

Marley's Ghost: Document Destruction Under Sarbanes-Oxley

By Stanley S. Arkin & Charles Sullivan¹

As part of the hastily conceived effort to allay public concerns arising from the wave of corporate scandals in the first years of this century, Congress enacted numerous statutory provisions greatly enhancing the ability of federal prosecutors to ferret out and courts to punish corporate crime. One of the focal points of the legislation that became the Sarbanes-Oxley Act of 2002² was to “to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records.”³ Far from mending a “patchwork” of laws that were interpreted too narrowly, however, the new federal provisions relating to obstruction precipitously enhance the criminal penalty provisions of statutes that now provide even less guidance on when otherwise ordinary and legitimate corporate activities may become suspect, thereby creating increased uncertainty, legal jeopardy and greatly increased cost for the business community.

Obstruction charges understandably are popular with prosecutors because they often are easier to prove and less complicated than most financial fraud crimes and provide prosecutors the opportunity to leverage cooperation by lower-level employees who may have received instructions to destroy documents into convictions against high-level targets. After a year of investigation, Federal Prosecutor James Comey elected not to bring charges of insider trading

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² Pub. L. No. 107-204, 107th Cong., 2d Sess., 116 Stat. 745 (2002).

³ 148 Cong. Rec. S7419 (July 26, 2000) (statement of Sen. Leahy).

against Martha Stewart, instead announcing that the case was not about the widely-publicized allegations of insider trading, but about "lying — lying to the F.B.I., lying to the S.E.C., lying to investors."⁴ According to the indictment, Ms. Stewart obstructed the investigation into her alleged insider trading "by telling [investigators] that she and her stockbroker had previously agreed to sell the shares if their market value fell below a certain price, and altered a phone message from the broker in her assistant's computer 'immediately following a lengthy conversation with her attorney.'"⁵

Ms. Stewart's is only the latest in a series of high-profile cases involving corporate insiders in which document destruction charges have played a pivotal role. Last summer, David Duncan, the former Arthur Andersen auditor of Enron, pled guilty to obstruction of justice based on his e-mail advising lower level Arthur Andersen employees to destroy documents related to the Enron audit.⁶ In May of this year, former Credit Suisse First Boston banker Frank Quattrone was indicted on obstruction charges for an e-mail he sent advising employees to "catch up on file cleaning" after subpoenas had been sent out by the Justice Department.⁷ And as a result of certain provisions included in the Sarbanes-Oxley Act passed last summer, the burden for prosecutors seeking convictions for document destruction should become even lower while the penalties become more draconian. Given federal prosecutors' proclivity for using obstruction as a key element of the current crusade against corporate crime, the new Sarbanes-Oxley provisions are certain to figure prominently in future prosecutions of white collar crime.

⁴ Constance L. Hays, *Prosecuting Martha Stewart: The Overview*, New York Times, June 5, 2003, page A-1, col. 2.

⁵ Docket No. 1:03 cr 717 (S.D.N.Y. June 14, 2003).

⁶ Docket No. CR H-02-209 (S.D. Tex. Apr. 9, 2002).

⁷ Docket No. 1:03 cr 582 (S.D.N.Y. May 12, 2003).

Document Destruction Pre-Sarbanes-Oxley

Prior to Sarbanes-Oxley there were three main federal obstruction of justice provisions, all of which could be deployed by prosecutors to combat the destruction of documents: 18 U.S.C. §§1503, 1505 and 1512. Sections 1503 and 1505 applied, inter alia, to situations in which there was evidence of alteration, destruction, falsification or concealment by someone who was aware of and intended to obstruct or impede a pending federal proceeding.⁸ In contrast, Section 1512 specifically delineated that "an official proceeding need not be pending or about to be instituted at the time of the offense."⁹ However, Section 1512 was limited to those who "corruptly persuade" another to destroy, alter, or falsify documents, while Sections 1503 and 1505 were used to prosecute directly the "individual shredder."

Document Destruction Under Sarbanes-Oxley

Section 802 of the Sarbanes-Oxley Act added two new sections to the federal criminal code and amended 18 U.S.C. § 1512 to eliminate supposed loopholes within the existing framework of document destruction proscriptions. Section 1519 is a new general anti-shredding provision with a 20-year maximum sentence. It is designed to expand the scope of the current

⁸ Although limited to "pending" proceedings, Section 1505 has been interpreted to encompass an expansive range of government activities, including informal inquiries and investigations, as well as all stages of agency action, from inception to conclusion. *See, e.g., United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir. 1984) ("[a]gency investigative activities are 'proceedings' within the meaning of § 1505"), *cert. denied*, 469 U.S. 1157 (1985); *Rice v. United States*, 356 F.2d 709, 712 (8th Cir. 1966) (proceeding before government department or agency under Section 1505 means "proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its conclusion"). Section 1503, which applies to "the due administration of justice," requires a "nexus" to an ongoing judicial proceeding. *United States v. Aguilar*, 515 U.S. 593, 599 (1995). But even this section has been extended to encompass documents that have not yet been subpoenaed, if the defendant knows that the documents likely will be sought, *see, e.g., United States v. Gravely*, 840 F.2d 1156, 1160 (4th Cir. 1988); Section 1503 also has been applied to private civil litigation. *United States v. Lundwall*, 1 F. Supp. 2d 249 (S.D.N.Y. 1998).

⁹ 18 U.S.C. § 1512(f)(1).

obstruction provisions to reach any person who destroys or alters documents 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 bankruptcy matter, “or in relation to or in contemplation of any such matter or case.”¹⁰ Congress thereby eliminated any technical requirement, previously imposed with respect to Sections 1503 and 1505, that the obstructive action be linked to a pending or imminent proceeding. As Senator Leahy stated on the floor of the Senate, “[d]estroying or falsifying documents to obstruct any... matters or investigations, which in fact are proved to be within the jurisdiction of any federal agency, are covered by this statute.... It also extends to acts done in contemplation of such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution.”¹¹ No evidence of corrupt persuasion is required under new Section 1519.

The amendments to Section 1512 bring within the ambit of section not only those who “corruptly persuade” others to destroy documents, but also those who themselves “corruptly” alter, destroy, mutilate or conceal documents with the intent to impair the document’s “integrity or availability for use in an official proceeding.”¹² According to the “Field Guidance” issued by the Attorney General, “[t]he term ‘corruptly’ shall be construed as requiring proof of a criminal state of mind on the part of the defendant.”¹³ In contrast to Section 1519, Section 1512, both new and old, will require evidence that the acts were done “in contemplation of an ‘official proceeding.’”¹⁴

¹⁰ 18 U.S.C. § 1519.

¹¹ 148 Cong. Rec. S7419.

¹² 18 U.S.C. § 1512 (c)(1).

¹³ Field Guidance on New Criminal Authorities Enacted in the Sarbanes-Oxley Act of 2002 (H.R. 3763) Concerning Corporate Fraud and Accountability, comment on section 1102 (Aug. 1, 2002) (available at <http://www.usdoj.gov/ag/reading room/sarox.htm>).

¹⁴ Id.

The other new provision added by Sarbanes-Oxley, Section 1520, creates a new felony with a maximum sentence of 10 years for “knowingly or willfully” failing to maintain covered audit or review work papers for a 5-year period following the conclusion of the audit or review or failing to abide by certain rules and regulations promulgated by the SEC relating to retention of audit and review records.¹⁵

Finally, Sarbanes-Oxley required the United States Sentencing Commission to review comprehensively the Sentencing Guidelines in order to take into account the new and amended obstruction of justice statutes in the Guidelines’ base offense levels and existing enhancements.¹⁶

In his explanation of Section 1519, Senator Leahy concluded, "the intent of the provision is simple; people should not be destroying, altering or falsifying documents to obstruct any government function."¹⁷ But is it really that simple?

Problems Created by the New Sarbanes-Oxley Document Destruction Provisions

While the amendments to Section 1512 sensibly closed an existing loophole by including the shredder as well as the corrupt persuader within the ambit of the statute, the widening of the anti-shredding laws to include not just all types of federal proceedings or investigations, but also document destruction “in contemplation of or in relation to” any official matter is far more problematic.

¹⁵ 18 U.S.C. § 1520 (b) & (c). Pursuant to Sarbanes-Oxley § 802(a), codified at 18 U.S.C. § 1520(a)(2), on January 24, 2003 the SEC adopted rules governing the retention of audit records by outside auditors. SEC Release Nos. 33-8180; 34-47241; IC-25911; FR-66; File No. S7-46-02, adding 17 C.F.R. § 210.2-06.

¹⁶ Sarbanes-Oxley §§ 805 & 905. The Sentencing Commission issued temporary emergency guideline amendments effective January 22, 2003 (United States Sentencing Commission, Increased Penalties Under the Sarbanes-Oxley Act of 2002, January 2003), and then submitted to Congress on May 1, 2003 permanent guideline amendments to become effective as of November 1, 2003, when the temporary amendments expire. 69 Fed. Reg. 26960 (May 16, 2003).

¹⁷ 148 Cong. Rec. S7419.

New Section 1519 apparently responds to the Supreme Court's decision in United States v. Aguilar, in which the Supreme Court declined to reinstate a conviction for obstruction of justice under Section 1503 absent a showing that the defendant had knowledge that his actions were likely to affect the official proceeding.¹⁸ But the drafters of Section 1519 may have paid insufficient heed to Justice Rehnquist's admonition in Aguilar that the Supreme Court traditionally construes criminal statutes narrowly not only in deference to Congress but also "out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'"¹⁹ Where is the line drawn with respect to a potential future investigation that has not yet commenced or even been considered? And how are ordinary citizens expected to be able to anticipate the full range of federal interest that could potentially be evinced with respect to any given e-mail or spreadsheet?²⁰

Increased Expense for Businesses

Increased uncertainty as to when documents can be destroyed inevitably will result in more documents being retained, which in turn will greatly increase businesses' document storage costs, which already are formidable. Businesses in the United States create a stunning amount of documents, both on paper and electronically. Since 1960, office paper generation has increased

¹⁸ 515 U.S. 593 (1995).

¹⁹ Id. at 600.

²⁰ See David B. Fein and Gates Garrity-Rokous, *Document Retention After U.S. v. Andersen: New Risks to Corporations – And the Attorney's Who Advise Them* Conn. Law Trib., Sept. 9, 2002, at 4 ("Do these new provisions mean, for example, that a corporate attorney should not approve the destruction of a sexist joke transmitted by e-mail by employees in a particular department? A federal agency (the EEOC), after all, can investigate employment discrimination -- and destroying such an e-mail certainly would render it unavailable 'for use in an official proceeding' regardless of whether such a proceeding is reasonably anticipated.... [T]he Sarbanes-Oxley amendments dramatically increase the difficulty in deciding when document destruction should be suspended.").

by 6.1 million tons (395%) and businesses are responsible for the creation of 32.7 million tons of waste printing and writing paper.²¹ According to one estimate, approximately 1.4 trillion e-mails were sent from businesses in North America in 2000 alone, with the numbers rising every year.²² Whole industries have arisen to meet the overwhelming business need to store, sort and eventually get rid of, electronic and paper files.²³ In the absence of a thoughtful document retention and destruction policy, most businesses of any size would soon be overrun with the detritus of their own information. Yet the new federal obstruction provisions create real uncertainties as to what must be preserved and what safely can be discarded in virtually any business. Unlike the accounting industry, which at least has been accorded some delineation of the types of audit documents and information that must be retained, as well as the retention period, most industries now have no clear idea of what their retention policy can or should be.²⁴ This uncertainty threatens to make universal the unenviable situation present in targeted sectors of the economy such as the tobacco industry, whose documents are warehoused in nationwide repositories, constantly replenished by the companies involved with waves of current documents.

Arousing Public Sympathy

Among the many ironies created by increased and more aggressive prosecutions for document destruction is the possibility that the public and the courts will be troubled by

²¹ Chaz Miller, *Profiles in Garbage: Office Paper*, Waste Age, Mar. 1, 2003 (available at http://www.wasteage.com/ar/waste_office_paper).

²² Michele C.S. Lange, *Document Retention Policies Can Help Pare Legal Bills*, 18 Fin. Exec. 43 (Dec. 1, 2002).

²³ See *Why We Now Need A National Association for Data Destruction*, 1/30/02 Wall St. J A1, 2002 WLWSJ 3384450 (currently, an estimated 600 shredding businesses nationwide generate annual revenues of approximately \$1.5 billion).

²⁴ *Cf., e.g., United States v. Triumph Capital Group, Inc.*, 260 F. Supp. 2d 470, 476 (D. Conn. 2003) (“Indeed, even conduct that would otherwise be lawful, i.e., deleting documents not under subpoena from one’s computer, can violate § 1503 if done with corrupt intent to accomplish what the statute forbids.”).

obstruction prosecutions that are not accompanied by charges relating to the substantive crimes giving rise to the potential or actual investigation or proceeding that allegedly was obstructed. Just as charges of lying to governmental officials, without an accompanying charge of wrongdoing to which the untruths relate, often fail to play well in the public eye, so too do charges of obstruction of justice absent a claim relating to the underlying wrongdoing. The Martha Stewart prosecution, which began with widespread disapproval of Stewart's alleged insider trading, has engendered at least some public sympathy for Stewart being charged, in part, with altering an e-mail and then thinking better of it, especially now that the federal charges do not include any substantive allegations of insider trading.²⁵

Judges too have on occasion expressed concern when the focus of the federal prosecution solely rests with obstruction. In United States v. Cueto, for example, a case that involved a lawyer being convicted for obstruction of justice based, in part, on legal litigation tactics he employed in court on behalf of a client (but with "corrupt intent"), the Seventh Circuit stated in a footnote that the theory of the prosecution, which elected to bring solely obstruction of justice charges against Cueto, gave it "some pause": "With the government's emphasis on Cueto's involvement in [his client's] illegal gambling operation and the racketeering enterprise, we are puzzled why the government did not indict and prosecute Cueto in the underlying racketeering case for his participation in the illegal gambling operation."²⁶

With obstruction cases becoming easier to bring and with the stakes even higher for the defendants, courts and the public may well evince increased skepticism when the prosecution, in

²⁵ See William Safire, *Fight It, Martha*, New York Times, June 12, 2003, page A35, col.1; Barbara Amiel, *Martha's great offence? Denying that she did it*, Daily Telegraph, June 6, 2003 (available at <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/w003/06/09/do0901.xml>); Alan Reynolds, *The Sleazy Political Persecution of Martha*, National Post, June 6, 2003, p. FP11.

²⁶ 151 F.3d 620, 631 n. 10 (7th Cir. 1998).

the legitimate exercise of their discretion, proceeds to trial only on charges that a government investigation was impeded by withholding or destroying a document, without also charging the defendant with the underlying wrongdoing he or she is alleged to have endeavored to conceal.

In Closing

Over the course of our nation's history, we have witnessed any number of times when laws fostered by sudden shifts in the political climate have compounded rather than rectified the perceived problems, from the Sedition Act of 1798 and Lincoln's suspension of habeas corpus during the Civil War to the current controversies over three-strike drug laws and certain intrusive provisions of the Patriot Act. In cobbling together a speedy response to a public perception that white collar criminal were getting away with their crimes, Congress has created an entirely new set of problems relative to document retention and destruction for businesses, their lawyers and the federal courts. Without some definitive guidance from the courts, the legal and business communities will face increased confusion and uncertainty as to when documents safely can be destroyed without legal jeopardy attaching; as a result, businesses throughout the United States may soon find themselves saddled with burgeoning warehouses stuffed with company documents that they must maintain in perpetuity, like the ledger books linked forever to the ghost of Jacob Marley by the chains he forged in life.