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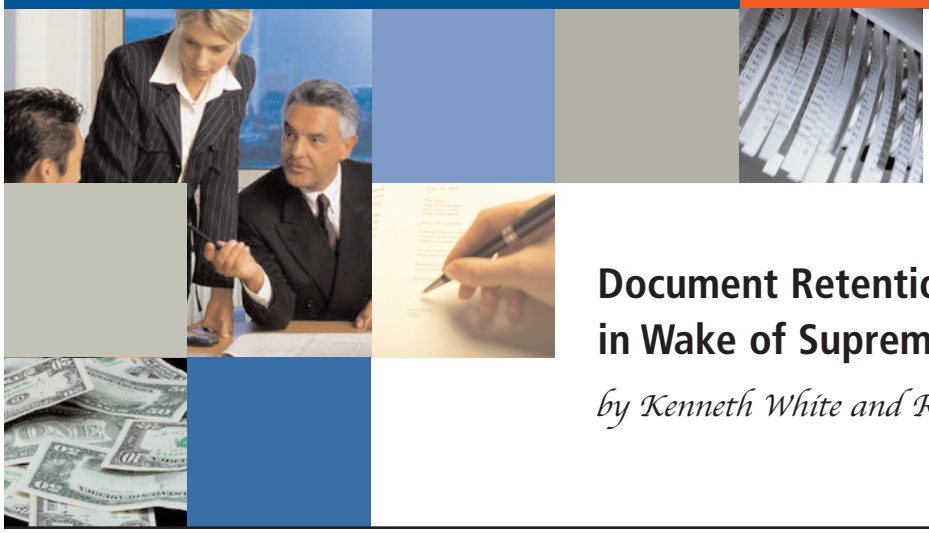

Document Retention Policies Remain Crucial in Wake of Supreme Court's *Andersen* Ruling

by Kenneth White and Robert Rose

On May 31, 2005, the United States Supreme Court reversed Arthur Andersen's 2002 conviction for evidence tampering. That vindication does not alter the core lesson of the Andersen prosecution: a document retention policy must be drafted ***and implemented*** carefully to serve its purpose of protecting a company against a charge of evidence tampering. Prudent companies should adopt document retention policies that halt document destruction in the face of government investigations, train employees about document retention policies routinely rather than in response to crisis situations, and exercise caution in email content.

Background

When the SEC began an informal investigation of Enron, several Andersen partners and an in-house counsel repeatedly reminded members of Andersen's Enron team to follow the Andersen document retention policy. Members of the Enron team destroyed numerous documents and emails as a result, and continued to do so until the SEC served Andersen with a subpoena for Enron-related documents.

In March 2002, federal authorities charged Andersen under the federal evidence tampering statute. That statute provides that anyone who "knowingly uses intimidation, threatens, or corruptly persuades another person" to withhold or destroy documents for use in an official proceeding has committed a crime. The government asserted that by repeatedly emphasizing its document retention policy in the face of the government investigation, Andersen meant to instruct its employees to destroy Enron-related documents and thwart the investigation. The jury agreed, and convicted Andersen.

In reversing Andersen's conviction, the Supreme Court found that the trial court had improperly instructed the jury. The trial court's instructions permitted the jury to find that Andersen had "corruptly persuaded" employees to shred documents even if it found that the persuaders did not know that the shredding would be unlawful. The Supreme Court found that the version of the evidence tampering statute before it required the government to prove that a defendant *knew that it was wrong* to persuade someone to with-hold the information in question from the government. The Court also found that the jury instructions were flawed because they did not require the government to prove that Andersen persuaded employees to destroy or withhold documents in accordance with a *particular* existing or expected proceeding.

Practice Pointers

The Court's ruling offers only limited solace to future criminal defendants, as the Sarbanes-Oxley Act of 2002 amended the evidence tampering statute so that it probably no longer requires the government to prove consciousness of wrongdoing. However, a cautious business can and should draw useful lessons from the Andersen prosecution and avoid becoming a criminal defendant in the first place.

- **Halt Document Destruction When the Government Begins an Investigation.**
  First, the Andersen case demonstrates the danger of destroying documents when there has been *any indication* that the government has launched an investigation. The legal process may eventually vindicate a company's routine destruction of documents despite the **possibility** of an imminent government proceeding. However, as with Andersen, that vindication may come too late. Even a government investigation of evidence tampering, let alone a formal accusation, can be ruinous. The far safer route is to enact a document retention policy that stops routine document destruction as soon as the company learns of a possible government proceeding. It would be prudent to remind employees that the destruction of documents must be suspended until further notice when there is the possibility of a legal proceeding.

- **Document Retention Training Must be Routine, Not a Reaction to Threatened Litigation.**
  Second, the Andersen case demonstrates that document retention policies must be subject to *routine* training and compliance review, and not enforced only on special occasions. The government suspected Andersen **not** because it had a universal document retention policy, but because it chose to repeatedly remind its employees of that policy in reaction to news of a particular government investigation. That approach raised the inference that Andersen's motive was not routine compliance with the policy, but the destruction of incriminating documents. A company should be sure that its employees are trained on its document retention policy on a regular basis, and that compliance is evaluated on a schedule.

- **Exercise Caution in Email Content.**
  Third, the Andersen case highlights the now-familiar danger of incautious comments in company emails. The government's case relied heavily on Andersen's own emails, which demonstrated not only that Andersen was aware of a probable SEC investigation, but that it urged employees to review the document retention policy as a result of that investigation. Andersen employees should have asked themselves the essential question about any email concerning an issue that could lead to litigation: how will this sound if it is read by my opponent, or shown to a jury?

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