

DOCUMENT RETENTION AFTER *U.S. V. ANDERSEN*

*New risks to corporations—and
to the attorneys who advise them*

By **DAVID B. FEIN** and
GATES GARRITY-ROKOUS

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Until Arthur Andersen's January 2002 disclosure that its employees had destroyed documents relating to Enron, little was written or discussed publicly about document retention issues. All that has changed. Recent corporate scandals have publicized the issue of corporate obstruction of justice—and obfuscation—as never before. Congress responded by passing the Sarbanes-Oxley Act, which (among other things) extended the reach and lengthened the potential penalties of the obstruction statutes. What new risks do attorneys and their clients face in this environment? How best to avoid them?

It bears stating that there is nothing inherently wrong with a policy that calls for the regular destruction of material that is not required by law or otherwise to be maintained. Indeed, in light of the Andersen conviction and the resulting public attention on document retention issues, maintaining such a policy has become essential. The regular destruction of business materials helps maintain confidentiality, protect trade secrets, stop corporate espionage and identity theft, and reduce storage costs. Irregular document destruction, however, invites risks: spoliation claims, adverse inferences, sanctions, or a criminal investigation.

Policy And Procedure

The basics of document retention are well known but worth repeating. Retention policies define documents to be retained based on the various federal, state and local laws and regulations requiring retention of designated types of documents for specified peri-

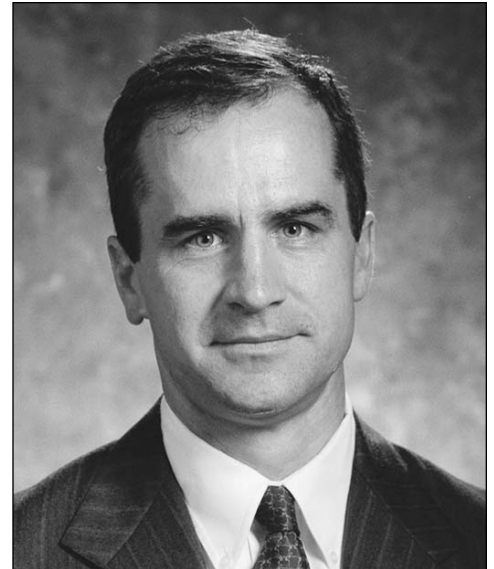
David B. Fein and Gates Garrity-Rokous are attorneys at Wiggin & Dana, which was counsel to Arthur Andersen in U.S. v. Andersen.



DAVID B. FEIN

ods. These requirements apply most often in regulated industries (e.g., financial services, health care) and also apply more generally to public companies and large employers. Any documents (electronic or paper) not covered by such regulations may, and should, be regularly destroyed by employees, while a designated custodian should be responsible for overseeing the destruction of preserved documents once retention periods have elapsed.

Most importantly, a document retention policy is risky if it is not followed regularly. Sporadic enforcement or the purposeful destruction of targeted materials in anticipation of litigation is a bad idea. Among other things, it could lead to criminal charges, civil damages, early discovery, default judgments and unfavorable jury instructions where a judge may instruct jurors that they can infer that destroyed materials contained damaging information. The high profile nature of the government's criminal case against Andersen assures that governmental and regulatory agencies, as well as plaintiffs' attorneys, will pay increased attention to organizations' document retention and destruction policies in investigations and litigation.



GATES GARRITY-ROKOUS

A retention policy, then, should include a process for suspending document destruction. Specifically, the policy should (1) identify who is responsible to halt regular destruction, and under which criteria; (2) identify who should be notified and the method of notification; and (3) require a description of the types of documents and other data to be preserved. Special attention must be paid to e-mail and other electronic data that may be deleted automatically.

Legal Compliance

When, however, should an organization suspend the regular destruction of documents? Knowledge that a subpoena is on its way, of course, essentially equates to possession of the subpoena. What if a lawsuit or investigation is merely a possibility? What if another party to the matter has been sued?

These are complicated questions that the Sarbanes-Oxley Act only made more complicated. In addition to increasing the maximum penalties for obstruction of justice (to 20 years imprisonment), Sarbanes-Oxley amended 18 U.S.C. § 1512 (c). That section makes guilty of an offense anyone who "cor-

ruptly ... alters, destroys, mutilates or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." In addition, the Act added section 1519, which makes it a crime to alter, destroy, conceal or falsify any record "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction" of any federal agency.

Congress attempted, through these amendments, to remove requirements under prior court decisions that limited obstruction to defendants who knew of or reasonably expected an official court proceeding (e.g., a trial or grand jury investigation) and to government functions leading to official proceedings—criminal or regulatory investigations and inquiries.

Do these new provisions mean, for example, that a corporate attorney should not approve the destruction of a sexist joke transmitted by e-mail by employees in a particular department? A federal agency (the EEOC), after all, can investigate employment discrimination—and destroying such an e-mail certainly would render it unavailable "for use in an official proceeding" regardless of whether such a proceeding is reasonably anticipated. Likewise, destroying the e-mail could be construed as intending to impede the EEOC's administration of sexual harassment claims. It appears unlikely that such intent could exist if the decision maker has no knowledge that a federal agency will exercise its jurisdiction or initiate an investigation. Thus regular document destruction (after proper retention requirements are met) should continue until the decision maker reasonably anticipates litigation or review by a federal agency, provided that care is taken targeting specific documents for destruction. Nonetheless, the Sarbanes-Oxley amendments dramatically increase the difficulty in deciding when document destruction should be suspended.

The manner in which Andersen was convicted also significantly increases the risks to attorneys providing advice on documentation. It appears from post-verdict reports that the jury focused not on shredded or deleted documents but on a single e-mail from in-house counsel Nancy Temple to Andersen partner David Duncan on October 16, 2001—before notice of an SEC informal inquiry was received either by Andersen or Enron. Temple suggested that Duncan change certain language in a file memorandum he wrote about Enron's press release, which explained third quarter charges against income. Temple's proposed changes included the recommendation that Duncan delete a reference to consultations with in-house counsel and delete language suggesting that Andersen had concluded that Enron's proposed press release was misleading. According to jurors interviewed after trial, the jury concluded Temple was the "corrupt persuader" and found Andersen guilty of obstruction based solely on this e-mail.

At a minimum, the Andersen conviction demonstrates that editing—"altering"—a document for a client by an attorney can constitute obstruction of justice, a risk never before realistically contemplated. Yet attorneys every day advise clients to change documents to reduce litigation exposure, remove suggestions of fault or liability, or correct misstatements of fact. These fundamental practices will continue, but with new risks.

These new risks can only be reduced by changing habits. Clients need to be reminded of the benefits—and pitfalls—of putting an issue or decision in writing. If a document needs to be created, remember all possible audiences: will the document go to a customer or government regulator? Who else might one day see that document? And because no legal distinction exists between destroying or altering a document, attorneys should consider whether to suggest edits with the same criteria used to decide whether a specific document may be destroyed.

In sum, the Andersen verdict and the Sarbanes-Oxley amendments have increased the risk that corporate clients may face allegations of document spoliation or obstruction. This risk can best be reduced by carefully designing and implementing a document retention policy. ■

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Wiggin & Dana's 15-attorney White-Collar Practice Group represents clients involved in regulatory, civil and criminal investigations by federal and state governments, conducts internal and external investigations for clients and advises clients on compliance-related matters. Attorneys include:

David B. Fein, Chair. Formerly senior federal prosecutor in the U.S. Attorney's Office, Southern District of New York, Associate Counsel to the President. Visiting Lecturer at Yale Law School, Federal Criminal Investigations. dfein@wiggin.com.

James Bicks. Practice focus: RICO, insurance, and financial fraud. jbicks@wiggin.com.

Gates Garrity-Rokous. Formerly federal prosecutor and Health Care Fraud Coordinator in the U.S. Attorney's Office, Connecticut. Practice focus: Investigations, health care fraud, tax fraud, financial and business crimes, and Internet and computer crimes. ggr@wiggin.com.

Patricia Roer. Formerly in-house counsel, Alliance Capital Management. Practice focus: Investment advisor and broker-dealer compliance, SEC, NYSE and NASD investigations. proer@wiggin.com.

Suzanne Wachsstock. Practice focus: Antitrust, business practices, environmental and tax. swachsstock@wiggin.com.

Howard Fields. Formerly U.S. Securities & Exchange Commission enforcement attorney, Manhattan office. Practice focus: securities law, SEC, NYSE and NASD investigations. hfields@wiggin.com.

Clement Naples. Registered patent attorney and formerly lead engineer at Silicon Valley Group Lithography, Inc. Practice focus: Technology-related crime. cnaples@wiggin.com.

Wiggin & Dana LLP
Counsellors at Law

203.363.7600
203.363.7676 fax
www.wiggin.com