The Obligation to Preserve Evidence
Before and During Civil Litigation
and Criminal Investigations

Dwight J. Davis
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Tuesday, September 20, 2005
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Dwight Davis is a senior partner in the Litigation Practice Group at King & Spalding. He is one of the nation’s leading authorities in consumer class actions and is one of the few lawyers that has tried a class action case to completion. In addition to his class action expertise, Mr. Davis has litigation and trial experience in a wide range of civil matters including securities fraud, antitrust, and consumer fraud, and has more than 20 years of experience as a trial lawyer defending corporations in numerous jurisdictions across the country. He is an AV rated lawyer and is listed in The Best Lawyers in America and Georgia Super Lawyers.

Mr Davis served as the leader of the firm’s Business Litigation Group from 1998 until 2001. In this capacity, Mr. Davis was responsible for over 100 lawyers and paralegals. In 2001, he was asked to relocate to the firm’s New York office to develop its litigation practice. Currently, Mr. Davis practices in the firm’s New York and Atlanta offices, and is currently a member of the firm’s Policy Committee.

Mr. Davis graduated, magna cum laude, from The Citadel in 1975. He served in the United States Army Infantry from 1975 to 1979; he was an Airborne Ranger and served on the DMZ in Korea from 1975 to 1976. Mr. Davis graduated, magna cum laude, from Mercer University School of Law in 1982 where he attended on a full academic scholarship. He was selected Best Oralist in the Freshman Moot Court Competition, was an editor of the Law Review and was selected for the Order of the Barrister.

Gary Grindler is a partner with King & Spalding’s Special Matters and Governmental Investigations Practice. He focuses on white collar criminal defense, internal corporate investigations and complex civil litigation. Mr. Grindler has extensive experience both with the Department of Justice and as defense counsel in white collar criminal matters.

Prior to joining King and Spalding in 2000, he served as Principal Associate Deputy Attorney General and Counselor to the Attorney General. In this capacity, he worked with both the Deputy Attorney General and the Attorney General on a range of issues relating to white collar prosecutions, law enforcement, national security, money laundering and computer crimes. Mr. Grindler previously served as an Assistant United States Attorney in the United States Attorney’s Offices in the Southern District of New York and the Northern District of Georgia.

Mr. Grindler’s practice has included numerous internal investigations for corporations and audit or special board committees of public companies as well as defense of corporations and individuals in white-collar criminal, civil fraud and government agency investigations. He has presented the results of internal investigations to the SEC, the Department of Justice and other federal, state and local governmental agencies on behalf of numerous clients.

Mr. Grindler is a member of the State Bar of Georgia and the District of Columbia Bar. He served as Council Member of the Criminal Justice Section of the American Bar Association (1999-2000); Chair of the Criminal Justice Committee of the General Practice Section of the American Bar Association (1998-1999); Commissioner, Interagency Commission on Crime and Security at U.S. Seaports (1999-2000); and Advisor to the Federal Judicial Code Revision Project, American Law Institute (1996-2000). When Mr. Grindler left the Department of Justice in early 2000, the Attorney General presented him with the Edmund J. Randolph Award in recognition of his outstanding contributions to the Department of Justice and its mission.
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The Obligation to Preserve Documents in Anticipation of Litigation: When & Why

Prepared by:
Dwight J. Davis
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Questions

- When is a company required to retain documents in anticipation of litigation?
- What must be retained?
- Is there a distinction between paper and electronic records?
- What consequence might follow the failure to suspend record retention?

General Rule

- Duty to preserve arises when a party or prospective party has notice of:
  1. Litigation or the potential for litigation; and
  2. The document’s or data’s potential relevance to the litigation or to the potential litigation.

Key Words: “Notice” and “Potential”
No Bright Line Rule

- The touchstone is FORESEEABILITY:
  - Of the potential litigation
  - Of the potential relevance of documents
- No requirement that litigation have begun
- Fact-specific inquiry

Triggering the Duty: Knowledge

- Does the company have “institutional knowledge” of the potential for litigation?
  - Not necessarily at the top levels of management
- Knowledge of underlying facts is sufficient
  - e.g., knowledge of death caused by product
- Knowledge of culpable conduct, even if not known outside company
Triggering the Duty: Conduct

- Internal investigation
- Heavy involvement of internal legal staff
- Retention of outside counsel
- Internal document review
- Designation of “Work-Product”
- Discussions of potential claims and defenses
- Contact by plaintiffs or their counsel

Relevance

- Broadly Defined
- Sanctions were approved where the company destroyed relevant documents because it “ignored the possibility that others might have entertained different theories about which evidence might have been relevant.”
  - Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995)
- Duty to preserve any documents routinely requested in the course of litigation germane to the companies’ business
  - e.g., discovery of “rollover problem” in vehicles triggered duty to retain all rollover testing and vehicle design data. Livingston v. Isuzu Motors, Ltd., 910 F. Supp 1473 (D. Mont. 1995)
Effect of Document Retention Policy

- Destroying documents pursuant to policy is not a safe harbor
- But, court is less likely to impose sanctions
- Party cannot avoid “notice” of claim by shielding information from those responsible for document retention

Illustrative Cases

- Testa v. Wal-Mart Stores, Inc., 144 F.3d 173 (1st Cir. 1998)
  - Delivery driver injured on Wal-Mart loading dock
  - Wal-Mart investigated incident and learned driver intended to sue
  - Wal-Mart maintained pre-incident telephone records that allegedly supported its defense, but they were destroyed after two years (but 2 months before suit filed) pursuant to record retention policy
  - Court found Wal-Mart should have preserved the records
Illustrative Cases

- **Blinzler v. Marriott Int’l, Inc., 81 F.3d 1148 (1st Cir. 1996)**
  - Marriott guest suffered heart attack and died; brought suit alleging Marriott staff was too slow in summoning medical care.
  - Outgoing telephone logs from night of incident were destroyed pursuant to record retention policy.
  - Trial court permitted evidence of Marriott’s destruction of this evidence.
  - 1st Circuit: “When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a fact-finder may reasonably infer that the party probably did so because the records would harm its case.”

Illustrative Cases

  - How to preserve documents is left up to the party
  - As a general rule, back-up tapes only need to be preserved if they are accessible
    - But, if you know where “key information” is on back-up tapes, then you must preserve those portions
  - Counsel should issue litigation hold and periodically remind employees
    - Communicate directly with employees most likely to have relevant information
  - Counsel needs to monitor compliance with litigation hold
  - Sanctions of company and outside counsel for non-compliance.
Paper vs. Electronic Records

- All records treated equally
- Company must act reasonably to preserve potentially relevant records
- Relevant email must be preserved
  - At minimum, preserve email for individuals who will be identified as having relevant information
  - Preserve for a reasonable time frame—not all email from all time
- Bottom line: preserve anything you think the other side will ask for in discovery

Consequences for Failure to Preserve

- Evidence of destruction allowed to reach jury
- Jury instruction allowing adverse inference
- More severe sanctions (default judgment, monetary sanctions) are usually only appropriate where a party has violated a discovery order or other flagrant conduct.
- Most severe sanction: Criminal Prosecution
    - But must show criminal intent to destroy evidence
Don’t Forget Ethical Rules

- Model Rule of Professional Conduct 3.4(a):
  - “A lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”

The Obligation to Preserve Evidence in the Context of a Criminal Investigation

Prepared by:
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QUESTIONS: Knowledge, Intent and Penalties

• When does a potential criminal investigation, proceeding or matter before a federal agency trigger an obligation to retain documents?

• What level of intent is required under the federal criminal statutes?

• What are the consequences of violating the federal criminal statutes?

Federal Criminal Statutes: Obstruction of Justice Generally

• Influencing or Injuring an Officer or Juror (18 USC 1503) – Section 1503 also reaches the destruction of documents which may obstruct judicial proceedings.

• Obstruction of Proceedings Before Departments, Agencies or Committees (18 USC 1505) – A “proceeding” under section 1505 is administrative rather than judicial.

• Tampering with a Witness, Victim or Informant (18 USC 1512) – Pre-Sarbanes-Oxley, this statute included a provision forbidding the causing or inducing of another person “to alter, destroy, mutilate, or conceal an object with the intent to impair the object’s integrity or availability for use in an official proceeding.”
Federal Criminal Provisions Under Sarbanes-Oxley

- **Witness Tampering Statute as Amended (18 USC 1512(c))** – “Whoever corruptly alters, destroys, mutilates or conceals a record, document or other object with the intent to impair the object’s integrity or availability for use in an official proceeding.”

- **Destruction, Alteration or Falsification of Records (18 USC 1519)** – Must involve either a federal investigation or bankruptcy proceeding and must be “in relation to or contemplation of any such matter or case.” Does not include the term “corruptly.”

- **Destruction of Corporate Audit Records (18 USC 1520)** – This statute states that a public auditor must maintain “all audit or review workpapers for a period of five years.” In addition, the SEC has promulgated a rule which requires accounting firms to retain workpapers for seven years. SEC Release 33-8180 (Jan. 24, 2003)

New Sarbanes-Oxley Statute 18 USC 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 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.”

- This statute applies to public and private companies, partnerships, and individuals.
**General Rule Under the New Statute**

- **Obligation to preserve documents may apply to:**
  - “Any matter” – including court proceedings, investigations, regulatory or administrative proceedings, and less formal government inquiries
  - “In relation to” – the prohibitions not only extend to “any matter within the jurisdiction of any department or agency of the United States” but also “in relation to … any such matter or case.”
  - “In contemplation of” – new criminal statute extends to acts done “in contemplation of” a federal investigation or any “such matter.”
  - **THIS LANGUAGE MAY REQUIRE THE SUSPENSION OF ORDINARY DOCUMENT POLICIES BEFORE A SUBPOENA OR INDICTMENT IS ISSUED and EVEN BEFORE AN INVESTIGATION HAS BEGUN. The statutory language is broad, but how exactly it will be applied is unclear.**

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**Criminal Intent and the “Nexus” Requirement**

What level of intent is required under the federal criminal statutes?
The Statutory Language: Intent and “Corruptly” Persuade

• In *Arthur Andersen LLP v. United States*, ___U.S.____ (2005), the trial court instructed the jury that it could convict even if it intended to “subvert, undermine, or impede” the government's fact finding even if “Andersen honestly and sincerely believed that its conduct was lawful.”

• The Supreme Court held that these instructions were inadequate. The Court made clear that there must be requisite culpability and that the defendant must have intended to “corruptly” persuade another in order to be liable under 18 USC 1512. The word “corruptly” normally means “wrongful, immoral, depraved or evil” conduct.

The “Nexus” Requirement

• In *United States v. Aguilar*, 515 U.S. 593 (1995), the Supreme Court addressed the intent requirement of 18 USC 1503 and held that there must be a nexus between the defendant's conduct and the “official proceeding.”

• The Court applied the nexus rule in *Andersen* and stated: “someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular proceeding in which those documents might be material” has not violated 1512(b).
The Effects of Andersen

- Will Andersen influence future prosecutions?
- The Andersen Court focused on the statutory language “corruptly” found in 18 USC 1512.
- However, the new Sarbanes-Oxley provision (18 USC 1519) which specifically addresses the alteration or destruction of documents does not require that the act be done “corruptly”; the act must only be done “knowingly.”

Welcome to the Brave New World of Sarbanes-Oxley

- 18 USC 1519 forbids the destruction of documents “in relation to or contemplation of any such matter or case.” What does this mean?
  - According to Webster’s Unabridged Dictionary “contemplation” includes “[t]he act of looking forward to an event as about to happen, expectation; the act of intending or purposing.”
  - However, if courts choose to define “contemplate” as “to have in mind as an intention or possibility,” a wider range of conduct might be included.
  - Defense counsel may urge courts to read a materiality standard into the new statute.
HYPOTHETICAL #1:
Internal Complaint Regarding a Government Contract

- An employee (maybe a whistleblower, maybe not) raises a question about whether the company has overbilled the government on one of its contracts. What steps, if any, should counsel take to ensure that documents relevant to this allegation are not destroyed?

HYPOTHETICAL #2:
Questions Arise Regarding Compliance with Federal Securities Laws

- An in-house attorney comes forward warning of potential securities violations or similar problems—which while not triggering immediate government involvement—may provide the basis for a later claim that the company should have expected future government involvement. What should counsel do to ensure that the document preservation efforts will later be viewed as “reasonable”? 
Document Preservation: Scope and Reasonableness

• How does one determine the scope of the document preservation obligation in the absence of a subpoena or formal demand by the government?

• How does one ensure that the efforts taken to suspend the ordinary document retention policy will be viewed as reasonable:
  – Quickly define the scope of the issue presented and the period of time involved. Is there time to evaluate the legitimacy of the claim or issue?
  – Identify individuals and record custodians who have a reasonable likelihood of holding relevant documents
  – Distribute document hold memoranda
  – Consider imaging computers for all potential witnesses
  – Isolate, if possible, electronically stored emails and data held by individuals who may have relevant documents or who may be the custodians of relevant documents
  – How do you respond to a claim that it is impossible to suspend the email or back-up tape over-ride policies?

Penalties

What are the consequences of violating the federal criminal statutes?
Sarbanes-Oxley Provisions

• Whereas 18 USC 1503, 1505, and the pre-Sarbanes-Oxley section 1512(b) provide for statutory maximum sentences of ten, five and ten years, respectively. Section 1519 increases the statutory maximum to twenty years, a dramatic increase.

• As an illustration of the severity of the increased penalty, consider that a defendant convicted of shredding documents faces a statutory maximum of twenty years under section 1519, while a defendant convicted of physically assaulting the President of the United States faces only ten.

Steps to Ensure Document Preservation in Both the Civil and Criminal Contexts

• Review current document retention policies for compliance
• Review and update methods of employee education
• Analyze methods of retaining electronic data and documents
• Identify key personnel
• Assign responsibility in business units for document retention
• Insist upon routine, strict compliance with destruction procedures, but have policies to allow for suspension of such procedures as may be necessary
• Remain cognizant of internal complaints and potential “whistleblower” allegations—develop policies for reacting to these situations