POLICING DISCOVERY: CRIMINAL PROSECUTIONS FOR THE DESTRUCTION OF DOCUMENTS IN CIVIL CASES AFTER UNITED STATES V. LUNDWALL

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Civil litigators have often grappled with the unfortunate situation of the destruction or deliberate hiding of documents during discovery by an adverse party, or worse, by their own clients. The remedy for such transgressions has traditionally been found to lie within the provisions of Rule 37 of the Federal Rules of Civil Procedure and/or 28 U.S.C. §1927, which provides for the imposition of costs, expenses, and attorneys' fees on an attorney who "multiplies the proceedings in any case unreasonably and vexatiously." Often the remedies take the form of a court order on motion precluding the transgressing party from offering evidence on issues touched upon by the destroyed documents,[1] affirmatively finding the relevant facts in favor of the aggrieved party,[2] entering a default judgment or dismissing certain claims or defenses,[3] and/or imposing monetary sanctions.[4] Unfortunately, particularly in civil cases, clients sometimes fail to heed the admonitions of their counsel that production of requested documents is mandatory in our legal system absent a claim of privilege or the invocation of a Constitutional right. Clients too often believe that withholding a document will bring only a mild rebuke or a tolerable fine if later discovered. Those clients might now wish to reconsider that assessment.

In an apparently precedent-setting case, *United States v. Lundwall*, 1 F. Supp. 2d 249 (S.D.N.Y. 1998), a federal district court upheld a prosecution for obstruction of justice under 18 U.S.C. §1503 based on the destruction of documents during civil discovery. This is to be distinguished from the situation where an independent grand jury investigation is already being conducted prior to or at the same time as a civil case brought by private plaintiffs and, in both matters, the same documents are subpoenaed or requested but have been or are subsequently hidden or destroyed. Under such circumstances, a prosecution for the withholding or destruction of documents would not necessarily arise out of conduct in the civil action, but rather would likely arise independently based on the destruction of grand jury documents. (*See, e.g., United States v. Benjamin*, 852 F.2d 413 (9th Cir. 1988), *jmt. vacated on other grounds*, 490 U.S. 1043, 109 S. Ct. 1948, 104 L.Ed.2d 418 (1989), *on remand*, 879 F.2d 676 (9th Cir. 1989).) As a result of *Lundwall*, though, civil litigators are now faced with the specter of prosecutions for purely civil discovery violations. Or are they?

The *Lundwall* case spawned from a widely publicized civil class action, *Roberts v. Texaco*, Inc., 979 F. Supp. 185 (S.D.N.Y. 1997), alleging that Texaco had discriminated against its African American employees. The *Roberts* plaintiffs made a request for documents pertaining to Texaco's minority employees on the record during Richard Lundwall's deposition, followed with a confirming letter. (*Lundwall, supra* at 250.) This is a normal practice among lawyers which rarely is followed-up by a formal request for the documents under Rule 34. Texaco assigned Lundwall, its former treasurer, and Robert Ulrich, its former senior coordinator of personnel services in its finance department, among others, the responsibility for collecting documents responsive to the plaintiffs' request. (Donovan, Karen, "Texaco: A Culture Full of Hubris," *The National Law Journal*, at A1 (December 1, 1996), *as reproduced at* http://www.corpcounsel.com/ hubris.html.) At some point thereafter, Texaco released Lundwall in a downsizing move. (Appelson, Donovan, *supra.*) Lundwall subsequently turned over to the *Roberts* plaintiffs' counsel secret tape recordings that he had made of management meetings pertaining to Texaco's document production. (Donovan, *supra; see also*, Fitzgerald, Jim, "Jury Begins Deliberations In Texaco Tapes Case," *News America Digital Publishing, Inc.* (May 7, 1998), *as reproduced at* Fox market wire, http://www.foxmarketwire.com/050798/texaco.html.)

Supposedly Lundwall, Ulrich, and another Texaco employee could be heard on the tapes discussing the shredding of documents. (*See, e.g., Id.*) It has also been claimed that the tapes show that Lundwall and Ulrich planned to remove from the production and hide from the plaintiffs documents that they deemed unfavorable to Texaco's position in the litigation. *(See, e.g.*, Fitzgerald, Donovan, *supra.*)

In closing arguments in the *Lundwall* case itself, prosecutors argued that Lundwall had intended to use the tape recordings as a "bargaining chip" against being fired and to extort Texaco. (Appelson, Fitzgerald, *supra.*) After Lundwall's attempt failed and Texaco terminated his employment, he turned the tapes over to the *Roberts* plaintiffs' counsel. (*See* Fitzgerald, Appelson, *supra.*)

Following release of the tapes and the ensuing media publicity, and possibly as a result thereof, in November 1996 Texaco and the *Roberts* plaintiffs settled the lawsuit for $176.1 million and an agreement by Texaco to diversify its workforce. (Appelson, Fitzgerald, Donovan, *supra.*) Lundwall was arraigned in federal court that same month. In June 1997, the United States Attorney's Office for the Southern District of New York filed a superseding indictment adding Ulrich as a named defendant and alleging violations of § 1503 and also of 18 U.S.C. § 371 for conspiracy to obstruct justice.

In denying Lundwall's and Ulrich's motion to dismiss the indictments, the *Lundwall* court ruled that their conduct fell "comfortably within the reach" of the broad text of § 1503. (*Lundwall, supra* at 251-52.) While acknowledging the notable lack of cases involving prosecutions for the destruction of documents during civil discovery, the *Lundwall* court noted that the indictment alleged that the defendants acted "corruptly"[5] by deliberately concealing and destroying relevant documents that they knew were to be produced during the civil litigation, (*Lundwall, supra* at 251), and that their actions influenced, impeded or attempted

to influence or impede the "due administration of justice"—*i.e.*, the development of facts and claims asserted in the civil litigation. (*Lundwall, supra* at 251-52.)

The court also examined the "somewhat sketchy" legislative history of the statute, which it found suggested that a prime focus "was to refine the judicial power to address contempts of court." (*Id.* at 253.) Although §1503 is found in the United States Code section related to *criminal* prosecutions and is one of several "obstruction" statutes, (*see* 18 U.S.C. §§1501-18), the *Lundwall* court ruled that "nothing in the legislative history demonstrates that its broad language *was not intended* to cover allegedly 'corrupt' conduct in civil litigation that impedes the 'due administration of justice.'" (*Lundwall, supra* at 253 (emphasis added).) Of interest in this regard is the following noteworthy phrase: "If the offense under this section occurs in connection with a trial of a criminal case . . ." It could be argued that this language indicates the intent of Congress that the statute also apply to civil proceedings, or else this language would be superfluous. On the other hand, it could be argued that the operative word is "trial," and that Congress only meant to distinguish between a criminal trial and pre-trial criminal investigations and proceedings. Refusing to restrict its broad reading of the statutory text, the court identified a few other civil matters in which §1503 has been applied, including a juror's solicitation of a bribe from a litigant in exchange for a promise to sway the jury, (*Lundwall, supra* at 235 (*citing United States v. Mohammad*, 120 F.3d 688 (7th Cir. 1997))), and a lawyer's presentation of a fraudulent civil judgment to his client. (*Id.* (citing *United States v. London*, 714 F.2d 1558 (11th Cir. 1983)).) The court also opined that the pendency of a federal civil action satisfies the "pending proceeding" requirement of §1503. Therefore, according to the court, the holdings of cases involving obstruction of justice prosecutions under §1503 for the willful concealment and destruction of documents in connection with grand jury proceedings apply equally to similar conduct in civil actions. (*Id.*)

Eventually a jury acquitted Lundwall and Ulrich on the charges alleged in the indictment. After the acquittals, Mary Jo White, the United States Attorney for the Southern District of New York, was quoted as stating, "we will prosecute such transgressions . . . to ensure the integrity of the administration of justice in the courts." (Appelson, *supra.*) But does Ms. White's comment really portend a new, increased focus for §1503 prosecutions for civil discovery violations by already overburdened prosecutors? Although one cannot be certain, it seems unlikely that federal prosecutors will unsheathe this weapon in any but the most egregious or high profile cases where it seems apparent that the withholding or destruction of documents did not result from oversight, genuine error, a misunderstanding of the request, or from the need to produce a large volume of documents within a short period of time and/or from widely separated locations.

As even the district court noted, the *Lundwall* case involved unusual and egregious circumstances. (*Lundwall, supra* at 255-56.) For instance, the district court distinguished between the *Lundwall* indictment charging the defendants with *knowingly* seeking to impair a pending proceeding by *intentionally* destroying relevant documents, and cases in which it is incorrectly concluded that certain documents either are not requested, are irrelevant, or that production would be overly burdensome. (*Id.* at 255.)

Interestingly, Lundwall and Ulrich might have felt a false sense of safety from prosecution or even civil sanctions for non-production because the civil plaintiffs in *Roberts* had requested the documents orally at Lundwall's deposition followed with a confirming letter—not by a formal request under Fed. R. Civ. P. 34. (*Id.*) Because Rule 37 provides for sanctions only after a party has failed to comply with the disclosure requirements of Rule 26(a), which incorporates Rule 34 by reference in subsection 5, and because plaintiffs had not served a Rule 34 document request, Rule 37 sanctions might not be applicable to the alleged violations, as the *Lundwall* court found. (*Id.*) No doubt many civil litigators harbor this view and believe that an oral request at a deposition that is not agreed to, or is met with a response such as "we will take that under consideration," allows them to avoid production. *Lundwall* may require a reconsideration of this thinking.

Moreover, the alleged obstruction in *Lundwall* was committed not by a party or counsel for a party, but by individuals alleged to have acted independently. (*Id.; see also*, Donovan, *supra.*) Therefore, the *Lundwall* court found that the civil discovery rules, which are primarily directed at parties and their counsel, were inadequate to address the alleged violations. (*Lundwall, supra* at 255.) However, corporations can be held to act through and to be liable for the actions of their employees, especially those in a supervisory capacity. (*See, e.g., United States v. Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 3029 (1992); *United States v. Basic Construction Co.*, 711 f.2d 570, 572 (4th Cir.), *cert. denied*, 104 S.Ct. 371 (1983); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 93 S.Ct. 938 (1973).) Therefore, another court might not follow the *Lundwall* court's interpretation of the discovery rules as applied to corporate employees who are given responsibility for gathering documents in response to civil discovery requests, as were Lundwall and Ulrich.

In addition, practical considerations suggest against a dramatic increase in prosecutions under §1503 for the destruction of documents in civil cases. As explained by the *Lundwall* court:

> Civil litigation typically involves parties protected by counsel who bring frequently exaggerated claims that, under the supervision of a judicial officer, are narrowed and ultimately compromised during pretrial proceedings. Prosecutorial resources would risk quick depletion if abuses in civil proceedings—even the most flagrant ones—were the subject of criminal prosecutions rather than civil remedies.

(*Lundwall, supra* at 254.) The court's analysis accords with the reported view of Kathleen Mehletretter, Chief of the Criminal Division of the United States Attorney's Office for the Western District of New York, with regard to federal prosecutions for perjury in civil depositions that "allowing the court to remedy the

situation absolves the need to refer the matter to a U.S. Attorney's office that already is saddled with more cases than it can conceivably handle." (Cogan, Brian, "Perjury in Civil Depositions," *Federal Bar Counsel News*, at 6 (June 1998).)

Given this consideration, combined with the usual availability of sanctions under the Federal Rules, and the potential damaging effect that a private litigant's referral to the United States Attorney's Office could have on the possibility of negotiating a civil settlement, it seems unlikely that federal prosecutors will jump to bring §1503 indictments for the destruction of documents during civil discovery in the vast majority of cases. Absent some federal interest, such as where the United States is a party to the underlying civil suit, or a high-profile or broad-based action such as a product liability or securities case, the likelihood of federal prosecutors scouring over civil transcripts in search of potential §1503 violations seems remote. *(See id.* at 5 (quoting Mark Pomerantz, Chief of the Criminal Division of the United States Attorney's Office for the Southern District of New York, as stating, "if the civil case was one to which the government was a party, the federal interest will be clear").) On the other hand, litigators should be especially wary where such factors are present, for if recent reports are accurate that the Justice Department has begun an investigation into allegations that Microsoft destroyed documents relevant to the antitrust case currently pending against it, with obstruction of justice charges possible, United States Attorney Mary Jo White's warning may have been anything but post-verdict rhetoric. *(See* Davidson, Paul "Microsoft target of new probe," *USA Today* (September 15, 1998), as reproduced at http://usatoday.com/money/mds2.htm.)

So what does *Lundwall* mean for civil litigators advising their clients with regard to discovery? First, it holds forth the possibility of a referral for indictment for the *willful* withholding or destruction of relevant documents. This should be kept in mind especially by litigators involved in widely publicized cases, particularly those involving issues of importance to national policy, such as the racial discrimination allegations of the *Roberts* case. But essentially, *Lundwall* merely reinforces the traditional rules and provides additional incentives for potentially wayward clients to fulfill their discovery obligations. Just as before *Lundwall*, counsel still need to advise clients at the outset of litigation to maintain any and all documents and files that could conceivably pertain to the issues in dispute. When responding to a discovery request, documents determined to be irrelevant should nevertheless be maintained in the event of a later discovery dispute. Documents deemed overly burdensome to produce should be retained and opposing counsel at least signaled that they exist by the traditional objection of "burdensome" so that a court or magistrate can resolve the issue if requesting counsel pursues the matter and will not modify the request. And, of course, counsel should consider advising their clients that the stakes for non-compliance with discovery requests have been raised, with criminal prosecution being a possibility in addition to civil sanctions. In the end, though, what *Lundwall* really appears to be is a reminder of the seriousness of the civil discovery process and the obligations of clients and counsel to faithfully adhere to the rules of civil discovery, and a warning that violations can have severe repercussions for those involved.

ENDNOTES

* Jason Pickholz is a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison and a member of the Pretrial Practice and Discovery Committee for which this is written. In the interest of disclosure, it is noted that Paul, Weiss, Rifkind, Wharton & Garrison represents a client in a civil litigation involving facts related to the *Lundwall* and *Roberts* actions. To date, Mr. Pickholz has had no involvement with that client or matter.

1 *See, e.g., Update Art, Inc. v. Modiin Pub. Ltd.*, 843 F.2d 67, 71-72 (2d Cir. 1988) (affirming magistrate's preclusion of defendant's evidence of damages where defendants failed to comply with disclosure order); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 110 F.R.D. 363, 369-71 (D.Del. 1986) (precluding defendant from introducing certain matters into evidence due to its failure to comply with request and order for production of "secret" formula); *Bergman v. United States*, 565 F. Supp. 1353, 1366-67 (W.D.Mich. 1983) (precluding defendant from presenting portions of its defense due to failure to disclose documents); *Rogers v. Chicago Park District*, 89 F.R.D. 716, 719 (N.D.Ill. 1981) (precluding defendant from introducing certain evidence where defendant destroyed relevant documents after onset of litigation); *see also Wilson v. Johns Manville Sales Corp.*, 810 F.2d 1358, 1362-63 (5th Cir.) (precluding expert from testifying where expert refused to produce documents pursuant to request and order), *reh'g denied*, 815 F.2d 700 (5th Cir.) (en banc), *cert. denied sub nom., Wilson v. Armstrong World Indus.*, 484 U.S. 828 (1987).

2 *See, e.g., Bergman, supra* at 1366-67 (allowing plaintiffs to submit proposed findings of fact based on defendant's undisclosed documents); *Coca-Cola Bottling, supra* at 369-71 (ruling that plaintiffs were "entitled to the advantage of every possible inference that fairly could be drawn from the formulae evidence sought" and specifically enumerating findings, where defendant refused to comply with request and order to produce secret formula); *Rogers, supra* at 717-18 (granting in part plaintiff's motion that certain facts be taken as established where defendant destroyed relevant documents after onset of litigation); *United States v. ACB Sales & Service, Inc.*, 95 F.R.D. 316, 318 (D.Ariz. 1982) (deeming as established facts set forth in debtor complaints where defendants failed to produce requested documents, stating that "any destruction of files . . . appears to have been motivated more from an attempt to suppress evidence than from the need of additional filing space for new files.").

3 *See, e.g., Affanato v. Merrill Bros.*, 547 F.2d 138, 139-40 (1st Cir. 1977) (entering default judgment as sanction for defendant's failures to respond to interrogatories and produce documents after several requests and order from

court); *Paine, Webber, Jackson & Curtis, Inc. v. Immobiliaria Melia de Puerto Rico, Inc.*, 543 F.2d 3, 6 (2d Cir. 1976) (affirming default judgment against defendant and dismissing counterclaims as sanction for failure to appear at deposition and produce documents pursuant to request and order), *cert. denied*, 430 U.S. 907 (1977); *Mutual Fed. Savings & Loan Ass'n v. Richards & Assocs., Inc.*, 872 F.2d 88, 93-94 (4th Cir. 1989) (affirming entry of default judgment where defendant failed to timely produce documents pursuant to order); *Bergman*, 565 F. Supp. at 1366-67 (precluding defendant from presenting portions of its defense based on its failure to disclose certain documents); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1456-57 (C.D.Cal. 1984) (entering default judgment against defendant who knowingly destroyed relevant documents subject to order to produce). *See generally National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam) (reinstating district court's dismissal of antitrust suit as discovery sanction for failure to respond to interrogatories).

4 *See, e.g., Legault v. Zambarano*, 105 F.3d 24, 28 (1st Cir. 1997) (affirming monetary sanctions against party and counsel who submitted false interrogatory responses and improperly withheld documents responsive to discovery request); *Wm. T. Thompson, supra; see also Rogers, supra.*

5 "Corruptly" under §1503 has been given various definitions depending on the jurisdiction. *See, e.g., United States v. Bufalino*, 285 F.2d 408, 416 (2d Cir. 1960) (finding no direct evidence that defendant could foresee that actions could impede administration of justice, or that defendant intended actions to do so); *United States v. Partin*, 552 F.2d 621, 642 (5th Cir.) ("corrupt" means with "improper motive or with bad or evil or wicked purpose"), *cert. denied*, 434 U.S. 903 (1977); *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir.) (holding that "corruptly as used in the statute means that the act must be done with the purpose of obstructing justice"), *cert. denied*, 454 U.S. 1157 (1981); *United States v. Ogle*, 613 F.2d 233, 238 (10th Cir. 1979) (approving trial court's interpretation that "an endeavor . . . to influence, obstruct or impede the due administration of justice is per se unlawful and is tantamount to doing the act corruptly."), *cert. denied*, 449 U.S. 825 (1980).

6 Courts have provided varying definitions of "due administration of justice," although most definitions tend to bear some relation to maintaining fairness and order during litigation. *See, e.g., Wilder v. United States*, 143 F. 433 (6th Cir. 1906) ("due administration of justice" means the right of every litigant to learn everything possible regarding any material facts relevant to any litigation), *cert. denied*, 204 U.S. 674 (1907); *United States v. Metcalf*, 435 F.2d 754, 757 (9th Cir. 1970) (ruling that obstruction of "due administration of justice" under §1503 is limited to "intimidating actions" committed in pending judicial proceedings); *see also Rosner v. United States*, 10 F.2d 675, 676 (2d Cir. 1926) (citing *Wilder, supra*, and other cases).