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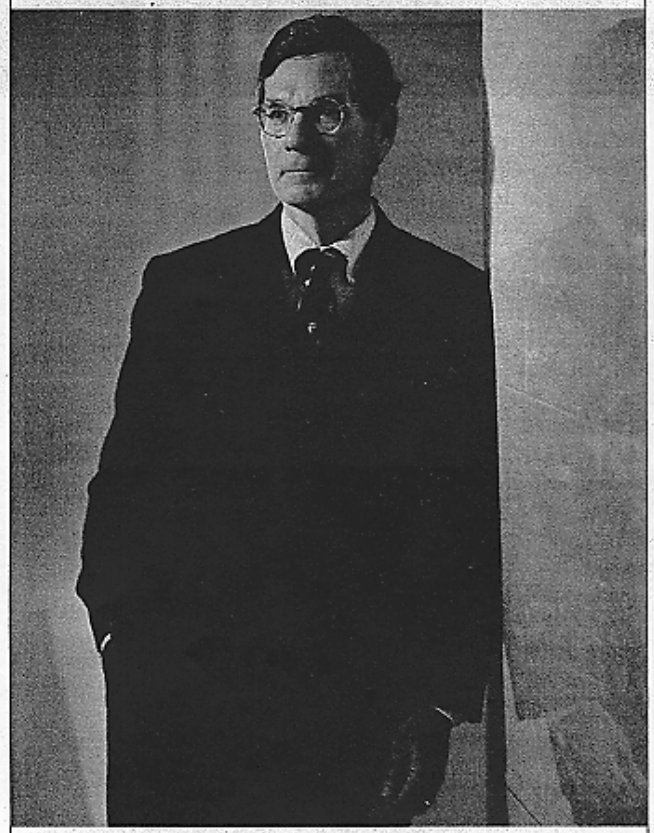
OF MOTIVES AND MEMOS

Supreme Court Will Hear the Tale of Arthur Andersen's Fall

DAVID G. SAVAGE

THE DEMISE OF ACCOUNTING megafirm Arthur Andersen has ascended almost to the status of a corporate fable: a cautionary tale of a venerable auditing firm that made the fatal mistake of becoming too cozy with a big client —in this instance, the energy trader Enron.

But on April 27, the U.S. Supreme Court will bring the tale back to the real world when it hears the case of *Arthur Andersen v. United States*, No. 04-368. The high court is expected to decide a question that could affect nearly every business and its lawyers: When is it illegal to push the computer's delete key?



James Miller: The justices seem to be interested in the issue of criminal intent.

The answer may turn on the issue of motive: Can it be a crime to hide something when you believe it is legal to hide it?

SHREDS OF EVIDENCE

IN ITS APPEAL TO THE SUPREME COURT, ANDERSEN'S LAWyers say they believed then, and now, that it was "perfectly lawful" for its in-house counsel in Chicago to have encouraged the firm's partners in Houston to shred files and delete e-mail related to Enron in the weeks leading up to the energy trader's filing for bankruptcy. Andersen had a policy of retaining the key documents behind an audit but getting rid of notes, drafts and memos that were produced during the audit.

"It might be useful to consider reminding the [Enron] engagement team of our documentation and retention policy," wrote Nancy Temple, the Chicago counsel, in an e-mail to David Duncan, the Andersen partner in Houston who oversaw the Enron account. "It will be helpful to make sure that we have complied with the policy."

Duncan followed her advice, but doing so set off a sequence of events that proved to be significant for the prosecution. Temple sent her e-mail Oct. 12, 2001. That was two months after Jeffrey Skilling, Enron's chief executive, suddenly quit; six weeks after *The Wall Street Journal* reported on improprieties at Enron; and a few days after Temple herself wrote that a Securities and Exchange Commission investigation of Andersen was "highly probable."

On Oct. 16, Enron announced it was reducing its shareholder equity by $1.2 billion because of an accounting error. Three days later, the SEC sent a letter to Enron saying it was opening an investigation. A copy went to Andersen.

But it was not until Nov. 9 that the SEC served a subpoena on Andersen for its Enron-related documents. That day, Duncan sent out an e-mail titled "Stop the Shredding."

However, in the roughly four weeks after Temple advised the Houston partners to comply with the "document retention policy," Andersen's staff destroyed more than two tons of paper related to its Enron work. It also undertook a "systematic effort ... to purge the computer hard drives and e-mail system of Enron-related files," said then-Deputy Attorney General Larry Thompson when he announced the one-count criminal indictment of the world's fifth-largest accounting firm.

The prosecution was controversial from the start because Andersen was not charged with substantive crime for its Enron work.

"This was the destruction of a business by the destruc-

David G. Savage covers the U.S. Supreme Court for the Los Angeles Times *and writes regularly for the* ABA Journal.

tion of documents," says New York City litigator Kathryn Keneally, who has written about the case. "With this kind of criminal charge, you run the risk of putting lots of people out of jobs who had nothing do with any of this. That should give the government pause."

The U.S. Chamber of Commerce and the Washington Legal Foundation supported Andersen in its petition to the Supreme Court. They said the prosecution had "cast a pall" over corporate America and threatened to make a crime out of the "everyday routine" shredding of paper.

The Justice Department also had a different view of what the law required when an investigation was looming. The statute addressing obstruction of justice, 18 U.S.C. § 1512, calls for up to 10 years in prison for anyone who "corruptly persuades another person" to destroy documents so they will not be available for use "in an official proceeding."

'There is nothing inherently corrupt about failing to facilitate a future government inquiry.' —Andersen's lawyers

While Andersen's lawyers contend it was legal to destroy extraneous files before receiving a subpoena, prosecutors described this conduct as "corrupt" because it was "motivated by an improper purpose"—seeking to destroy potential evidence in a looming SEC investigation.

"Companies [are] not free to destroy documents so long as a subpoena had not yet arrived," acting Solicitor General Paul Clement said in his reply to the court. Moreover, the obstruction statute does not "require proof that the defendant knew his conduct was unlawful," Clement added.

The jury deliberated 10 days before convicting Andersen. The company was fined $500,000 and all but barred from doing audits of public corporations. The conviction also leaves the partners vulnerable to civil judgments.

Defense lawyers had objected to the jury instructions, which defined "corruptly" to mean "having an improper purpose, ... an intent to subvert, undermine or impede the fact-finding ability of an official proceeding." They argued the government should have been required to prove that Andersen knew its actions were illegal.

SUDDEN MOTIVATION

ON APPEAL, THE 5TH U.S. CIRCUIT COURT OF APPEALS based in New Orleans agreed with the government. "A company's sudden instruction to institute or energize a lazy document-retention policy when it sees investigators around the corner ... is easily viewed as improper," wrote Judge Patrick Higginbotham.

Moreover, "one could act with an improper purpose even if one did not know the actions were unlawful," Higginbotham added. 374 F.3d 281 (2004).

This turns the law on its head, Andersen's lawyers said in their appeal to the Supreme Court: If it were legal for Andersen's employees to discard extraneous documents prior to the SEC serving a subpoena, how could it be a crime for the firm's lawyers to remind employees of that?

Moreover, "in the absence of a specific legal duty imposed by a subpoena or the unambiguous command of a statute, there is nothing inherently corrupt about failing to facilitate a future government inquiry," they said.

Keneally says the 5th Circuit's opinion was unpersuasive, amounting to "circular reasoning to justify a result." The notion of acting corruptly suggests a willful breaking of the law, and she questions how Temple could have been said to corruptly persuade others to destroy documents when Temple thought it was legal at that time to dispose of extraneous paper.

James Dabney Miller, a Washington, D.C., lawyer who also has written about the case, says he hopes that the Supreme Court rules the government must prove criminal intent, mens rea, to obtain a conviction of obstruction.

"The conduct prosecuted in *Arthur Andersen* was conduct that many reasonable people would not think was criminal," he says.

"I think it's significant they were never prosecuted for an underlying offense. I also like a bright-line test in the criminal context. When the government serves a subpoena, the organization has a duty to preserve any documents that might be relevant. The wrong rule in my view is to put the burden on the company to try to figure what's in the government's mind," Miller says.

Andersen was prosecuted before the 2002 enactment of the Sarbanes-Oxley Act, which was designed to tighten the law in the wake of the Enron and WorldCom bankruptcies. It amended 18 U.S.C. § 1519, giving the government broad powers to prosecute companies for "knowingly" destroying or falsifying records "in relation to or contemplation of any matter or case." Congress dropped the reference to acting corruptly.

Because the new law was so broad, the acting solicitor general had advised the Supreme Court to turn away the *Andersen* case because it "will have little future impact in prosecutions for document destruction."

But Miller says he is encouraged that the court granted the appeal. It suggests the justices are interested in the issue of criminal intent. The new § 1519, he says, is so broad and vague that a wise corporate manager would be advised to avoid "even wistful glances at the delete key." ■