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ESSAYS

DOCUMENT DESTRUCTION AFTER ARTHUR ANDERSEN: IS IT STILL HOUSEKEEPING OR IS IT A CRIME?

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The indictment and subsequent conviction of Arthur Andersen & Co.[1] has recently focused much attention on the previously little-known subject of document retention. The government charged that Andersen's auditors willfully obstructed justice when they destroyed thousands of Enron work papers as an SEC investigation loomed, but had not yet commenced.[2] In defense, the accounting firm's representatives claimed that it was merely "good housekeeping" to inform employees of the need to eliminate reams of unnecessary paper.[3] Because the jury evidently based its ultimate decision on an

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1. *United States v. Arthur Andersen, LLP*, Crim. Action No. H-02-0121 (S.D. Tex. June 15, 2002).

2. Kurt Eichenwald, *Enron's Many Strands: The Investigation; Andersen Charged With Obstruction in Enron Inquiry*, N.Y. Times A1 (Mar. 15, 2002).

3. Kristen Hays, *Disposal Good Housekeeping: Andersen Official*, Toronto Star C6 (May 28, 2002); Kurt Eichenwald, *Andersen Witnesses Defend Intent of Shredding*, N.Y. Times C1 (June 1, 2002).

altered memorandum rather than on the wholesale shredding,[4] important questions about the legality of Andersen's policy were not fully resolved. The resulting uncertainty seems likely to yield confusion, as this short essay will demonstrate.

It is surely impossible for a large firm, or even an individual, to retain every piece of paper generated in a professional practice. But when must documents be saved and stored, and when may they be destroyed? And most importantly, what constitutes guilty knowledge when documents are in fact being discarded? Every company in the United States is probably reviewing its own policies, at one level or another, in view of Andersen partner David Duncan's statement that he did not initially believe he had done anything wrong, but after much "soul searching" came to conclude that he had "committed a crime."[5] The courts, however, have provided little guidance on this issue,[6] which will likely remain unaddressed when the Fifth Circuit reviews the Arthur Andersen case.[7]

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4. Jonathan D. Glater, *Jurors Say File Shredding Didn't Factor Into Verdict*, N.Y. Times § 1, at 21 (June 16, 2002).

5. E.A. Torriero, *Duncan: Believed Order To Be Legal*, Chicago Trib. Bus. 1 (May 16, 2002); *see also* Carrie Johnson, *"Soul-Searching" to Guilty Plea; Andersen Auditor Says He Didn't Think He Broke Law at First*, Washington Post E1 (May 16, 2002).

6. The appellate cases on spoliation, both state and federal, nearly all address the duty to preserve evidence during active or clearly anticipated litigation. *See e.g. Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214 (1st Cir. 1982) (indicating that litigation was pending); *Caparotta v. Entergy Corp.*, 168 F.3d 754 (5th Cir. 1999) (same); *Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985) (same); *Sargent v. Armontrout*, 841 F.2d 220 (8th Cir. 1988) (same); *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294 (D.C. Cir. 1999) (indicating that litigation was anticipated, but not yet pending, when the evidence was destroyed); *Wuest v. McKennan Hosp.*, 619 N.W.2d 682 (S.D. 2000) (same, and indicating that the documents were destroyed in the ordinary course of defendant hospital's business); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, 432 Utah Adv. Rep. 44 (indicating that litigation was pending, and noting that insurer's practice of routinely destroying documents made work of policyholders' attorney more difficult, and treating it as a reasonable factor to consider in awarding attorney fees), *cert. granted*, 122 S. Ct. 2326 (June 3, 2002); *Torgerson v. Journal/Sentinel Inc.*, 563 N.W.2d 472 (Wis. 1997) (indicating that litigation was anticipated, but not yet pending, when the evidence was destroyed).

7. In response to special interrogatories, the jury indicated that its verdict was based primarily on an altered memorandum circulated by Andersen attorney Nancy Temple, rather than on the destruction of documents. Andersen's attorneys consequently premised their post-trial motions on the claim that Temple's actions were not unlawful, rather than on the legality or illegality of the document shredding. Lucas Wall, *Judge Upholds Andersen Guilty Verdict*, Houston Chron. Bus. 3 (Sept. 13, 2002).

Given the relative dearth of case law, the Ohio Supreme Court's opinion in *Ohio ex rel. Corn v. Russo*[8] is potentially quite important, since it is one of the relatively few appellate court decisions to address the general question of document retention outside the context of discovery abuse.[9] Many corporate executives, consultants, and especially expert witnesses, will find much cause for alarm in this case, as it appears to set an exceptionally high standard for maintaining documents, even in the absence of an investigation or discovery request. Moreover, the court evidently predicated its decision on a single line of transcript—a flaw not unknown elsewhere in appellate court review, but especially problematic in this context.

The significance of the decision is somewhat obscured by the arcana of Ohio appellate practice. The case involves a contempt proceeding against an expert witness, but much of the opinion is devoted to such technicalities as the difference between a writ of prohibition and a writ of mandamus, the distinction between civil and criminal contempt, and the trial court's jurisdiction over witnesses following dismissal of the underlying case. These questions are procedurally meaningful, of course, but they do not have much extrinsic impact. The ultimate issue in the case, however, could end up having tremendous consequences for record keeping, by businesses and expert witnesses, in Ohio and elsewhere.

In brief, these were the facts in *Corn*: Dr. Corn is an orthopedic surgeon frequently retained as an expert witness by defense counsel in personal injury cases. He testified for the defense in this case, and in an attempt to establish his pro-defense biases, the plaintiff's lawyers subpoenaed his tax and office records, hoping that they would reveal Dr. Corn's receipt of great amounts of money from insurance companies. Most importantly, the plaintiffs wanted all of Dr. Corn's appointment calendars for the previous eight years and all of his Independent Medical Examination (IME) reports for the same period.[10]

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8. 740 N.E.2d 265 (Ohio 2001).

9. More typically, the issue arises when documents are destroyed or concealed once litigation has commenced. *See e.g. Coates*, 756 F.2d 524 (indicating that plant closing resulted in extensive destruction of documents while class action was pending).

10. 740 N.E.2d at 267.

Dr. Corn produced one appointment calendar and about one hundred IME reports, claiming that the balance of the requested material had been discarded according to his office policy.[11] Faced with this response, most courts would either accept the witness's excuse[12] or, at most, bar his testimony for failure to comply with a valid discovery request.[13] In this case, however, the court went much further.

The trial judge held that Dr. Corn's failure to comply with the subpoena could be deemed contempt of court, and ordered him to show cause why he should not be held in contempt. Dr. Corn then testified that he had routinely destroyed his old appointment books and IME reports. On cross examination he conceded that one of his reasons for discarding these materials was to prevent plaintiffs' attorneys from using them to establish bias.[14]

Before the trial court could rule on the contempt citation, Dr. Corn's attorneys sought relief in the Ohio Supreme Court, claiming that the entire proceeding was improper. The Supreme Court held that the proceeding was proper and returned it to the trial court to complete the hearing. Implicit in the court's ruling was the idea that Dr. Corn could indeed be punished for the routine destruction of his records, even though the destruction evidently occurred *before* the issuance, or even the notice, of any subpoena. In fact, the Ohio Supreme Court made the startling observation that it could constitute criminal contempt for parties to "purposefully conduct[] their business[es] in such a fashion as to circumvent civil discovery rules and orders of the court attempting to enforce them."[15]

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11. *Id.*

12. *See e.g. Coates*, 756 F. 2d at 551 (imposing no sanction because plant employee "was unaware at the time he destroyed the disciplinary letters that there was any pending litigation regarding defendants' disciplinary policies, although [he] was aware that one employee had filed a suit regarding his discharge").

13. *See e.g. Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001) (recognizing that preclusion of testimony based on spoliated evidence is sometimes appropriate, but holding that the intentional destruction of expert witness materials in this case warranted an "adverse inference" jury instruction about the experts' work and preclusion of their further participation in the case).

14. 740 N.E.2d at 267.

15. 740 N.E.2d at 269.

There can be no doubt that it is contempt of court (or worse) to destroy documents that have been subpoenaed or requested in discovery. And, as Arthur Andersen learned, it can constitute obstruction of justice to destroy records known to be the subject of a pending investigation. On the other hand, most businesses and governmental agencies, including physicians and expert witnesses, follow retention policies that call for the regular disposal of old documents on a defined schedule. Before the decision in the *Corn* case, it would have been widely believed that there was no general obligation to maintain old appointment calendars and reports that were not the subject of pending or impending proceedings.[16] Discarding old documents was considered permissible, so long as it was not done for the specific purpose of evading discovery. As I explained elsewhere just a few years ago,

> an expert should never destroy any items—document, object, photograph, record—for the purpose of concealing it from discovery or obstructing another party's access to evidence. Of course, papers and objects may be discarded in the ordinary course of "housekeeping," but any item that has been requested in discovery must be preserved until the request has been complied with by the expert or disallowed by a court.[17]

It appears that Dr. Corn made a practice of throwing away his old calendars and reports. He agreed, on cross examination, that one reason was to prevent their use by opposing counsel, but he did not say that this was the only reason, or even the primary reason. Most important, he does not seem to have destroyed anything directly related to a matter in litigation, or to have undertaken any destruction at a time when the material destroyed was subject to a discovery request or subpoena.

In other words, Dr. Corn faced a contempt citation because of his cagey practice of limiting the material he kept on hand, and concomitantly limiting the material he might someday be asked to supply in response to discovery. However one regards

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16. Retention of certain documents may, however, be governed by statute or regulation. *See e.g* 29 C.F.R. § 1602.14 (requiring employment records to be kept for at least one year).

17. Steven Lubet, *Expert Testimony: A Guide for Expert Witnesses and The Lawyers Who Examine Them* 183 (Natl. Inst. for Tr. Advoc. 1998).

such a scheme—is it astute or conniving?—it was not previously thought to be grounds for contempt.

Most disturbing was the Ohio court's manipulation of a single snippet of Dr. Corn's testimony. According to the court's paraphrase of the trial record, Dr. Corn "conceded that one of the reasons he destroys these records is to prevent plaintiffs and plaintiffs' attorneys from establishing his financial interest and defense bias in personal injury litigation."[18] The absence of a direct quote from the transcript is troubling, since it seems exceptionally unlikely that Dr. Corn actually testified that he was seeking to conceal an alleged "defense bias."

Anyone familiar with the techniques of cross examination would recognize the inherent ambiguity of Dr. Corn's concession. He testified on direct examination that he regularly and routinely discarded old files that were no longer active. Then on cross examination, he candidly agreed—no doubt in response to a leading question—that the collateral benefits of his policy included the subsequent unavailability of the materials for possible impeachment in later, as yet unfiled, proceedings. The Ohio Supreme Court opinion, however, gives us no way of knowing the actual nature and scope of Dr. Corn's concession. Did he simply acknowledge that he was aware that a plaintiff might someday ask for his old reports? Did he actually use the phrase "one of [my] reasons," or is that merely an interpretation? Was he allowed to explain the relative importance of that "reason" in developing his office policy? Indeed, was there any redirect examination on the point, expanding on Dr. Corn's full position?

The lack of specificity in the Ohio Supreme Court opinion is troubling for two reasons. First, it seems likely that the court exaggerated the degree of Dr. Corn's intent, seizing upon a single line of testimony to the exclusion of the rest. But even granting the broadest implications of Dr. Corn's statement, the court nonetheless failed to explain the rationale for its ruling.

How could it be contempt for Dr. Corn to destroy documents *before he had notice* that anyone was seeking them? And what level of intent is necessary to base a contempt finding on the conduct of one's business "in such a fashion as to

18. 740 N.E.2d at 267.

circumvent civil discovery rules"? Do businesses have an obligation to maintain their records in a way that facilitates future discovery? May anyone involved in frequent litigation ever throw away any documents? Or must every paper (and probably every email message) be preserved indefinitely, at least by those who are regularly in court—a group that would presumably include not only expert witnesses, but also insurance companies, taxicab operators, utilities, consumer lenders, public housing authorities, and any number of other businesses and governmental agencies?

Of course, the Ohio Supreme Court's ruling merely remanded Dr. Corn for a hearing on the show-cause order, so it might have seemed logical to wait for a final disposition before addressing the many complex questions raised by the case. But that was surely a mistake. The trial court's eventual ruling (if any) is unlikely to be published or widely publicized; it may or may not be appealed.[19] Thus, all we may have in the way of a holding is the Ohio Supreme Court's rather chilling pronouncement that a finding of criminal contempt can be based on business practices that had among their perceived benefits when adopted the advantage of avoiding hypothetical discovery requests in hypothetical cases, even if they served valid business purposes as well.

Perhaps that is the law in Ohio. If so, it would have been better by far to develop it on a more complete record. If not, it would have been better to say so with some clarity, because this decision leaves lawyers and their clients with far too little guidance. And if that is indeed the law in Ohio, and if it is likely to become the law elsewhere, businesses, expert witnesses, and professionals of all kinds will be well advised to review their document-retention polices, to consider whether those policies might expose them to *Corn*-style citations for contempt, and to keep an eye on what the appellate courts do next.

19. As of this writing, the case is still pending and Dr. Corn's fate is as yet undecided.