LOOKING BEYOND *Arthur Andersen:*

The Impact on Corporate Records and Information Management Policies and Practices

BY JONATHAN M. REDGRAVE, R. CHRISTOPHER COOK, AND CHARLES R. RAGAN

On May 31, the Supreme Court handed down its opinion in the case of *Arthur Andersen LLP v. United States*.[1] The unanimous opinion of the Court reversed the conviction of the former accounting firm giant under 18 U.S.C. § 1512(b)(2).

The opinion is significant both for what it does and does not say. First, the decision should not be read as an endorsement of Andersen's policies or an exoneration of actual practices related to its dealings with Enron. Second, the holding of the case is limited because of the issues decided by the Court and the fact that Congress amended the statute after the prosecution was brought. Third, despite the narrow holding in the case, the Court's decision provides guidance on how to evaluate document retention policies and litigation hold practices. This article explores forward-looking guidance that can be drawn from the *Andersen* opinion, particularly as it relates to corporate policies regarding records and information management as well as "legal hold" procedures in the event of investigation or litigation.

Background

In 2001, Arthur Andersen was confronting a number of independent problems. In June, the accounting firm entered into a settlement agreement with the Securities and Exchange Commission related to its auditing work done for Waste Management Inc. In particular, Andersen paid a large fine and was enjoined from committing further violations of the securities laws. In July 2001, the SEC filed an amended complaint in another matter alleging improprieties by the Sunbeam Corporation and work done by Andersen on that engagement.

Later during that summer, it became evident that Andersen had another looming problem — this time concerning its work related to the Enron Corporation of Houston. During the 1990s, Arthur Andersen audited Enron's publicly filed financial statements and provided internal auditing and consulting services to Enron. Beginning in 2000, Enron's financial performance began to suffer and became worse through 2001. By August 2001, the record reflects numerous circumstances evidencing concern at Enron and Arthur Andersen over possible accounting irregularities as a part of Enron's deteriorating financial performance.

On Aug. 28, 2001, an article in the *Wall Street Journal* suggested improprieties at Enron and revealed that the SEC had opened an informal investigation of the energy company. Andersen was well aware of this publicity and formed an "Enron 'crisis-response' team" in early September. Although one of the first meetings of this team included a discussion to the effect that an SEC investigation was "highly probable," Andersen did not institute any

"hold" on documents to preserve them for litigation or investigation, but did the opposite. In fact, the record reflects that, at a general training meeting on Oct. 10, 2001, employees were urged to comply with Andersen's document retention policy, with one Andersen partner stating: "[I]f it's destroyed in the course of [the] normal policy and litigation is filed the next day, that's great. … [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable."[2]

On Oct. 16, 2001, Enron announced its third-quarter results. That release disclosed a $1.01 billion charge to the company's earnings. The following day, the SEC sent Enron a letter notifying the company that the government had opened an investigation in August and requesting certain information and documents. Enron forwarded a copy of that letter to Arthur Andersen on Oct. 19. Even so, the record reflects that the Andersen team was still instructing employees by e-mail and in meetings to follow the "retention" policy. These directives were followed by substantial destruction of paper and electronic documents, despite concerns expressed by some of Andersen's managers.

Andersen's destruction of documents continued through Nov. 8, 2001, when the SEC served Andersen with a subpoena for the production of records. Only then — on Nov. 9, 2001 — did Andersen distribute to employees an instruction to preserve documents.[3] Enron filed for bankruptcy less than a month later.

In March 2002, Arthur Andersen was indicted in the Southern District of Texas on one count of violating 18 U.S.C. §§ 1512(b)(2)(A) and (B). The indictment alleged that, between Oct. 10 and Nov. 9, 2001, the petitioner "did knowingly, intentionally and corruptly persuade … other persons, to wit: [petitioner's] employees, with intent to cause" them to withhold documents from, and alter documents for use in, "official proceedings, namely: regulatory and criminal proceedings and investigations." The case proceeded to a jury trial.

A central issue at trial was whether Andersen had acted "corruptly," as that term is used in the statute. The trial court instructed the jury that "[t]he word 'corruptly' means having an improper purpose" and "[a]n improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding."[4] Notably, this instruction departed from a pattern jury instruction in significant ways. The pattern instruction defined "corruptly" as "knowingly and dishonestly, with the specific intent to subvert or undermine the integrity" of a proceeding. At the government's request and over Andersen's objection, the District Court altered the pattern instruction in a way that allowed Andersen to be convicted

even if the company had not acted "dishonestly" and even if it had intended to "impede" but did not intend to "subvert" or "undermine" an official proceeding. The jury also was instructed that, "even if [Andersen] honestly and sincerely believed that its conduct was lawful, you may find [Andersen] guilty."

After seven days of deliberations, the jury indicated that it was deadlocked. The judge then issued an "*Allen* charge,"[5] and three days later the jury returned a guilty verdict. The district court denied motions for acquittal.

In affirming the conviction, the Court of Appeals for the Fifth Circuit held that the government was not required to prove that Andersen knew the document destruction was unlawful as long as the prosecution proved that Andersen acted with an improper purpose. The Court of Appeals further held that the government was not required to prove that Andersen had a particular proceeding in mind that it sought to obstruct. The Fifth Circuit also affirmed the trial court's instructions that the "corruptly persuaded" element of the offense includes persuasion motivated by "an improper purpose" to "impede the fact-finding ability of an official proceeding."[6] Based on a split of authority regarding the meaning of § 1512(b), the Supreme Court granted certiorari.

The Supreme Court's Decision

In overturning Andersen's conviction, the Supreme Court held that the jury instructions had failed to convey properly the elements of a "corrupt[ ] persua[sion]" conviction under 18 U.S.C. § 1512(b). The basis for the holding was essential twofold.

First, contrary to the government's argument in support of the jury instruction, the Court held that any conviction under the statute requires someone to "knowingly … corruptly persuade[ ]," which in turn means that only persons who are conscious of wrongdoing can be convicted under the statute.

Second, in light of the statutory construction, the Court held that the jury instructions had failed to convey the requisite consciousness of wrongdoing. The Court actually noted that "it is striking how little culpability the instructions required."[7] The Court also held that the jury instructions had diluted the meaning of "corruptly" in a way that caused the term to cover innocent conduct. In particular, and at the government's insistence, the District Court had instructed the jury that it could convict Andersen if it found that the firm had intended to "subvert, undermine, or impede" governmental fact-finding by suggesting to its employees that they enforce the firm's document retention policy, and that the jury could do so without any finding of dishonesty or corruption. The Court specifically noted that "impede" has broader connotations than "subvert" or even "undermine," and many of these connotations do not incorporate any "corrupt[ness]" at all. Thus, the instructions that referred to behaving "corruptly" did no limiting whatsoever to eliminate a conviction for innocent or proper withholding of information. The Court also held that the jury instructions 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 rejecting the government's argument, the Court stated: "A 'knowingly … corrupt[] 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."

In sum, the Court held that a defendant's attempt to persuade others to shred documents pursuant to a document retention policy is not "knowingly corrupt" under § 1512(b) of the 2001 version of the statute if the defendant was not conscious of any wrongdoing; did not act dishonestly or intend to do more than just "impede" governmental fact-finding, which is potentially innocent conduct; or did not have in mind a particular proceeding that the shredding would affect.

What the *Andersen* Opinion Does (and Does Not) Mean

As with any case decided by the Supreme Court, the *Andersen* opinion is important simply because it was a matter decided by the Court. That said, the decision must not be oversold in terms of significance for future prosecutions for destroying documents. In the first footnote of its opinion, the Supreme Court itself stated that the case was limited with respect to the particular statute at issue — 18 U.S.C. § 1512(b). The Court specifically recognized that the statute had been amended after the prosecution was brought, and that, furthermore, of course, the Sarbanes-Oxley Act had added other provisions regarding document destruction, namely 18 U.S.C. § 1519. Indeed, the U.S. Department of Justice has made it clear that future prosecutions for document destruction are much more likely to be brought under § 1519 than under § 1512(b).[8] Thus, the direct impact of the *Andersen* decision on criminal prosecutions for obstruction of justice appears limited.

Notwithstanding these significant limitations on the legal holding in *Andersen*, the decision provides guidance that extends beyond the facts of the case.

Guidance for Future Criminal Prosecutions for Corporate Document Destruction

In the *Andersen* ruling, the Supreme Court recognized that persuading someone to withhold documents or information from a government investigation is not "inherently malign." The Court explained its holding by way of three examples:

1. There is nothing criminally wrong with a mother telling a son to invoke his Fifth Amendment rights.
2. There is nothing wrong with a wife convincing her husband not to disclose marital confidences.
3. It is not improper for an attorney to persuade a client to withhold from the government documents protected by the attorney-client privilege.

These examples — along with the Court's discussion of the usual requisites of culpability for criminal liability and the discussion of the requisite nexus between the conduct

and the criminal prohibition — indicate that the Court may well scrutinize future prosecutions for document destruction to ensure that innocent conduct is not subject to criminal punishment.[9]

Accordingly, even though the language of § 1512(b)(2) has been amended and § 1519 does not contain the same "corrupt persuasion" language of § 1512(b)(2), the Court's decision nonetheless provides important guidance for future prosecutions under either statute. The technical result will be that the government will have to craft particularized jury instructions regarding the requisite consciousness of wrongdoing required in obstruction prosecutions. The wider impact, however, should be seen in the government's efforts to keep legitimate activity outside the bounds of criminal prosecutions for obstruction of justice.[10]

Guidance for Corporate Document Retention Policies and Practices

With respect to the much broader issues of corporate document retention policies and practices, the Court's observations may have a significant impact on the way courts understand reasonable and defensible conduct. In particular, immediately after its discussion of conduct that is not "inherently malign," the Court observed that document retention policies are, in fact, created in part to keep certain information from getting into the hands of others, which, of course, may include the government as well as business competitors:

> "Document retention policies," which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. *See generally* Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORD. J. CORP. & FIN. L. 721 (2003). It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.[11]

Unpacking the last sentence of the quoted passage provides significant guidance for companies, counsel, and courts. The first relevant phrase — "valid document retention policy" — means two things: there must be a document retention policy in existence and it must be legitimate. In terms of having a document retention policy per se, many organizations have outdated or insufficient policies (or none at all).[12] The Supreme Court's observations can be seen as providing clear directions for organizations to review existing practices in order to ensure that policies exist and that they properly address the organization's information and communications systems — especially as regards electronic records and information. In terms of legitimacy, document retention policies should be formed for the proper purposes of complying with statutory and regulatory retention (and destruction)[13] mandates as well as maintaining information of lasting business value. Conversely, such policies should not be formed for the improper purpose of destroying harmful documents or information.[14]

Assuming good faith on the part of the organization, what is required for a document retention policy to be considered "valid?" The *Andersen* decision does not answer this question. Organizations seeking additional guidance, however, can find it in a recently published report, *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age*,[15] which provides four basic guidelines for organizations when adopting a valid document retention policy as suggested by the Supreme Court:

Guideline 1: An organization should have reasonable policies and procedures for managing its information and records.

Guideline 2: An organization's information and records management policies and procedures should be realistic, practical, and tailored to the circumstances of the organization.

Guideline 3: An organization need not retain all electronic information ever generated or received.

Guideline 4: An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval, and ultimate disposition or destruction of information and records.

The Sedona Guidelines then set forth a comprehensive analysis of case law and secondary authorities — such as publications produced by trade associations (like ARMA[16] and AIIM[17]) — as a way to provide detailed guidance for crafting defensible document retention policies. By considering *The Sedona Guidelines* and similar guidance and by investing the proper resources, organizations can ensure they have in place "valid" retention policies as contemplated in the *Andersen* ruling.

Guidance for "Litigation Hold" Policies and Practices

The second relevant qualification in the above-quoted passage from the *Andersen* decision is the requirement that the document destruction take place "under ordinary circumstances." By definition, this requirement implies that the mere existence of a document retention policy may not adequately explain or defend document destruction activities. By way of example, in the *Andersen* case itself, the government never challenged the fact that Arthur Andersen had a valid document retention policy on its face. The government's main thrust was that the destruction of documents related to Enron did not take place "under ordinary circumstances" — *i.e.*, the destruction was not an ordinary implementation of Andersen's retention program and was, in fact, inconsistent with the "litigation hold" plan included in the policy. The significance of this qualification is the critical need for companies to have litigation hold plans in place before litigation or an investigation either takes place or is reasonably anticipated. In that way, the organization will be able to

take adequate steps promptly in an effort to preserve documents and information subject to the preservation obligation.

Again, the Supreme Court's decision stops short of setting forth what constitutes a proper litigation response and when preservation steps must be taken. In the context of civil litigation, the fifth guideline in *The Sedona Guidelines* provides a basic restatement of the obligation:

> An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, governmental investigation or audit.

Thus, simply having a policy is not enough. Indeed, the Supreme Court noted that Arthur Andersen itself had a specific litigation hold policy in its manuals. Instead, what is necessary is a procedure that is created in good faith and is designed to identify and preserve documents subject to the preservation obligation. In turn, creating such a program involves awareness of eight basic concepts:

1. recognizing that an effective litigation hold process will involve a team effort that includes the legal department, the information technology department, the records management department, affected third parties, and, of course, the company's employees;
2. keeping abreast of emerging law to determine if practices and policies need to be modified;
3. understanding that preservation involves a process and not just a policy;
4. having a good grasp of the location and nature of an organization's documents that may be subject to the preservation obligation and that understanding this is essential to success;
5. understanding the need for clear communication within the legal department and with outside counsel in order to properly evaluate the litigation preservation requirements and communicate the organization's efforts to the courts;
6. providing clear and repeated communications to employees regarding the preservation requirements, including adequate education and training regarding employees' responsibilities;
7. auditing and revising practices as necessary to ensure that litigation hold policies work in practice; and
8. understanding the need to seek specialized advice (both technical and legal) when necessary to analyze and address litigation preservation obligations.[18]

In light of the *Andersen* decision — notably the facts recited in that decision — organizations should devote the necessary resources to evaluate their policies and practices to make sure that they have internal controls in place to identify promptly when litigation or investigation has been brought or is reasonably anticipated. Furthermore, these organizations must implement effective steps (such as those noted above) to preserve information and documents when the preservation duty is triggered.

Conclusion: Guidance for Future Steps

In sum, there are three strands of forward-looking guidance that can be drawn from the Supreme Court's decision in *Arthur Andersen*. First, with respect to future criminal prosecutions under 18 U.S.C. § 1512(b) and even § 1519, by forcing a greater focus on the requisite level of culpability and the nexus of the actions taken to the criminal prohibition in the statute, the Court's decision is likely to have an impact on the prosecutions that are brought and the crafting of jury instructions for cases that proceed to trial.

Second, with respect to corporate document retention policies, companies must understand the need for — and value of — having up-to-date policies that are valid. This is by no means a simple endeavor in today's electronic world, and it may involve substantial investments of time to conduct a policy review, investigate the architecture of information systems, and implement education and audit procedures. The value of a strong defense against charges of evidence tampering (in both the civil and criminal contexts), however, cannot be understated.

Third, regarding litigation hold procedures, the decision in *Andersen* sounds a separate warning bell that organizations must have litigation hold policies *and* the wherewithal to implement them when the duty to preserve has been triggered in the case of investigation or litigation. Again, while the *Andersen* case does not provide that further guidance, emerging case law, such as the *Zubulake v. UBS Warburg* series of cases regarding electronic discovery issues,[19] and secondary materials, such as *The Sedona Principles* (2004)[20] and *The Sedona Guidelines* (2005), provide contours for improving understanding of when the duty to preserve has been triggered and the scope of the duty once it arises. **TFL**

Jonathan M. Redgrave and R. Christopher Cook are partners with the firm of Jones Day in its Washington, D.C., office. Charles R. Ragan is a partner with the firm of Pillsbury Winthrop Shaw Pitman LLP in its San Francisco office. *Portions of the background and analysis have been drawn from Gregory A. Castanias, R. Christopher Cook, Louis K. Fisher, and David L. Horan,* The Supreme Court's Decision in *Arthur Andersen LLP v. United States*: An Important Development Regarding the Legal Consequences of Document Retention Policies*, Jones Day Commentaries (June 2005) (available at www.jonesday.com/pubs/pubs_detail.aspx?pubid=311802603). The views expressed in this article are solely those of the authors and do not reflect the views or positions of their firms or any of their clients.*

Endnotes

[1]*Arthur Andersen LLP v. United States*, 524 U.S. ___, 125 S. Ct. 2129 (2005).

[2]*United States v. Arthur Andersen LLP*, 374 F.3d 281,

286 (5th Cir. 2004).

[3]The record reflects an e-mail from the secretary of an Andersen partner that stated "Per Dave: No more shredding. … We have been officially served for our documents." 125 S. Ct. at 2133.

[4]Brief for United States, 2005 WL 738080 at *11–12, *Arthur Andersen LLP v. United States* (U.S. Mar. 29, 2005) (No. 04-368).

[5]*Allen v. United States*, 164 U.S. 492 (1896).

[6]*United States v. Arthur Andersen LLP*, 374 F.3d 281, 292–300.

[7]For example, the jury was instructed that even if Andersen honestly and sincerely believed its conduct was lawful the jury could convict.

[8]Specifically, in its briefing before the Court, the government contended that "[m]ost federal prosecutors will henceforth use Section 1519 — which does not require proof that the defendant engaged in 'corrupt persua[sion]' — to prosecute document destruction cases." Brief for United States in Opposition to Certiorari, 2004 WL 2825876 at *13, *Arthur Andersen LLP v. United States* (Dec. 8, 2004) (No. 04-368).

[9]Importantly, however, the *Andersen* opinion standing alone cannot be argued to immunize corporations from prosecution for any of the acts of its employees. *See In re Adelphia Communications Corp.*, ___ B.R. ___, 2005 WL 1398062 (Bkrtcy S.D.N.Y. Jun. 13, 2005) ("Thus the Court is constrained to disagree with the Creditors' Committee's broad statement, citing to page 2134 of the slip opinion, that *Arthur Andersen* 'makes clear that a company may not be convicted where the wrongdoing is not intentional and pervasive, and that the acts of a few cannot be imputed to a corporation that otherwise lacks criminal intent.' *Arthur Andersen* makes clear that wrongdoing must be intentional, but that is as far as it goes. The portion beyond that may be what the law already is, and may be what the law should be, but it is not what *Arthur Andersen* announced, on page 2134 or otherwise.") (footnote omitted).

[10]A more expansive discussion of the possible impact of the *Andersen* decision on § 1519 and future criminal prosecutions is found in Elkan Abramowitz and Barry Bohrer, *The "Andersen" Decision: Its Effects on 18 U.S.C. § 1519 and Attorneys*, N.Y. L. J. (July 5, 2005), and James Dabney Miller, *The* Andersen *Decision and Document Management Under Sarbanes-Oxley*, LEGAL BACKGROUNDER 20, no. 26 (Washington Legal Foundation, June 17, 2005).

[11]125 S. Ct. at 2135.

[12]*See* Cohasset and Associates "Electronic Records Management Survey: A Call to Action" (May 2004), available at www.merresource.com/whitepapers/survey.htm; *see also* AMA/ePolicy Institute Research *2004 Workplace E-Mail and Instant Messaging Survey Summary*, available at www.epolicyinstitute.com/survey/survey04.pdf.

[13]Importantly, one cannot overlook the fact that laws and regulations are being passed that require the *destruction* of certain information. For example, the Federal Trade Commission recently issued rules that mandate the disposal (destruction) of certain documents under the Fair and Accurate Credit Transactions Act of 2003, with the stated goal of reducing "the risk of consumer fraud and related harms, including identity theft, created by improper disposal of consumer information." Notably, 16 C.F.R. § 682(a) (effective June 1, 2005), requires that "[a]ny person who maintains or otherwise possesses consumer information for a business purpose must properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal."

[14]In civil litigation, records management programs that focus on eliminating "bad documents" have been found improper, and the resulting destruction of documents has lead to severe sanctions; *see Rambus Inc. v. Infineon Techs.* AG, 220 F.R.D. 264, 286 (E.D. Va. 2004) (finding that policy was developed and implemented with the intent to destroy documents relevant to anticipated litigation); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73 (D. Mass. 1976) (a party cannot adopt a records management system designed to obstruct discovery); *Reingold v. Wet 'N Wild Nev. Inc.*, 944 P.2d 800, 802 (Nev. 1997) (finding that a one-season retention policy at a water park was unreasonable as "deliberately designed to prevent production of records in any subsequent litigation"; remanding for a new trial and holding that an adverse inference instruction was appropriate in the circumstances).

[15]*The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age* (The Sedona Conference, Sept. 2005).

[16]The Association of Records Managers and Administrators Inc. (ARMA), *see* www.arma.org; *see also* www.arma.org/about/overview/index.cfm ("ARMA International is a not-for-profit association and the leading authority on managing records and information — paper and electronic.").

[17]The Association for Information and Image Management (AIIM), *see* www.aiim.org; *see also* www.aiim.org/article-aiim.asp?ID=18274 ("AIIM is the international authority on Enterprise Content Management (ECM), the tools and technologies that capture, manage, store, preserve, and deliver content in support of business processes.").

[18]This list is adapted from Lori Ann Wagner and Jonathan M. Redgrave, *Create a Litigation Response Plan (Before You Need One!)*, E-DISCOVERY ADVISOR (August 2005).

[19]*See Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004); *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003); and *Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D.N.Y. 2003).

[20]*The Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Production* (The Sedona Conference, Jan. 2004).