investigations. Thus, the criminal code now provides that:

> 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.

18 U.S.C. § 1519. Congress further ensured retention of audit records by requiring that "[a]ny accountant who conducts an audit of [a public company] shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded." 18 U.S.C. § 1520. Further, Congress added, as 18 U.S.C. § 1512(c), a provision making it a crime punishable by not more than 20 years to "corruptly alter, destroy, mutilate or conceal a record, document or other object … with the intent to impair the object's … availability for use in an official proceeding." Accordingly, if the same facts occurred today, the Government would likely seek a conviction under these new statutes, rather than under section 1512(b)(2) with its "knowingly … corruptly persuad[e]" language.

Although a victory, the Court's decision came too late to save Arthur Andersen. Arthur Andersen once employed 28,000 people in the U.S., but now employs fewer than 200. The Court's decision, however, provides important lessons for other organizations. The Court stated that it is not inherently wrong to systematically

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destroy documents as part of a document retention program, even if part of the motivation for such a program is to prevent disclosure of information to others including the Government. Slip op. at 7. The government evidence tended to show that, before the Enron issues surfaced, Arthur Andersen employees had not regularly disposed of unnecessary documents and, more important, did not seem to know or understand that the company policy required the suspension of destruction of all information related to Enron, once litigation was threatened. Thus, if an organization adopts a document retention policy, however, publication of the policy should be accompanied by adequate training and education as well as monitoring of compliance.

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