

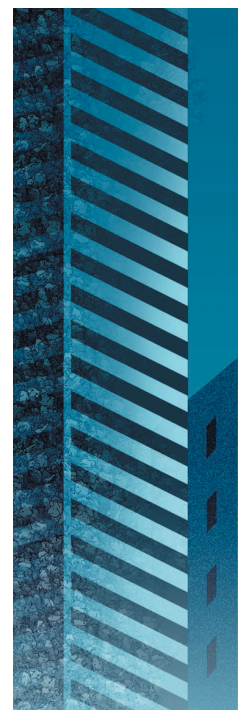
# Timing Is Everything:

## When Document Retention Policies and Related In-house Counsel Advice Intersect with Government Investigations and Litigation

**T**he Enron/Andersen saga has focused significant attention on document retention policies and advice provided by in-house counsel on the application of those policies. Document retention policies have been around for a long time and have been upheld by courts in a variety of contexts. In-house counsel have also been advising their clients about document retention policies for a long time and without incident. But Enron/Andersen illustrates the difficult issues that can arise when document retention policies intersect with pending investigations or litigation—whether civil or criminal—and in-house counsel are called into that intersection.

Our purpose here is not to dissect the still unfolding Enron/Andersen story. Rather, we want to take a broader look at two related points. First, we will outline in general terms some of the hot button issues that arise with document retention policies when investigations and litigation are looming. Second, we will then examine some situations in which advice concerning the application of those policies could run afoul of the crime-fraud exception to the attorney-client privilege. At the risk of oversimplification, with each, timing is a key ingredient. The deference that a court may pay to both a document retention policy and advice concerning that policy will turn largely on when documents were destroyed and when the advice was given in relation to the investigation or litigation involved.

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## DOCUMENT RETENTION POLICIES

Corporate document retention policies have been around for a long time. There's no mystery to them. Organizations—whether stock companies, nonprofits, or government agencies—generate huge amounts of paper and other data every day, including letters, emails, purchase orders, and records of every stripe. Electronic storage media have made retention somewhat easier, but saving everything isn't the answer for most organizations. To analogize, just because we might want to save our important personal papers like federal income tax returns doesn't mean that we would also want to save our 15-year old electric bills. So, too, with organizations. Therefore, most organizations have some form of document retention policy under which at least some records are routinely destroyed once they reach a certain age. Courts have also recognized the legitimacy of document retention policies in a variety of contexts ranging from product liability to banking cases.<sup>1</sup> See the sidebar on pages 22–23 for practical tips.

So when do problems arise? They tend to occur when document retention policies intersect with government investigations or litigation. The critical element in this setting is the timing of the destruction of the documents in relation to the investigation or litigation. Documents that were destroyed under an established routine long before an investigation or litigation was on the horizon should not generally draw particular scrutiny.<sup>2</sup> On the other hand, once a government investigation or litigation is in the offing, document retention policies are likely to be more heavily scrutinized if they have led to the destruction of records that are relevant to the investigation or litigation.

## INCREASED SCRUTINY

Several reasons exist for this increased scrutiny. For one thing, even if the motives for the destruction were completely pure, the destruction of documents that later turned out to be material to the investigation or litigation could, at minimum, pose public relations problems. Also, some statutes, such as the federal Private Securities Litigation Reform Act, require specific documents to be preserved at particular points once litigation has begun.<sup>3</sup> But the two reasons with potentially the longest reach are spoliation of evidence and obstruction of justice.

### Spoliation of Evidence

Spoliation is usually defined as the “willful destruction of evidence or the failure to preserve potential evidence for another’s use in pending or future litigation.”<sup>4</sup> As the definition implies, the elements of spoliation are both a duty to preserve evidence and the intentional destruction of that evidence.<sup>5</sup>

The duty element generally requires some degree of notice that the evidence involved may be relevant to pending or threatened litigation.<sup>6</sup> A formal discovery request served in ongoing litigation for documents that appear to be relevant to an opposing party’s claim would likely meet this test, such as the agreement at issue in a breach of contract case. The more difficult situations arise, however, when litigation is simply threatened or implied even less specifically. This determination will ultimately turn on the facts of a given situation. But as a general rule, the





less notice that a party has that litigation is probable, the more difficult it will be for an opponent to argue successfully later that the party who destroyed the material involved had had a duty to preserve it.

The intent element does not necessarily imply bad faith. Most courts have held that something beyond simple negligence is required, such as a showing that the party destroying the evidence had at least some knowledge that the evidence was relevant to the litigation and that, despite that knowledge, the evidence was nonetheless destroyed through a willful act. For example, a party who in the midst of litigation intentionally destroyed working papers to avoid cross-examination would likely be found to have had the requisite intent.<sup>7</sup> But if

those same working papers had been inadvertently thrown out one night by the party's janitorial service, a court might be less likely to find the required intent.<sup>8</sup>

In some jurisdictions, spoliation is a tort.<sup>9</sup> In most, however, it simply results in sanctions, with the following possible penalties, among others: instructing the jury that it may draw an adverse inference against the party that destroyed the materials involved; excluding testimony on the issue involved by the party responsible for the destruction; and, in extreme cases, dismissal of claims.<sup>10</sup> The sanctions could conceivably extend to the individuals who acted on behalf of the corporation, as well.<sup>11</sup>

## CONSIDER THIS

**H**ere are some practical considerations for in-house counsel, for both themselves and their clients:

- **Keep document retention policies simple.** Lawyers are prone to divide things into too many categories. The risk is that no one will remember and that they'll just tune out instead. Obviously, if a statute or a regulation imposes a minimum requirement, that requirement must be followed. But if a number of other categories would be for a year longer, then why not adopt the longer period of time? A good retention policy is one with a few categories that people can easily remember and will actually comply with.
  - **Don't let people with laptops become amateur transcribers.** Many people now sit in meetings and type away on their laptops. Often, they are making extraordinarily copious notes of what they think other attendees are saying. The risk is that they really don't understand some of the discussion, they inadvertently don't record as diligently those statements with which they agree or disagree, or they stop taking notes when they themselves are talking (or worse, write down things that they think they said or wish they had said, even if they didn't). In any event, what can look, years later, like a precise record of a meeting often is not. And because these amateur transcribers also have a high propensity for using quotation marks, they often put unsaid words in other people's mouths or quote only portions of what others have said. They give the illusion of high credibility, and after the fact, no one will be able to
- sort out fiction from reality. The best advice is to tell participants that this kind of note-taking is not permitted. Alternatively, any such note-taking should be conditioned on circulating the notes in draft form to all other participants, with the risk of immense time then being taken for everyone to make revisions and to review everyone else's revisions. And again, for what purpose?
- **Be careful of all informal notes.** Usually, notes are best tossed out within a week after a meeting. Just like the amateur transcript, informal notes often are inadvertently selective: points that are self-evident or with which the writer agrees might never be recorded, thus giving the false impression that important points were never made. Also, as already discussed, note-takers seldom record their own points. A good rule of thumb is to try to put into brackets key points that you intend to make or have made so that even your own notes have some indication of what your positions were.
  - **The best notes are limited to agreed upon actions.** The format can be as simple as a time and responsibility chart. Not only does such an approach avoid the problems that come from inaccurate note-taking, but also it effectively converts the record of the meeting into an action plan and even helps shift the dynamics of the meeting to one of focused decision-making.
  - **Apply the same cautions to board minutes.** Unless a director, for example, specifically wants to be on record by name, refer instead to one director or several directors,

## Obstruction of Justice

Although spoliation may be sanctionable conduct or a tort, obstruction of justice is a federal crime.<sup>12</sup> Obstruction of justice is defined quite broadly under 18 U.S.C. § 1503 to include conduct that “corruptly . . . endeavors to . . . obstruct, or impede, the due administration of justice.” The government must generally prove three elements to prevail on an obstruction of justice charge: (1) a judicial proceeding was pending; (2) the defendant knew that the judicial proceeding was pending; and (3) the defendant attempted to impede that proceeding (regardless of whether the defendant was successful or not).<sup>13</sup>

The classic situation giving rise to an obstruction of justice charge involves the person who,

having learned that a grand jury has been empanelled to investigate the person’s conduct, destroys incriminating evidence in an effort to cover up.<sup>14</sup> But there is no requirement for a grand jury or any other judicial proceeding to have actually issued a subpoena to the target of the investigation. Rather, courts have generally found that it is enough that the target knew that a document was reasonably likely to be material to a judicial proceeding and destroyed the document to prevent its use in that proceeding.<sup>15</sup>

The obstruction must be of judicial or related proceedings, such as a grand jury. As the U.S. Supreme Court noted in *United States v. Aguilar*, “it is not enough that there be an intent to influence

and virtually never use quotes. Just as with notes, keep the minutes oriented to outcomes. On the other hand, even for routine business matters, when there has been discussion, the minutes should convey the accurate impression that the meeting was not a rubber stamp, such as in this example: “Several directors asked about the source of capital and management’s efforts to consider alternatives. Management addressed these points and the various other points outlined in the briefing paper contained in the board book. After additional discussion, upon motion duly made. . . .”

- **Don’t engage in debates via email.** Email is a very self-satisfying but hugely inefficient and even dangerous form of one-way communication. People typically say stupid things that they wouldn’t say face-to-face or even on the phone when they actually have to interact with others. People also tend to use hyperbole to make a point on an otherwise silent screen. Email is an appropriate medium for sending factual information, but it is not an appropriate medium for making arguments and finding solutions. Instead, pick up the phone and/or go see the people who have different views. Two-way communication is far more efficient for problem solving. And in matters that come to litigation, controlled use of email avoids the problem of selective and inaccurate retention.
- **Never email sensitive material.** Email messages are likely to be forwarded and/or permanently archived, no matter what a company’s policy is. Go ahead and label some basic materials “Confidential and Privileged” if you want to warn people to treat the communication as something more than

another email joke. One would hope that such an admonition would cause at least slightly greater care by the recipients. But again, don’t even put something in email if there would be material harm if the item were archived and/or forwarded. To say it another way: It’s fine to label some items Confidential and Privileged. Just don’t count on it.

- **Monitor what people say via email.** Conduct periodic audits of what is being sent on email and, more importantly, what tone is being used. Train employees that off-hand remarks take on an unintended formality and permanence. For example, train them not say in an email, “If this fool wants to sink this company, this is the way to do it” unless they would say it directly to the fool. And if they would, then tell them to do it face-to-face, not via email to someone else.
- **Be careful of privilege outside the United States.** If a conference call or an email distribution includes persons outside the United States, check on the rules of privilege in the other jurisdictions. If, for example, a French company lawyer does not have privilege, treat him or her as the client instead, and possibly take the extra step of having outside French counsel participate to assure privilege. (Watch the June 2002 *ACCA Docket* for an entire article on this topic.)
- **Be sensitive about dual roles as both an attorney and a manager.** If you are the manager in a sensitive matter, be sure that someone else is acting as the lawyer. Otherwise, not only might you have a fool as your client, but also you might be a very unprivileged one, as well.



some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority."<sup>16</sup> Before drawing too much solace from that limitation, however, we should also note that at least one federal district court recently applied obstruction to the destruction of corporate records in a civil proceeding between private parties.<sup>17</sup>

### **TIMING IS EVERYTHING**

Timing is a consistent theme running through cases that involve the destruction of documents—whether inadvertent or intentional. Aside from the rare case in which a business is involved in wrongdoing and systematically destroys documents to cover its tracks, the timing of the destruction of documents will be a significant determining factor in whether a court will find that documents were innocently destroyed as a part of a legitimate document retention policy or will reach a more pejorative conclusion.

## **THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE IS NO LONGER THE SOLE PROVINCE OF THE CRIMINAL DEFENSE BAR.**

Line-drawing is inherently an inexact science. But the farther along a situation is on a continuum from the mere possibility of litigation to being in the middle of formal discovery in a pending case, the more likely it is that a court will draw a negative conclusion if relevant documents are destroyed—even if they would otherwise have fallen within the scope of an established document retention policy and routine.

Two further points cannot be overemphasized:

- First, documents that might otherwise have been destroyed might very well contain significant evidence in your company's favor. For example, an aging purchase order with an indemnity clause that may be subject to routine destruction might suddenly loom very large if it concerned a component that your firm uses in an end-product and you are sued in a product liability case over the alleged failure of that subassembly.

- Second, as so many Washington dramas seem to highlight, an asserted cover-up is often worse than the supposed original offense. Even the truly inadvertent destruction of what may ultimately be irrelevant documents can, at minimum, prove embarrassing in the court of public opinion. In a court of law, it could lead to at least the risk of having a jury permitted to draw an adverse inference from the destruction—or perhaps something worse.

In light of these factors, we generally recommend that, at least at the point that a government investigation or litigation is threatened against a company, in-house counsel move affirmatively to ensure the preservation of documents that might otherwise be subject to routine destruction under the company's document retention policy. In that way, the company will be protected against the downside of charges of spoliation or worse and may, at the same time, preserve evidence that may ultimately be important for its own defense.

How these instructions are communicated will depend on the size of the organization and where within the organization the documents involved likely are. To avoid later questions or simply inaccurate memories, however, we generally recommend that in-house counsel memorialize in some fashion when the instructions were transmitted and the notice that the company had received that triggered the instructions. How the documents involved are secured or gathered will again depend on the size of the organization. But we generally recommend that in-house counsel take reasonable steps to follow up on compliance, as well.

### **THE CRIME-FRAUD EXCEPTION**

The crime-fraud exception to the attorney-client privilege is no longer the sole province of the criminal defense bar. With the increasing criminalization of laws ranging from environmental compliance to antitrust to political campaign finance, in-house counsel are now routinely called on to give advice to clients on regulatory systems that have at least some criminal penalties attached. Consequently, in-house counsel in recent years have had to become familiar with the crime-fraud exception, even in the area of document retention. The inter-



section between document retention policies and the crime-fraud exception arises when in-house counsel are called on to advise clients about the application of those policies against the backdrop of government investigations or litigation. As with the document retention issues that we have just discussed, the crime-fraud exception to the attorney-client privilege turns heavily on timing.

The crime-fraud exception generally excludes attorney-client communications from the privilege when the advice sought is directed toward the commission of a future crime or fraud as opposed to legal advice on past conduct.<sup>18</sup> Although the crime-fraud exception is framed in terms of the attorney-client privilege, courts have generally held that it is applicable to the work product rule, as well.<sup>19</sup>

As noted, the crime-fraud exception is oriented toward future crimes or fraud. It has also been applied, however, to situations in which the lawyer's advice is sought on ways to cover up past criminal or fraudulent conduct.<sup>20</sup> At the same time, however,

the crime-fraud exception has not been applied to situations in which the lawyer's advice is sought so that the client can attempt to comply with the law in the future.<sup>21</sup>

Because the privilege belongs to the client, courts typically look to the intent of the client in seeking the advice in assessing whether the crime-fraud exception applies. Therefore, it is possible for the exception to apply even if the attorney is not aware that his or her advice is being sought in furtherance of the client's criminal or fraudulent conduct.<sup>22</sup> But the client's bad intentions are not enough. For the exception to apply, the client must have actually carried out the crime or fraud.<sup>23</sup>

Document retention policies potentially meet the crime-fraud exception if in-house counsel is (wittingly or unwittingly) consulted by the corporate client on those policies in furtherance of the client's intention either to commit a future crime or fraud or to conceal a past crime or fraud. Again, the timing of the consultation can be critical:

- Advice to a client about legal liability (or the lack thereof) for the past destruction of documents should not generally fall within the crime-fraud exception.
- Advice to a client about how to cover up or otherwise conceal past criminal or fraudulent conduct that involves the destruction of documents would likely fall within the crime-fraud exception.
- Advice to a client about how to comply with the law in the future as it relates to the handling of documents should not generally fall within the crime-fraud exception if the advice is, in fact, being sought by the client for compliance.
- Advice to a client (even if the attorney is not aware of the client's intent) that the client procures in the furtherance of a future crime or fraud that involves the destruction of documents would likely fall within the crime-fraud exception.

A recent case from the D.C. Circuit draws out these distinctions nicely. Although *In re Sealed Case*<sup>24</sup> involved campaign finance laws rather than the destruction of documents, it focuses on the temporal distinctions involved in the crime-fraud exception. The case involved a corporation that asked its general counsel for advice on campaign finance laws so that it could maximize its contribution to a former candidate who was trying to retire his campaign debt. The general counsel gave the

## POST-ENRON PRACTICE RESOURCES AVAILABLE ON ACCA ONLINE<sup>SM</sup>

**A**CCA is gathering practice resources online to address issues that members are raising specific to the recent and continuing events at Enron. The material and information assembled to date are on ACCA Online<sup>SM</sup> at [www.acca.com/legres/enron/index.php](http://www.acca.com/legres/enron/index.php). Thanks to the members of ACCA's Corporate and Securities Law Committee for their assistance in identifying relevant issues and in sharing their available resources. The committee is also hosting an online discussion board that you can use to raise questions and discuss issues (at the above address and open to ACCA members only). Finally, we ask that you help us to expand these resources. Let us know what we should add, such as links to related websites, sample forms and policies, recent articles, press releases, regulatory statements, or anything else that would benefit members. Email your suggestions to ACCA's Managing Attorney Jim Merklinger at [merklinger@acca.com](mailto:merklinger@acca.com).

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- “Internal Investigations: You May Be Working for the Government,” *Outside Counsel*, Winter 2001, available on ACCA Online<sup>SM</sup> at [www.acca.com/protected/pubs/oc/winter01/Zuckerman.pdf](http://www.acca.com/protected/pubs/oc/winter01/Zuckerman.pdf).
- “Model Corporate Records Retention Plan,” available in the Records Retention InfoPAK<sup>SM</sup> on ACCA Online<sup>SM</sup> at [www.acca.com/protected/infopaks/records/modelplan.html](http://www.acca.com/protected/infopaks/records/modelplan.html).
- Victor A. Warnement, Michael J. Missal, and Leigh P. Freund, “When the SEC Comes Calling: Tips for Dealing with an Enforcement Investigation,” *ACCA Docket* 19, no. 4 (2001): 18–35, available on ACCA Online<sup>SM</sup> at [www.acca.com/protected/pubs/docket/am01/sec1.php](http://www.acca.com/protected/pubs/docket/am01/sec1.php).

#### ON PAPER:

- EDNA S. EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* (4<sup>th</sup> ed. 2001).
- JAMIE S. GORELICK, STEPHEN MARZEN & LAWRENCE SOLUM, *DESTRUCTION OF EVIDENCE* (1989).
- Peter R. Jarvis & Mark J. Fucile, “Recent Attorney-Client Privilege Decisions: Some Cases of Interest to In-house Attorneys,” *ABA PROFESSIONAL LAWYER*, 1997 Symposium Issue at 85.
- Bart S. Wilhoit, “Spoliation of Evidence: The Viability of Four Emerging Torts,” 46 *UCLA L. REV.* 631 (1998).

advice to a corporate vice president, who summarized the advice in a memo to the corporation’s president. There was no evidence that, at the time that the vice president sought the advice, he intended to violate the law. But he later contributed company funds in excess of what the law allowed. When the vice president’s conduct was discovered later, the general counsel then prepared a memo analyzing the corporation’s legal liability for the excess contribution. Again however, there was no evidence that the general counsel did so in any effort to conceal the past violation.

A federal grand jury then sought the two memos, with the government arguing that both memos fell within the crime-fraud exception. The federal district court agreed and ordered their production, but the appeals court reversed. The appeals court began by analyzing the advice that the general counsel had given before the vice president broke the law. It concluded that, because there was no evidence that either the vice president or the corporation had sought the advice to further a future crime, the crime-fraud exception did not apply. In doing so, the appeals court held that simply seeking advice about compliance absent a showing of intent to break the law was not sufficient to invoke the crime-fraud exception:

Companies operating in today’s complex legal and regulatory environments routinely seek legal advice about how to handle all sorts of matters, ranging from their political activities to their employment practices to transactions that may have antitrust consequences. There is nothing necessarily suspicious about the officers of this corporation getting such advice. True enough, within weeks of the meeting about campaign finance law, the vice president violated that law. But the government had to demonstrate that the Company sought the legal advice with the intent to further its illegal conduct. Showing temporal proximity between the communication and a crime is not enough.”<sup>25</sup>

For in-house counsel, a simple inquiry along the lines of “what are our obligations to retain these documents?” should not necessarily evoke particular concern. As the appeals court pointed out in *In re Sealed Case*, in-house counsel are constantly asked by their clients to advise them on how to comply with the law. But as with the application of





document retention policies themselves, advice given by in-house counsel concerning document retention will be subject to a level of scrutiny commensurate with where an underlying investigation or case is located on the continuum running from remote possibility to formal discovery. If the probability of an investigation or litigation is at most a distant murmur, then a court later reviewing in-house counsel's advice on document retention is more likely to find that the attorney-client privilege remains intact. By contrast, the risk of having a reviewing court pierce the privilege would be significantly greater if that same advice were painted against the backdrop of a pending investigation or litigation and there were evidence that the client had sought that advice (regardless of the attorney's knowledge) to further a crime or fraud or to cover one up.

## CONCLUSION

Until recently, document retention policies and advice by in-house counsel on their application were hardly front-page news. The unfolding events in the Enron/Andersen story, however, vividly illustrate how document retention policies and advice by in-house counsel concerning their application can become the subject of intense scrutiny if the destruction of documents and advice on the destruction occur at a time when government investigations and litigation are either threatened or pending. As we have noted throughout this article, timing is a critical element in trying to establish a dividing line in this area. Routine document destruction and routine advice on document retention policies will not likely draw much attention (nor should it) if there is no prospect of an investigation or litigation involving the documents concerned. But once investigation or litigation is threatened or becomes a reality, document destruction and related advice may become flashpoints if documents that ultimately prove to be relevant to the matter involved are destroyed. To avoid the negative consequences and to ensure that documents that are potentially helpful to the company's defense are preserved, in-house counsel would be wise to ensure the preservation of all relevant documents once investigation or litigation is threatened against the company. ■

## NOTES

1. *See, e.g., Lewis v. Caterpillar, Inc.*, 156 F.3d 1230, 1998 WL 416022 (6th Cir. 1998) (unpublished) (noting a manufacturer's five-year retention policy for product accident reports and refusing to find prejudice in a case in which a plaintiff sought older records); *Anthony v. Security Pacific*, 75 F.3d 311 (7th Cir. 1996) (noting a bank's three-year retention policy and finding no prejudice in a case in which plaintiffs sought documents destroyed under that policy beyond the three years).
2. An exception, of course, would be if the destruction itself were done intentionally to cover up an ongoing fraud or other crime.
3. *See, e.g.,* 15 U.S.C. § 78u-4(b)(3)(C).
4. *Trigon Ins. v. United States*, 204 F.R.D. 277, 284 (E.D. Va. 2001) (hereinafter "Trigon"); *accord West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 778 (2d Cir. 1999).
5. *See generally* Trigon, 204 F.R.D. at 286–87.
6. *Id.*
7. *See, e.g., id.* at 277 (the court found that consultants working for the U.S. government had intentionally destroyed work papers to avoid being cross-examined on them).
8. *See, e.g., Caparotta v. Entergy Corp.*, 168 F.3d 754 (5th Cir. 1999) (Fifth Circuit held that no "adverse inference" could be drawn against a litigant in a case in which it appeared that a box of relevant documents stored in an in-house counsel's office had been inadvertently removed and destroyed by the company's janitorial service).
9. *See generally* *Holmes v. Amerex Rent-a-Car*, 113 F.3d 1285 (D.C. Cir. 1997) (surveying jurisdictions); Comment, *Spoilation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631 (1998) (same).
10. *See generally* *West v. Goodyear Tire & Rubber Co.*, 167 F.3d at 779–80 (discussing the range of remedies available for spoliation in the sanctions context); *see, e.g., Kronisch v. United States*, 150 F.3d 112, 126–30 (2d Cir. 1998) (adverse inference); Trigon, 204 F.R.D. at 291 (exclusion of testimony); *Beers v. General Motors*, 1999 WL 325378 (N.D.N.Y. May 17, 1999) (unpublished) at \*2–\*8 (dismissal of claim).
11. *See, e.g., McGuire v. Sigma Coatings, Inc.*, 48 F.3d 902 (5th Cir. 1995) (vacating on personal jurisdiction grounds sanctions entered by a federal district court against an out-of-state in-house counsel who destroyed environmental audit work papers that the court found responsive to pending formal discovery requests, but pointedly expressing its sympathy for the district court's "frustration" with the attorney and equally pointedly expressing no opinion on the sanctions if the district court had had personal jurisdiction over the attorney).

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12. *See* 18 U.S.C. § 1503.
  13. *See generally* *United States v. Aguilar*, 515 U.S. 593, 598–600, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995).
  14. *See, e.g.*, *United States v. Monus*, 128 F.3d 376 (6th Cir. 1997) (upholding the conviction of the CEO of a major retailer for participating in shredding incriminating documents upon learning of a grand jury investigation of financial statement fraud at the company).
  15. *See, e.g.*, *United States v. Fineman*, 434 F. Supp. 197 (E.D. Pa. 1977) (target of bribery investigation had incriminating letter destroyed after learning that grand jury investigation had begun but before subpoena for the letter had been issued); *accord* *United States v. Solow*, 138 F. Supp. 812 (S.D.N.Y. 1956).
  16. *Aguilar*, 515 U.S. at 599.
  17. *United States v. Lundwall*, 1 F. Supp. 2d 249 (S.D.N.Y. 1998) (refusing to dismiss the indictment on obstruction charges of corporate employees who had destroyed documents relevant in a pending civil class action against the company).
  18. *See generally* *United States v. Zolin*, 491 U.S. 554, 562–63, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989); Steven A. Saltzburg, Michael Martin, & Daniel J. Capra, 2 *Federal Rules of Evidence Manual* § 501.02[5][1][iii] at 501-60 through 501-64 (8th ed. 2002). Although a distinct minority, Saltzburg notes that some courts have suggested that the exception may extend beyond crimes and fraud to the furtherance of torts generally. Saltzburg at 501-61.
  19. *See generally* *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998); *accord* *In re Sealed Case*, 107 F.3d 46, 51 (D.C. Cir. 1997).
  20. *See, e.g.*, *United States v. Reeder*, 170 F.3d 93, 105–07 (1st Cir. 1999) (crime-fraud exception applied when client asked lawyer about advice on back-dating documents to cover up a client's insurance fraud).
  21. *See* *In re Sealed Case*, 107 F.3d at 50.
  22. *See, e.g.*, *In re Grand Jury Proceedings*, 87 F.3d 377 (9th Cir. 1996) (former corporate counsel could be compelled to testify about confidential communications with corporate personnel where, unbeknownst to the attorneys, the advice was sought in furtherance of the corporation's violations of immigration and tax laws); *accord* *United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996).
  23. *See* *In re Sealed Case*, 107 F.3d at 49.
  24. *Id.*
  25. *Id.* at 50.
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