

Fordham Journal of Corporate & Financial Law

Volume 8, Issue 3

2003

Article 2

To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes

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TO SHRED OR NOT TO SHRED: DOCUMENT RETENTION POLICIES AND FEDERAL OBSTRUCTION OF JUSTICE STATUTES

*Christopher R. Chase**

INTRODUCTION

For numerous business and legal reasons, business entities, both large and small, are developing complex document retention policies¹ in order to protect themselves and their bottom line.² While these policies may have both economic and legal benefits, a poorly developed or mismanaged policy may lead to violations of or eliminate protection from the obstruction of justice laws of the United States, particularly 18 U.S.C. sections 1503, 1505, 1512, and the newly enacted sections 1519 and 1520, legislating the procedure for destruction of documents.³ Such was the case for Arthur Andersen LLP (“Andersen”), formerly one of the Big Five⁴

* J.D. received at Catholic University of America, Columbus School of Law, 2002. The author would like to thank J. Bradley Bennett, Greg Faragasso, and David Lipton for their comments.

1. See *Neiley v. State Farm Ins. Cos.*, 1999 U.S. App. LEXIS 34580, at *15 (6th Cir. 1999) (noting State Farm’s document retention policy); *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 565 (5th Cir. 2001) (noting Foot Locker’s document retention policy); *Lewis v. Caterpillar, Inc.*, 1998 U.S. App. LEXIS 16220, at *8 (6th Cir. 1998) (discussing Caterpillar’s document retention policy). Such policies are referred to as “document retention policies” or “document destruction policies,” and are essentially the same thing. Throughout this Article, I will refer to such policies as “document retention policies.”

2. See, e.g., Lori Block, *Which Documents Can Be Safely Destroyed? Record Retention On Trial*, BUS. INS., Mar. 9, 1992, at 1 (noting the rationales for the development of document retention policies).

3. See 18 U.S.C. §§ 1503, 1505, 1512, 1519, 1520 (2002).

4. After the disintegration of Andersen, the Big Five are now the Big Four. See Scot J. Paltrow, *Companies Swap Fired Auditors*, WALL ST. J., July 1, 2002, at C1. The Big Four include KPMG International, Deloitte & Touche LLP, Ernst & Young LLP, and PricewaterhouseCoopers LLP. *Id.*

accounting firms of the United States, after the firm was indicted on March 14, 2002, and subsequently convicted on June 15, 2002,⁵ on one count of obstruction of justice for destroying documents related to the firm's work for the Enron Corporation ("Enron").⁶

Wrongful destruction of documents can lead to penalties in both civil and criminal cases. In civil litigation, document destruction can lead to an adverse inference before the jury as a penalty for spoliation.⁷ In the criminal context, and pertinent for the present discussion, destroying documents can lead to a charge of obstruction of justice.⁸ Penalties in both the civil and criminal contexts can have harsh effects on the party who destroys documents: losing a jury trial because of the adverse inference or being fined and imprisoned as a criminal punishment.

Corporate senior management must deal with many questions regarding whether the company may destroy documents, when the corporation is allowed to destroy the documents and how the destruction should occur.

To avoid legal problems resulting from the destruction of documents, a document retention policy must be routinely

5. See Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry on Enron*, N.Y. TIMES, June 16, 2002, at A1.

6. See Susan Schmidt & David S. Hilzenrath, *Andersen Charged in Shredding Probe*, WASH. POST, Mar. 15, 2002, at A1. Andersen stated in an internal report investigating the document destruction that the firm's policy towards document retention when litigation was anticipated was not very clear. *Id.*

7. One remedy for the destruction of evidence is an adverse inference instruction to the jury. See Jerold Solovy & Robert Byman, *Discovery—Evidence Destruction*, NAT'L L. J., Nov. 16, 1998, at B12. "[T]he spoliation inference is a logical deduction of guilt from the destruction of presumably incriminating evidence." JAMIE S. GORELICK ET AL., *DESTRUCTION OF EVIDENCE* 5 (1989). Additionally, an unreasonable document retention policy may justify granting a motion for a new trial under Federal Rule of Civil Procedure 60(b)(3) if evidence was destroyed and could be found as fraud or other misconduct. See *Jordan v. Paccar, Inc.*, 1996 U.S. App. LEXIS 25358, at *30 (6th Cir. 1996).

8. Both the United States and individual states themselves have obstruction of justice laws. See, e.g., 18 U.S.C. §§ 1503, 1505, 1512, 1519, 1520; ARIZ. REV. STAT. ANN. § 13-2809 (1977); D.C. CODE ANN. § 22-723 (1982); GA. CODE ANN. § 16-10-50 (1968).

followed and diligently maintained.⁹ All employees must know what to do with their documents and how to eliminate unnecessary documents. Likewise, all supervisors must clearly state and remind their employees of how the policy works. These techniques will ensure that a properly designed policy will be consistently applied.

In Andersen's case, the accounting firm's document retention policy states that their employees are only required to retain final work papers supporting client audits and should destroy drafts, notes and memos.¹⁰ If litigation is anticipated, however, all documents related to such litigation are to be retained.¹¹ Possible factors leading to the obstruction charge against the firm include the fact that the firm's employees did not adhere to this policy correctly, this policy's ambiguity or the employees simply chose to ignore it.¹²

Part I of this Article will discuss document retention policies and how they are established. Part II of this Article will present an overview of the three older federal obstruction of justice laws that are applicable to document destruction—sections 1503, 1505 and 1512¹³—and the two new obstruction laws that were drafted to combat document destruction itself.¹⁴ Part III will focus on Andersen's document retention policy and the firm's trouble due to the Enron bankruptcy. Part IV will analyze the competing purposes of document retention policies and federal obstruction of

9. See Block, *supra* note 2, at 1 ("If documents are destroyed pursuant to a reasonable [sic] established document retention policy, the jury never hears that documents were destroyed.").

10. See Practice Administration: Client Engagement Information—Organization, Retention and Destruction, Statement No. 760 (Andersen's document retention policy) §§ 3.1.1, 3.1.2, at http://www.washingtonpost.com/wp-srv/business/daily/transcripts/andersen_policy020100.pdf (last visited, Mar. 2, 2003) [hereinafter Practice Administration: Client Engagement Information].

11. See *id.*

12. Apparently, the jurors convicted the firm, however, not for the shredding of documents or the flawed policy, but because Andersen attorney Nancy Temple requested that an Andersen partner remove her name from a memo, thus altering it. See C. Bryson Hull, *U.S. Files Opposition to Andersen Motion for New Trial*, REUTERS, July 31, 2002.

13. 18 U.S.C. §§ 1503, 1505, 1512.

14. *Id.* §§ 1519–1520.

justice laws. Finally, this Article will conclude that document retention policies are necessary for business purposes and can be reconciled with the federal laws as long as the policy is clear, consistently applied, well maintained and suspended when the potential for litigation or a federal investigation arises.

I. DOCUMENT RETENTION POLICIES

Companies, firms, and partnerships produce a multitude of documents during their ordinary course of business. It is impossible to keep all of these documents because of space limitations and storage costs.¹⁵ Therefore in an effort to manage their paperwork and to deal with excess and unnecessary documents, companies have turned to document retention policies.¹⁶ Such policies should be created in advance of document destruction or during a neutral time without litigation.¹⁷ In order to avoid violating the law, however, these policies must clearly describe what documents have to be retained and what documents can be destroyed, as well as the appropriate time for destruction.¹⁸

15. See GORELICK ET AL., *supra* note 7, at 275.

16. See *Online Exchange: Texaco and the Science of Shredding*, LEGAL TIMES, Dec. 9, 1996, at 12 [hereinafter *Online Exchange*] ("The operative principle regarding routine document destruction is if the documents do not contain material that is useful in guiding future business operations (and the documents are not otherwise required to be retained to meet legal standards), then they can (and probably should) be destroyed."). *Id.* (stating comments of Richard Gruner); see also *Document Retention Policies: Evolving Beasts*, CORP. LEGAL TIMES, Apr. 1998, at 46 ("[A] good document-retention policy helps a company manage its paperwork, and that's the biggest benefit."). Because most companies have document retention policies, destroying documents has become a profitable business for shredding companies. There are around 600 shredding companies and shredding services that generate an annual revenue of about \$1.5 billion. See Michael Orey, *Why We Now Need A National Association for Data Destruction*, WALL ST. J., Jan. 30, 2002, at A1.

17. See Lisa Shaheen, *Required Recordkeeping Sets the Record Straight*, PEST CONTROL, Apr. 1, 2001, at 27 (pointing out that it is unwise to develop a document retention policy when the company is already involved in legal proceedings).

18. Speaking of the necessity of a policy, one Washington, D.C. attorney stated that "[w]ithout a policy, you're open to an allegation that there was some

Most companies, firms, and partnerships have policies designed to guarantee that outdated and otherwise useless documents are not needlessly maintained.¹⁹ Moreover, routinely reviewing and purging old files will prevent unnecessarily damaging documents from coming to light.²⁰ Indeed, one of the best reasons for having a formal policy is that it reduces legal exposure through the destruction of possibly incriminating evidence.²¹ No single document retention policy will suit all companies; each business must create one that is specifically tailored to its needs.²² Nevertheless, because a company has a duty to preserve specific documents pursuant to federal laws and when there is a possibility that litigation may be commenced, certain requirements should be in all policies.²³ All policies should clearly

nefarious purpose for destruction of documents.” Michael Orey, *Accounting for the Fall: Document Shredding Shows Importance of Having a Policy on What Is Preserved*, WALL ST. J., Jan. 14, 2002, at A6. Another Washington, D.C. attorney stated that “you don’t destroy anything until you have a ‘document retention policy’ in place.” Sandra Torrey, *Shredding: Decisions of Taste, Law and Common Sense*, WASH. POST, Mar. 14, 1994, at F7 (discussing law firms’ document retention policies).

19. See John McFadden & Joseph Wolfe, *Record Retention Tips*, PRACTICING CPA, June 1, 2000, at 4 (noting that a formal document retention policy is an important risk management tool for accountants and auditors).

20. See *Online Exchange*, *supra* note 16 (comments of William Carmell); see also Dave Lindorff, *The New Corporate Motto: Shred Carefully* (discussing the case of the industrial corporation Owens-Corning, which was forced into bankruptcy after numerous liability suits due to the discovery of old notes and memos from the 1940’s and 50’s), available at http://www.treasuryandrisk.com/display.asp?article_id=86 (last visited Mar. 2, 2003). Indeed, even a senior Andersen partner acknowledged during testimony that the document policy was intended to keep information from potential litigants. See Eichenwald, *supra* note 5, at A1.

21. See GORELICK ET AL., *supra* note 7, at 277. This also reduces litigation costs because there will not be as many documents to produce. See *id.* at 303. Of course, plaintiffs and their attorneys are skeptical of such practical reasons for retention policies and would like to see all documents ever created. One such attorney noted that: “I think companies are destroying documents not because storing them is a problem but because of concerns about potential liability issues.” Lindorff, *supra* note 20.

22. See Orey, *supra* note 16, at A1.

23. Federal employment laws require companies to retain documents

state the categorization of documents and electronic files, what documents must be preserved, the retention period for each category, the document destruction procedures, and what to do when litigation or an investigation commences.²⁴

In order for a document retention plan to be of value, the policy should be strictly and routinely followed.²⁵ Document retention policies may work against a company when a subpoena is issued or an official proceeding begins if the company's employees have violated the policy in the past.²⁶ To ensure strict compliance,

regardless of whether litigation is foreseeable. *See, e.g.*, 29 C.F.R. §§ 1602.14, 1627.3, 516.5 (2002) (requiring companies to retain documents pursuant to Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act and the Fair Labor Standards Act). Employment records, time sheets, and wage and hour data, for example, must be retained for one to six years. *See* Michael Starr & Jordan Lippner, *Spoliation By Oversight*, NAT'L L. J., Nov. 12, 2001, at A19. Additionally, the Occupational Safety and Health Act requires companies to keep documents pertaining to an employee's exposure to toxic substances for thirty years. *Id.* Following section 1520 in the Sarbanes-Oxley Act, auditors must keep all substantive material related to the performed audit, regardless if the material is the final conclusion or inapposite to the final conclusions. *See* 148 CONG. REC. S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy).

24. *See* Robert M. Barker et al., *Document Retention*, INTERNAL AUDITOR, Dec. 1, 1996, at 48.

25. Michael R. Overly, *Electronic Document Retention: Reducing Potential Liability for E-mail*, 23 ANDREWS DERIVATIVES LITIG. REP. 11 (2001) (stating that liability can be limited if a company adopts and consistently follows a uniform retention policy); *see also* Stephanie Ingersoll, *Enron Officials Grilled, Former Top Auditor Invokes Fifth Amendment at House Hearing Enron/Andersen Document Destruction Timeline*, 34 SEC. REG. & L. REP. (BNA) 158, 164 (2002) (noting that according to two accountants, the most important quality pertaining to document retention policies is that the policy must be applied reasonably and consistently). In order to pass judicial muster, policies should contain the following features: document destruction should be carried out in the ordinary course of business; destruction should follow an aging scheme; it should be carried out in an arbitrary and consistent manner; and a mechanism should be included to suspend document destruction if management has notice of an investigation or judicial proceeding. *See* GORELICK ET AL., *supra* note 7, at 314-15.

26. John M. Fedders, Lecture at the Catholic University of America's Columbus School of Law (Feb. 18, 2002).

management should inform all employees of the policy and clearly announce what procedures need to be followed.²⁷ Companies may also “issue periodic reminders” to make sure that the company is adhering to the policy.²⁸ It is of great importance that the company makes sure that employees know of and how to deal with the document retention policy.

Once any judicial or investigative proceeding is contemplated or begins, companies should automatically suspend their document retention policies.²⁹ A company should send out a “red alert letter” that will tell employees to save documents related to the proceeding.³⁰ Upon receiving a subpoena, the company should suspend any document destruction policy it has in order to prevent the destruction of responsive documents.³¹ Attorneys for the organization should specifically express what types of documents need to be preserved by the organization and constantly remind employees to ensure that no post-request destruction occurs.³²

27. See Barker et al., *supra* note 24, at 49; *In re the Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 615 (D.N.J. 1997) (penalizing Prudential for destroying documents during a class-action law suit and criticizing senior management for never directing a court order regarding preservation of documents be disseminated to all employees and relying on others to discuss the company’s policy on document retention). Management should also make clear that the purpose of the policy is not to cover up dishonesty or destroy evidence. See Julian Joshua, *European Union: Antitrust Compliance Programmes for Multinational Companies*, INT’L FIN. L. REV., Apr. 1, 2001, at 6569.

28. Barker et al., *supra* note 24, at 49.

29. See GORELICK ET AL., *supra* note 7, at 276 (stating that organizations can be vulnerable to sanctions if they do not suspend their programs). One in-house attorney stated that whenever the legal department recognizes a situation of litigation or when it’s important to keep certain documents, he notifies management to preserve such records. See *Document Retention Policies*, *supra* note 16.

30. Fedders, *supra* note 26. Fedders said that this letter should go to every department, the attorneys and accountants of each department and any outside group that worked on the issue at hand. *Id.* Most importantly, the letter should go to reasonably foreseeable people who would be involved in such document destruction. *Id.*

31. See Benito Romano, *Criminal Investigations of Accounting Irregularities: A Primer for Company Counsel*, METRO. CORP. COUNS., Apr. 2001, at 16.

32. See GORELICK ET AL., *supra* note 7, at 304.

Most courts will not punish evidence destruction pursuant to an organization's policy.³³ The policies, however, must be reasonable and have a purpose, as opposed to a sham policy created to destroy unfavorable evidence in anticipation of litigation.³⁴ It is important to note that a document retention policy does not guarantee that destruction will not give rise to sanctions or an adverse inference.³⁵ When looking at a policy during the course of a product liability suit, the Eighth Circuit remarked that when a court reviews a policy to determine if it is reasonable, the court should look at the facts and circumstances surrounding the relevant documents.³⁶ Additionally, another court has asserted that destroying documents in the absence of a document retention policy is evidence of bad faith on the part of an organization.³⁷

33. See, e.g., *Moore v. Gen. Motors*, 558 S.W.2d 720, 737 (Mo. Ct. App. 1977) ("[W]e see no evidence of fraud or bad faith in a corporation destroying records it is no longer required by law to keep and which are destroyed in accord with its regular practices."); see also *GORELICK ET AL.*, *supra* note 7, at 280-81 n.30 (citing cases that did not punish companies who destroyed evidence according to the organization's document destruction policy).

34. *GORELICK ET AL.*, *supra* note 7, at 291 (stating that courts have struck a corporate defendant's answer because of a sham policy) (citing *In re Comair Air Disaster Litig.*, 100 F.R.D. 350 (E.D. Ky. 1983)); see also *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 485-86 (S.D. Fla. 1984) (ordering the entry of a default judgment against the defendant after finding that the destruction of documents with the intention of preventing them from being produced in law suits was not a bona fide policy).

35. *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) ("Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous retention policy.").

36. See *id.*

37. See generally *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987).

While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.

Id.

II. FEDERAL OBSTRUCTION OF JUSTICE STATUTES RELATING TO THE DESTRUCTION OF DOCUMENTS

The purpose of the federal obstruction of justice statutes is to protect the honor and integrity of proceedings before the federal judiciary, proceedings before federal agencies, and proceedings before Congress.³⁸ While there were eighteen sections in the obstruction of justice chapter of Title 18, three sections in particular dealt with the destruction of documents prior to the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"): 18 U.S.C. sections 1503, 1505 and 1512—sections 1503 and 1505 concerning the obstruction of justice and section 1512 explicitly forbidding the destruction of evidence by tampering with a witness, victim or informant.³⁹ Sarbanes-Oxley has created two new obstruction of justice laws that specifically alter the destruction or alteration of documents and evidence: 18 U.S.C. section 1519, as a general anti-shredding law, and section 1520, as a retention of audit workpapers law.⁴⁰ These two provisions, drafted in response to the recent corporate scandals and document destruction in the Andersen case, are protective measures, designed to preserve documents and punish those who destroy such documents without having to use the different elements of sections 1503, 1505, and 1512.⁴¹

Obstruction charges are rather straightforward and something the government will typically pursue because prosecutors do not have to prove that a defendant was involved in any underlying crime.⁴² Prosecutors only need to show that the defendant lied,

38. See Tracey B. Fitzpatrick & Stacey L. Parker, *Obstruction of Justice*, 31 AM. CRIM. L. REV. 747, 748 (1994).

39. 18 U.S.C. §§ 1503, 1505, 1512 (2002).

40. *Id.* §§ 1519–1520.

41. 148 CONG. REC. S7358 (daily ed. July 25, 2002) (statement of Sen. Leahy) (describing the importance of having these provisions in order to preserve evidence for possible action, Senator Leahy stated: "[i]t only takes a few seconds to warm up the shredder, but unfortunately it will take years for victims to put this complex case back together again.").

42. See Richard B. Schmitt et al., *Accounting for Enron: Obstruction Charges Likely to Be First Step in Enron Criminal Case*, WALL ST. J., Jan. 28, 2002, at A6.

destroyed evidence or otherwise hindered the government's case.⁴³ For companies with document retention policies, it is important to understand *when* destruction of documents becomes criminal.

A. 18 U.S.C. Section 1503—Obstruction of Justice Generally

Section 1503 is the original obstruction of justice statute, dating back to 1831 when Congress enacted a statute condemning obstruction of justice in general terms.⁴⁴ This statute currently remains in force, with only minor amendments made since 1831.⁴⁵ It was not until the late 1950's, however, that the first reported cases applying this statute to destruction of evidence were decided.⁴⁶

The pertinent language of section 1503 relating to the destruction of documents is located in the "omnibus clause" of the statute, wherein "[w]hoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished."⁴⁷ Because the omnibus clause is liberally worded, federal courts construe the language as reaching a large amount of activities.⁴⁸ Although seemingly broad, courts have limited the scope of criminal liability under section 1503 by requiring that some form of judicial proceeding be actually pending and the defendant have notice of such proceeding.⁴⁹ Indeed, the Supreme Court has determined that

43. *Id.* (noting that the government likes the obstruction angle in a corporate criminal case because it is relatively easy to establish the facts).

44. *See GORELICK ET AL.*, *supra* note 7, at 8.

45. *See id.*

46. *See United States v. Siegel*, 152 F. Supp. 370 (S.D.N.Y. 1957), *aff'd*, 263 F.2d 530 (2d Cir. 1959); *see also United States v. Solow*, 138 F. Supp. 812 (S.D.N.Y. 1956).

47. 18 U.S.C. § 1503 (2002).

48. *See Edward Brodsky, Think Before You Shred That Document*, N.Y. L.J., July 6, 1998, at 4; *see also United States v. Aguilar*, 515 U.S. 593, 598 (1995) (stating that the omnibus clause serves as a catchall prohibition).

49. *See Aguilar*, 515 U.S. at 599; *United States v. Frankhauser*, 80 F.3d 641 (1st Cir. 1996) (determining that there was no evidence showing that the defendant knew or had notice of the pending grand jury proceeding).

the omnibus provision requires a “nexus” in time, causation or logic between the act and the judicial proceeding.⁵⁰

While the language of the statute does not include the specific act of document destruction, interfering with the “due administration of justice” has been construed as extending to destroying, altering or concealing documents because the statute prohibits the willful destruction of evidence relevant to pending judicial proceedings.⁵¹ To convict a person or corporation under section 1503 for document destruction, the government must prove beyond a reasonable doubt that the defendant 1) destroyed relevant documents 2) that the defendant knew were relevant 3) to a pending judicial proceeding 4) for the purpose of interfering with the administration of justice.⁵²

50. See *Aguilar*, 515 U.S. at 599 (citing precedent from 1893, wherein the court held that “a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administrated in such court.”).

51. See *United States v. Lench*, 806 F.2d 1443, 1445 (9th Cir. 1986) (determining that concealment of documents subpoenaed by grand jury violates section 1503); *United States v. Rasheed*, 663 F.2d 843, 850–52 (9th Cir. 1981) (“[C]oncealing and attempting to conceal certain ledgers and notebooks after receiving a grand jury subpoena duces tecum” can “fall within the prohibition of the statute.”); *United States v. Faudman*, 640 F.2d 20, 21, 23 (6th Cir. 1981) (“We believe prosecution of the defendant in the present case was properly founded on 18 U.S.C. section 1503,” when defendant “alter[ed] or destroy[ed] corporate records with knowledge that the records [were] being sought by a grand jury.”); *United States v. Weiss*, 491 F.2d 460, 464, 466 (2d Cir. 1974) (holding that failing to produce subpoenaed documents is not actionable under section 1503 unless there is affirmative conduct such as destruction, concealment, or removal); *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 440 (7th Cir. 1994) (“Federal law prohibits ‘corrupt endeavors to obstruct justice,’ 18 U.S.C. section 1503, and this provision has been read to forbid the willful destruction of evidence.”); see also GORELICK ET AL., *supra* note 7, at 8 (noting that the general obstruction of justice statute has been construed to forbid destruction of evidence).

52. See GORELICK ET AL., *supra* note 7, at 175; see also *Rasheed*, 663 F.2d at 852. Other commentators have described the elements as: i) there was a pending federal judicial proceeding; ii) the defendant knew of the proceeding; and iii) the defendant acted corruptly with the intent to obstruct or interfere with the due administration of justice, endeavored to influence, obstruct or impede the proceeding. See Michael B. Himmel & Christopher S. Porrino, *Document Destruction May Constitute Pre-Subpoena Obstruction of Justice*, N.J. L.J., Feb. 1,

Under section 1503 there is no requirement that the destroyed documents be admissible into evidence or material to the criminal proceeding.⁵³ This obstruction statute only requires that the documents be relevant to the inquiry or proceeding.⁵⁴ The Southern District of New York declared that the documents or notes in question need only bear a reasonable relationship to the inquiry or "be relevant to the inquiry" to be covered by the statute.⁵⁵ The court further announced that the word material is not in section 1503 nor does it say "the acts condemned must be in relation to a matter 'material' to an action or proceeding."⁵⁶ Additionally, when considering the materiality of certain documents, the Ninth Circuit stated that the issue "is not whether the government needed the information, but whether [the defendant] tried to conceal evidence he had an obligation to provide."⁵⁷

The second element of a section 1503 violation for document destruction is a requirement that the defendant knew of the document's relevance to a pending judicial proceeding.⁵⁸ When discussing this element of obstruction of justice, the Supreme Court asserted that it was necessary for the accused to have knowledge or notice of judicial proceedings before he could be found guilty of obstruction or endeavoring to obstruct the administration of justice.⁵⁹ Moreover, the knowledge element only requires a reasonably subjective belief by the defendant.⁶⁰

A more difficult element to prove is the pendency of a judicial proceeding. For a violation of section 1503 for document destruction, an individual or corporation must interfere with judicial procedure by destroying documents.⁶¹ There is, however,

1999, at 32.

53. 18 U.S.C. § 1503 (2002).

54. *Id.*

55. *United States v. Siegel*, 152 F. Supp. 370, 375 (S.D.N.Y. 1957), *aff'd*, 263 F.2d 530 (2d Cir. 1959).

56. *Id.* at 373-74.

57. *United States v. Lench*, 806 F.2d 1443, 1446 (9th Cir. 1986).

58. 18 U.S.C. § 1503.

59. *See Pettibone v. United States*, 148 U.S. 197, 205 (1893).

60. GORELICK ET AL., *supra* note 7, at 177 (citing *United States v. Vesich*, 724 F.2d 451, 457-58 (5th Cir. 1984)).

61. 18 U.S.C. § 1503. Section 1503 only applies to "judicial proceedings." *Id.*

no bright-line test to determine when a judicial proceeding begins under section 1503.⁶² It could begin when a grand jury is empanelled⁶³ or when a complaint has been filed.⁶⁴ Courts take into account all of the specific facts of the case to determine when judicial proceedings begin rather than looking towards one formal act that would create pendency.⁶⁵

Courts typically use a pragmatic test to determine whether the pendency requirement of section 1503 is satisfied. For instance, the Third Circuit refused to adopt a rigid test that a grand jury proceeding is not pending until the grand jury has heard testimony, but rather held that empanelling of the grand jury and the issuance of subpoenas were enough to establish pendency.⁶⁶ The Fifth Circuit found pendency where a grand jury had been empanelled and the witness had signed a written agreement to testify before a grand jury.⁶⁷ Additionally, the Seventh Circuit determined that the pendency requirement was satisfied when the jury was empanelled and subpoenas had been issued even though appearance before the grand jury could be waived and subpoenaed documents were

Therefore, obstructing an investigation conducted by Congress or a United States agency cannot be punished under this section. Rather, section 1505 covers this type of obstruction. *Id.* § 1505.

62. See GORELICK ET AL., *supra* note 7, at 178–83 (discussing the differing views as to when judicial proceedings begin).

63. See John M. Fedders & Lauryn H. Guttentplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME L. REV. 5, 21 (1980) (arguing that once the grand jury is empanelled and subpoenas are issued, the judicial proceedings have begun). Fedders and Guttentplan believe that a party will probably be protected from section 1503 liability if he or she destroys a document before a grand jury proceeding has commenced. *See id.*

64. See *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1972) (noting that section 1503 is “not applicable until a complaint ha[s] been filed with a United States Commissioner”); *United States v. Metcalf*, 435 F.2d 754, 756 (9th Cir. 1970). One commentator wrote that “[s]ection 1503 apparently allows parties to destroy any document . . . if the destruction occurs before the complaint is filed.” Dale A. Oesterle, *A Private Litigant’s Remedies for An Opponent’s Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1201 (1983).

65. See *supra* notes 62–64.

66. See *United States v. Walasek*, 527 F.2d 676, 678 (3d Cir. 1975).

67. See *United States v. Vesich*, 724 F.2d 451, 456 (5th Cir. 1984).

handed over to the FBI rather than the grand jury.⁶⁸ Conversely, one District Court declined to find pendency where a grand jury was empanelled but no subpoenas had been issued, nor was the grand jury notified of the investigation.⁶⁹ Moreover, not looking at the context of a grand jury, the Ninth Circuit held that section 1503 is not applicable until a complaint has been filed with a United States Commissioner.⁷⁰

As courts have rejected a rigid, formal test for deciding when a proceeding begins under section 1503, it is possible that persons or corporations can obstruct justice by acting in pre-subpoena document destruction.⁷¹ Knowledge of a likely subpoena or grand jury investigation may be enough to fulfill the pendency requirement.⁷² The Eastern District of Pennsylvania punished pre-

68. See *United States v. McComb*, 744 F.2d 555, 561 (7th Cir. 1984).

69. See *United States v. Ellis*, 652 F. Supp. 1451, 1453 (S.D. Miss. 1987).

70. See *United States v. Metcalf*, 435 F.2d 754, 756 (9th Cir. 1970).

71. See 58 AM. JUR. 2d *Obstructing Justice* § 22 (2002) (stating that one can still be guilty of obstruction even though no subpoena was served); see also David S. Hilzenrath, *Data Destruction Intensifies Andersen's Woes*, WASH. POST, Jan. 11, 2002, at E1 (looking at the context of section 1505, a former federal prosecutor stated that "[e]ven before authorities have subpoenaed records, destroying them can expose people to charges of criminal obstruction if they are aware that Congress or a government agency is conducting an inquiry into a matter and is likely to seek the records."). In 1994, Harvey Pitt, the former Chairman of the SEC, argued that a company should develop a procedure for determining document retention and that destruction should be halted when a subpoena was about to be issued. See Harvey Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 15 CARDOZO L. REV. 951, 961, 968 (1994). However, many lawyers, including some in the Justice Department, say that Pitt's earlier view of the time to suspend destruction is incorrect. See David Lindorff, *supra* note 20. Instead, they believe that a company should suspend its policy because when it should reasonably know of an investigation. *Id.*

72. See Michael B. Himmel & Christopher S. Porrino, *Document Destruction May Constitute Pre-Subpoena Obstruction of Justice*, N.J. L.J., Feb. 1, 1999, at 32 ("The relevant question is whether the company or individual is aware of a pending judicial proceeding in which the documents likely will be sought in the future."). As obstruction charges do not require subpoenas to be issued or served, one commentator suggests that "[o]nce counsel is aware of the government's investigation, counsel should act as if the company has already received a subpoena." David B. Fein, *Innocuous Decisions May Exonerate*

subpoena document destruction under section 1503 when a defendant persuaded a third party to destroy a letter implicating the defendant in a RICO action.⁷³ The court determined that a person who knows a grand jury is engaging in an investigation and who believes that a certain document may become relevant to such investigations can be convicted for obstruction by destroying such document.⁷⁴ The Fourth Circuit sustained the conviction of a defendant who destroyed documents pre-subpoena, holding that “[t]he documents do not have to be under subpoena; it is sufficient if the defendant is aware that the grand jury will likely seek the documents in its investigation.”⁷⁵ More importantly, the Second Circuit has indicated that “destroying documents in anticipation of a subpoena can constitute obstruction.”⁷⁶ There the court found that an obstruction conviction was proper even though the destruction of documents occurred pre-subpoena, because the defendant destroyed the documents after learning of a FBI investigation.⁷⁷

The final requirement of a section 1503 violation involves the intent of the violator. When interpreting this section, courts require that “one must impede the due administration of justice with the general intent of knowledge as well as the specific intent of purpose to obstruct.”⁷⁸ The term “corruptly” in section 1503 essentially describes the specific intent of the crime. Yet, courts have split over the exact meaning of “corruptly”, some requiring a corrupt motive⁷⁹ and others stating that the term “corruptly” simply

Corporate Dilemma When Prosecutors Are Sniffing Around, LEGAL TIMES, Sept. 28, 1998, at S46.

73. See generally *United States v. Fineman*, 434 F. Supp. 197 (E.D. Pa. 1977), *aff'd mem.*, 571 F.2d 572 (3d Cir. 1977).

74. See *id.* at 202 (reasoning that empanelment of the grand jury was enough for pendency).

75. *United States v. Gravely*, 840 F.2d 1156, 1160 (4th Cir. 1988).

76. *United States v. Ruggiero*, 934 F.2d 440, 450 (2d Cir. 1991).

77. See *id.* at 445–46.

78. *United States v. Jeter*, 775 F.2d 670, 679 (6th Cir. 1985).

79. See *United States v. Barfield*, 999 F.2d 1520, 1525 (11th Cir. 1993); *United States v. Thomas*, 916 F.2d 647, 651 (11th Cir. 1990); *United States v. Cintolo*, 818 F.2d 980, 991 (1st Cir. 1987); *United States v. Howard*, 569 F.2d 1331, 1336 n.9 (5th Cir. 1978); *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1971).

means that the act must be done with the purpose of obstructing justice.⁸⁰

*B. 18 U.S.C. Section 1505—Obstruction of Agency and
Congressional Proceedings*

Section 1505 concerns the obstruction of pending agency and congressional proceedings.⁸¹ While the first section of the statute specifically regards the Antitrust Civil Process Act, the second section is the omnibus provision, which is very similar to section 1503's omnibus provision in breadth.⁸² Likewise, the pertinent language regarding document destruction is located in the omnibus clause:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of Congress . . . shall be fined under this title or imprisoned not more than five years, or both.⁸³

Much like section 1503, in order to convict a person or corporation under section 1505 for document destruction, the government must prove beyond a reasonable doubt that "the defendant (1) destroyed relevant documents (2) that the defendant knew were relevant (3) to a pending agency or congressional proceeding or civil investigative demand (4) for the purpose of obstructing justice."⁸⁴

80. See *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) (stating that corruptly "means that the act must be done with the purpose of obstructing justice."); *United States v. McComb*, 744 F.2d 555, 561 (7th Cir. 1984).

81. 18 U.S.C. § 1505 (2002).

82. *Id.* § 1503.

83. *Id.* § 1505.

84. GORELICK ET AL., *supra* note 7, at 185; see also *United States v. Price*, 951 F.2d 1028, 1031 (9th Cir. 1991) (considering three elements of a section 1505

Only if documents are relevant to a pending agency or congressional proceeding will document destruction violate section 1505.⁸⁵ For example, the Northern District of Ohio upheld an indictment charging the defendant with altering documents during a Senate proceeding against a motion to dismiss.⁸⁶ The indictment alleged that the document altered and partially “destroyed bore a *reasonable relation* to the subject of the Committee’s inquiry.”⁸⁷

Additionally, the knowledge requirement, much like in section 1503, requires that the defendant knew of the document’s relevancy and of the pending agency or congressional proceeding.⁸⁸ It is unclear whether actual notice is required or whether likely suspicion of a proceeding is sufficient for this requirement.⁸⁹ One commentary maintains that if a defendant should have known of a document’s relevance and a concurrent proceeding, he might be imputed with knowledge.⁹⁰

Construed even more flexibly than under section 1503, courts give the element of pendency more breadth. An agency or congressional proceeding no longer limits itself to formal activities in a court of law.⁹¹ A pending proceeding can be found as early as a notification of potential violations⁹² and as late as a formal order of investigation.⁹³ Yet, many periods in between can also be considered a pending proceeding, such as during the preinvestigation period,⁹⁴ during an informal inquiry,⁹⁵ during an

violation: a pending proceeding before a department or agency of the United States; the defendant is aware of the pending proceedings; and the defendant intentionally endeavored corruptly to influence, obstruct or impede the pending proceeding).

85. See 18 U.S.C. § 1505.

86. See *United States v. Presser*, 187 F. Supp. 64, 65 (N.D. Ohio 1960), *aff’d*, 292 F.2d 171 (6th Cir. 1961), *aff’d per curiam by an equally divided Court*, 371 U.S. 71 (1962).

87. *Id.* at 65 (emphasis added).

88. 18 U.S.C. § 1505.

89. See GORELICK ET AL., *supra* note 7, at 186.

90. See Fedders & Guttenplan, *supra* note 63, at 25.

91. See *United States v. Browning, Inc.*, 572 F.2d 720, 724 (10th Cir. 1978).

92. See *Rice v. United States*, 356 F.2d 709, 712–15 (8th Cir. 1966).

93. See *United States v. Batten*, 226 F. Supp. 492, 493–94 (D.D.C. 1964).

94. See *Browning*, 572 F.2d at 722–25 (discussing a Bureau of Customs

IRS investigation,⁹⁶ and during an INS proceeding.⁹⁷ Due to such a broad and flexible approach as to when agency or congressional proceedings are pending,⁹⁸ anyone who considers destroying documents may be covered by section 1505 if the proceeding is imminent or reasonably foreseeable.⁹⁹

The final requirement regarding the purpose of obstructing or impeding the administration of the law is exactly the same as discussed previously concerning section 1503.¹⁰⁰

C. 18 U.S.C. Section 1512—Tampering With a Witness, Victim or Informant

Section 1512 was passed to specifically prevent tampering with a witness, victim or informant, permitting prosecutors to use section 1512, instead of those sections dealing with obstruction of justice. Although Congress passed this section in order to remedy perceived inadequacies under section 1503 concerning witness tampering, section 1512 also forbids document destruction.¹⁰¹ The applicable language for document destruction is:

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—2) cause or induce any person to—A) withhold testimony, or withhold a record, document, or other object from an official proceeding; B) 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

investigation inquiry).

95. See *United States v. Fruchtman*, 421 F.2d 1019, 1021 (6th Cir. 1970) (discussing a Federal Trade Commission inquiry).

96. See *United States v. Vixie*, 532 F.2d 1277 (9th Cir. 1976).

97. See *United States v. Abrams*, 427 F.2d 86 (2d Cir. 1970).

98. See, e.g., *United States v. Tallant*, 407 F. Supp. 878 (N.D. Ga. 1975) (stating that section 1505 may be considered broad enough to include falsifying records in anticipation of an agency subpoena).

99. Fedders & Guttenplan, *supra* note 63, at 25.

100. See generally *supra* Part II.A.

101. John C. Coffee, Jr., *The Andersen Fiasco*, NAT'L L. J., Feb 11, 2002, at A19 (stating that section 1512 extends the net of criminal liability).

imprisoned for not more than 10 years, or both.

(f) For the purpose of this section—1) an official proceeding need not be pending or about to be instituted at the time of the offense; and 2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.¹⁰²

Thus, a violation of section 1512 can occur when a defendant 1) knowingly 2) coerces or attempts to coerce another person, or misleads the other person 3) to withhold a document from an official proceeding or alter or destroy a document in order to render it unavailable for use in the proceeding 4) specifically intending this result.¹⁰³

Similar to sections 1503 and 1505, this section includes the elements of knowledge and specific intent.¹⁰⁴ Contrary to the other two sections, however, it is not necessary to act “corruptly” according to the statutory language; “[the defendant] need only perform one of the enumerated acts with the intent to ‘influence’ testimony” rather than acting with a corrupt purpose.¹⁰⁵ Nevertheless, as written before Sarbanes-Oxley, section 1512 was limited by its own language—it only covered the acts of an individual who coerced a third party to destroy documents,¹⁰⁶ rather than the person who actually destroyed the documents.¹⁰⁷ Moreover, section 1512 does not cover the acts of a defendant who did not mislead the witness while persuading the witness to lie.¹⁰⁸

102. 18 U.S.C. § 1512 (2002).

103. See GORELICK ET AL., *supra* note 7, at 189; 18 U.S.C. § 1512(b).

104. 18 U.S.C. § 1512(c).

105. Fitzpatrick & Parker, *supra* note 38, at 764.

106. See *id.*

107. Senator Leahy noted that the technical provision only makes it a crime to persuade another to destroy documents, and it's not a crime to destroy them yourself, something that section 1519 will correct. See 148 CONG. REC. S7419 (daily ed. July 25, 2002) (statement of Sen. Leahy).

108. *United States v. King*, 762 F.2d 232, 237–38 (2d Cir. 1985) (determining that a defendant who attempts to persuade the witness to lie to the government without misleading the witness has not violated section 1512). It is important to note that an attorney may be prosecuted as an aider or abettor since a third

Although the section requires an official proceeding as in sections 1503 and 1505, section 1512 eliminates language concerning pendency of an official proceeding or the initiation of a proceeding at the time of the alleged illegal conduct.¹⁰⁹ Taking an expansive view of the section, the District of Rhode Island determined that a violation occurred even though neither official proceedings nor any investigation had begun at the time that the corporate defendant's employee removed and altered documents respecting a price-fixing conspiracy.¹¹⁰ In that case, the office manager's instructions to an employee respecting such documents were strong circumstantial evidence that the manager intended to affect testimony by altering the documents because she "realized that a federal proceeding could be commenced in the future."¹¹¹ Consequently, it is sufficient for an official proceeding to be instituted at a date after the document destruction or alteration for a violation to occur as long as there was an intent to alter or render documents unavailable in any such proceeding.¹¹²

Even though section 1512(e) appears to ease the burdens of prosecutors when seeking obstruction of justice violations, courts are divided on whether the defendant must know that an official proceeding is imminent or scheduled. Relying on the language in subsection (e), some courts do not require the defendant to have such knowledge.¹¹³ The Fifth Circuit, however, requires "at least a

person does the destroying under this statute. *See* 18 U.S.C. § 1512.

109. *See* 18 U.S.C. § 1512(e); *United States v. Gonzalez*, 922 F.2d 1044, 1055 (2d Cir. 1991); *United States v. Frankhauser*, 80 F.3d 641, 651 (1st Cir. 1996).

110. *United States v. Conneaut Indus., Inc.*, 852 F. Supp. 116 (D.R.I. 1994) ("Nor do we adopt the *Conneaut* opinion insofar as it might be read as allowing conviction in any case where there is some circumstantial evidence that the defendant may have foreseen an official proceeding at some time in the future. Each case must be evaluated on its own facts.").

111. *Id.* at 125. John C. Coffee, Jr. argues that under this expansive reading, "targeted document destruction would never be safe once the decision-maker was specifically aware that misconduct has occurred and might be investigated in the future." Coffee, *supra* note 101, at A19.

112. *See* Coffee, *supra* note 101, at A19. This statute may also reach conduct that occurs during an informal investigatory stage of proceedings. *See Gonzalez*, 922 F.2d at 1055; *Frankhauser*, 80 F.3d at 646.

113. *See United States v. Kelley*, 36 F.3d 1118, 1128 (D.C. Cir. 1994); *United*

circumstantial showing of intent to affect testimony at some particular federal proceeding that is ongoing or is scheduled” for the future.¹¹⁴ Even so, the inclusion of subsection (e) has eliminated the more difficult questions appearing in sections 1503 and 1505 concerning the pendency of a proceeding and the defendant’s knowledge of such.

A new subsection has been added to section 1512 to catch the individual who alters or destroys the document or other object, rather than just the “corrupt persuader.”¹¹⁵ The newly inserted subsection (c) was created by Sarbanes-Oxley in an attempt to create corporate fraud accountability and “prevent persons from tampering with a record or otherwise impeding an official proceeding.”¹¹⁶ Thus, after pushing former sub-sections (c) through (i) down a slot, section 1512(c) reads:

Whoever corruptly—(1) 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; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.¹¹⁷

Therefore, what was seen as a technical distinction (punishing the persuader only) burdening prosecutors has now been lifted with the inclusion of language to prosecute the document destroyer himself.¹¹⁸

D. 18 U.S.C. Section 1519—Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy

In order to close technical loopholes and clarify the existing

States v. Scaife, 749 F.2d 338, 348 (6th Cir. 1984).

114. United States v. Shively, 927 F.2d 804, 812–13 (5th Cir. 1991).

115. 18 U.S.C. § 1519 (2002).

116. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

117. *Id.*

118. *Id.*

obstruction of justice laws that cover document destruction,¹¹⁹ and in response to the corporate scandals of 2001 and 2002, Congress passed the Sarbanes-Oxley Act of 2002 to “deter and punish corporate and accounting fraud and corruption.”¹²⁰ In Title VIII of the Act, a new general anti-shredding provision was enacted at 18 U.S.C. section 1519:

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.¹²¹

Unlike the three previous obstruction statutes that were a narrowly interpreted patchwork of laws governing the destruction of evidence, this new section can “be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is, as a factual matter, within the jurisdiction of any federal agency or any bankruptcy.”¹²² As summed up by Senator Leahy, the drafter of Title VIII, “[t]he intent of the provision is simple: people should not be destroying, altering, or falsifying documents to obstruct any government function.”¹²³

Section 1519 is meant to correct the ambiguities and technical

119. 148 CONG. REC. S7419 (daily ed. July 25, 2002) (statement of Sen. Leahy). Senator Leahy drafted the Corporate and Criminal Fraud Accountability Act, which became Title VIII of the Sarbanes-Oxley Act of 2002. This Title includes the new sections 1519 and 1520. *Id.* Senator Leahy provided a section-by-section analysis for these new provisions. *Id.*

120. President’s Statement on Signing the Sarbanes-Oxley Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1286 (July 30, 2002); David S. Hilzenrath, *Andersen’s Collapse May Be Boon to Survivors*, WASH. POST, Aug. 24, 2002, at E01 (stating that passage of the law was in response to the accounting scandals).

121. Sarbanes-Oxley Act § 802.

122. 148 CONG. REC. S7418 (daily ed. July 25, 2002) (statement of Sen. Leahy).

123. *Id.* at S7419.

limitations found in the interpretations of sections 1503, 1505, and 1512 by federal courts.¹²⁴ Unlike the narrow interpretation of section 1503 that requires any obstruction to be tied to a pending judicial proceeding,¹²⁵ section 1519 is designed “not to include a technical requirement . . . to tie the obstructive conduct to a pending or imminent proceeding or matter by intent or otherwise.”¹²⁶ Because section 1519 extends to acts done in contemplation of a federal matter or bankruptcy case, “the timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution.”¹²⁷ This section is also meant to eliminate the distinctions recognized in section 1505 between court proceedings, agency investigations, informal or formal administrative proceedings, and basic government inquiries.¹²⁸ Any action named by this statute performed during an investigation or matter within the jurisdiction of a federal agency is covered.¹²⁹ Finally, the problem of section 1512 covering only the “corrupt persuader” is rectified by section 1519 because the new section extends coverage beyond the persuader and covers the document destroyer himself.¹³⁰

Although there are no court decisions interpreting this section yet, the legislative history makes it apparent that section 1519 was enacted to purposely target document destruction and alteration in connection with a federal agency action.¹³¹ Congress’s serious intent in deterring document destruction is evidenced by the possible 20-year prison sentence that one may receive if found guilty under such section.¹³² The concern that document

124. *See id.*

125. *See United States v. Aguilar*, 515 U.S. 593, 598 (1995).

126. 148 CONG. REC. S7419.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See id.*

132. The penalties for destroying documents and obstructing justice have been strengthened with this statute, but the twenty-year maximum penalty itself is an expansion of what was originally promulgated by the first bill. *See* 148 CONG. REC. E1451 (daily ed. July 29, 2002) (statement of Rep. Sununu). Moreover, to show that Congress means business, section 805 of Title VIII requires the United

destruction would go unpunished because of the varied interpretations of the patchwork of obstruction laws covering document destruction should be alleviated with the broad language of this new section.

E. 18 U.S.C. Section 1520—Destruction of Corporate Audit Records

Title VIII of the Sarbanes-Oxley Act also created section 1520 to preserve an accountant's audit workpapers for five years from the end of the fiscal period in which the audit was concluded.¹³³ Specifically targeting the document destruction performed by accountants during the recent corporate scandals, this section requires the retention of audit and review workpapers for a certain period of time so that evidence can be gathered before the statute of limitations for bringing certain securities and criminal actions runs.¹³⁴ Creating a new 10-year felony that applies to the willful failure to preserve audit papers of companies that issue securities, this section states:

(a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, 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.

(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.¹³⁵

States Sentencing Commission to review and possibly enhance the types of penalties given out to offenders of the obstruction statutes. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

133. Sarbanes-Oxley Act § 802.

134. See 148 CONG. REC. S7419 (daily ed. July 25, 2002) (statement of Sen. Leahy) (mentioning specifically Andersen and its acts).

135. Sarbanes-Oxley Act § 802. Sub-section (a)(2) of this section requires the SEC to promulgate rules and regulations relating to the retention of relevant audit records. Moreover, sub-section (c) states that nothing in this section

As opposed to the other obstruction sections that apply to document destruction, this section pursues a specific audience—accountants.¹³⁶ According to the legislative history of this section, the overriding purpose of targeting such persons and specific documents is the preservation of financial and audit records.¹³⁷ Not only does this section penalize the willful failure to preserve specific audit records, it also “will result in clear and reasonable rules that will require accountants to put strong safeguards in place to ensure that such corporate records are retained.”¹³⁸ The materials requiring preservation under this section must be substantive materials, “whether or not the conclusions, opinions, analyses or data in such records support the final conclusions reached by the auditor or expressed in the final audit or review,”¹³⁹ and specifically include e-mails and other electronic records.¹⁴⁰

Similar to section 1519, the federal courts have not interpreted this new section yet. Section 1520, however, is the least ambiguous of the five obstruction sections targeting document retention and destruction. It specifically states the situation and time period wherein documents must be retained, and additionally gives the SEC the power to create or clarify rules further define this section.¹⁴¹ On the other hand, it is more limited than the other four sections because section 1520 only punishes and prohibits an accountant who conducts an audit of a 1934 Act issuer.¹⁴²

III. ARTHUR ANDERSEN LLP AND THE DOWNFALL OF THE ENRON CORPORATION

In 2001, Arthur Andersen LLP (“Andersen”), the venerable 89 year-old accounting firm, became a lead character in the play

relieves a person of the duties imposed by other federal or state laws to retain documents.

136. 148 CONG. REC. S7419.

137. *Id.*

138. *Id.*

139. *Id.*

140. Sarbanes-Oxley Act § 802.

141. *See id.*

142. *See id.*

that was the downfall of Enron, an international energy-trading company.¹⁴³ For Andersen, Enron's longtime outside auditor,¹⁴⁴ it was a part that it should never have taken. The drama began to unfold during the second week of October 2001, when Enron reported a \$618 million third-quarter loss and disclosed a \$1.2 billion reduction in shareholder equity as a result of terminating transactions related to clandestine partnership arrangements.¹⁴⁵ After this disclosure, the Securities and Exchange Commission ("SEC") began to informally investigate the loss by sending a letter to Enron on October 17, 2001¹⁴⁶ which Enron only acknowledged on October 22, 2001.¹⁴⁷ Following two months of questions about, and investigations into, the Enron situation, Andersen disclosed to federal agencies that Andersen employees disposed of "a significant but undetermined number" of documents related to the firm's work for Enron.¹⁴⁸ Determining that Andersen should be held accountable for any interference with investigations into Enron's demise, the Department of Justice charged Andersen with obstruction of justice and a grand jury indicted the firm on March

143. Enron was formed in 1985, when two natural gas pipeline companies were combined, and was transformed into a powerful supplier of gas and electricity. See Dan Morgan & Peter Behr, *Enron Chief Quits As Hearings Open*, WASH. POST, Jan. 24, 2002, at A1 ("In the 1990s it created a vast, complex energy and commodity trading operation marked by increasingly elaborate outside partnership structures that are a central focus of the Enron investigations."). The corporation filed for bankruptcy on December 2, 2001. See Richard A. Oppel, Jr. & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Corp. Files Largest U.S. Claim for Bankruptcy*, N.Y. TIMES, Dec. 3, 2001, at A1.

144. See Jonathan Weil et al., *Audit Nightmare: Arthur Andersen Says It Disposed of Documents That Related to Enron*, WALL ST. J., Jan. 11, 2002, at A1.

145. Rebecca Smith & John R. Emshwiller, *Enron May Issue More Stock to Cover Obligations*, WALL ST. J., Oct. 24, 2001, at A2. The loss of shareholder equity was due to Enron's repurchasing of fifty-five million shares of its own stock held by partnerships directed by Enron's CFO, Andrew Fastow. See Peter Behr, *Enron Discloses SEC Inquiry; Information Request Involves Ties to Money-Losing Partnerships*, WASH. POST, Oct. 23, 2001, at E3.

146. Marcy Gordon, *Arthur Andersen Says Auditors Destroyed Enron Documents After SEC Request*, AP NEWSWIRE, Jan. 15, 2002.

147. See Behr, *supra* note 145, at E3.

148. Weil et al., *supra* note 144, at A1.

7, 2002.¹⁴⁹ According to one expert on corporate and securities law, “[w]hether or not this is a crime, it’s a colossal blunder.”¹⁵⁰

The indictment and subsequent conviction has led to the departure of numerous Andersen clients,¹⁵¹ the sell-off of profitable units, and the exodus of partners and personnel.¹⁵² After being convicted of this felony, Andersen lost its ability to audit clients on any of the national stock exchanges.¹⁵³ Andersen was also fined \$500,000 and was sentenced to five years probation.¹⁵⁴ The firm is a shadow of its former self and has virtually disintegrated, with only 200 to 300 of its former 28,000 workers left on the payroll.¹⁵⁵

149. See Schmidt & Hilzenrath, *supra* note 6, at A1; see also Mitchell Pacelle et al., *Auditor's Concerns: In Wake of Enron, Andersen Is Looking for a White Knight*, WALL ST. J., Mar. 11, 2002, at A1 (according to one person close to the Department of Justice’s investigation, “justice has a lot of power. Andersen has no leverage” because it admitted that its employees had destroyed relevant Enron documents even after Andersen learned of an SEC inquiry into Enron). Prosecutors unsealed the indictment on March 14, 2002. See Brenda Sapino Jeffreys, *Andersen Defense Bets on Speedy Trial*, LEGAL TIMES, Apr. 1, 2002, at 19.

150. David S. Hilzenrath & Susan Schmidt, *Andersen Dismisses Lead Enron Auditor*, WASH. POST, Jan. 11, 2002, at A1 (discussing comments by John C. Coffee, Jr., a law professor at Columbia University, describing the document destruction to which Andersen admitted).

151. See Hull, *supra* note 12 (noting that more than 700 clients have left Andersen); see also John R. Wilke et al., *U.S. Warns Andersen of Indictment Risk*, WALL ST. J., Mar. 8, 2002, at A3 (stating that Merck & Co., Freddie Mac, SunTrust Banks Inc and Delta Airlines are just some of the clients that have dropped Andersen as their auditors).

152. See Kirstin Downey Grimsley, *Andersen Exodus Might Be Near*, WASH. POST, Apr. 17, 2002, at E1 (stating that more than 80% of Andersen’s 1,700 U.S. partners are pursuing positions at other accounting firms or new companies); see also Hull, *supra* note 12.

153. See Hull, *supra* note 12 (informing the SEC that Andersen’s practice will cease operations on August 31, 2002); Schmidt & Hilzenrath, *supra* note 6, at A1. Before the convictions, Andersen was trying to “work out a disciplinary agreement with the SEC that would allow the firm to continue to audit publicly traded companies.” See Susan Schmidt, *Enron Plaintiffs, Andersen to Talk*, WASH. POST, Apr. 16, 2002, at E1.

154. *Andersen Fined \$500,000 for Obstructing Justice*, REUTERS, Oct. 16, 2002.

155. See Michael Brick, *Andersen Seeks Graceful Exit to Leases*, N.Y. TIMES, Mar. 12, 2003, at C6. See also Delroy Alexander, *Andersen Offices’ Art for Sale*;

A. Arthur Andersen's Document Retention Policy

Andersen developed its current document retention policy after the government investigated its questionable accounting for Waste Management, Inc. in 1998.¹⁵⁶ In settling the investigation, the SEC forced Andersen to pay a fine and accept an injunction forbidding the firm from future wrongdoing.¹⁵⁷ Since the majority of the damaging information against Andersen in the Waste Management case came from the firm's own files, the firm created a policy wherein all unnecessary files would be destroyed.¹⁵⁸ In February 2000, Andersen created its current policy, which required employees to preserve audit work in a central file, while related documents are to be destroyed once they became unnecessary.¹⁵⁹

The Executive Summary of Andersen's document retention policy states that the purpose of the policy is to protect confidential information, to retain such information in order to support or defend the firm's work and to destroy the information when it is no longer needed.¹⁶⁰ The policy requires that "only essential information to support [the firm's] conclusions should be

Auction May Raise \$1 Million, CHI. TRIB., Oct. 29, 2002, at N1.

156. See Kurt Eichenwald, *Andersen Misread Depths of Government's Anger*, N.Y. TIMES, Mar. 18, 2002, at A1.

157. See *id.*

158. See *id.*

159. See Practice Administration: Client Engagement Information, *supra* note 10, §§ 3.1.1, 3.1.2. Andersen, however, tried to cut costs by dismissing some employees who worked on the document destruction and by June of 2001, accountants in Houston were buried in documents that should have been shredded under the policy. See Eichenwald, *supra* note 156, at A1.

160. See Practice Administration: Client Engagement Information, *supra* note 10,

§ 2.0. Of course, the policy has now come under fire, as Representative Billy Tauzin, chairman of the House Energy and Commerce Committee, has urged Andersen to reconsider its policy of leaving matters related to the preservation of documents to auditors. "If all your policies are to let accountants decide when it is legal to destroy documents in a pending investigation, an awful lot of people are going to be in trouble down the road," he said. "If you don't change it, I promise you, we will." Tom Hamburger & Jonathan Weil, *Andersen Knew of "Fraud" Risk at Enron*, WALL ST. J., Jan. 25, 2002, at A3.

retained.”¹⁶¹ Notably, “it is the engagement partner’s responsibility to assure compliance with these standards.”¹⁶² The policy states that “all working papers should be retained for six years and then destroyed,” but that the period “is predicated upon the legal statutes of limitations in the United States.”¹⁶³

When discussing destruction guidelines, the policy declares that once Andersen is notified of “litigation or subpoenas regarding a particular engagement, the related information should not be destroyed.”¹⁶⁴ The policy also maintains that destruction should be delayed and retention extended if there are “regulatory agency investigations (e.g., by the SEC), pending tax cases, or other legal action in connection with which the files would be

161. See Practice Administration: Client Engagement, *supra* note 10, § 3.4.1. Information having relevance to our opinion or findings should be part of the central client engagement files. Drafts and preliminary versions of memos and reports, superseded workpapers, backup diskettes, and other types of information not in the central client engagement files should be destroyed when they are no longer useful to the engagement and no later than when the engagement is completed. Draft versions of documents should be discarded or deleted at the time the final document is completed.

Id. § 3.5.3. John Ormerod, Andersen’s “top man” in the United Kingdom, stated “[w]e don’t have a shredding policy Our policy is to retain the documents which support our opinion. We don’t retain the ones that are unnecessary.” *Don’t Mention the Shredding*, DAILY TELEGRAPH, Feb. 2, 2002, at P30.

162. Practice Administration: Client Engagement Information, *supra* note 10, § 3.4.3. David Duncan was the engagement partner for the Enron account.

163. *Id.* § 4.4.1. It is interesting to note that in the legislative history discussing section 1520, Senator Leahy states that if the “clear requirements” of section 1520, with its five year period to retain workpapers, had been in place “countless [Andersen] documents might have been saved from the shredder.” 148 CONG. REC. S7419 (daily ed. July 25, 2002) (statement of Sen. Leahy). Yet the Andersen policy itself requires a longer retention period for its audit papers, so this new section may not have made a difference.

164. Practice Administration: Client Engagement Information, *supra* note 10, § 4.5.4. Once any Andersen employee learns of the institution of legal action or threatened legal action against Andersen or its personnel, prompt notification should be made to the Chicago legal office and the relevant area office of Andersen’s legal group. See Practice Administration: Notice of Threatened or Actual Litigation, Governmental or Professional Investigations, Receipt of a Subpoena, or Other Requests for Documents or Testimony (Formal or Informal), Statement No. 780, § 2.0, at <http://www.findlaw.com> (last visited Mar. 11, 2003).

necessary or useful.”¹⁶⁵ In these cases, the policy notes, the material in the Andersen files cannot be altered or deleted.

Other Big Five accounting firms’ policies are similar to Andersen’s, but the wording varies slightly in each policy. Deloitte & Touche LLP requires the firm’s employees to maintain “working papers which document the principal work performed, and the conclusions reached, by the auditors.”¹⁶⁶ Ernst & Young LLP’s policy requires the retention of records on audit engagements for a minimum of six years, a time requirement that the other Big Five firms, including Andersen, follow.¹⁶⁷ PricewaterhouseCoopers LLP pronounces in its policy that “any documents that are created or received by the firm that are necessary or appropriate to record or support the firm’s professional work” must be retained.¹⁶⁸

B. The Destruction of Documents and the Relation to the Policy

The saying goes “the devil is in the details”—but here “the devil is in the dates”—the dates when Andersen learned of the SEC investigation. On October 12, 2001, four days before Enron announced massive losses, Nancy Temple, an Andersen attorney in the firm’s Chicago headquarters, sent the infamous e-mail stating that “[i]t might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy.”¹⁶⁹ Nancy

165. Practice Administration: Client Engagement Information, *supra* note 10, § 4.7.1.

166. Jonathan Weil, *Questioning the Books: Two Andersen Employees Believed Enron Shredding Was Firm’s Policy*, WALL ST. J., Mar. 13, 2002, at C1.

167. *See id.*; *see also* Ingersoll, *supra* note 25, at 164 (noting that at the larger accounting firms audit documents are kept for six years “because you never know what might come up”). With the passage of Sarbanes-Oxley, all substantive audit documents must be preserved for five years. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804, 116 Stat. 745 (2002).

168. Weil et al., *supra* note 144, at A1.

169. *See* E-mail from Nancy Temple, Attorney, to Michael Odom, Andersen Partner (Oct. 12, 2001), *available at* http://www.washingtonpost.com/wp-srv/business/daily/transcripts/twoemails_andersen101201.pdf (last visited Mar. 2, 2003) [hereinafter Temple e-mail]. During the government’s closing arguments at trial, the prosecution argued that the policy was simply a cover for the

Temple sent the e-mail to Michael Odom, a partner and head of risk management in Houston, who then forwarded it to David Duncan, another partner and the lead auditor for the Enron account.¹⁷⁰ At this point, shareholders of Enron had already filed suits against the company and the SEC was beginning to informally inquire about the corporation.¹⁷¹ Shortly after receipt of the e-mail, Andersen employees in Houston led by Duncan proceeded to expedite the destruction of Enron-related documents, with the exception of the Enron audit workpapers wherein the auditors' conclusions were contained.¹⁷² Duncan also organized an urgent meeting to coordinate the destruction of Enron-related records on October 23, 2001.¹⁷³ The SEC launched a full formal investigation into Enron on October 31, 2001 and followed with a subpoena to

shredding of documents. See Kurt Eichenwald, *Summations in Andersen's Criminal Trial*, N.Y. TIMES, June 6, 2002, at C1. The government also stated that suddenly in October following the policy became a major priority, while in reality it was to prevent impending litigation against the firm. *Id.*

170. See Temple e-mail, *supra* note 169; see also Eichenwald, *supra* note 156, at A1 (documenting the stages of destruction in October, this story states that Odom reminded his accountants on October 10, 2001 about the importance of destroying documents, after which they immediately went back to their desks and deleted a large amount of e-mails).

171. See Susan Schmidt, *Prosecutors, FBI Pore Over Enron's Books*, WASH. POST, Jan. 30, 2002, at A6. Temple herself recognized that the possibility of suits against Enron was great. See Michael Schroeder, *Probe of Andersen Lawyer Is Sought—House Panel Wants To Investigate If Temple Lied About Enron Role*, WALL ST. J., Dec. 18, 2002, at A6. Twenty-one minutes after sending her e-mail regarding the document policy, she opened a litigation-tracking account for the Enron matter, wherein she noted: "Enron expects to announce a \$1.3 billion charge in the third-quarter." *Id.*

172. See Ken Brown et al., *Paper Trail: Andersen Fires Partner It Says Led Shredding of Enron Documents*, WALL ST. J., Jan. 16, 2002, at A1 (citing people close to Duncan who said that no documents were destroyed before the e-mail was sent).

173. See Eichenwald, *supra* note 156, at A1 (noting that the message of October 23, 2001 was to get all files into compliance with the document retention policy). In the three-day period of October 23 to October 26, 2001, twenty-six trunks of documents, as well as twenty-four boxes, were destroyed, compared with the destruction of less than one trunk for the three previous weeks in October. See *id.*

Andersen on November 8, 2001.¹⁷⁴ The destruction of documents, however, did not stop until November 9, 2001,¹⁷⁵ a day after the SEC sent Andersen a subpoena seeking all of the firm's Enron-related documents, when Duncan's assistant sent an e-mail to the office stating "stop the shredding."¹⁷⁶

While the management in Andersen's Chicago headquarters maintained that the Temple e-mail was a reminder of the firm's standard policy,¹⁷⁷ the management of the Houston office, including Duncan, considered it an authorization to begin shredding documents.¹⁷⁸ After acknowledging that Andersen employees did destroy documents pertinent to the SEC inquiry, Andersen's senior management in Chicago placed the blame on the poor judgment of partners in the Houston office working on the Enron account.¹⁷⁹ Duncan and Odom, however, maintained that the document destruction began only when the e-mail from Temple reminded the Houston office of the document retention policy.¹⁸⁰

174. See Hilzenrath & Schmidt, *supra* note 150, at A1.

175. See Eichenwald, *supra* note 156, at A1. Temple also sent an e-mail to the Houston office on November 10, 2001 telling Andersen employees to preserve documents, "suggesting that Andersen's legal department did not explicitly tell auditors to start preserving documents related to Enron's audit until nearly three weeks after Enron disclosed that the SEC was looking into its finances." Susan Schmidt & Kathleen Day, *Testimony Is Sought on File Shredding*, WASH. POST, Jan. 20, 2002, at A5.

176. Hilzenrath & Schmidt, *supra* note 150, at A1.

177. See Peter Behr, *Manager Says Enron Shredded Documents*, WASH. POST, Jan. 22, 2002, at A1 (discussing that former Andersen CEO Joseph P. Berardino stated that the Temple e-mail was a reminder "because accountants are pack rats We save lots of stuff that's not relevant.").

178. See Brown et al., *supra* note 172, at A1. Andersen fired Duncan, stating that he led an expedited effort to destroy documents after learning that the SEC was investigating Enron. *Id.* Duncan has defended himself by stating that he was merely following the instructions in the Temple e-mail. *Id.*

179. See Tom Hamburger & Jonathan Weil, *Second Executive Tells of Andersen E-mail*, WALL ST. J., Jan. 21, 2002, at A3. "These activities [of Houston employees] were on such a scale and of such a nature as to remove any doubt that Andersen's policies and reasonable good judgment were violated." Hilzenrath & Schmidt, *supra* note 150, at A1.

180. See Hamburger & Weil, *supra* note 179, at A3; see also Susan Schmidt & April Witt, *U.S. Refuses to Clear Andersen*, WASH. POST, Mar. 9, 2002, at E1

The firm's management has continuously denied that the October 12, 2001 Temple e-mail was a veiled order to begin destroying Enron documents.¹⁸¹ The destruction of documents became even more furious after a meeting on October 23, 2001, where Duncan directed an expedited effort to shred Enron-related documents.¹⁸² Moreover, Temple admitted knowing of the SEC investigation of Enron and Andersen's work for the company by October 23, 2001 but asserts that it was the responsibility of the engagement partner, Duncan, to ensure that the document retention policy was followed.¹⁸³ Nevertheless, during Congressional investigations Duncan stated that he learned of the SEC investigation of Enron on either October 19 or 20, 2001, but Andersen employees continued destroying documents until November 9, when Temple ordered the Houston office to retain all paperwork.¹⁸⁴ Andersen finally suspended its document destruction policy on January 10.¹⁸⁵

Andersen was indicted on charges of obstruction of justice under 18 U.S.C. section 1512.¹⁸⁶ The firm was charged with

(according to two Houston Andersen employees, "an unusual number of Enron-related documents were destroyed" after the receipt of the Temple e-mail on October 12, 2001, specifically on the weekend of October 13-14).

181. See Schmidt & Witt, *supra* note 180, at E1.

182. Milo Geyelin, WALL ST. J., Mar. 18, 2002, at C1. Duncan has subsequently pleaded guilty to illegally destroying documents in October 2001. See Susan Schmidt & Carrie Johnson, *Andersen's Troubles Mount of Two Fronts*, WASH. POST, Apr. 10, 2002, at A1. During his plea, Duncan told the court that "[d]ocuments were in fact destroyed so that they would not be available to the SEC. I also personally destroyed such documents. I accept that my conduct violated federal law." *Id.*

183. Jaret Seiberg, *Lawmakers Bash Andersen*, DAILY DEAL, Jan. 24, 2002.

184. See *id.*

185. Robert O'Harrow, Jr. & Kathleen Day, *Andersen Officials Grilled on Shredding*, WASH. POST, Jan. 25, 2002, at A1.

186. See David O. Stephens, *Lies, Corruption, and Document Destruction*, 36 INFO. MGMT. J. 23 (2002). At the time of the indictment, sections 1519 and 1520 of Title 18 had not yet been created because the Sarbanes-Oxley Act of 2002 was passed on July 30, 2002, mainly in response to the Andersen case. *Id.* These sections would have allowed federal prosecutors to take a more direct shot at Andersen's obstruction, since the two sections specifically target document destruction by accountants, instead of using the more obscure section 1512. *Id.*

widespread criminal conduct for destroying a multitude of records about its Enron audit.¹⁸⁷ The indictment asserted that Andersen had non-public information from which the firm could reasonably anticipate litigation; information such as their internal knowledge of Enron's business losses, a memo from an Enron employee addressing concerns about the corporation, and the firm's own hiring of an experienced law firm to complete an internal investigation.¹⁸⁸ Further, according to the Justice Department, Andersen partners personally directed the widespread destruction of documents immediately after they learned of an SEC investigation.¹⁸⁹ At trial, the only major issue of dispute between Andersen and the government relating to the document destruction was whether anyone at Andersen was acting with the purpose of impeding a government investigation,¹⁹⁰ as required under section 1512.¹⁹¹

Ultimately, a federal jury found Andersen guilty of obstruction of justice for impeding a SEC investigation into the

187. See Schmidt & Hilzenrath, *supra* note 6, at A1.

188. See Indictment, United States v. Arthur Andersen LLP (No. H-02-0121), at <http://news.findlaw.com> (last visited Mar. 2, 2003).

189. See Schmidt & Hilzenrath, *supra* note 6, at A1 (noting that shredding of Enron documents occurred in Andersen's Portland, Ore., Chicago and London offices as well). Under section 1512, prosecutors needed to prove three things in order to convict the firm of obstruction: 1) that Andersen persuaded employees to destroy Enron-related audit documents; 2) that whoever gave these orders intended to impair the SEC investigation of Enron; and 3) that highly placed individuals at the firm were culpable, because according to the DOJ's own tough internal guidelines for charging a corporate this is required to implicate the whole firm. See Geyelin, *supra* note 182, at C1.

190. See Stephens, *supra* note 186, at 23.

191. See Kurt Eichenwald, *Andersen Testimony Ends With Denial of Ill Intent*, N.Y. TIMES, June 5, 2002, at C8. One important legal point that came out of the case was the ruling by the trial judge, Melinda Harmon, that the jury may find the firm guilty of obstruction, even if they could not agree on which of the firm's employees had the criminal intent. *Id.* Thus, each juror could find a different employee with the requisite intent and still find the firm as a whole guilty of obstruction. See Kurt Eichenwald, *Judge's Ruling Hurts Defense*, N.Y. TIMES, June 15, 2002, at C1. Nevertheless, the jury ultimately agreed on a single person as possessing the criminal intent to obstruct justice—Nancy Temple. Eichenwald, *supra* note 5, at A1.

finances of Enron.¹⁹² According to a few of the jurors, however, the decision to convict was based on an instruction by Temple to Duncan to alter a memo, rather than specifically for the document destruction or shredding.¹⁹³

IV. ANALYSIS

Having a document retention policy is a standard procedure for almost all corporations.¹⁹⁴ But other than saving a corporation money by not having to store and retain numerous unnecessary or outdated documents, what can a policy really do for a corporation?¹⁹⁵ Could it protect a corporation from being charged with obstruction of justice because it instructs on a routine destruction of documents?¹⁹⁶ Can document retention policies be reconciled with federal obstruction of justice laws?¹⁹⁷

A. How Can One Reconcile Document Retention Policies With Federal Obstruction of Justice Statutes?

Document retention policies request that a business enterprise destroy documents. Conversely, obstruction of justice laws seek the inherently opposite position, since they are designed to protect documents from being destroyed. Truth-seeking, impartiality, and the honor of the judicial and governmental system seem to necessitate more legal control over document retention policies because such policies are designed to destroy documents relevant to potential litigation.¹⁹⁸ On the other hand, practical considerations, such as the costs of retaining documents and the

192. See Hull, *supra* note 12.

193. See *id.* Temple wanted Duncan to remove her name from a memo that discussed problems with how Enron classified earnings in a press release. *Id.* In the opposition to Andersen's motion for a new trial, "prosecutors allege her motive was to remove reference to the fact that Andersen may have concluded the press release misleading, but did nothing about it." *Id.*

194. See generally *supra* note 1.

195. See discussion *infra* Part IV.A.

196. See discussion *infra* Part IV.A.

197. See discussion *infra* Part IV.B.

198. See GORELICK ET AL., *supra* note 7, at 278.

administrative burdens of retention, must be taken into account.¹⁹⁹ Regardless of this apparent contradiction, these two opposite behaviors should be able to co-exist as long as a document retention policy is not designed to deliberately interfere with the federal government or pertinent litigation.

A balance can be struck between the fairness sought by obstruction of justice laws and the practicality of document retention policies. This balance can be achieved if a well-designed policy is: a) suspended when a corporation learns that litigation or an investigation into the corporation is imminent; b) the corporation then reinstates the policy as to irrelevant or unnecessary documents regarding the investigation or litigation proceedings;²⁰⁰ c) and is fully reinstated once the investigation or litigation proceedings are over, thereby making the process cost effective while at the same time complying with the government and the essence of fairness.

A well-designed policy or document retention program that would not run afoul of the obstruction of justice laws involves numerous considerations. First, the policy should be created at a neutral time, when litigation or an investigation is not pending or foreseeable.²⁰¹ By creating a policy in advance, a corporation will not appear to be creating a sham policy designed with the primary intention of eliminating documents that relate to the litigation or investigation. Next, the policy should divide each type of document or file into categories and then assign a retention period for each category.²⁰² The retention periods should be consistent with applicable federal laws, including employment, labor, tax and audit retention laws that require retention of certain documents for

199. *See id.* at 275–76 (“Routine destruction can lower storage costs by reducing the volume of retained documents. Cataloging and uniform filing can lower the cost of record retrieval and thereby the cost of compliance with discovery requests.”).

200. *See id.* at 279 (discussing the balance between preserving documents to promote fairness and allowing their destruction to avoid undue expense and noting that this balance must be struck with great care).

201. *See* Shaheen, *supra* note 17, at 27.

202. *See* Barker et al., *supra* note 24, at 49.

specific amounts of time.²⁰³ Significantly, document destruction cannot be selective, but rather must be consistent. The policy should also clearly describe the document destruction procedures in order to give all personnel an idea of what to do with the documents they receive or create.²⁰⁴ Furthermore, the policy should state what corporate personnel need to do when litigation or an investigation commences, the occurrence of which triggers the obstruction of justice laws.

Managing the document retention program is just as important as the policy itself. Once a policy is created, it is up to the corporation's management and legal advisors to ensure that the policy is strictly and routinely followed.²⁰⁵ Management must make certain that all personnel are aware of the policy and the procedures to follow. If there is confusion among employees, an open dialogue between the employees and those in charge of the policy must occur. By requiring strict compliance, management must ensure that the policy is consistently followed and not haphazardly adhered to.

Pendency of a proceeding is an integral element to find a violation according to the three federal obstruction of justice statutes that deal with document destruction.²⁰⁶ Thus, once a corporation has notice of a pending investigation or official proceeding, it should immediately suspend any document retention policies.²⁰⁷ If a corporation does so, it will not interfere in the

203. See GORELICK ET AL., *supra* note 7, at 309; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802, 116 Stat. 745 (2002) (noting the new time period for audit workpaper retention).

204. See Barker et al., *supra* note 24, at 49.

205. *Id.* In the Andersen case, the evidence at trial established that there was a breakdown of internal procedures at the firm, not only in regards to the document retention policy, but as to accounting principles as well. See Kurt Eichenwald, *Early Verdict on Audit: Procedures Ignored*, N.Y. TIMES, June 6, 2002, at C6. This led to "an atmosphere of recklessness among some of the accountants" at the firm. See *id.*

206. See 18 U.S.C. §§ 1503, 1505, 1512 (2002).

207. Although sections 1519 and 1520 do not require pendency of a proceeding, these two statutes still require an investigation of the matter by a federal agency or a bankruptcy filing, so the suspension of a policy should still occur once a federal department or agency has jurisdiction. See Sarbanes-Oxley

administration of justice because it no longer will be using the policy that requires destruction of records and documents. The corporation may not have a duty to suspend its policy, but it would obviously be risking an obstruction charge if the policy continued and documents relevant to a proceeding are destroyed.²⁰⁸ To ensure that all employees have knowledge of the suspension in order to prevent any destruction of documents in violation of sections 1503, 1505 and 1512, management must effectively communicate with personnel regarding the policy's suspension.

Pendency of an official proceeding is not as crucial under section 1512, which eliminates the pendency requirement to some extent,²⁰⁹ or in courts that allow pre-subpoena obstruction convictions.²¹⁰ The cases suggest that corporations and their employees should not use formal pendency as the threshold at which they would suspend document retention policies as courts are flexible with this requirement.²¹¹ Even high-ranking government attorneys believe that "an official proceeding does not have to be pending in order for someone to come within the ambit of the obstruction of justice statute."²¹² Therefore, even before a subpoena has been issued, a corporation or its employees can still obstruct justice.²¹³ If a corporation has knowledge of a likely subpoena or investigation, it should either suspend its policy or reconfigure it to guarantee that no relevant documents are eliminated, regardless of whether a proceeding is pending or not.

Once an appropriate policy is in place, the best argument a

Act § 802.

208. See GORELICK ET AL., *supra* note 7, at 276 (discussing an enterprise's vulnerability to criminal charges if a policy is not suspended).

209. See 18 U.S.C. § 1512(e).

210. See, e.g., *United States v. Fineman*, 434 F. Supp. 197 (E.D. Pa. 1977), *aff'd mem.*, 571 F.2d 572 (3d Cir. 1978); *United States v. Gravely*, 840 F.2d 1156 (4th Cir. 1988); *United States v. Ruggiero*, 934 F.2d 440 (2d Cir. 1991).

211. See, e.g., *United States v. Walasek*, 527 F.2d 676, 678 (3d Cir. 1975); *Fineman*, 434 F. Supp. at 202; *Gravely*, 840 F.2d at 1160; *Ruggiero*, 934 F.2d at 450.

212. See Lindorff, *supra* note 20.

213. Because of the addition of section 1519, this is more true than ever, since section 1519 punishes destruction or alteration of documents in even a "contemplated" matter or case. See Sarbanes-Oxley Act § 802.

corporation can make in order to reconcile its policy with obstruction statutes is that because of a consistently applied and routinely followed retention policy, the corporation did not have the specific intent to obstruct justice as required by federal law. By using a policy that is consistent in its application rather than selectively applied, a pre-existing policy appears to eliminate the specific intent of impeding the administration of justice because the policy is not intended to impede a specific proceeding.²¹⁴ It can be argued that there is a lack of intent because the policy was drawn up well in advance of any potential litigation or contemplated investigation so that an enterprise's employees were following set instructions that apply across the board. Nevertheless, corporations that are involved in a potentially litigious business²¹⁵ should maintain more documents or create a retention-friendly policy because destroying documents before the relevant statute of limitations runs on a potential claim appears to be bad faith and may indicate specific intent.²¹⁶ Additionally, once a corporation learns of litigation or an investigation, adherence to a policy may create the appearance of specific intent to destroy relevant documents.

All in all, document retention policies can be reconciled with obstruction of justice laws. Whether it be a legal defense, such as a lack of specific intent due to consistent application, or a policy defense, such as the exorbitant costs of retaining all documents, arguments can be made that adherence to a document retention policy does not obstruct justice. All previously discussed sections of Title 18, including those added by Sarbanes-Oxley, involve a litigation or investigatory context, an inappropriate time to destroy documents. However, as long as the policies are being utilized during non-litigation or non-investigative circumstances, such

214. See Fedders & Guttenplan, *supra* note 63, at 54.

215. Although it may be obvious for certain corporations depending on what business the enterprise is engaged in, this is a vague standard in most cases.

216. See *Reingold v. Wet N' Wild Nevada, Inc.*, 944 P.2d 800, 802 (Nev. 1997) (determining that the spoliation inference in a civil case should be given because a water slide company that routinely destroyed its records after one year appeared to destroy documents intentionally because claims against the company were reasonably foreseeable).

policies will not oppose the federal obstruction laws.

B. Did Arthur Andersen's Document Retention Policy Protect the Firm Against Obstruction of Justice? Will It in the Future?

A conviction for obstruction of justice seemed likely under section 1512(b), the section under which the Department of Justice charged the firm.²¹⁷ Much of the document destruction occurred after Andersen learned of the SEC investigation and possibly even after the subpoena was served.²¹⁸ If this was done with the intent to impede an official proceeding, then the firm's chances to receive an unfavorable verdict were high.²¹⁹ Ironically, however, the jury convicted the firm not for this destruction of a vast amount of documents with thousands of sentences, but for removing a few sentences from an internal memorandum discussing how Enron should characterize certain third-quarter losses in a press release.²²⁰ The unanimous verdict of the jury was based solely on this removal, and not on the shredding of documents in October 2001.²²¹

217. See Indictment, *United States v. Arthur Andersen LLP* (No. H-02-0121), at <http://news.findlaw.com> (last visited Mar. 2, 2003). This conviction seemed likely because Andersen admitted that the firm's employees destroyed documents. See Weil et al., *supra* note 144, at A1.

218. Weil et al., *supra* note 144, at A1.

219. It is interesting to note that during David Duncan's plea statement to the court, he stated that "[d]ocuments were in fact destroyed so that they would not be available to the SEC." Schmidt & Johnson, *supra* note 182, at A1.

220. Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry on Enron*, N.Y. TIMES, June 16, 2002, at A1. The jury foreman said that the smoking gun that led to the conviction was the e-mail sent from Nancy Temple to David Duncan suggesting that he remove the paragraph in his memorandum that stated his disagreement with the Enron characterization of certain third-quarter losses. *Id.* "The jury agreed that Ms. Temple had 'corruptly persuaded' Mr. Duncan to alter information for the purpose of impeding an official proceeding," and thus convicted Andersen. *Id.*

221. See Kurt Eichenwald, *Andersen Team Weighs Asking Judge to Undo Guilty Verdict*, N.Y. TIMES, June 19, 2002, at C1; Joseph Weber, *Commentary: The Lingering Lessons of Andersen's Fall*, BUS. WEEK ONLINE, July 1, 2002 ("[U]ltimately, the jury set aside most of the government's accusations, even largely disregarding the shredding efforts the government had made so much of."), available at

The jury's reason for conviction notwithstanding, Andersen's document retention policy should have protected the firm for any document destruction before the firm learned of the SEC investigation during the third week of October, as being the typical applications of the policy.²²² Since the firm admitted to destroying documents after it learned of the investigation, however, anything destroyed from that date onward would not be protected by the firm's policy. In fact, the sensible approach would have been to suspend the policy immediately after learning of the investigation around October 17 or 18, 2001, or even earlier when they learned of possible trouble with Enron in late September and early October.²²³ An internal report conducted by Andersen declared that the policy was flawed because it created the impression that Andersen employees were permitted to destroy documents even after litigation was anticipated.²²⁴ Because the policy lacked clarity, according to Andersen, the firm ended up destroying relevant documents that may not have been destroyed if a clear policy was in place.

The question remains as to whether or not Andersen's retention policy was really unclear. At the very beginning of the policy, the Executive Statement announces, "[i]n cases of threatened litigation, no related [client] information will be destroyed."²²⁵ Additionally, section 4.5.4 states that "[i]n the event the Arthur Andersen Business Unit is advised of litigation or subpoenas regarding a particular engagement, the related

http://www.businessweek.com/magazine/content/02_26/b3789017.htm (last visited Mar. 11, 2003).

222. Nevertheless, under an expansive view of section 1512(b), specific document destruction may bring about an obstruction conviction if the firm knew of alleged wrongdoing and could reasonably anticipate an investigation or litigation into relevant accounts. See *United States v. Conneaut Industry Inc.*, 852 F. Supp. 116 (D.R.I. 1994) (taking an expansive view of pendency and intention and allowing circumstantial evidence to show knowledge of potential future proceedings).

223. Schmidt & Hilzenrath, *supra* at note 6, at A1.

224. See *id.* This internal report of the shredding was given to the Department of Justice. *Id.*

225. Practice Administration: Client Engagement Information, *supra* note 10, § 2.0(9).

information should not be destroyed.”²²⁶ These statements appear to be clear—when litigation is possible, all related client information should be preserved. Contrary to Andersen’s internal report, this policy does not give the impression that documents could be destroyed even after litigation is anticipated. If the employees were unaware that litigation was on the horizon, then they would not have adhered to the policy. Nevertheless, the policy itself appears clear regarding document retention procedure when litigation is threatened. It is possible that the Houston office was not even using the policy at all, as Duncan remarked that he and others destroyed documents to avoid turning them over to the SEC.²²⁷ If that was the case, it seems that Andersen’s policy is fine and it is the lack of adherence to it that caused the confusion.

Moreover, the management of the document retention program may have been more flawed than the policy itself. When the legal department in the Chicago headquarters e-mailed the Houston office on October 12, 2001, they did not specify precisely what was meant by “remember the firm’s policy.”²²⁸ The lack of clear communication may have been more of a problem than the policy itself. Consequently, the Andersen employees in Houston had no clear guidance as to the next correct step and most likely destroyed pertinent documents.²²⁹ In fact, the jurors said that the shredding was not the issue in their decision, because they were “convinced that it was not intended to hinder a government inquiry but was a good faith, if misguided, effort to comply with internal policies” at Andersen.²³⁰ Instead, according to the jury’s foreman,

226. *Id.* § 4.5.4.

227. See Schmidt & Johnson, *supra* note 219, at A1. It is interesting to note that while he did destroy documents, Duncan may not have done so in order to hinder any government investigation. According to the testimony of David Stulb, head of Andersen’s Fraud and Investigative Unit, Duncan didn’t understand the legal ramifications of document retention or destruction because he did not have such legal training. See Jonathan Glater, *Witness Cites Confusion in Shredding at Andersen*, N.Y. TIMES, May 23, 2002, at C4.

228. See Temple e-mail, *supra* note 169.

229. Of course, they may have done the shredding on purpose, and therefore a document retention policy really would not matter anyway.

230. Jonathan Glater, *Jurors Say File Shredding Didn’t Factor Into Verdict*, N.Y. TIMES, June 16, 2002, at A22.

“[t]he shredding simply showed that ‘Andersen hadn’t trained its people very well.’”²³¹

CONCLUSION

Document retention policies, used in virtually all business organizations, serve many practical purposes. On the other hand, these policies authorize the elimination of documents that may prove relevant in a judicial or administrative proceeding, thus presenting the opportunity to impede the due administration of justice. Nevertheless, the practical reasons of cost and administrative savings for organizations that use them and the fact that the policies may prevent future litigation because of a document taken out of context weigh heavily in favor of having such a tool. These policies are necessary for business purposes and can be reconciled with federal obstruction laws if the policy is clear, consistently applied and correctly managed. As long as the policy is suspended during litigation, a bankruptcy filing or an official investigation or matter, times when the policies of fairness and truth-seeking are of the utmost importance, the balancing of the two sides will allow such document retention policies to be available for organizations to use.

231. *Id.*

Notes & Observations