Legal Backgrounder

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THE *ANDERSEN* DECISION AND DOCUMENT MANAGEMENT UNDER SARBANES-OXLEY

by

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Congress, over the years, has conferred on our country at least four separate obstruction of justice criminal statutes that apply to acts of destroying internal corporate documents.[1] The most recent of these statutes — 18 U.S.C. §1519, which was enacted as part of the Sarbanes-Oxley corporate reform legislation — appears to throw by far the widest criminal net over document destruction, and for this reason the Government in the future probably will use §1519 as its primary criminal enforcement vehicle in document destruction cases.[2]

Arthur Andersen was convicted in June 2002 on a single count of obstruction of justice under one of the earlier document destruction statutes, §1512(b), as a result of destroying documents related to its audits of Enron. Andersen destroyed these documents before it was served with an SEC subpoena, but after some Andersen officials knew an SEC investigation was likely. The Supreme Court recently reversed Andersen's conviction in a unanimous, terse opinion by Chief Justice Rehnquist, in which the Court concluded that "the jury instructions here were flawed in important respects."[3]

Although Andersen was prosecuted for document destruction, the Government never charged Andersen or any of its partners, with any offense relating to its audits of Enron; the document destruction, therefore, did not "cover up" any underlying, substantive offense. Additionally, an

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[1]18 U.S.C. §§1503(a), 1505, 1512(b), & 1519.

[2]*See* Brief for United States in Opposition at 13, *Arthur Andersen LLP v. United States* (U.S. Dec. 8, 2004) (No. 04-368) ("Most federal prosecutors will henceforth use Section 1519 . . . to prosecute document destruction cases.").

[3]*Arthur Andersen LLP v. United States*, 2005 WL 1262915 (U.S. May 31, 2005).

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innovative empirical study of the quality of audits by the major accounting firms (including Andersen) reached the conclusion that Andersen's audits in general were at least as reliable — perhaps more so — than those of the other major firms.[4] The (initially) successful prosecution of Andersen ended that firm's professional existence; it now continues only as a litigation shell. Given the lack of any underlying, substantive offense, and the overall quality of Andersen's audits, the loss of a major accounting firm from an already highly-concentrated profession can only be regretted.

Does the Court's reversal of Andersen's conviction under §1512(b) have any relevance to future criminal prosecutions under the new Sarbanes-Oxley §1519? The Court's opinion does not mention §1519,[5] and since Andersen destroyed the documents before Congress enacted Sarbanes-Oxley, §1519 cannot apply to Andersen's conduct.[6]

The earlier statute under which Andersen was prosecuted, §1512(b), provides in relevant part that a person violates the law who "knowingly . . . corruptly persuades another person . . . with intent to . . . cause or induce any person to . . . withhold a record [or] document . . . from an official proceeding." Section 1512(e)(1) provides that an "official proceeding" need not be "pending or about to be instituted as the time of the offense."

The district court's jury instructions on the meaning of this convoluted statute had three salient features:

- The district court instructed the jury that the term "corruptly persuades" means to "subvert, undermine, or impede the fact-finding ability of an official proceeding."[7]

- The district court instructed the jury that it could convict "even if Andersen honestly and sincerely believed that its conduct was lawful."[8]

- Finally, the district court did *not* instruct the jury that, in order to convict, it must find some "nexus" between Andersen's conduct and some particular official proceeding.

The Supreme Court rejected the district court's instructions essentially for two reasons: first, the Court concluded that the jury instructions failed to require an adequate level of culpability. The Court, in a passage no doubt reassuring to the legal profession, noted that "[n]o one would suggest" that an attorney who persuaded a client to withhold documents on the ground, *e.g.*, of privilege "acted

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[4]Theodore Eisenberg & Jonathan R. Macey, *Was Arthur Andersen Different? An Empirical Examination of Major Accounting Firm Audits of Large Clients*, 1 J. EMP. LEGAL STUDIES 263 (July 2004).

[5]Section 1519, however, was raised briefly in oral argument. Tr. 14-15, 17-18 (Apr. 27, 2005).

[6]U.S. CONST. art. I, §9, cl. 3 ("No . . . ex post facto law shall be passed.").

[7]*United States v. Arthur Andersen LLP*, 374 F.3d 281, 293 (5th Cir. 2004) (quoting jury instruction), *rev'd*, 2005 WL 1262915 (U.S. May 31, 2005) (No. 04-368).

[8]2005 WL at *4.

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wrongfully."[9] The Court also noted that document retention policies "are common in business," and stated that "[i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."[10] The element of culpability is a major theme of *Andersen*.

Second, the Court, relying on *United States v. Aguilar*,[11] held that the jury should have been instructed that there must be a nexus between the defendant's conduct and the "official proceeding." As the Court stated, "someone who persuades others to shred documents under a document retention policy when he *does not have in contemplation any particular official proceeding* in which those documents might be material" has not violated §1512(b).[12]

The Court did not discuss the standard of review it applied in determining to reverse based on the incorrect jury instructions. (The Fifth Circuit, in affirming the conviction, applied a "harmless error" standard to the jury instructions.[13]) It may be that the Court saw the erroneous instructions as so "flawed in important respects" as to easily satisfy any applicable standard of review.

What effect will *Andersen* have on the interpretation of the new Sarbanes-Oxley document destruction statute? New §1519 shares with §1512(b) a "knowingly" requirement, but it lacks any "corruptly" element. It provides in relevant part that it is a serious felony to "knowingly" alter or destroy a document "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction" of a federal agency or a bankruptcy court, "or in relation to or contemplation of any such matter or case."

Three points about §1519 seem especially important in the context of *Andersen*:

- First, the *Andersen* Court, in discussing the nexus requirement under §1512(b), used the same term — "contemplation" — that appears in §1519: the Court stated that a person who "does not have *in contemplation* any particular official proceeding" does not violate the statute. In §1519, Congress used "in . . . contemplation of" to express the loosest connection between the destruction or alteration of a document on the one hand, and a federal matter or case on the other, that would suffice for a violation. Now the Court has used the same word to describe the *minimum* nexus that a jury must be instructed to find in order to

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[9] *Id*.

[10] *Id*.

[11] 515 U.S. 593 (1995) (Rehnquist, C.J.)

[12] *Id*. at *5 (emphasis added). Significantly, the district court in the high-profile prosecution of investment banker Frank Quattrone, affirmatively instructed the jury that there was no 'nexus' requirement under §1512(b). Reply Brief for Frank Quattrone at 23, *Quattrone v. United States* (2d Cir. June 3, 2005) (No. 04-5007-CR) ("As to the §1512 count . . ., the jury was told that 'because there is no requirement you find a threat of proceeding impending there is no requirement that there be a nexus between the defendant's conduct and the federal proceeding.'"). Presumably the Second Circuit will find that the *Andersen* decision now compels a nexus instruction under §1512(b).

[13] 374 F.3d at 297.

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convict under §1512(b). The lower federal courts, in interpreting new §1519, are likely to conclude that the new statute, like §1512(b) in *Andersen*, includes a nexus requirement on which the jury must be instructed.

- Second, it is striking that §1519 includes the word "impede" in its list of the types of intent a person must possess in order to violate the statute ("with the intent to impede, obstruct, or influence"). In *Andersen*, however, the Court rejected the use of "impede" in the district court's jury instructions on the ground that "impede" could sweep in innocent conduct.[14] True, this discussion in *Andersen* was in the context of the "corruptly" element of §1512(b), which is absent from new §1519. The point is still significant, however, because of the *Andersen* Court's overarching emphasis with "the level of 'culpability . . . we usually require in order to impose criminal liability.'"[15] It may be that the Court is signaling that a jury should not be permitted to convict under §1519 merely for conduct intended to "impede" a Government matter or case.

- Finally, §1519, like §1512(b), includes a "knowingly" element. In *Andersen*, the Court emphasized that §1512(b) "punishes not just 'corruptly persuad[ing] another', but knowingly . . . corruptly persuad[ing]' another", and commented that the "knowingly" element "provides the mens rea."[16] In light of the Court's emphasis on culpability under §1512(b), it will be interesting to see how the lower courts interpret the "knowingly" element of §1519. It is certainly unlikely that the courts, in light of *Andersen*, will instruct juries under §1519 that they may convict even if the defendant "honestly and sincerely believed that its conduct was lawful."

[14]2005 WL at *5.

[15]*Andersen*, 2005 WL at *4 (quoting from *United States v. Aguilar*, 515 U.S. 593, 602 (1995) (Rehnquist, C.J.) (ellipses in *Andersen*).

[16]2005 WL at *4.

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