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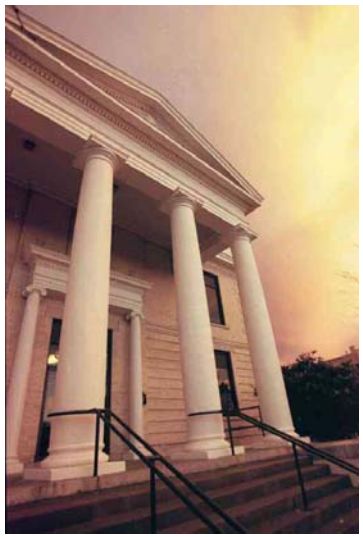
INTERNAL INVESTIGATIONS OF PUBLIC ENTITIES



Madeleine Johnson
Fish & Richardson P.C.
Dallas, TX

- *Proactive Investigations*
- Someone within or outside of the organization reports possible wrongdoing

Reactive Investigations

- Subpoena, CID, or informal request for information from a governmental entity

- Execution of a search warrant by a law enforcement agency



Your initial response to a government investigation or action

- Have your own attorneys conduct an investigation
- Retain outside counsel to conduct an investigation
- Decide to dust off the document retention policy

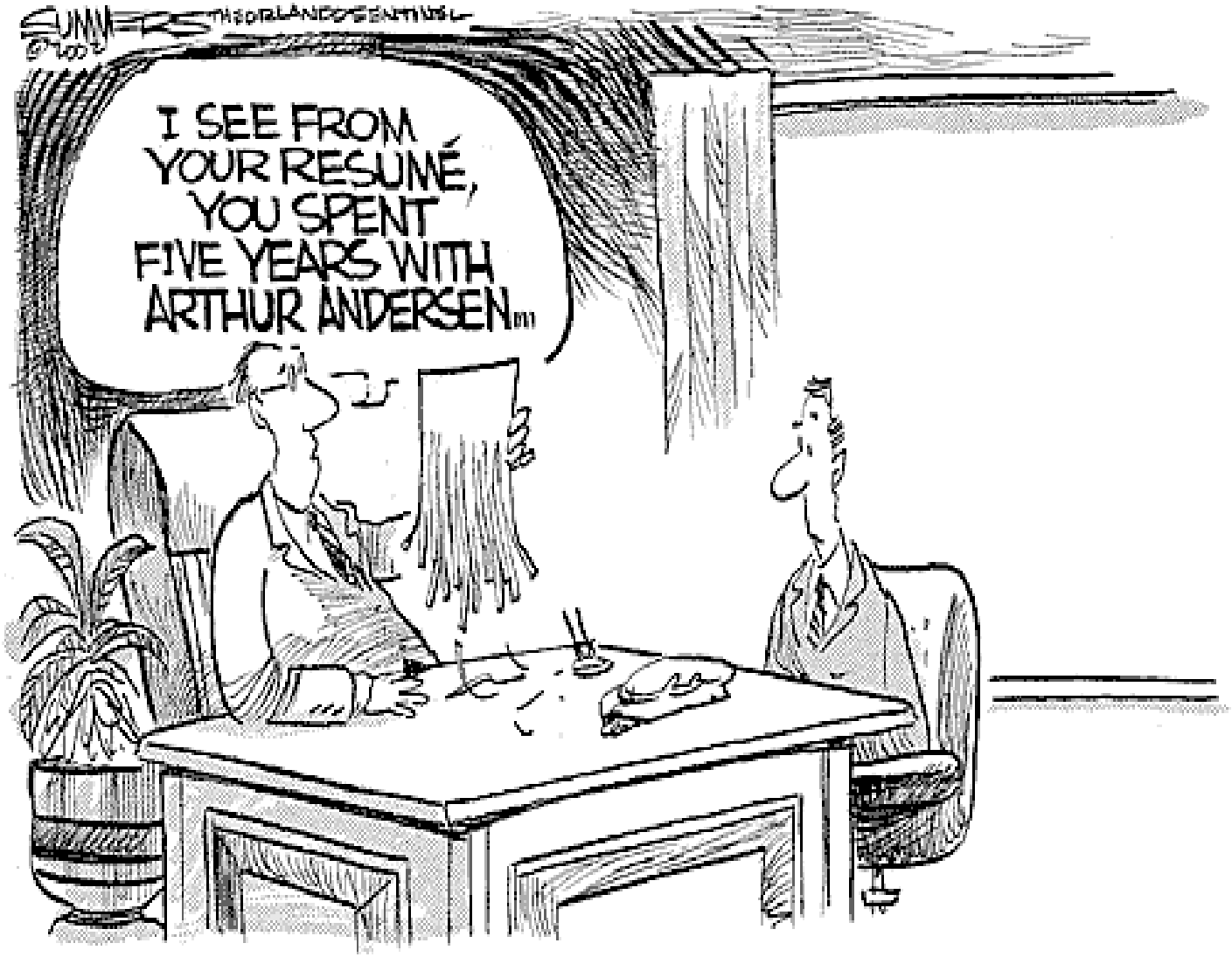
To: Michael C. Odom@ANDERSEN WO
cc:
Date: 10/12/2001 10:53AM
From: Nancy A. Temple, Chicago 33 W. Monroe, 50 / 11234
Subject: Document Retention policy

Mike-

It might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions.

Nancy

http://www.intranet.andersen.com/oncfirm.nsf/content/ResourcesFirmwidePoliciesPolicy-ClientInformationOrganization! Open Document


I SEE FROM YOUR RESUMÉ, YOU SPENT FIVE YEARS WITH ARTHUR ANDERSEN(tm)

Planning the Investigation

- Circulating a non-destruction memorandum
- Determining the scope of the investigation
- Determining who needs to assist in the investigation
- Determining location of documents to be collected and how they will be organized
- Determining who needs to be interviewed
- Deciding who needs to be kept informed and what channels of communication should be used
- Deciding if a report should be prepared and what it should contain

Addressing disclosure issues

- Preserving privilege
- Waiving privilege
- Open records requests during the investigation
- How to make public disclosure

Collection and reproduction of documents

- How likely are documents collected in an investigation to be subject to public information requests or requested by a subpoena?
- For all of these purposes, organization of documents is critical
- Due diligence in identifying paper documents and electronic information relevant to the investigation
- Paper documents: making paper copies v. electronic scanning / ORC
- Bates-numbering
- Creating a database
- Chain of custody
- Ability to refer back to source documents in investigation report

Creating a database

- Transfer of electronic information by transfer to a server, hard drive or disk
- Imaging paper documents (TIFF)
- OCR: searchable data
- Database software
- Web remote database



Interviewing Employees

- Informing employees before interview that you or outside counsel represents the entity, not the individual being interviewed
- Informing employees about the possibility that they may be contacted by government agents
- Encouraging employees to inform counsel if they are contacted by a government agent
- Informing employees that they may have counsel present if they choose to talk to government employees
- Avoid directing employees not to talk to government agents or representatives as such directives could subsequently be used against the company
- Whether to allow employees' counsel to be present during interview
- Former employees

Garrity and *Miranda* warning

- Voluntary cooperation is best
- Do internal practices or policies require you to give warnings?
- *Garrity* warning: Compelling testimony from employees and consequences of failure to comply
- *Miranda* warning: Should it be given during an internal investigation?
- Consequences of giving or not giving warnings

Disciplining employees during an investigation

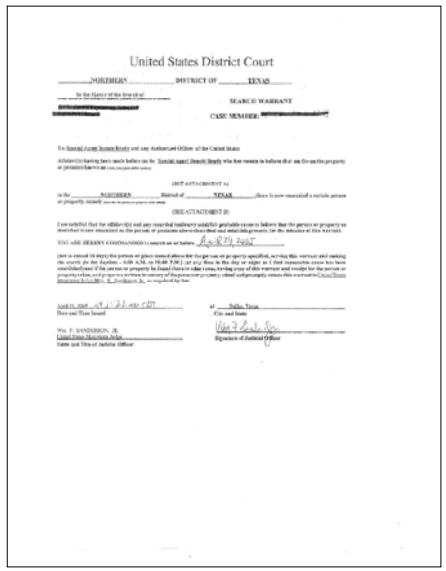
- Disciplinary measures may need to be taken during the course of the investigation to protect the organization's interest
- Think through how any disciplinary action should be handled, particularly for whistleblowers who may consider discipline as retaliation
- Disciplined employees may require separate counsel in proceedings in which the organization and the disciplined employee are parties
- Be aware that disciplined employees may retain their own counsel for employment related actions
- Be aware of where to draw the line between the investigation and disciplinary proceedings
- Be cognizant of civil service rules and procedures

Parallel proceedings

- Governmental investigations may lead to parallel civil litigation
- Criminal and civil investigations may be simultaneously conducted
- State and federal agencies may be investigating the same conduct
- Multiple internal investigations may be simultaneously conducted
- Employment actions may follow
- Impact of one proceeding on another – who goes first?
- Implications of invoking the Fifth Amendment

Search Warrants

- A search warrant is a court order
- Importance of cooperation
- Securing the premises
- Dealing with employees in the area to be searched
- Computers and electronic information
- Gaining access to or return of removed documents and equipment
- The contents of a search warrant may provide clues about the nature and scope of a criminal investigation
- Agents conducting a search may also show up with arrest warrants



United States District Court

NORTHERN DISTRICT OF TEXAS

SEARCH WARRANT

CASE NUMBER:

Responding to subpoenas or informal requests for information

- Inquiries by a law enforcement agency may be informal or through the issuance of a subpoena
- If asked for information informally, consider whether you want to be served with a subpoena
- Privacy and confidentiality issues that may need to be addressed
- Can raise objections to a subpoena
- Substitution of copies for original records
- Waiver of requirement to appear before the grand jury
- Public disclosure relating to subpoenas

Waiver of attorney-client and work product privileges in internal investigations

. ***Private Sector***

- The organization and individuals may face sanctions and liability, both civil and criminal
- The emphasis on waiver of privilege as a component of demonstrating cooperation has intensified
- Dilemma of shareholder suits

Public Sector

• The organization and individuals face sanctions and civil liability, and individuals may be criminally prosecuted

• Considerable pressure to inform the public about what is going on

•Dilemma of civil lawsuits (tort, civil rights violations)

Attorney work product

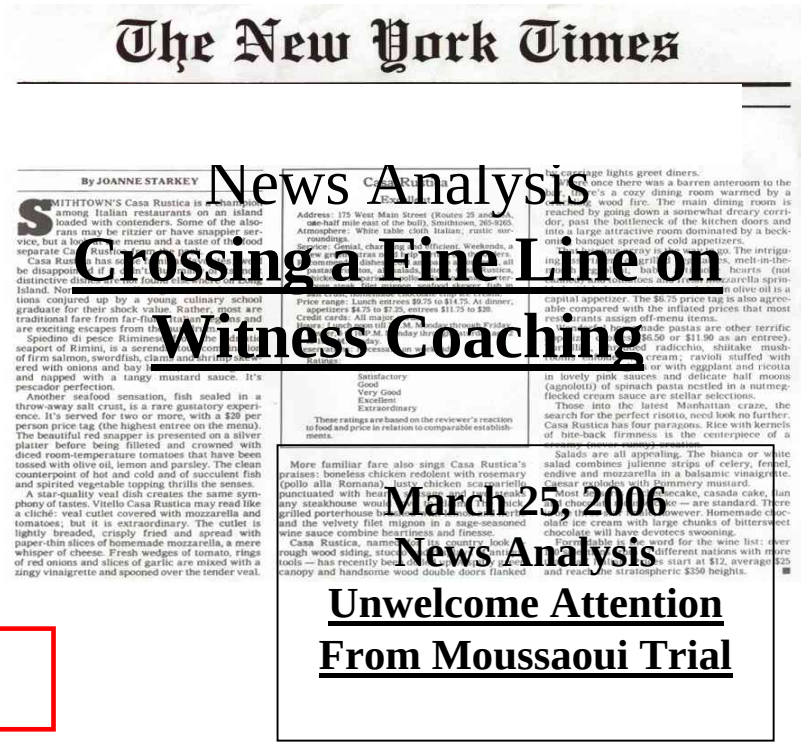
privileged attorney communications

Media and public disclosure issues during an internal investigation

- Promptly releasing public information
- ***Don't let failure to release information become the story***
- ***Weigh whether non-disclosure is really in the organization's best interest even if permitted by law***
- Handling confidential information
- Press conferences and press releases
- Communications with the media

Caveats for City Attorneys during investigations

- Adequate steps to preserve evidence or information requested by public
- Caution in revising reports prepared by outside counsel
- Prepping witnesses



The New York Times

News Analysis

Crossing a Fine Line on Witness Coaching

March 25, 2006

News Analysis

Unwelcome Attention From Moussaoui Trial

OBSRUCTION OF JUSTICE

Ten key points to remember when conducting an internal investigation

- Plan investigations and be sure to consider potential consequences – particularly the possibility of parallel litigation
- Do not selectively apply document retention policies- a non-destruction memorandum is the appropriate communication when an investigation is triggered
- Make sure employees who are interviewed understand the ground rules when being interviewed
- Take necessary steps to preserve privilege
- Take necessary remedial actions where wrongdoing is uncovered, thinking through and remaining mindful of the ramifications of adverse employment actions taking during the course of or as a result of an investigation
- Weigh carefully the pros and cons of withholding information related to the investigation
- Weigh carefully the pros and cons of preserving/waiving privileges
- Have a plan for informing the public and dealing with media
- Avoid conduct that could be construed as obstructing justice in the course of an investigation
- Don't bury you head in the sand. When deemed appropriate, conduct an internal investigation or retain outside counsel to do so

Anatomy of an investigation

"Fake Drugs" investigation - Dallas 2004

