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ANDERSEN'S FALL FROM GRACE†

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Arthur Andersen is all but gone.[1] The accounting firm's undoing follows the collapse of Enron—a major Andersen client—in the first of an unparalleled series of corporate financial fraud scandals.[2] As civil and criminal investigations into Enron's accounting practices gathered steam, Andersen became the subject of a criminal investigation in its own right for destroying Enron-related documents. The investigation led to contentious plea negotiations between Andersen and the Justice Department, and when the talks broke down, Andersen was charged in a one-count indictment with obstruction of justice. Andersen's lawyers later appeared before a federal magistrate at the firm's arraignment while hundreds of chanting employees—many wearing Andersen T-shirts—demonstrated outside the courthouse to protest the prosecution.[3]

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1. With its public auditing practice closed at the end of August, 2002, Andersen's workforce of 28,000 U.S.-based partners and employees had dwindled to fewer than 3,000. Jonathan D. Glater, *Last Task at Andersen: Turning Out the Lights*, N.Y. TIMES, Aug. 30, 2002, at C3. *See also* SUSAN E. SQUIRES ET AL., INSIDE ARTHUR ANDERSEN—SHIFTING VALUES, UNEXPECTED CONSEQUENCES 146 (2003). The principal function of its remaining operation is winding up its business affairs—including collecting receivables, negotiating the cancellation of leases, and defending dozens of lawsuits. *See infra* text accompanying note 144, and tbl. 1.

2. *See generally* Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357 (2003) [hereinafter Brickey, *From Enron to WorldCom*]. During the first eighteen months when fraud indictments were handed down, more than ninety corporate officers and executives were criminally charged in major accounting and securities fraud scandals at Adelphia, Enron, HealthSouth, Qwest, Rite Aid, Tyco, WorldCom, and other publicly held corporations. During that same time, about half of the individuals who were charged pled guilty. *See id.* at app. A.

3. John Schwartz, *Arthur Andersen Employees Circle the Wagons*, N.Y. TIMES, Mar. 22, 2002,

The demonstration on the courthouse steps was emblematic of Andersen's high profile handling of the case. From the outset, Andersen embarked on an aggressive and often belligerent campaign to shield the firm from prosecution. As it struggled to preserve its reputation and to end the criminal probe, Andersen pursued some high-risk tactics that kept the firm in the public eye for an extended period of time. Those tactics ultimately led to Andersen's withdrawal from plea negotiations and the firm's indictment and trial.[4]

This Article critically examines the legal strategy Andersen pursued to save the firm. Part I explores why the government felt constrained to prosecute Andersen despite dire warnings that an indictment would deal the firm a fatal blow. Andersen's history of serious regulatory woes, its refusal to learn from its past, its insistence that it would not admit guilt as a firm, and its reasons for destroying Enron-related documents all combined to make a strong case for criminal prosecution. In addition, the threat of prosecution was one of the few remaining incentives for Andersen to change what had become a culture of noncompliance. But Andersen did too little and did it too late.

Part II analyzes Andersen's challenges to the legal adequacy of the indictment. The analysis reveals that Andersen relied on contrived arguments that both lacked support in the case law and contradicted the text of the statute under which the firm was charged. Yet its unfounded legal claims helped to mold public opinion in support of Andersen's cause.

Part III examines concerns Andersen raised about the government's procedures and tactics. Andersen claimed that the government abused its power by continuing the grand jury investigation after the firm was indicted and claimed that prosecutors arbitrarily denied Andersen an opportunity to present its case to the grand jury. Like the challenge to the legal adequacy of the indictment, these claims had little to recommend them. Andersen's arguments invited the court to intervene in matters over which it had little supervisory power, based the abuse of power claim on sheer speculation, and publicly cast the government's handling of grand jury matters in a plainly false light.

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at C1 [hereinafter *Employees Circle Wagons*]; *Arthur Andersen Pleads Not Guilty As Workers Protest at Courthouse*, WALL ST. J., Mar. 20, 2002, at C13 [hereinafter *Andersen Pleads Not Guilty*].

4. A jury convicted Andersen of obstruction of justice at the end of a six week trial. Mark Babinek, *Andersen Had Strong Motive, U.S. Says*, ST. LOUIS POST-DISPATCH, May 8, 2002, at C1; Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry on Enron*, N.Y. TIMES, June 16, 2002, at A1.

Part IV focuses on the tactics Andersen used to get its message across. Simply put, Andersen orchestrated an aggressive, high-profile public relations campaign to sway public opinion. In addition to portraying the firm's employees as "emotionally and financially crippled" by the indictment, Andersen cast the government's actions as "unjust," politically motivated, and a "gross abuse of government power."[5] Although the thematic material varied from time to time, the constants that tied it all together were Andersen's heated rhetoric and calculated distortion of the truth.

Putting the firm's handling of the case in a broader context, Part V considers some potentially harmful implications of Andersen's coordinated legal and public relations strategies, including potential harm to the justice and regulatory systems. On a more practical level, the Andersen experience has influenced regulatory and legislative agendas and led to reforms that will preclude the future use of Andersen's principal defenses.

I. ANDERSEN'S LIABILITY AS A FIRM

The narrative begins with Enron's disclosure of financial accounting problems in the fall of 2001.

- October 16: Enron issued a press release announcing a $618 million net loss for the third quarter.[6] It also told analysts that it would reduce shareholder equity by $1.2 billion. Enron stock immediately plummeted.[7]
- October 17: The SEC notified Enron that it had opened an inquiry and made a written request for information from Enron officials.[8]
- October 19: Enron notified the Andersen audit team that the SEC had initiated an inquiry into Enron's use of off-book special purpose entities.[9]

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5. *Andersen Pleads Not Guilty*, *supra* note 3; Press Release, Arthur Andersen, LLP, Statement by Arthur Andersen, LLP (Mar. 14, 2002) [hereinafter Andersen Mar. 14 Press Release] (on file with author).

6. Indictment, United States v. Arthur Andersen LLP, CRH-02-121, at 7 (S.D. Tex. Mar. 3, 2002) [hereinafter Andersen Indictment] (on file with author).

7. *Id.* at 3.

8. *Id.*

9. *Id.* at 5. The SEC also wanted to determine what role Enron's Chief Financial Officer, Andrew Fastow, played in orchestrating the use of special purpose entities. *Id.* Mr. Fastow was later

- October 20: High-level Andersen partners held an emergency conference call to discuss the SEC inquiry. Participants in the call concluded that Andersen auditors should assemble documentation that might help Enron respond to the SEC. [10]
- October 22: Andersen's Enron engagement team spent the day at Enron's headquarters.[11]
- October 23: Andersen's Enron engagement team began wholesale destruction of Enron-related documents in Houston.[12]
- November 8: Andersen received an SEC subpoena relating to the firm's Enron work.[13]
- November 9: The lead Enron engagement partner's secretary sent an emergency e-mail telling Andersen employees to stop the shredding[14] because Andersen had been "officially served" by the SEC.[15]
- January 4, 2002: Andersen reported the document destruction to the SEC and the Justice Department.[16]
- January 10: Andersen publicly disclosed the shredding.[17]

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indicted and charged with ninety-eight counts of fraud and related offenses. *See* Superseding Indictment, United States v. Fastow [Andrew], CRH-02-0665 (S.D. Tex. Apr. 30, 2003) [hereinafter Fastow Indictment] (on file with author). After protracted plea negotiations, he pled guilty to two counts of conspiracy. His plea agreement required him to serve a ten-year prison term and to cooperate in the continuing fraud investigation. *See* Plea Agreement, United States v. Fastow, CRH-02-0665 (S.D. Tex. Jan. 15, 2004) (on file with author).

10. Andersen Indictment, *supra* note 6, at 5.

11. *Id.*

12. *Id.* at 5-6.

13. *Id.* at 6.

14. *Id.* at 7; Press Release, Arthur Anderson, LLP, Andersen Announces Preliminary Enron-related Disciplinary and Administrative Actions (Jan. 15, 2002) [hereinafter Andersen Jan. 15 Press Release] (on file with author).

15. Andersen Indictment, *supra* note 6, at 7. According to one account, the secretary also taped a sign on the office shredder repeating the admonition. Flynn McRoberts, *Ties to Enron Blinded Andersen*, CHI. TRIB., Sept. 3, 2002, News Sec., at 1 [hereinafter *Ties to Enron*].

16. Destruction of Enron-Related Documents by Andersen Personnel: Hearing Before the House Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce, 107th Cong. 16 (2002) (statements of C.E. Andrews, Managing Partner, Global Audit Practice, Andersen LLP, and Dorsey L. Baskin, Jr., Managing Director, Professional Standards Group, Andersen, LLP).

17. Press Release, Arthur Andersen, LLP, Andersen Notifies SEC, Justice Department, Congress that a Significant but Undetermined Number of Enron-Related Documents Were Disposed of; Firm Issues New Interim Document Management Policy; Asks Former U.S. Sen. Danforth To Review Records Management Policies (Jan. 10, 2002) [hereinafter Andersen Jan. 10 Press Release] (on file with author).

- March 14: Andersen was indicted on one felony count of obstructing justice.[18]

From the outset, Andersen claimed that criminal prosecution of the firm would be unjust and "an extraordinary abuse of prosecutorial discretion."[19] This claim was based on several distinct but related themes. Foremost among them was concern about how an indictment could affect the continued viability of the firm. Under SEC rules, a felony conviction would disqualify Andersen from auditing public companies unless the firm received a waiver,[20] but the SEC gave no assurances that it would waive the rule if Andersen were convicted.[21] Thus, an indictment could trigger serious concerns about Andersen's future and further erode its client base, even if the firm were acquitted.[22]

As Andersen's lawyers put it, a criminal indictment would be tantamount to a death sentence for the firm, unfairly imposing punishment before trial.[23] That, in turn, would unjustly punish thousands of innocent

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18. *See* Andersen Indictment, *supra* note 6.

19. Press Release, Arthur Andersen, LLP, Statement by Arthur Andersen, LLP (Mar. 14, 2002) [hereinafter Andersen Mar. 14 Press Release] (on file with author).

20. *See* SEC Rules of Practice, 17 C.F.R. § 201.102(e) (2003).

21. Kurt Eichenwald, *S.E.C. Had Sought $500 Million in Failed Talks with Andersen*, N.Y. TIMES, Mar. 20, 2002, at A1 (detailing how three-way negotiations between Andersen, the DOJ, and the SEC fell through when the DOJ deadline for agreement on a guilty plea expired before Andersen concluded its negotiations with the SEC). *See also* Delroy Alexander & Stephen J. Hedges, *Andersen Charged in Shredding*, CHI. TRIB., Mar. 15, 2002, at 1.1 [hereinafter *Andersen Charged in Shredding*] (observing that Andersen's failure to obtain a waiver from the SEC was a major "sticking point" in the negotiations with the DOJ); Susan Schmidt & David S. Hilzenrath, *Andersen Is Indicted in Enron Case*, ST. LOUIS POST-DISPATCH, Mar. 15, 2002, at A1 [hereinafter *Andersen is Indicted*] (stating that negotiations with the DOJ broke down after Andersen failed to get SEC assurances that the agency would grant Andersen a waiver if the firm pled guilty); Michael Schroeder, *SEC Attempts To Reassure Current Clients of Andersen*, WALL ST. J., Mar. 15, 2002, at C1 (noting that the SEC's inaction was a blow to Andersen, which had hoped the Commission would intervene to prevent an indictment).

22. Other immediate concerns for Andersen included the role of state regulators, who could have revoked state licenses and imposed other crippling sanctions on the firm. *See* Jonathan Weil, Richard B. Schmitt, & Devon Spurgeon, *Arthur Andersen Met with U.S., Hoping to Strike Agreement*, WALL ST. J., Apr. 8, 2002, at C15 [hereinafter *Andersen Met with U.S.*]; Richard B. Schmitt, Ianthe Dugan, & Cassell Bryan-Low, *Andersen Will Meet With Justice Officials: Auditor Attempts to Settle Criminal Case, Civil Suits in Bid To Avert Collapse*, WALL ST. J., Apr. 5, 2002, at A3 [hereinafter *Andersen Will Meet With Justice Officials*]; Richard B. Schmitt, Gary Fields, & Devon Spurgeon, *U.S. May Be Open to Andersen Settlement: Admission of Wrongdoing Short of Guilty Plea Might Satisfy Prosecutors*, WALL ST. J., Apr. 4, 2002, at A3. *See also* Kurt Eichenwald, *Andersen Charged With Obstruction in Enron Inquiry*, N.Y. TIMES, Mar. 15, 2002, at A1 [hereinafter *Andersen Charged With Obstruction*]; *Connecticut AG Steps Up Investigation of Andersen*, 16 CORP. CRIME REP., Feb. 11, 2002, at 7; Richard B. Schmitt, Michael Schroeder, & Jonathan Weil, *Glitches Imperil Possible Deal for Andersen*, WALL ST. J., Apr. 17, 2002, at C1.

23. Floyd Norris, *Execution Before Trial for Andersen*, N.Y. TIMES, Mar. 15, 2002, at C1 [hereinafter *Execution Before Trial*]. *See also Andersen Pleads Not Guilty*, *supra* note 3 (quoting Andersen's lead trial lawyer as saying that an indictment would be "just as bad as a conviction" in

Andersen employees who were strangers to the Enron account and did not destroy Enron documents. Thus, the argument ran, it would be "extraordinary," "an unprecedented exercise of prosecutorial discretion," and "a gross abuse of governmental power" to prosecute the firm.[24]

Given the potentially dire consequences for Andersen and its employees, why did the government insist on criminally prosecuting the firm? Several plausible explanations come to mind. First, Andersen was no stranger to legal controversy. In June of 2001—just four months before Enron's accounting problems were publicly disclosed—Andersen and three of its partners settled a civil injunctive action brought by the SEC. The complaint charged that Andersen committed fraud in connection with its audits of Waste Management Inc.'s financial statements.[25]

In the Waste Management case, the SEC found that Andersen had violated the fundamental principle that an auditor owes its "ultimate allegiance" to corporate shareholders and the investing public.[26] Andersen failed to stand up to Waste Management executives and, from 1992-1997, knowingly or recklessly issued false and misleading audit reports.[27] Notably, the Waste Management litigation was the first time the SEC had ever accused a major accounting firm of securities fraud in connection with a failed audit.[28]

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terms of reputational harm to the firm).

24. Letter from Richard J. Favretto, Partner, Mayer, Brown, Rowe, & Maw, to Michael Chertoff, Assistant Attorney General 1 (Mar. 13, 2002) [hereinafter Favretto Letter] (on file with author). *See also* Andersen Mar. 14 Press Release, *supra* note 5.

25. Arthur Andersen LLP and Three Partners Settle Civil Injunctive Action and Related Administrative Proceedings; Andersen Practice Director Settles Administrative Proceedings, Litig. Release No. 17039, 75 SEC Docket 612 (June 19, 2001) [hereinafter SEC Settlement Release]. Waste Management, which had been an Andersen client since 1971, was considered a "'crown jewel' client." *Id.* at 615.

The Waste Management case was the first civil fraud complaint filed by the SEC against a major accounting firm in decades. *Execution Before Trial*, *supra* note 23.

26. *In re* Arthur Andersen LLP, Order Instituting Public Administrative Proceedings, Making Findings and Imposing Remedial Sanctions, Exchange Act Release No. 34-44,444, 75 SEC Docket 501, 511 (June 19, 2001) [hereinafter SEC Order, Findings, and Sanctions].

27. *Id.* A later SEC civil suit against six former Waste Management executives for securities fraud portrayed Andersen's actions in a harsher light, alleging that Andersen purposefully conspired with the executives to cook the company's books. Jonathan Weil & Michael Schroeder, *Waste Management Suit by SEC Zings Andersen*, WALL ST. J., Mar. 27, 2002, at C1.

An internal Andersen memo suggests that partners at the firm knew about Enron's accounting problems as early as mid-August after being warned about them by an Enron Vice-President, Sherron Watkins. Richard A. Oppel, Jr., *Auditor Received Warning on Enron Five Months Ago: Questions in Congress; Inquiry Says Andersen Studied Issues Raised but Decided to Stand by Its Work*, N.Y. TIMES, Jan. 17, 2002, at A1 [hereinafter *Auditor Received Warning*]; John R. Wilke, Anita Raghavan, & Alexei Barrianuevo, *U.S. Will Argue Andersen Knew of Missteps: Prosecutors Marshal Evidence About Role in Flawed Enron Work*, WALL ST. J., May 7, 2002, at C1 [hereinafter *Andersen Missteps*].

28. Jonathan Weil, *SEC Sanctions 2 at Ernst & Young: Partners Aided Violations at Cendant,*

The accounting fraud at Waste Management led to an earnings restatement of $1.43 billion—the largest in the history of the SEC.[29] Although Andersen agreed to settle the case without admitting or denying wrongdoing,[30] the settlement permanently enjoined Andersen from violating federal securities laws, censured the firm, and imposed a $7 million fine.[31] To settle SEC administrative actions against them, three Andersen partners on the Waste Management engagement team agreed to the entry of a permanent injunction against future violations of the securities laws, the imposition of civil monetary penalties against them, and the suspension of their privileges to practice as accountants before the SEC.[32] The SEC also suspended a fourth partner's privilege to practice for "engag[ing] in improper professional conduct."[33]

Just a month before the Waste Management settlement, the SEC filed securities fraud charges against another Andersen client, the Sunbeam Corporation.[34] The complaint also named five of Sunbeam's former top officers and Andersen's Sunbeam engagement partner.[35] Shortly before the SEC filed its civil complaint, Andersen settled a class action fraud suit over its accounting work for Sunbeam. The $110 million settlement was

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Agency Says; A Suspension From Audits, WALL ST. J., April 25, 2003, at C7 (reporting the SEC's suspension of two Ernst & Young partners from performing audits on public corporations for four years because of accounting irregularities found in their audits of Cendant Corporation).

29. SEC Andersen Order, Findings, and Sanctions, *supra* note 26, at 502. The accounting fraud also resulted in the understatement of Waste Management's tax expense by nearly $178 million. *Id.*

30. This is a customary practice in SEC settlements. Because the SEC lacks the resources to litigate every case it brings, it tries to resolve most of them through settlement agreements. Although the SEC believes that allowing defendants to settle a case without admitting guilt increases the chance of reaching a settlement, the agency is currently debating whether it should toughen settlement terms—including the possibility of requiring an admission of guilt as part of an agreement. Deborah Solomon, *SEC Considers Stronger Sanctions, Applying Stiffer Penalties in Coming Cases is Seen as Having Deterrent Value*, WALL ST. J., June 16, 2003, at A2.

31. SEC Andersen Order, Findings, and Sanctions, *supra* note 26; SEC Settlement Release, *supra* note 25, at 612-13.

32. Robert E. Allgyer, the partner responsible for the Waste Management engagement, was fined $50,000 and suspended from practice for at least five years; Edward G. Maier, the concurring partner on the Waste Management engagement, was fined $40,000 and suspended from practice for at least three years; and Walter Cercavschi, a partner on the Waste Management engagement, was fined $30,000 and suspended for at least three years. SEC Settlement Release, *supra* note 25, at 613.

33. The partner, Robert G. Kutsenda, served as Andersen's Central Region Audit Practice Director. *Id.*

34. *In re* Sunbeam Corporation, Order, Exchange Act Release No. 33-7976, 74 SEC Docket 2143 (May 15, 2001).

35. SEC v. Dunlap et al., SEC Sues Former Top Officers of Sunbeam Corporation and Arthur Andersen Auditor in Connection With Massive Financial Fraud, Litig. Release No. 17001, 74 SEC Docket 2271 (May 15, 2001); SEC v. Dunlap et al., Former Top Officers of Sunbeam Corp. Settle SEC Charges, Litig. Release No. 17,710, 78 SEC Docket 1136 (Sept. 4, 2002) [hereinafter Former Sunbeam Officers Settle].

reportedly one of the largest paid by an accounting firm in a shareholder suit.[36]

Although the SEC enforcement actions suggested serious lapses in auditing controls, Andersen remained unrepentant. By the time the sanctions in the Waste Management litigation were announced, Andersen had promoted the partner whom the SEC had suspended for improper professional conduct. As managing partner of global risk management, his new responsibilities included the task of developing strategies to limit Andersen's exposure to lawsuits.[37] Ironically, it was he who devised the client record retention and destruction policy whose purpose, meaning, and enforcement were central to the Enron document shredding dispute.[38]

Andersen's failure to take its encounters with the SEC more seriously provided a strong incentive to prosecute the firm. But the permanent injunction in the Waste Management case gave Andersen an equally strong reason to avoid prosecution at all costs. If convicted, Andersen could be found to have violated the injunction[39] and would be subject to additional and more severe SEC sanctions.[40]

To avoid these perils, Andersen tried to persuade the Justice Department to enter into a deferred prosecution agreement.[41] Under the arrangement that Andersen proposed, the government would forego bringing criminal charges in exchange for Andersen's agreement to undertake sweeping structural and management reforms.[42] Andersen

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36. Nicole Harris, *Andersen To Pay $110 Million To Settle Sunbeam Accounting-Fraud Lawsuit*, WALL ST. J., May 2, 2001, at B11. Sunbeam settled its part of the suit in August of 2002. *Judge Approves Sunbeam Settlement*, N.Y. TIMES, Aug. 10, 2002, at B2.

37. Flynn McRoberts, *Civil War Splits Andersen*, CHI. TRIB, Sept. 2, 2002, News Sec., at 1 [hereinafter *Civil War Splits Andersen*].

38. *Execution Before Trial*, *supra* note 23; *Civil War Splits Andersen*, *supra* note 37. *See* Arthur Andersen, Practice Administration: Client Engagement Information—Organization, Retention and Destruction, Statement No. 760 (February 2000) (on file with author) [hereinafter Client Engagement Information]. Ironically, there were allegations of improper document destruction in the Waste Management case as well.

39. The government clearly believed the document shredding violated the Waste Management injunction. *See Andersen Charged With Obstruction*, *supra* note 22.

40. Recently, for example, as part of continuing disciplinary proceedings against Ernst & Young, the SEC sought to bar Ernst from taking on additional public companies as audit clients for a period of six months. The disciplinary proceedings related to allegations that Ernst improperly co-marketed an auditing client's software in the 1990s. Cassell Bryan-Low, *Did Ties That Bind Also Blind KPMG?*, WALL ST. J., June 18, 2003, at C1.

41. Favretto Letter, *supra* note 24, at 2.

42. The proposed reforms were announced in mid-March by former Federal Reserve Chairman Paul Volcker, who headed an Independent Oversight Board created to identify and remedy management and accountability problems within the Andersen firm. Ken Brown & Joann S. Lublin, *Andersen Offers a Superb Case of Image Goofs*, WALL ST. J., Mar. 14, 2002, at C1 [hereinafter *Image Goofs*]; Jonathan Weil, *Andersen Retains Volcker in Effort To Boost Its Image: Former Fed Chairman*

would also agree to have a special monitor oversee implementation of the reforms and would promise to discipline everyone who was responsible for destroying Enron documents.[43]

This strategy failed for several reasons: the lawyers could not agree on all of the details, Andersen feared that state regulators and accountancy boards would revoke its state licenses,[44] and Andersen's partnership structure made it difficult to reach a decision within the allotted time.[45] But the key sticking points were whether—as the government insisted—Andersen would have to admit to wrongdoing as a firm,[46] and how long

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Is Set To Lead Panel To Help Change Audit Practices, WALL ST. J., Feb. 4, 2002, at A8. Mr. Volcker's plan included splitting Andersen's auditing and consulting functions and instituting other measures to avoid conflicts of interest in addition to ousting Andersen's top management. Cassell Bryan-Low, Mitchell Pacelle, Robert Frank, & John R. Wilke, *Andersen's Hopes To Avoid Indictment Dim: Deloitte, Ernst & Young End Merger Discussions Over Liability Concerns*, WALL ST. J., Mar. 14, 2002, at A3 [hereinafter *Andersen's Hopes Dim*]; Floyd Norris, *Andersen Told To Split Audits and Consulting*, N.Y. TIMES, Mar. 12, 2002, at C1; Press Release, Arthur Andersen, LLP, Volcker Outlines Framework for a "New Andersen" with Governing Board: Success Depends on Preconditions Dictated by Market Realities (March 22, 2002) (on file with author). *See also* Andersen Jan. 15 Press Release, *supra* note 14. The plan was contingent, however, on the Department of Justice agreeing to drop its plans to prosecute the firm; on the SEC's agreement to settle civil charges against the firm; and on Andersen partners' willingness to remain at a smaller, less profitable firm. Cassell Bryan-Low & Devon Spurgeon, *Andersen Partners Grasp at the Volcker Plan: Nationwide Teleconference Is Scheduled To Discuss Options To Save the Firm*, WALL ST. J., Mar. 28, 2002, at C1; Cassell Bryan-Low & Ken Brown, *Volcker Steps Up as Waste Management Bolts: Ex-Fed Chairman Offers To Take Over Andersen Amid More Defections*, WALL ST. J., Mar. 25, 2002, at C1.

43. Favretto Letter, *supra* note 24.

44. *See supra* note 22. *See also* Ted Bridis, *Negotiations Between U.S., Andersen Collapse, Says Government: Government Prepares for Trial on May 6*, ST. LOUIS POST-DISPATCH, Apr. 19, 2002, at C1; Richard B. Schmitt, Devon Spurgeon, & Jonathan Weil, *Behind Andersen's Tug of War with U.S. Prosecutors*, WALL ST. J., Apr. 19, 2002, C1; Jonathan Weil, Devon Spurgeon, & Cassell Bryan-Low, *Arthur Andersen Breaks Off Talks To Settle Criminal Case*, WALL ST. J., Apr. 19, 2002, at A1.

45. Kurt Eichenwald, *Talks Break Down Between Andersen and Justice Dept.: Trial Now Seen as Likely; Negotiations Over Enron Case Collapse as Auditor Balks at Deadline*, N.Y. TIMES, Apr. 19, 2002, at A1.

46. *Compare Andersen's Hopes Dim*, *supra* note 42 (reporting that any plea agreement would have to include admission of Andersen's responsibility for document destruction), *with Andersen Will Meet with Justice Officials*, *supra* note 22, *and Andersen Met With U.S.*, *supra* note 22 (reporting that a Justice Department official said that any agreement with Andersen would require the firm to accept public responsibility for the shredding), *and* David Spurgeon & Jonathan Weil, *Andersen to Settle as Soon as Today: Audit Firm Would Admit to Obstruction of Justice, Be Placed on Probation*, WALL ST. J., Apr. 12, 2002, at A3 (reporting that Andersen was prepared to admit that its agents obstructed justice if the government would enter into a deferred prosecution agreement).

Indeed, it was not even clear who had authority to negotiate with the Justice Department and the SEC. Kurt Eichenwald, *Andersen Dealt Another Setback as Takeover Civil Case Stalls: Firm Shows Signs of Growing Financial Problems*, N.Y. TIMES, Mar. 30, 2002, at C1 [hereinafter *Another Setback*]. *See also* Floyd Norris, *Leaderless When Direction Is Needed Most*, N.Y. TIMES, Mar. 30, 2002, at C1 [hereinafter *Leaderless*] (reporting that Andersen's legal strategy was controlled by the firm's United States Administrative Board).

Andersen would remain subject to prosecution if it violated the terms of the agreement.[47]

Andersen was adamant that it would not admit guilt, but in a last minute effort to reopen negotiations, the firm proposed that it would admit wrongdoing by some of its employees if the entire firm did not have to accept responsibility.[48] The Justice Department turned the proposal down.[49]

Though not widely discussed, this was not the first time Andersen had faced the threat of criminal prosecution. In 1996, Andersen paid $10.3 million to settle federal fraud charges relating to accounting services it had provided to Connecticut-based Colonial Realty Company.[50] An earlier $3.5 million settlement with the Connecticut Attorney General barred Andersen from doing real estate syndication work in Connecticut for a two-year period and barred the firm from bidding on or receiving state contracts for a year.[51] Andersen later agreed to pay $90 million to settle all claims relating to its role in the Colonial Realty scandal.[52]

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47. The government proposed a probation period of three years, but Andersen argued for a shorter term. Richard B. Schmitt, Devon Spurgeon, & Jonathan Weil, *Andersen, Justice Department Continue Settlement Discussions*, WALL ST. J., Apr. 15, 2002, at A2.

48. *See* Jonathan Weil, *Andersen Attorney Is New Focus of Expanding Criminal Inquiry*, WALL ST. J., Apr. 25, 2002, at A1; Richard B. Schmitt, Jonathan Weil, & Cassell Bryan-Low, *Andersen Bids Again To Settle Criminal Charge*, WALL ST. J., Apr. 25, 2002, at C1 [hereinafter *Andersen Bids To Settle*]; Kurt Eichenwald & Jonathan D. Glater, *Andersen Sends New Proposal for Settlement to Government*, N.Y. TIMES, Apr. 25, 2002, at C1; Jonathan Weil, *Two Employees at Andersen Are Key to U.S. Investigation: Focus Is on Refusals To Destroy Documents; Firm's Lawyer Says U.S. Rejects Settlement Overture*, WALL ST. J., Apr. 26, 2002, at C1 [hereinafter *Two Employees Are Key*]; *Andersen's Hopes Dim*, *supra* note 42.

Contrary to this factual account, Andersen's lead trial lawyer now claims that if Andersen had been offered a deferred prosecution deal like the one Merrill Lynch reached with the Enron Task Force, Andersen would have agreed to it "in a New York second." Kristen Hays, *Lawyer for Andersen Decries Merrill Deal*, AUSTIN AMERICAN-STATESMAN (Texas), Sept. 20, 2003, at F3. Since Merrill Lynch was required to accept responsibility for criminal acts its employees may have committed, see *supra* note 41, Hardin's complaint that this is "the way it should be done" and that "the way they did it with Arthur Andersen is wrong" provides another curious twist. *Id.*

49. Two Employees Are Key, *supra* note 48.

50. George Judson, *Accountants to Pay $10 Million to Victims of Real Estate Fraud*, N.Y. TIMES, Apr. 24, 1996, at B5; Mark Pazniokas, *Accounting Firm Settles Colonial Case for $10.5 Million*, THE HARTFORD COURANT, Apr. 15, 1996, at A1; *If Andersen Gets Deferred Prosecution Agreement, It Won't Be the First Time*, 16 CORP. CRIME REP., Apr. 24, 2002, at 1 [hereinafter *Deferred Prosecution Agreement*]. Like Enron, Colonial Realty went bankrupt because of the fraud. *Id.* The Colonial Realty scandal led to more than a dozen criminal convictions. Mark Pazniokas, *Former Banker Pleads Guilty in Colonial Case*, THE HARTFORD COURANT, Apr. 13, 1994, at D8 (noting the thirteenth conviction in the Colonial case).

51. *Andersen Settles Colonial Realty Case: $3.5 Million*, CHI. SUN-TIMES, May 5, 1993, at 69; Stanley Ziemba, *Settlement Costs Firm Millions*, CHI. TRIB., May 5, 1993, at 1; Gregory Seay and George Gombossy, *Colonial Accountants Agree to Fine: Attorney General Highly Critical of Andersen Firm*, THE HARTFORD COURANT, May 5, 1993, at A1. *Cf.* Diane Levick, *Settlement Is Latest Blow to*

Andersen's strategy for resolving the Enron matter came from the same play book. In Colonial Realty, Andersen settled the federal charges through a deferred prosecution agreement. The acting United States Attorney agreed to this course of action partly because of concern that prosecuting the firm would harm innocent Andersen employees and partly because there was no evidence that the wrongdoing was firm-wide.[53] As was true of the SEC settlement in the Waste Management case, the deferred prosecution agreement in Colonial Realty did not require Andersen to acknowledge any wrongdoing.[54] And, as with Enron, once Colonial Realty's financial difficulties began to surface, Andersen began destroying all "extraneous" Colonial documents and electronic files.[55]

So where does all of this leave us? By the government's lights, Andersen destroyed Enron documents to avoid detailed SEC scrutiny of Enron accounting issues and to forestall a finding that it had violated the Waste Management injunction. But the permanent injunction, censure, and large financial penalties imposed in Waste Management did little to change Andersen's course.[56] As was true of its ties with Waste Management,[57] Andersen enjoyed a cozy relationship with Enron that seriously compromised its independence.[58] Andersen even allowed Enron's management to overrule Andersen's own Professional Standards Group (PSG) on technical accounting issues and to bar a member of PSG

Profession Under Fire, THE HARTFORD COURANT, May 5, 1993, at A18.

52. *$90 Million Deal Settles Colonial Case: Arthur Andersen Firm To Pay Realty Investors*, THE HARTFORD COURANT, Apr. 22, 1999, at A1. The agreement settled 31 federal lawsuits against Andersen. *Id.*

53. *Deferred Prosecution Agreement*, *supra* note 50.

54. *Id.*

55. *Id.*; George Gombossy, *Staff's Competence, Integrity Questioned: Report Questions Accountants' Competence*, THE HARTFORD COURANT, May 5, 1993, at A1 [hereinafter *Staff's Competence Questioned*].

56. *See supra* text accompanying notes 37-38. *See also Leaderless*, *supra* note 46.

57. Until 1997, every person who had held the position of chief financial officer or chief accounting officer at Waste Management was an Arthur Andersen alum. *Civil War Splits Andersen*, *supra* note 37.

58. According to the court-appointed examiner in Enron's bankruptcy proceedings, more than eighty-five Andersen accountants left the firm to become Enron employees between 1989 and 2000. Final Report of Neal Batson, Court-Appointed Examiner 39, In re: Enron Corp., 01-16-34 (Bankr. N.D.N.Y. Nov. 4, 2003) [hereinafter Final Batson Report]. Many of those Andersen alums had previously worked on the Enron account. *See* United States v. Arthur Andersen LLP, CRH-02-121, Trial Transcript at 1113-14 (Testimony of Kate Agnew) [hereinafter Andersen Trial Transcript] (on file with author). It was not uncommon for other members of the Enron engagement team to work primarily with former colleagues who were Andersen alums. *Id.* Some members of the Andersen engagement team developed close personal relationships with Enron executives, and David Duncan even vacationed with them. *See* ROBERT BRYCE, PIPE DREAMS: GREED, EGO, AND THE DEATH OF ENRON 237-38 (2002); MIMI SWARTZ & SHERRON WATKINS, POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON 234 (2003).

from consulting on Enron matters because he was "too rule-oriented" and Enron did not like his accounting advice.[59] Thus, in view of Andersen's past, the government's decision to prosecute the firm should have come as no surprise.

Second, it would be shortsighted to disregard the harm the shredding may have caused. Destruction of a paper trail crucial to understanding Enron's complex and sometimes byzantine financial transactions could have jeopardized the government's probe of a potentially massive fraud. Thus, even though Andersen may have been motivated by concerns about its complicity in the fraud, the importance of the document shredding extends well beyond Andersen's attempt to save its own hide.

And third, despite Andersen's claims to the contrary, conventional rules of entity liability fit this case like a glove. Andersen maintained that the shredding was confined to a few rogue employees in the Houston office and had occurred without the knowledge or consent of senior Andersen management.[60] Thus, the argument ran, since the shredding was neither widespread nor approved at the top, a decision to prosecute the entire firm would be legally and factually baseless.[61]

The "entire firm" language provides an interesting twist. Under established rules of enterprise liability, a firm can be prosecuted only if it is recognized as a legal entity.[62] In Andersen's case, the entity was Arthur

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59. *Ties to Enron*, *supra* note 15; Jonathan Weil & Alexei Barrionuevo, *Andersen Is Denied Witness Notes*, WALL ST. J., May 13, 2002, at C16; Tom Hamburger, Richard B. Schmitt, & John R. Wilke, *Andersen Auditor Talks With U.S.: Auditor Who Questioned Accounting for Enron Speaks to Investigators*, WALL ST. J., Apr. 1, 2002, at C1 [hereinafter *Andersen Auditor Talks*]; Anita Raghavan, *How a Bright Star at Andersen Fell Along With Enron*, WALL ST. J., May 15, 2002, at A1. *See also* Andersen Trial Transcript, *supra* note 58, at 114-15 (testimony of Kate Agnew); *id*. at 1344-51 (testimony of Amy Repepi). The PSG partner, Carl Bass, was removed from consultations on the Enron account after Enron management complained that he raised questions about Enron's aggressive accounting. *Id.* at 1163 (testimony of Carl Bass). The Enron executive who asked to have Mr. Bass removed was Richard Causey, Enron's chief accounting officer and an Andersen alum. *See id*. at 1114, 1163-64 (testimony of Kate Agnew). Mr. Causey has since been charged in a forty-two count indictment with conspiracy, securities fraud, wire fraud, making false statements to auditors, and insider trading. *See* Superseding Indictment, United States v. Skilling, CRH-04-25 (S.D. Tex, Feb. 18, 2004) [hereinafter Skilling Indictment] (on file with author).

60. *Image Goofs*, *supra* note 42; Richard B. Schmitt, *Andersen Gets an Early Date for Federal Trial*, WALL ST. J., Mar. 21, 2002, at C1 [hereinafter *Early Date*]; Kurt Eichenwald, *Andersen Is Said to Rule Out Plea: Indictment Looms Over Enron Hope for Merger Fades*, N.Y. TIMES, Mar. 14, 2002, at A1; *Andersen's Fight*, CHI. TRIB., Mar. 15, 2002, at 1.16.

61. Favretto Letter, *supra* note 24, at 3.

62. As the common-law rules for entity liability evolved, the focus was on associations doing business in the corporate form. *See* Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393 (1982). The modern rule is far more expansive. Under federal law, for example, unless the context otherwise requires, statutes in the United States Code—including those in the federal criminal code—are applicable to both incorporated and unincorporated associations. *See* 1 U.S.C. § 1 (2002) (defining the terms "person" and "whoever" to

Andersen, LLP—a limited liability partnership. Even if all or most of the shredding had been limited to the Houston office, as Andersen claimed, that office was integrated into the limited liability partnership and had no identity distinct from the firm. Thus, because it was not a separate legal entity, the Houston office could not be prosecuted separately from the firm.[63] That being true, the government's only choice was either to prosecute the "entire" Andersen firm or forego the opportunity to seek institutional accountability.

Moreover, Andersen's argument that the government failed to identify any "higher ups" who masterminded the criminal scheme is simply beside the point. Under the respondeat superior rule applicable to federal criminal trials, the acts and intent of agents at any level of an entity's hierarchy—including those at the lower end of the organizational ladder[64]—are imputable to the firm.[65]

But the factual premises for Andersen's claims are equally flawed. As the global management partner on the Enron engagement, David Duncan was part of Andersen's senior management team. It was Duncan who directed the expedited destruction of Enron documents to keep them from

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include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies" throughout the federal code, unless the context otherwise requires). Specialized regulatory schemes may also define the term "person" even more expansively. *See, e.g.*, 31 U.S.C. § 5312(a)(4) (2000) (defining the term "person" to include—in addition to those enumerated in 1 U.S.C. § 1—trustees, representatives of estates, and governmental entities for purposes of the currency reporting requirements in the Currency and Foreign Transactions Reporting Act).

63. At least one account suggests that Andersen tried to persuade the government to approve a restructuring that would allow Andersen to spin off the Houston office as a separate entity, reasoning that the Houston office could then be separately prosecuted without implicating the rest of the firm. The government persisted in its view that the firm as a whole would have to bear responsibility for the shredding, so no agreement to that effect was ever reached. *Andersen's Hopes Dim*, *supra* note 42.

But even if a spinoff of the Houston office had occurred, the restructuring solution would have remained problematic. General principles of entity liability allow the criminal acts and intent of Andersen's agents to be imputed to the firm. If the Houston office had been restructured as a separate partnership, the crucial time for determining its status as a legal entity would have been the time when the criminal conduct occurred. When Andersen partners and employees shredded the Enron documents, the Houston office had no separate legal identity. Thus, Andersen was the only entity to which its agents' acts and intent could be imputed.

64. *See, e.g.*, United States v. Harry L. Young & Sons, 464 F.2d 1295 (10th Cir. 1972) (upholding conviction of common carrier corporation whose truck drivers left explosive-laden truck unattended).

65. Nor does the respondeat superior rule require that the wrongdoing be firm-wide. As long as the agent acted within the scope of his employment and on behalf of the organization, the firm can be held responsible. United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972).

The scope of employment rule merely requires that the agent's conduct be in connection with his performance of some job-related activity. *Id.* Conduct may be "within the scope of employment" even though it is beyond the actual scope of the agent's authority or contrary to express instructions. *Id*. at 1004, 1008 (holding that hotel purchasing agent's boycott of hotel supplier, which was contrary to express instructions and motivated by "personal pique," was imputable to his employer).

the SEC.[66] He was not a rogue employee acting alone. He called an urgent meeting at which Andersen personnel were told to begin the shredding.[67] He was a high managerial agent acting on Andersen's behalf. Duncan later admitted responsibility for directing the shredding and pled guilty to obstruction of justice.[68] Although his plea does not require a finding that Andersen is guilty as well, it is more than sufficient to expose Andersen as a firm to criminal liability.[69]

Quite apart from Duncan's admission of guilt, the claim that the Enron document destruction was nothing more than routine shredding cannot be sustained. As will be seen in Part II, it was an unprecedented and sustained effort that involved the expedited shredding of tons of Enron records. Nor was the shredding a purely localized effort. A number of Andersen partners and employees—including partners in the Chicago, Portland and London offices—construed an e-mail from Andersen's legal department as a signal to start destroying Enron documents, and partners in Chicago and London soon began deleting computer files and shredding records.[70] Thus, contrary to Andersen's claim, the shredding was not confined to the Houston office after all. It occurred on a far more widespread basis and was a collective effort of the firm.

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66. Although Andersen's position shifted from time to time, Andersen publicly blamed Duncan for the shredding and dismissed him from the firm. *Compare Image Goofs*, *supra* note 42, *and Auditor Received Warning*, *supra* note 27, *and* Floyd Norris, *For Andersen and Enron, the Questions Just Keep Coming: Firing Leaves Accounting Firm Open to Criminal Investigation*, N.Y. TIMES, Jan. 16, 2002, at C1 [hereinafter *Questions Keep Coming*], *and* Richard A. Oppel, Jr. and Kurt Eichenwald, *Arthur Andersen Fires an Executive for Enron Orders: 3 Others Placed on Leave; Firm Says That a Partner Told Auditors To Destroy Papers and E-Mail in the Case*, N.Y. TIMES, Jan. 16, 2002, at A1 [hereinafter *Andersen Fires Executive*] (reporting that Andersen stated that David Duncan ordered Enron document destruction), *and* Ken Brown, Greg Hitt, Steve Liesman, & Jonathan Weil, *Andersen Fires Partner It Says Led Shredding of Enron Documents: It Claims Disposal Effort Started After SEC Asked Energy Firm for Data; Was He Following Orders?*, WALL ST. J., Jan. 16, 2002, at A1 (reporting that Andersen dismissed Duncan and vowed to fire others who participated in document destruction), *with* Kurt Eichenwald, *Andersen May Find Its Fate in Hands of the Man It Fired*, N.Y. TIMES, Mar. 25, 2002, at A1 (quoting Andersen's lead trial lawyer as saying that "Duncan did not commit a crime" and that "[w]e will never suggest that he did"), *and Early Date*, *supra* note 60 (reporting that Andersen attorneys stated that David Duncan did not intend to commit any crimes).

67. Andersen Jan. 15 Press Release, *supra* note 14, at 1-2.

68. Information, United States v. Duncan, CRH-02-209 (S.D. Tex. Apr. 9, 2002) [hereinafter Duncan Information] (on file with author); Cooperation Agreement, United States v. Duncan, CRH-02-209 (S.D. Tex. Apr. 6, 2002) [hereinafter Duncan Cooperation Agreement] (on file with author).

69. The implication of Andersen's claim is either that the partner, David Duncan, did not commit a crime or that, as the lead engagement partner for one of Andersen's largest accounts, he was too subordinate to act for the firm.

70. Andersen Trial Transcript, *supra* note 58, at 982-85 (testimony of Benjamin Neuhausen, Arthur Andersen partner assigned to Professional Standards Group in Chicago); Kurt Eichenwald, *Andersen Executive Says Shredding Worried Him*, N.Y. TIMES, May 31, 2002, at C4.

Simply put, Andersen's claim that prosecution of the entire firm would be legally and factually baseless was—well, legally and factually baseless.

II. THE OBSTRUCTION OF JUSTICE CHARGE

The obstruction of justice charge revolved around three key points. The indictment charged: (1) that Andersen knew about accounting irregularities at Enron and about allegations of fraud relating to Enron's use of special purpose entities; (2) that after Enron told Andersen about the SEC inquiry, Andersen hired an outside law firm in anticipation of litigation relating to the Enron engagement; and (3) that Andersen partners instructed employees in the Houston, Portland, Chicago, and London offices to destroy Enron documents and electronic files to make them unavailable for use in government investigations.[71]

Andersen lawyers claimed the obstruction of justice charge was groundless because no official proceeding was pending when the document destruction occurred. Since the Enron records were destroyed before Andersen was subpoenaed to produce them, Andersen maintained there could be no obstruction of justice because there was no proceeding to obstruct.[72]

This argument has a curious ring. Historically, the federal obstruction of justice statutes[73] required proof of a pending proceeding.[74] If the

71. Andersen Indictment, *supra* note 6, at 3-6.

72. *Updated Analysis on the Justice Indictment of Andersen: The Government's Factual and Legal Errors* at 4 (Mar. 15, 2002) [hereinafter *Andersen Analysis*] (on file with author). Andersen made the same argument in the Colonial Realty case. *See Staff's Competence Questioned*, *supra* note 55 (stating that Andersen's legal counsel approved the Colonial document destruction because there was no "'existing or expected subpoena'") (quoting ATTY. GEN. & MULTI-AGENCY INVESTIGATORY TEAM REP. TO THE CT. STATE BOARD OF ACCOUNTANCY, INVESTIGATION OF THE ACCOUNTING SERVICES PROVIDED BY ARTHUR ANDERSEN & CO. TO THE COLONIAL REALTY CO. ON THE COLONIAL CONSTITUTION LIMITED PARTNERSHIP AND THE RELATIONSHIP BETWEEN ARTHUR ANDERSEN & CO. AND COLONIAL REALTY (May, 1993)) [hereinafter REP. TO THE CT. STATE BOARD OF ACCOUNTANCY] (on file with author).

73. The principal statutes are 18 U.S.C. § 1503 (2000) (relating to obstruction of judicial proceedings) and 18 U.S.C. § 1505 (2000) (relating to obstruction of administrative or congressional proceedings).

74. The pending proceeding requirement in 18 U.S.C. § 1503 is imposed by case law. *See, e.g.*, United States v. Washington Water Power Co., 793 F.2d 1079, 1084 (9th Cir. 1986); United States v. Reed, 773 F.2d 477, 485 (2d Cir. 1985). The requirement in 18 U.S.C. § 1505 is explicitly imposed by statute.

While there is no evidence of a pending judicial proceeding at the time the shredding occurred, the SEC had already notified Enron that it was opening an inquiry, and Enron had passed the word along to Andersen. Andersen Indictment, *supra* note 6, at 5. Thus, under section 1505, the question would be whether an informal SEC inquiry in its early stages—here, a written request for Enron materials—is the legal equivalent of a pending proceeding before the agency.

indictment had charged a violation of one of those laws, the pending proceeding issue would have been ripe for consideration. But the crux of the problem is this: Andersen was charged under a more recently enacted witness tampering statute,[75] which prohibits corruptly persuading another person to alter or destroy a document to impair its availability for use in an official proceeding.[76] While Andersen's argument made it appear that the firm was on the same legal footing as it would have been if it were charged under a different law, that is simply not the case.

The witness tampering statute unambiguously provides: "For purposes of this section . . . an official proceeding *need not be pending or about to be instituted* at the time of the offense."[77] Thus, the focus of the statute is not the status of the proceeding. It is, instead, the actor's purpose. He must intend to make the records unavailable for use in an official proceeding, whether or not the proceeding is actually pending when the tampering occurs.

Given the clarity of the statute, one is left to wonder how Andersen's lawyers transformed the pending proceeding issue into a key element of its defense. Apart from sheer bravado, a thorough search of the record discloses only one authority cited to support Andersen's claim.[78] As luck would have it, the case is wholly inapposite.[79] Yet Andersen persisted in claiming that the indictment failed to charge the firm with a crime.

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75. *See* 18 U.S.C. § 1512(b) (2000).

76. The term "official proceeding" includes an authorized proceeding before a federal regulatory agency. 18 U.S.C. § 1515(a)(1)(C) (2000).

77. 18 U.S.C. § 1512(f)(1) (2000) (emphasis added).

78. United States v. Shively, 927 F.2d 804 (5th Cir. 1991).

79. Andersen cites *Shively* in several documents, including the Favretto Letter, *supra* note 24, at 3, and a background paper from its legal team. *See Andersen Analysis*, *supra* note 72, at 4.

In *Shively*, a federal indictment charged the defendants with intimidating a witness two-and-a-half years earlier with intent to prevent him from truthfully testifying in an official proceeding. 927 F.2d at 811. At the time when the intimidation occurred, the witness was scheduled to testify in a *state* civil suit the Shivelys had filed against their insurance company. *Id.* The state court proceeding clearly did not qualify as an official proceeding under section 1512, which applies only to federal proceedings. 18 U.S.C. § 1515(a)(1) (2000).

The government argued that the jury could have found that one purpose of the intimidation was to deter the witness "from testifying honestly before any federal grand jury that might be convened" in the future, but the court concluded that there was no evidence that the defendants' intent went beyond trying to influence testimony in the state civil proceedings. *Shively*, 927 F.2d at 811-12.

Because there was no evidence that the Shivelys threatened the witness in anticipation of a federal proceeding (i.e., a federal grand jury proceeding) that was ongoing or scheduled to begin sometime in the future, there was no violation of the statute. *Id.* at 812-13.

The court in *Shively* explicitly acknowledged that the statute does not require the government to prove that a proceeding is pending or about to be instituted. *Id.* at 812 (citing United States v. Scaife, 749 F.2d 338, 348 (6th Cir. 1984) and 18 U.S.C. § 1512(e)(1) (now renumbered § 1512(f)(1) by an amendment added by the Sarbanes-Oxley Act).

Andersen also claimed the obstruction of justice charge was flawed because the government could not prove that any of the documents contained "any incriminating information that could have materially advanced a governmental inquiry."[80] Stated differently, there was no evidence that any of the destroyed documents contained "smoking guns."[81]

This argument is problematic in at least two respects. First, the witness tampering statute does not require that the contents of altered or destroyed records be material to the proceeding. On the contrary, it explicitly provides that the records need not even be admissible or free from a claim of privilege.[82] Second, the argument is highly contrived. To require the government to prove the evidentiary value of a document that was destroyed for the very purpose of concealing its contents would "yield the perverse result that the more successful the obstruction the less likely the prosecution."[83] Surely this cannot be so.[84]

Andersen also claimed the indictment was based on flimsy evidence that its employees acted corruptly or with intent to obstruct.[85] Indeed, Andersen insisted that the document destruction amounted to nothing more than routine shredding to comply with its record retention policy.[86]

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80. Favretto Letter, *supra* note 24, at 3.

81. *Andersen Analysis*, *supra* note 72, at 2.

82. 18 U.S.C. § 1515 (f)(2) (2003) (as renumbered by Sarbanes-Oxley Act).

83. Letter from Michael Chertoff, Ass't Att'y Gen., to Richard J. Favretto, Esq. (Mar. 14, 2002) [hereinafter Chertoff Letter] (on file with author).

An even more contrived argument can be found in a background paper Andersen lawyers prepared. The paper claimed that because in-house investigators were able to retrieve many deleted e-mails, "it is not possible to conclude that any of the document destruction . . . actually resulted in the loss of important accounting information." *Andersen Analysis*, *supra* note 72, at 2. This argument is both illogical and contrary to the terms of the statute. The thrust of the crime is corruptly persuading or attempting to persuade another to conceal, alter, or destroy evidence. The statute does not require actual or irretrievable loss of information.

84. Indeed, the case law in many jurisdictions is to the contrary. Some courts will draw an adverse inference against a party who improperly destroys evidence. *See, e.g.*, Warner Barnes & Co. Ltd. v. Kokosai Kisen Kabushiki Kaisha, 102 F.2d 450, 453 (2d Cir. 1939) ("[w]hen a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt"); Bird Provision Co. v. Owens Country Sausage, Inc., 379 F. Supp. 744, 751 (N.D. Tex. 1974), aff'd, 568 F.2d 369 (5th Cir. 1978) ("[I]t is elementary in the law of evidence that when a party destroys, fabricates or alters evidence, the Court properly may draw inferences unfavorable to the spoliator.").

85. Favretto Letter, *supra* note 24, at 4.

86. Kristen Hays, *Jurors Hear Final Arguments*, CHI. SUN-TIMES, June 6, 2002, Financial Sec., at 57 (reporting that Andersen's closing argument claimed that the shredding was routine compliance with the firm's document policy and was designed to protect client confidentiality); Jonathan Weil & Alexei Barrionuevo, *Andersen Hits Major Setback One Day Into Criminal Trial: Federal Judge Rules Government Can Introduce Past Misconduct as Evidence of Obstruction Motive*, WALL ST. J., May 8, 2002, at C1 [hereinafter *Andersen Hits Setback*] (quoting Andersen's lead trial lawyer as stating that "[s]hredding is not a dirty word in the accounting world" and that it is routinely done to safeguard client confidentiality). *Cf. Staff's Competence Questioned*, *supra* note 55 (stating that it was not

Again, the claim is highly problematic. David Duncan, the lead partner on the Enron engagement team, admitted he told Andersen partners and employees to destroy documents to keep them from the SEC.[87] And as was seen in Part I, his corrupt intent is imputable to the firm.

But there is more to it than that. A controversial e-mail from Nancy Temple, a partner in Andersen's legal department, urged compliance with the firm's document policy at a highly crucial time.[88] The policy required destruction of all audit-related papers that were not included in the final work papers.[89] Although she denied that concern about possible litigation played a role in her decision to send the e-mail, she opened an Enron litigation tracking account on her computer just twenty-one minutes after sending it. Coincidentally, Andersen had just hired outside litigation counsel,[90] and Temple knew about Enron's impending earnings

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unusual for Andersen to destroy extraneous documents toward the end of an engagement assignment).

At one point, Andersen spokesmen even claimed that the Enron documents were destroyed only because Andersen personnel were "embarrassed" that the audit files were such a "mess." *Andersen Charged in Shredding*, *supra* note 21. This, too, has an all too familiar ring. *See* REP. TO THE CT. STATE BOARD OF ACCOUNTANCY, *supra* note 72, at 144-47 (describing how Arthur Andersen systematically destroyed documents relating to its work for Colonial Realty because of an audit partner's "frustration with the condition of the . . . files"). *See also Staff's Competence Questioned*, *supra* note 55 (also quoting the report).

87. *See* Duncan Information, *supra* note 68; Duncan Cooperation Agreement, *supra* note 68. Duncan ordered the document destruction at a meeting on October 23, the day after Enron informed Andersen that it was being investigated by the SEC. *Andersen Fires Executive*, *supra* note 66; *Auditor Received Warning*, *supra* note 27; *Image Goofs*, *supra* note 42; *Questions Keep Coming*, *supra* note 66; *see also* Andersen Trial Transcript, *supra* note 58, at 1874-1913 (testimony of David Duncan).

88. The e-mail was sent on October 12 to Michael Odom, the risk management partner responsible for Andersen's Houston office. The text of the message read: "'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.'" Press Release, Arthur Andersen, LLP, Statement (Jan. 14, 2002) [hereinafter Andersen Jan. 14 Press Release] (on file with author). The e-mail also contained a link to the policy on Andersen's internal website. This appears to be the first time that this had ever been done. Andersen Trial Transcript, *supra* note 58, at 979 (testimony of Benjamin Neuheusan, Partner & Member of Professional Standards Group, Arthur Andersen, LLP). Mr. Odom forwarded the message to David Duncan, the lead engagement partner on the Enron account, with the note, "'More help.'" Andersen Jan. 14 Press Release, *supra*.

89. *See* Client Engagement Information, *supra* note 38. The policy did not extend to many of the documents that were destroyed or deleted on an expedited basis. Andersen Trial Transcript, *supra* note 58, at 1294-95 (testimony of Carl Bass).

90. Letter from W.J. "Billy" Tauzin, Chairman, Subcommittee on Oversight and Investigations of the House Committee on Energy & Commerce, and John D. Dingell, Ranking Committee Member, to John Ashcroft, Attorney General, 4 (Dec. 17, 2002) (on file with author). The tracking file also contained a notation that Enron expected to take a charge against its third quarter earnings and that Andersen had determined that the accounting method for the first and second quarters was incorrect. Because Temple's sworn testimony during a congressional investigation of Enron conflicted with evidence introduced at Andersen's trial, the Committee sent a criminal referral letter to the Justice Department asking the Department to investigate whether Temple committed perjury during her congressional appearance. *Id*. at 1.

restatement and about issues concerning questionable accounting methods. Moreover, the document policy she invoked had been created in part to ensure that non-essential documents that might be useful to third parties—including regulators and litigants—would be destroyed.[91] And last, her e-mail urged compliance with a policy that had rarely been mentioned and had never been enforced.[92]

The timing of the Nancy Temple e-mail and the document destruction is critical because the government had just begun its investigation of accounting irregularities at Enron. More telling still, Andersen itself publicly acknowledged that the shredding was *not* routine document disposal. In a January 15 press release, Andersen stated that David Duncan had called an urgent meeting on October 23 "to organize the expedited effort to destroy Enron-related documents."[93] The press release continued:

> In its review of the document disposal issue, the firm discovered activities including the deletions of *thousands* of e-mails and the *rushed disposal* of a large number of paper documents. These activities were on *such a scale* and of *such a nature* as to remove any doubt that Andersen's policies and reasonable good judgment were violated.[94]

Later in the month, Andersen's managing partner and CEO Joseph Berardino issued a statement acknowledging the document destruction was "wrong" and that Andersen's 85,000 partners and employees were "appalled," "disappointed," and "angry" about it.[95] These are Andersen's words, not mine.

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91. Another e-mail from an Andersen staff member, titled "Destruction of files," notes that at an October 10 meeting in Houston "we were reminded that once files have been coded, all other documents/electronic files etc. should be destroyed . . . this is especially important with pending litigation." *Andersen Missteps*, *supra* note 27. A facsimile of the Nancy Temple e-mail with Michael Odom's notation is published in PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON: EVERYONE'S GUIDE TO THE LARGEST BANKRUPTCY IN U.S. HISTORY 202 (File 7) (2002).

Moreover, an instructional videotape shows Michael Odom telling employees that if Andersen's document policy is followed and "litigation is filed the next day, that's great . . . whatever there was that might have been of interest to somebody is gone and is irretrievable." Jonathan Weil & Alexei Barrionuevo, *Andersen Takes Different View on Shredding*, WALL ST. J., May 10, 2002, at C1 [hereinafter *Different View on Shredding*]; *Andersen Missteps*, *supra* note 27.

92. *See* Andersen Trial Transcript, *supra* note 58, at 1291 (testimony of Carl Bass); *Andersen Hits Setback*, *supra* note 86.

93. Andersen Jan. 15 Press Release, *supra* note 14, at 1-2. A letter from one of Andersen's outside lawyers to the Assistant Attorney General also characterized the shredding as an "expedited effort to destroy documents." Favretto Letter, *supra* note 24, at 2. Simply put, Andersen spokesmen publicly admitted the shredding was not routine.

94. Andersen Jan. 15 Press Release, *supra* note 14, at 1 (emphasis added).

95. Joseph F. Berardino, Statement to Chicago Media (Jan. 28, 2002) (on file with author).

Moreover, Andersen argued that it fully cooperated with the government and even turned itself in. According to Andersen's lawyers, when the document destruction came to light, Andersen "immediately notified the Justice Department and the SEC."[96] Yet if the document destruction at the Houston office was merely routine, why would Andersen find it advisable to notify federal prosecutors and securities regulators? And why would it issue a press release about its continuing investigation into routine shredding and its planned disciplinary and administrative actions against eight partners who did it?[97] Andersen cannot have it both ways.

III. THE GOVERNMENT'S PROCEDURES AND TACTICS

Andersen also complained that the government's treatment of the firm was highly unfair. A brief account of events that occurred in the spring of 2002 sets the stage.

- March 7: A federal grand jury handed up a sealed indictment charging Andersen with one count of obstructing justice.[98]
- March 13: Andersen withdrew from extended plea negotiations with the government.[99]
- March 14: The indictment was unsealed.[100]
- March 15: The government asked several Andersen partners and an employee to testify before a grand jury in April.[101] Two of the witnesses were served with subpoenas soon after that.[102]
- March 19: After Andersen pled not guilty before a federal magistrate, its lawyers immediately went to Judge Melinda

96. Favretto Letter, *supra* note 24, at 3.

97. *See* Andersen Jan. 15 Press Release, *supra* note 14.

98. Andersen Indictment, *supra* note 6.

99. Declaration of Leslie R. Caldwell in Support of Government's Opposition to Defendant Andersen's Motion to Quash Subpoenas and Limit Grand Jury Proceedings at ¶ 12, United States v. Arthur Andersen, LLP, CRH-02-121 (S.D. Tex. Mar. 28, 2002) [hereinafter Caldwell Declaration] (on file with author).

100. Defendant's Motion to Quash Subpoenas and Limit Grand Jury Proceedings at 5, United States v. Arthur Andersen LLP, CRH-02-121 (S.D. Tex. Mar. 25, 2002) [hereinafter Andersen's Motion to Quash] (on file with author).

101. *Id.*

102. Declaration of Michael L. Simes in Support of Andersen's Motion to Quash Subpoenas and Limit Grand Jury Proceedings, United States v. Arthur Andersen, L.L.P., CRH-02-121 (S.D.N.Y. Mar. 25, 2002) (on file with author). The subpoenas were served on March 22.

Harmon—who was assigned to try the case—and asked for an expedited trial date.[103] A few days later, Judge Harmon set the trial to begin in 47 days.[104]

- March 27: The government convened a second grand jury ("the Enron grand jury") to investigate Enron-related matters.[105]

Andersen moved to quash the subpoenas, asserting the government's continued investigation was "an extraordinary step" and a "manifest abuse of the grand jury process."[106] Andersen claimed the subpoenas violated a longstanding prohibition against post-indictment use of a grand jury for the purpose of preparing the government's case for trial.[107]

The government and Andersen agreed on two points: (1) that prosecutors may not use a grand jury for the primary purpose of strengthening their case against an indicted defendant; and (2) that after issuing an indictment, a grand jury may continue to hear evidence for the purpose of either considering additional charges against the defendant or indicting additional defendants.[108] Beyond that, the prosecution and defense were profoundly at odds.

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103. Richard B. Schmitt, *Andersen Gets an Early Date on Federal Trial*, WALL ST. J., Mar. 21, 2002, at C1.

104. *Id.* Several things about this aspect of the case are unusual. First, knowledgeable observers said that several days or weeks ordinarily would pass between the entry of a plea and the setting of a trial date. Observers were also surprised because the lead time the government has in a complex corporate case is usually considerably longer. According to a former prosecutor, "Light speed in a complex white-collar case is six months from indictment to trial. . . . This is giga-light speed." Kurt Eichenwald, *Andersen Wins an Early Trial as Date Is Set for May 6*, N.Y. TIMES, Mar. 21, 2002, at C1. The government had sought seventy days to prepare for the Andersen trial.

105. Government's Memorandum of Law in Opposition to Defendant Andersen's Motion to Quash Subpoenas and Limit Grand Jury Proceedings at 4-8, United States v. Arthur Andersen, LLP, CRH-02-121 (S.D. Tex. Mar. 28, 2002) [hereinafter Government's Memorandum of Law] (on file with author).

106. Andersen's Motion to Quash, *supra* note 100, at 5.

107. The grand jury is essentially an investigative body. Its primary function is to "determine whether there is probable cause to believe that a federal crime has been committed" and, if so, whether criminal charges should be filed. CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 3d § 101 (1999). In the federal system, defendants who are prosecuted for serious crimes are constitutionally entitled to have the charges brought by grand jury indictment. U.S. CONST. amend. V. *Cf.* Costello v. United States, 350 U.S. 359, 362 (1956) (stating that the grand jury historically served the purpose of ensuring a fair process for initiating criminal prosecutions).

It has long been settled that the grand jury's power is limited by its investigatory and charging functions. Thus, it would be an abuse of the grand jury process to use a grand jury merely as a proxy for discovery or to preserve evidence against a defendant who is already indicted, or to assist the government in preparing a pending case for trial. *In re* Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels), 767 F.2d 26, 29 (2d Cir. 1985); United States v. Beasley, 550 F.2d 261, 266 (5th Cir. 1977); Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972).

108. Andersen's Motion to Quash, *supra* note 100, at 2-4; Government's Memorandum of Law, *supra* note 105, at 4-8.

Andersen claimed the timing of the subpoenas was far too suspicious. As is often the case, the indictment was based on the sworn affidavit of an FBI agent who investigated the shredding and interviewed witnesses. The government did not ask fact witnesses to provide grand jury testimony until the day after the indictment was unsealed. By then, it had become clear that Andersen would not plead guilty. Thus, in Andersen's view, the government belatedly began calling grand jury witnesses when it realized that it "might actually have to prove its case at trial."[109] Because Andersen witnesses were first summoned for grand jury appearances "immediately after it became apparent that a trial was suddenly imminent," it stood to reason that the government must have been using the grand jury for the improper purpose of preparing its case for trial.[110] Under these highly questionable circumstances, Andersen maintained, there could have been no alternative innocent explanation.[111]

The government categorically denied any improper motive. It said its purpose in convening the Enron grand jury was to develop Enron-related cases against other defendants and, perhaps, to bring additional charges

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It is equally well settled that the grand jury may continue to hear evidence relating to additional defendants or additional crimes committed by an indicted defendant even if that has the incidental effect of allowing the government to discover evidence that assists in building a pending case for trial. United States v. Alred, 144 F.3d 1405, 1413 (11th Cir. 1998); *Beverly*, 468 F.2d at 743.

109. Andersen's Motion to Quash, *supra* note 100, at 5.

110. *Id*. Andersen maintained that postponing the grand jury investigation would not prejudice the government, but that even if it would:

> [T]he government . . . made this bed: having rushed to indict on an extraordinarily expedited schedule, the Justice Department is in no position to complain if temporary restrictions on the grand jury are necessary to prevent the government from obtaining an unfair advantage at trial.

Id. at 8. The government's memorandum opposing the motion to quash observed that Andersen had repeatedly requested a speedy investigation to remove the cloud over its reputation. Government's Memorandum of Law, *supra* note 105, at 16.

In denying the motion to quash, Judge Harmon found that Andersen had indeed urged the Justice Department to expedite its decision whether to indict the firm, but that after the indictment was returned, "Andersen reversed its position and asked the government to delay investigating individual employees, including those that Andersen has publicly blamed for the destruction of documents." Order Denying Defendant's Motion to Quash, United States v. Arthur Andersen, LLP, CRH-02-121, at 2 (S.D. Tex. Apr. 9, 2002) [hereinafter Order Denying Andersen's Motion to Quash] (on file with author). *See also id*. at 5-6.

111. Andersen also argued that if the witness interviews generated sufficient evidence to indict the firm, "there is no innocent explanation why . . . more is needed to support the decision whether to indict partners or employees of the firm." *Id.* at 6. But as the government observed, the proof requirements in a prosecution against an organization may differ from the elements required to prove a case against the organization's agents. Government's Memorandum of Law, *supra* note 105, at 9 (citing the collective knowledge doctrine, which applies only to proof of organizational knowledge and intent).

against Andersen itself.[112] And, in fact, the government did bring additional criminal charges not long after the Andersen indictment was unsealed. In early April, prosecutors negotiated a cooperation agreement with David Duncan, Andersen's lead Enron engagement partner, who acknowledged responsibility for the shredding and pled guilty to one count of obstructing justice.[113] Moreover, the subpoenaed Andersen witnesses were scheduled to appear before a different grand jury than the one that indicted Andersen. The Enron grand jury was convened to conduct a sprawling and complex investigation of Enron-related matters, including crimes and parties wholly unrelated to Andersen's document destruction.[114] Thus, because Andersen's motion to quash was based solely

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112. Government's Memorandum of Law, *supra* note 105, at 7. At a March 14, 2002, press conference announcing Andersen's indictment, Deputy Attorney General Larry Thompson stated that the Justice Department's investigation of Enron-related matters would actively continue and would include further investigation into Andersen and its individual partners. Deputy Att'y. Gen. Lawrence Thompson, Press Conference on the Arthur Andersen Indictment at Department of Justice Conference Center (Mar. 14, 2002) (transcript on file with author).

As an initial matter, the party seeking to halt or delay grand jury proceedings bears the burden of producing particularized proof of grand jury irregularity to prevail. Order Denying Andersen's Motion to Quash, *supra* note 110, at 6-7. Andersen's motion put it the opposite way, stating "it is not enough for the government simply to assert that its purpose in calling witnesses before the grand jury is a permissible one." Andersen's Motion to Quash, *supra* note 100, at 3.

But that statement blithely overlooks the presumption of regularity that grand juries enjoy. This presumption can only be overcome by particularized proof of irregularity. Yet Andersen provided nothing more than "conclusory statements" about the government's improper purpose, and thus failed to overcome the presumption of regularity. Order Denying Andersen's Motion to Quash, *supra* note 110, at 6.

113. The cooperation agreement was signed on April 6, three days before the one-count information was filed. *See supra* note 68.

114. Order Denying Andersen's Motion to Quash, *supra* note 110, at 4-6.

As of the date of this writing, twenty-one Enron executives, three British bankers, and five Merrill Lynch executives have been criminally charged in connection with Enron-related fraud, and the investigation is ongoing. *See* Skilling Indictment, *supra* note 59 (charging Enron CEO and Enron Chief Accounting Officer with conspiracy, securities fraud, wire fraud, making false statements to auditors, and insider trading); Superseding Indictment, United States v. Bayly, CRH-03-363 (Werlein) (S.D. Tex. Oct. 14, 2003) (charging a Merrill Lynch Vice President, three Merrill Lynch Managing Directors, an Enron Vice President, and an Enron Managing Director with conspiracy to defraud; also including false statements, perjury, and obstruction of justice charges); Criminal Complaint, United States v. Forney, CR3-03-30210 (EDL) (N.D. Cal. May 30, 2003) (charging Enron senior trader with conspiracy and wire fraud); Indictment, United States v. Howard (indictment filed in the United States District Court for Southern District of Texas) (S.D. Tex. Mar. 26, 2003) (charging Enron Broadband Services Vice President for Finance and Broadband Services Senior Director of Transactional Accounting with conspiracy, securities fraud, wire fraud, and false statements); Fastow Indictment, *supra* note 9 (charging Enron CFO with securities fraud, wire fraud, money laundering, obstruction of justice, tax fraud, and conspiracy; also charging Enron Treasurer and Vice President in Global Finance with conspiracy, wire fraud, and money laundering); Indictment, United States v. Fastow [Lea], CRH-03-150 (S.D. Tex. Apr. 30, 2003) (charging former Enron assistant treasurer and wife of Enron CFO with conspiracy to defraud, money-laundering conspiracy, and tax fraud); Superseding Indictment, United States v. Rice, CRH-03-93-01 (S.D. Tex. Apr. 29, 2003) (charging seven broadband executives

on unsupported conclusory allegations, Judge Harmon ruled there was no showing that the government had either acted in bad faith or abused the grand jury process.[115]

Andersen also contended that, contrary to Justice Department policy, the government arbitrarily refused to allow the firm to tell its story to the grand jury.[116] Although this was a centerpiece of Andersen's "fight against the government," the facts are distinctly at odds with Andersen's claim.

While the target of a grand jury investigation ordinarily has no right to testify, the Justice Department may, in its discretion, allow the target to appear and present evidence.[117] Throughout the investigation, Andersen's

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with securities fraud, false statements, wire fraud, conspiracy, and money laundering); Plea Agreement, United States v. Richter, CR-03-0026 (MJJ) (N.D. Cal. Feb. 4, 2003) (Enron Trading Division Manager) (pleading guilty to conspiracy to commit wire fraud and to violating federal false statements statute); Information, United States v. Lawyer, CRH-02-705 (S.D. Tex. Nov. 26, 2002) (charging an Enron mid-level manager with tax perjury for failure to report taxable income generated by his work on an Enron special purpose entity); Information, United States v. Belden, CR-02-0313 (MJJ) (N.D. Cal. Oct. 17, 2002) (charging Enron's former Vice President and Managing Director of Enron's Energy Trading Operations with conspiracy to commit wire fraud); Indictment, United States v. Bermingham, CRH-02-0597 (S.D. Tex. Sept. 12, 2002) (charging three London bankers with fraud and with conspiring with Enron's Andrew Fastow and Michael Kopper in connection with several Enron special purpose entities); Information, United States v. Kopper, CRH-02-0560 (S.D. Tex. Aug. 20, 2002) (charging Enron's Managing Director for Global Finance with fraud) (all on file with author); Randall Smith, *New Charges in Merrill Energy Case: Regulators Say Employees Rigged Results at Unit to Boost Its Sale Price*, WALL ST. J., Dec. 22, 2003, at C11. *See* Brickey, *From Enron to WorldCom and Beyond*, *supra* note 2, at app. A.

Andersen's stated rationale for asking the court to intervene in the grand jury proceedings contained an odd subtext. It reasoned that because the grand jury testimony of Andersen partners might be deemed admissions attributable to Andersen at trial, in reality the prosecutors were improperly trying to compel *Andersen* to provide testimony against itself to build the government's case. Andersen's Motion to Quash, *supra* note 100, at 7.

Of course, as a limited liability partnership, Andersen can only act and speak through its agents. But Andersen's agents are separate and distinct from the firm. They can refuse to testify on Fifth Amendment grounds if the testimony would be self-incriminating, but they cannot assert the privilege to protect a third party (i.e., Andersen). Because Andersen is a legal entity, it has no Fifth Amendment privilege against self-incrimination. Bellis v. United States, 417 U.S. 85, 87-94 (1974).

Andersen's motion to quash turns this principle on its head by arguing that *because* Andersen is an entity with no Fifth Amendment rights, its need for the court's protection from misuse of prosecutorial authority is "particularly strong." Andersen's Motion to Quash, *supra* note 100, at 8 n.2. The government found it ironic that this claimed need for protection came from an entity represented by "legions of lawyers" and armed with "hundreds of millions of dollars for its defense." Government's Memorandum of Law, *supra* note 105, at 13.

115. Order Denying Andersen's Motion to Quash, *supra* note 110, at 6.

116. Andersen's Motion to Quash, *supra* note 100, at 4 (asserting that "the government affirmatively strove to keep Andersen personnel *away from* the grand jury prior to indictment"); Favretto Letter, *supra* note 24, at 1 (asserting that the government "has refused to allow the firm to tell its story to the grand jury").

117. United States v. Fritz, 852 F.2d 1175, 1178 (9th Cir. 1988); United States v. Pabian, 704 F.2d 1533, 1538-39 (11th Cir. 1983). *See generally* 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY KING, CRIMINAL PROCEDURE § 15.2(c) (2d ed. 1999).

lawyers were in daily contact with Justice Department officials and members of the Enron task force.[118] Andersen representatives participated in full day meetings with high government officials—including Assistant Attorney General Michael Chertoff—to plead their case against prosecuting the firm.[119]

Up until the eve of indictment, Andersen's lawyers never mentioned a possible grand jury appearance.[120] Then, late on March 6, Andersen told prosecutors for the first time that it wanted to present grand jury testimony.[121] But when asked rudimentary questions about what evidence Andersen would like to present, its lawyers had nothing to say.[122] They would not say who would be called to testify, when their witnesses would be available to appear, or how this undisclosed evidence would be exculpatory to the firm.[123] Simply put, they gave no specific reason why the government should delay the indictment to accommodate an unusual last minute request.

The following day, Andersen's lawyers made another lengthy presentation at the Justice Department. At this meeting, the lawyers offered to produce a witness from Enron's Houston office who would testify that he did not personally shred Enron documents.[124] But since Andersen's lawyers admitted that other Houston personnel shredded thousands of Enron records, the witness's testimony would have been irrelevant to the case.[125] In consequence, the government denied Andersen's eleventh hour appeal.[126]

But that is not the end of the tale. At the same meeting, Justice Department officials invited Andersen lawyers to make a written submission of exculpatory evidence they thought the grand jury should consider.[127] Again, the lawyers did not respond. Yet Andersen claimed—

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118. Caldwell Declaration, *supra* note 99, at ¶ 6.
119. *Id.* at ¶¶ 6-7.
120. *Id*. at ¶ 6.
121. *Id.* at ¶ 9.
122. *Id*.
123. Government's Memorandum of Law, *supra* note 105, at 14-15.
124. *Id.* at 15 n.3; Caldwell Declaration, *supra* note 99, at ¶ 10.
125. This tactic foreshadowed a trial strategy of Andersen's lead trial lawyer, who tried to show that because some Andersen employees were not privy to the shredding, Andersen was not guilty. *See Andersen Hits Setback*, *supra* note 86; Andersen Trial Transcript, *supra* note 58, at 998. Judge Harmon ruled that this tactic was impermissible and ordered him to stop. Andersen Trial Transcript, *supra* note 58, at 1100.
126. Caldwell Declaration, *supra* note 99, at ¶ 10.
127. *Id.* Since the government is not obligated to present exculpatory evidence to the grand jury, United States v. Williams, 504 U.S. 36, 53 (1992), the prosecutors actually extended Andersen a courtesy by offering this opportunity.

and the press reported as fact—"The government didn't give Andersen a chance to present its case to the grand jury investigating the firm."[128]

IV. HOW ANDERSEN GOT ITS MESSAGE ACROSS

Andersen waged a pitched campaign to pressure the government not to prosecute.[129] In addition to the demonstration on the courthouse steps, rallies in Houston, Washington, and Philadelphia were staged to humanize Andersen's plight.[130] After all, relatively few Andersen personnel had anything to do with Enron or the document shredding. And, as with Enron, many of Andersen's 28,000 United States partners and employees would suffer economic hardship if the firm did not survive.

Grassroots organizing was a relatively simple task because of Andersen's heavy investment in internet and telecommunications technology.[131] Andersen set up an internal webpage to make it easy for employees to communicate with their congressmen.[132] Andersen encouraged them to convey the message that they were "emotionally and financially crippled" by the indictment[133] and that it was wrong to punish everyone in the firm for the misdeeds of a few.[134] In response, Andersen employees bombarded Congress, the Justice Department, policy makers,

128. John R. Wilke & Richard B. Schmitt, *Andersen Ex-Partner Might Aid U.S. Case*, WALL ST. J., Mar. 25, 2002, at A3 [hereinafter *Ex-Partner Might Aid Case*] (stating that while the government sometimes allows high-profile defendants to present their case to the grand jury, the government's "refusal" to allow Andersen to appear was an indication that Andersen had miscalculated just how tough the government intended to be). *See also U.S. Reportedly is Ready to Charge Andersen With Obstruction of Justice Over Shredding*, ST. LOUIS POST-DISPATCH, Mar. 12, 2002, at A7 (reporting that Andersen asked to appear before the grand jury and claiming that the government denied it the opportunity); Ken Brown, Mitchell Pacelle, Cassell Bryan-Low, Jonathan Weil, Robert Frank, & Susanne Craig, *Called To Account: Indictment of Andersen In Shredding Case Puts Its Future in Question: Obstruction of Justice Count May Speed the Departure of Clients and Partners; Firm Calls It 'Death Penalty'*, WALL ST. J., Mar. 15, 2002, at A1 [hereinafter *Future in Question*].

129. Andersen reportedly spent $1.5 million on its public relations campaign in an effort to burnish its image. Constance L. Hays & Leslie Eaton, *Martha Stewart, Near Trial, Arranges Her Image*, N.Y. TIMES, Jan. 20, 2004, at A1 [hereinafter *Martha Stewart*].

130. *Employees Circle Wagons*, *supra* note 3.

131. A Chicago executive in Andersen's internal technology services operation could dial seven digits on his phone and reach any Andersen employee world wide. "Imagine having an 85,000-person discussion group," he said. *Id.* Mass e-mail communications were even easier, and thousands of Andersen employees received e-mail messages describing how to contact congressmen and the media. *Id.*

132. *Id*. In turn, Andersen employees sent mass e-mails containing hundreds of e-mail addresses for congressmen and reporters. *Id.*

133. *Andersen Pleads Not Guilty*, *supra* note 3. *Cf.* David Shepardson, *U.S. Judge Won't Delay Kmart Fraud Trial*, THE DETROIT NEWS, Oct. 7, 2003, at 1F (quoting defense lawyers' description of their clients as "emotionally devastated and financially ruined" by the criminal charges against them).

134. *Employees Circle Wagons*, *supra* note 3.

and the media with hundreds of impassioned messages and phone calls.[135] Andersen even called on the President to intervene.[136]

Andersen's public website also played an instrumental role in its drive to end the criminal probe. One prominent website posting was a background paper prepared by Andersen's legal team. The paper, billed as an analysis of the "factual and legal errors" in the government's case,[137] was replete with misleading assertions. It maintained that the obstruction of justice charge was "false and wholly unsupported by the facts,"[138] that the government unfairly refused to allow Andersen to address the grand jury, that there was no crime because the documents were destroyed before Andersen received a subpoena, and that the indictment improperly failed to allege who the wrongdoer was or what documents were destroyed.[139]

A series of press releases about Andersen's determination to fight the criminal charge—also posted on the website—repeated and reinforced these themes. They asserted that the indictment was a "gross abuse of government power," that the criminal charge was factually and legally baseless, that prosecution of the firm violated both Justice Department policy and "basic precepts of fundamental fairness," that the government arbitrarily refused to allow Andersen present its case to the grand jury, and

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135. *Id.*

136. The Andersen partner who crafted Andersen's media campaign recruited UCLA basketball coach John Wooden to help draft a letter to President Bush. Flynn McRoberts, *Repeat Offender Gets Stiff Justice*, CHI. TRIB., Sept. 4, 2002, at 1.1. The letter was later published as a two-page paid advertisement, captioned "Injustice for All," in the Wall Street Journal. *Id. See Injustice for All*, *infra* note 145 and accompanying text.

137. *Andersen Analysis*, *supra* note 72.

138. *Id.* at 1.

139. *Id.* at 1-4. It also pejoratively called the document destruction allegations "wrong or grossly misleading," and asserted that the government's case "entirely lacks substance." *Id.* at 1.

Shortly after she was indicted, Martha Stewart created a special website to post current information about her case. The postings include statements by her defense lawyers describing the government's decision to prosecute as a "bizarre" turn of events and questioning the government's motives for bringing criminal charges they say are "baseless," "extraordinary," "peculiar," and "unfounded." Statement from Martha's Attorney (June 4, 2003), *at* http://www.marthatalks.com (on file with author). *See also* Setting the Record Straight, Oct. 6, 2003, *at id.* (summarizing defense motions to dismiss several counts in the indictment and to strike "inflammatory and irrelevant language" from it) (on file with author); Setting the Record Straight, June 10, 2003, *at id.* (correcting "some frequent errors" in media coverage of allegations in the indictment) (on file with author).

Not to be outdone, HealthSouth's deposed CEO Richard Scrushy launched his own website immediately after he was indicted for his alleged role in HealthSouth's financial accounting fraud scandal. *See* Indictment, United States v. Scrushy, CR-03-BE-0530-S (N.D. Ala. 2003) (charging Scrushy with conspiracy, mail and wire fraud, securities fraud, false certification of financial statements, and money laundering). The principal features of Mr. Scrushy's website, http://www.richardmscrushy.com, bear a remarkable resemblance to those found at Martha Stewart's site. It includes a letter to supporters, messages from the legal team, e-mail correspondence from supporters and admirers, and published news accounts and opinions favorable to his side of the story.

that the indictment failed to allege the destroyed documents contained incriminating evidence.[140]

There were also full page newspaper ads. One, captioned "Why we're fighting back,"[141] called the indictment "tragically wrong" and a "political broadside."[142] It stated that Andersen's lawyers were "absolutely convinced that no one in [the] firm committed a crime" and that Andersen's partners and employees were confident the firm would be vindicated at trial.[143] It also decried unspecified "errors" in the government's case, which it said could explain why the Justice Department "refused to even allow Andersen officials to appear before the Grand Jury."[144] In a two page ad captioned "Injustice for all," Andersen focused on the thousands of employees, retirees, and family members put at risk by the government's "unjust" indictment of the firm.[145]

To the close observer, notable similarities soon began to emerge. The press liberally quoted everything from Andersen's website postings to documents its lawyers prepared.[146] Language found in website postings

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140. Andersen Mar. 14 Press Release, *supra* note 5.

141. *Why We're Fighting Back* (Arthur Andersen Advertisement), WALL ST. J., Mar. 20, 2002, at A5 [hereinafter Andersen *Fighting Back* Advertisement].

142. *Id.* Claims that the prosecution was politically motivated were never particularized. Nor did Andersen ever attempt to explain why a Bush Administration Justice Department would be out to get an auditor for a big energy company. And not just any auditor. Through its PAC, Andersen was among the top five contributors to the Bush campaign. BARBARA LEY TOFFLER, FINAL ACCOUNTING—AMBITION, GREED, AND THE FALL OF ARTHUR ANDERSEN 251 (2003). More telling still, Andersen publicly sought political relief through its letter-writing campaign to Congress and the President and a demonstration on the Capitol steps. *Employees Circle the Wagons*, *supra* note 3.

143. Andersen *Fighting Back* Advertisement, *supra* note 141.

144. *Id.*

145. *Injustice for All* (Arthur Andersen Advertisement), WALL ST. J., Mar. 27, 2002, at A10-11.

Martha Stewart also published, as a full page ad, an open letter proclaiming her innocence and expressing confidence that she would be exonerated of the government's "baseless charges" against her. *An Open Letter from Martha Stewart*, USA TODAY, June 5, 2002, at 7A. Her full-page add and personalized website, see *supra* note 136, are part of a million dollar public relations campaign that includes focus groups convened by jury experts, polling, and two high-profile television interviews. *Martha Stewart*, *supra* note 129.

146. *See, e.g.*, Adrien Michaels & Peter Spiegel, *Request for a Speedy Trial May be Slow in Coming Court Case*, FIN. TIMES (London, England), Mar. 20, 2002, at 40 (quoting *Andersen Analysis*, *supra* note 72); Jackie Spinner and Susan Schmidt, *Andersen Wants Quick Trial on Obstruction Charge; Accounting Giant Faces Rising Number of Defections by Clients*, WASH. POST, Mar. 16, 2002, at E01 (same); Zachary Coile, *U.S. Issues Blistering Andersen Indictment; Action Threatens Survival of Enron Accounting Firm*, SAN FRANCISCO CHRON., Mar. 15, 2002, at A1 (same); Kurt Eichenwald, *Grand Jury Being Misused As Investigator, Andersen Says*, N.Y. TIMES, Mar. 26, 2002, at C1 (quoting Andersen's Motion to Quash, *supra* note 100); Jerry Hirsch, Edmund Sanders, & Jeff Leeds, *Auditor Balks at Guilty Plea in Enron Case: Andersen Says Its Destruction of Papers Does Not Warrant a Plea Bargain That Could Be Firm's Death Sentence*, L.A. TIMES, MAR. 14, 2002, Bus. Sec., at 1 (quoting Favretto Letter, *supra* note 24); Susan Schmidt, *Andersen Refuses to Plead Guilty; Firm Could Be Indicted Today*, WASH. POST, Mar. 14, 2002, at A01 (same).

and press releases appeared in documents Andersen filed with the court.[147] And so it went on down the line. And when all was said and done, Andersen's legal and public relations strategies had become so closely intertwined that it was hard to tell one from the other.

V. FALLOUT FROM ANDERSEN'S FALL

Andersen conducted a highly charged campaign to "fight the government" in every conceivable way. Although one would scarcely expect Andersen to give up without a struggle, its confrontational tactics went well beyond a forceful defense of the firm. Andersen repeatedly impugned the prosecutors' motives, accused the government of dealing unfairly with the firm, and boldly distorted both the facts and the law.[148]

It is one thing to confidently predict vindication at trial after all the evidence is heard. It is quite another to accuse prosecutors of grossly abusing government power simply because they sought to indict the firm. It is one thing to argue for government restraint in prosecuting an entity for misconduct that may be neither widespread nor approved at the top. But to insist that an indictment is legally and factually baseless *because* it fails to allege pervasive wrongdoing or to name high-level participants is yet another matter. And while it is one thing to suggest that the government should have allowed Andersen to present evidence before the grand jury, it is another to wrongly insist that prosecutors arbitrarily denied Andersen the chance to appear.[149]

This parade of red herrings led my colleagues to wonder how the government could prosecute Andersen if even half of this was true. But the implicit assumption helps to illustrate the point. If groundless or greatly exaggerated claims are repeated long enough and loud enough, they begin

147. *Compare* Andersen's Motion to Quash, *supra* note 100, Exhibit 1 at 1 *with* Andersen Jan. 14 Press Release, *supra* note 88.

148. Another example of Andersen's efforts to discredit the government through distorted versions of the truth involves Kate Agnew, an Andersen manager. Ms. Agnew refused to testify at Andersen's trial on Fifth Amendment grounds. Andersen's lead trial lawyer called a press conference at the end of the day. He accused government lawyers of witness tampering and demanded a federal inquiry into the government's handling of witnesses. He claimed that Agnew's pleading the Fifth would intimidate other witnesses who could provide testimony favorable to Andersen. Ms. Agnew's decision to plead the Fifth was, of course, an exercise of a personal right, and there was utterly no evidence of government intimidation apart from Andersen's bald assertions. *Different View on Shredding*, *supra* note 91.

149. Favretto Letter, *supra* note 24, at 1 (stating that the Justice Department, "for no apparent reason," refused to allow Andersen to present evidence to the grand jury); *Andersen Analysis*, *supra* note 72, at 1 (suggesting that the lack of facts to support the indictment may explain "why the government refused to allow Arthur Andersen, LLP to address the grand jury").

to have a ring of truth. And if that happens, a strategy of disinformation can undermine the government's ability to respond to public crises. The effectiveness of the government's response depends in part on its credibility, and Andersen aggressively sought to discredit both the prosecutors and the merits of the case.

Andersen's campaign to avoid prosecution was also calculated to create the perception that the indictment would bring the firm down.[150] But lest we forget, Andersen had only recently settled serious SEC fraud charges in the Waste Management case and was permanently enjoined from future wrongdoing. As shown in Table 1, Andersen paid hundreds of millions of dollars to settle Waste Management, Sunbeam, and other recent litigation involving allegations of accounting fraud, and the firm is still embroiled in many audit-related class action suits.

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150. A letter from Andersen lawyers to the Justice Department argued that "the institution of criminal felony proceedings would place the survival of Arthur Andersen in grave jeopardy." Favretto Letter, *supra* note 24, at 1. When CEO Joseph Berardino reluctantly stepped down for the good of the firm, his message to prosecutors was "If you want to kill us, go kill us, if you want to keep us alive, we can get through, but we can't take an indictment." Ken Brown & John R. Wilke, *Andersen Partners Grasp at the Volcker Plan: 'If You Want to Kill Us, Go Kill Us,' Berardino Says He Told Prosecutor*, WALL ST. J., Mar. 28, 2002, at C1.

There was speculation that if Mr. Berardino had resigned before the indictment, that could have sent prosecutors a much-needed message that Andersen was serious about reforms. Jonathan D. Glater & John Schwartz, *Andersen Chief Quits in Effort to Rescue Firm*, N.Y. TIMES, Mar. 27, 2002, at A1.

TABLE 1
RECENT AUDIT-RELATED LAWSUITS AGAINST
ARTHUR ANDERSEN[151]

AUDIT	CLAIM	STATUS
Allied Capital[152]	False Financial Statements	Dismissed
AVS[153]	False Financial Statements	Pending
Baptist Foundation of Arizona[154]	Fraud	$217 Million Settlement (2002)
Bennet Funding Group[155]	False Financial Statements	Pending

151. Unless otherwise noted, these are class action suits. Andersen is not the sole defendant in some of the suits.

Table 1 does not reflect other large civil claims against Andersen that are unrelated to audits. One example is a pending case filed by Department 56 claiming fraud in connection with an Andersen consulting project that was alleged to have "virtually destroyed" Department 56. The prayer for relief seeks $6 billion. Janet Moore, *Dept. 56 Sues Arthur Andersen for $6 Billion; Retailer Says Botched Project 'Virtually Destroyed' Company*, STAR TRIB. (Minneapolis-St. Paul), Mar. 2, 2001, at 1D.

152. The original consolidated complaint naming Andersen was dismissed for failure to state a claim. The amended complaint, which does not name Andersen, is pending. *See In re* Allied Capital Corporate Securities Litigation, 02 CV 3812 (S.D.N.Y. 2003), *described at* http://securities.stanford.edu/1024/ALDC2-01.

153. *See* Holmes v. Baker, 166 F. Supp. 2d 1362, 1375-76, 1380, 1382 (S.D. Fla. 2001) (ruling, on motion to dismiss, that complaint alleged a prima facie claim against Andersen for misrepresentations and omissions on client's financial statement, but dismissing separate accounting fraud charge with leave to amend because complaint failed to allege scienter).

154. Anne Brady, *Andersen Pays Foundation Investors*, WALL ST. J., June 6, 2002, at C20. The Foundation's collapse, which cost investors about $570 million, was reportedly "the largest nonprofit bankruptcy in American history." *Another Setback, supra* note 46.

155. The suit by individual investors was allowed to proceed to discovery. Bennett Funding Group, Inc. v. Arthur Andersen & Co., 2000 WL 565187 (S.D.N.Y.). The suit by the bankruptcy trustee was dismissed for lack of standing. Breeden v. Kirkpatrick & Lockhart LLP, 268 B.R.704 (S.D.N.Y. 2001).

AUDIT	CLAIM	STATUS
Boston Chicken[156]	Concealment of Fraud	$20.8 Million Settlement (2002)
Cal-American Insurance[157]	Negligent Misrepresentation	Stay Vacated
CMI[158]	Failure to Detect Errors and Irregularities	Settled
Colonial Realty[159]	False Revenue Projections	$90 Million Settlement (1999)
Discovery Zone[160]	False Financial Statements	Dismissed (1998)
First Connecticut Life Insurance[161]	False Financial Statements	$2 Million Settlement

156. *Briefing: Boston Chicken Suit Settled*, DENVER POST, Feb. 27, 2002, at C2. The case settled after the defendants' motions to dismiss were denied. *See* K. Smith v. Andersen, LLP, 175 F. Supp. 2d 1180 (D. Ariz. 2001).

157. This suit was filed by the California Insurance Commissioner. The court ruled that the Commissioner could sue Andersen for damages on behalf of the defunct insurance company's policyholders and other creditors. Quackenbush v. Superior Court, 94 Cal. Rptr. 2d 282 (Ct. App. 2000).

158. Andersen's motion to withdraw reference of adversary proceeding was granted because the class action suit was not a "core proceeding" under bankruptcy law. *In re* Complete Mgmt., Inc. v. Arthur Andersen, LLP, No. 02 Civ. 1736 (NRB), Adv. P. No. 01-03459, 2002 U.S. Dist. LEXIS 18344 (S.D.N.Y. Sept. 26, 2002). Shareholders then filed a direct class action against Arthur Andersen and others that was approved for settlement on Feb. 27, 2003. *See* Notice of Proposed Settlement, *In re* Complete Management Inc. Securities Litigation, 99 Civ. 1454 (NRB), *at* http://www.dberdon.com/claims/cases/CMI/CMI%20Notice.pdf.

159. *Recent Andersen Settlements*, DALLAS MORNING NEWS, June 16, 2002, at 23A [hereinafter *Recent Andersen Settlements*]. Andersen settled two other Colonial Realty cases for $14 million earlier in the decade. *Arthur Andersen Gets Off Cheaply*, HARTFORD COURANT, May 2, 1996, at A18.

160. Suit dismissed on statute of limitations grounds. Antell v. Arthur Andersen LLP, No. 97 C 3456, 1998 U.S. Dist. LEXIS 7183, at *20 (N.D. Ill. Apr. 30, 1998).

161. The suit was filed by the Connecticut Insurance Commissioner. Reider v. Arthur Andersen, LLP, 784 A.2d 464 (Conn. 2001) (denying Andersen's motion to strike). *See also* Eric Rich, Jack Dolan, & Dave Altimari, *When the Public Interest Is a State Secret: Lawsuits Involving Corporations, Regulations & Even Sexual Abuse Find Their Way Behind Closed Doors*, HARTFORD COURANT, Mar. 9, 2003, at A1. The Connecticut Attorney General called the First Connecticut case part of a "'pattern of professional wrongdoing'" through which Andersen misrepresented the financial stability of its clients and deceived regulators. Al Lara, *Andersen Target of 2d State Probe: Details Sought in Collapse of Local Insurance Company*, HARTFORD COURANT, Apr. 17, 2002, at A1. The Attorney General also sued Andersen to recover losses incurred by the Connecticut Resources Recovery Authority in a failed $220 million power generation deal with Enron. *Id.*

AUDIT	CLAIM	STATUS
GT Interactive Software[162]	False Earnings Statements	Dismissed (2000)
Global Crossing[163]	False Financial Statements	Pending
Gunther International[164]	Fraud and Malpractice	Pending
Halliburton[165]	False Financial Statements	Settlement Pending
McKesson HBOC[166]	False Financial Statements	Pending
Peregrine Systems[167]	Fraud and Accounting Irregularities	Pending
Periscope[168]	False Financial Statements	Dismissed (2001)
SCI[169]	False Statement of Liabilities	Compensatory and Punitive Damage Award Upheld (2000)

162. Although the suit against Andersen was dismissed because the complaint did not adequately plead scienter, the court upheld the complaint against GT. Rothman v. Gregor, 220 F.3d 81 (2d Cir. 2000).

163. *Diary: The Courts: Two Ohio Pensions to Lead Lawsuit*, PLAIN DEALER (Cleveland, Ohio), Dec. 13, 2002, at C1; Jack Torry, *Montgomery Testifies on Pension-Fund Losses*, COLUMBUS DISPATCH (Ohio), May 2, 2002, at 1B.

164. The prayer for relief seeks an unspecified amount of damages. *Connecticut Opinions—Federal Court Reports Civil Practice Arthur Andersen Suit Is Remanded To State Court*, CONN. L. TRIB., May 20, 2002, at B1.

165. *Halliburton Agrees to Pay $6 Million To Settle 20 Suits*, N.Y. TIMES, May 31, 2003, at C4.

166. Multiple suits have been filed, including Green v. McKesson HBOC, Inc., 2002-CV-48407 (Fulton County, Ga. Jan. 31, 2002), and *In re* McKesson HBOC, Inc. Securities Litigation, 99-CV-20743 (N.D. Cal. Apr. 28, 1999), *described at* http://securities.stanford.edu/1004/MCK99/. *See also* Caravetta v. McKesson HBOC, Inc., No. Civ. A. DOC-04-214-WTQ, 2000 WL 1611101 (Del. Super. Ct. Sept. 7, 2000).

167. The prayer for relief seeks $250 million in damages. *Failed Former Client Sues Andersen*, CHI. TRIB., Sept. 24, 2002, Bus. Sec., at 3. Peregrine's board of directors has also filed a $1 billion lawsuit against Andersen alleging that Andersen "permitted, encouraged and consented" to misleading accounting practices. Bruce V. Bigelow, *Andersen Points Blame at Peregrine Bosses*, SAN DIEGO UNION-TRIB., Nov. 14, 2002, at C-2.

More recently, the SEC charged Peregrine with "massive financial fraud" relating to its improper reporting of hundreds of millions of dollars of revenue and announced a partial settlement with the company. *See infra* note 192.

168. The motion to dismiss was granted on statute of limitations grounds. The prayer for relief sought $35 million. Giant Group, Ltd. v. Sands, 142 F. Supp. 2d 503 (S.D.N.Y. 2001).

AUDIT	CLAIM	STATUS
Southern Equities[170]	Negligence	Settled (2002)
Sunbeam[171]	False Earnings Statements	$110 Million Settlement (2002)
Trust Insurance[172]	Negligence	Pending
Waste Management[173]	False Earnings Statements	$220 Million Settlement (2001)
WorldCom[174]	False Financial Statements	Pending

Simply put, there was a substantial cloud over Andersen's future regardless of whether the firm was indicted. Andersen had presided over a string of failed audits,[175] and a number of its corporate clients were or are

169. The amount of the jury award is unknown. Stroud v. Arthur Andersen & Co., 37 P.3d 783 (Okla. 2001).

170. Mark Drummond, *Bond Case: Andersen's $100M*, AUSTL. FIN. REV., May 22, 2002, at 9. The amount of the settlement was confidential but was reportedly in the range of $100 to $110 million, a figure that would make it one of the largest audit-related settlements in Australia's history. *Id.*

171. *See In re* Sunbeam Securities Litigation, 89 F. Supp. 2d 1326, 1344-46 (S.D. Fla. 1999) (holding that complaint sufficiently alleged scienter required to prove fraud). Another class action suit arising out of the Sunbeam audit is pending in a California state court. *Recent Andersen Settlements*, *supra* note 159; *Arthur Andersen Faces Suit by Oaktree Capital*, L.A. TIMES, Sept. 5, 2001, at C4.

172. The suit, which was filed by Massachusetts insurance regulators, seeks $90 million in damages. Jenifer Hedlt Powell, *Andersen Sued over Trust*, BOSTON HERALD, Sept. 20, 2002, at 36.

173. The settlement was paid by Andersen and Waste Management. Andersen also settled an SEC suit for fraudulent accounting practices on the Waste Management account for $7 million in 2001. Bill Hensel Jr., *Waste Management Pleased With Quarter*, HOUSTON CHRON., Aug. 2, 2002, at B2.

174. Multiple WorldCom suits are pending against Andersen. *See In re* WorldCom, Inc., 02-Civ-3288 (DLC), 2003 WL 21488087 (S.D.N.Y. June 25, 2003); Albert Fadem Trust v. WorldCom, Inc., 02-Civ-3288 (DLC), 2002 WL 1880530 (S.D.N.Y. Aug. 15, 2002); Press Release, Univ. of Cal.-Davis, UC Will Pursue WorldCom Lawsuit in California State Court (Jan. 16, 2003), *at* http://www.ucop.edu/news/archives/2003/jan16art1.htm; Press Release, Primezone, Bondholder Lawsuit Commenced Against WorldCom, Inc., Certain of Its Officers and Directors, and Arthur Andersen, LLP by Wechsler Harwood Halebian & Feffer LLP (July 16, 2002), *at* http://www.primezone.com/ca/news.shtml?d=29671. On July 1, 2003, a federal district judge in Mississippi ruled that a WorldCom class action suit could proceed against Andersen. Accounting WEB, *WorldCom Lawsuit Against Andersen Gets Go-Ahead* (July 1, 2003), *at* http://www.accountingweb.com/cgi-bin/item.cgi?id=97761&d=659&h=660&f=661. *See also In re* WorldCom, Inc. Securities Litigation, 234 F. Supp.2d 301 (S.D.N.Y. 2002).

175. On average, during the five-year period ending December 31, 2001, Andersen was associated with eleven restatements of audited annual financial statements. In the year ending December 31, 2002, the number of restatements the firm was associated with rose to forty, and additional

now under government scrutiny for financial accounting irregularities (Table 2). Even without an indictment, Andersen was bracing to lose up to twenty-five percent of its United States revenue,[176] and it is far from clear that the firm could have weathered so many storms. Andersen had already begun to lose clients,[177] and knowledgeable commentators say this was only the last—not the first—serious blow to the firm.[178] Even Andersen CEO Joseph Berardino had expressed concern that a rising number of flawed audits and lawsuits was putting Andersen's reputation and financial condition at risk.[179] In short, the government did not bring Andersen down. Andersen's own failings brought Andersen down.[180]

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restatements were possible after 2002. Huron Consulting Group, An Analysis of Restatement Matters: Rules, Errors, Ethics, For the Five Years Ended December 31, 2002, at 5 (Jan. 2003). Because the methodology of this study only counted restatements that were actually filed by December 31, not all companies that announced impending restatements in 2002—including Andersen client WorldCom—were included in the database for that year. *Id*. at 2. For a recent study that develops a model for empirically measuring auditor risk, see Ross D. Fuerman, *Accountable Accountants*, *at* http://www.thecorporatelibrary.com.

176. *Future in Question*, *supra* note 128. Some client defections began in January after Andersen announced the document destruction and before there was serious talk of a criminal indictment. Jonathan Weil, John Emshwiller, & Scot J. Paltrow, *Audit Nightmare, Arthur Andersen Says It Disposed of Documents That Related to Enron*, WALL ST. J., Jan. 11, 2002, at A1. In the first few weeks of March, a partner at a rival Big Five accounting firm reported that he had been approached by at least fifty Andersen clients seeking to change auditors. *Future in Question*, *supra* note 128.

177. By the time the indictment was unsealed, five of Andersen's twenty largest clients—Delta Air Lines, Dynegy, Enron, FedEx, Freddie Mac, Merck, and WorldCom—had already jumped ship. Jonathan D. Glater, *Audit Firms Await Fallout and Windfall: Andersen Rivals Foresee Scramble To Calm Fears*, N.Y. TIMES, Mar. 14, 2002, at C1.

In late March, Andersen announced it would adopt the Volcker reform package, in part to stem the tide of client defections. Andersen had been faulted for taking so long to embrace Volcker's proposed reforms. *Andersen Adopts Volcker Rescue Plan*, ST. LOUIS POST-DISPATCH, Mar. 29, 2002, at C1. But the situation degenerated from bad to worse, and the Volcker proposal was never implemented. By late April or early May, the oversight board Mr. Volcker headed was about to disband. *Andersen Hits Setback*, *supra* note 86; *Government Takes Strong Case Into Andersen Trial*, WALL ST. J., May 3, 2002, at C1.

178. *See* Delroy Alexander, Gerg Burns, Robert Manor, Flynn McRoberts, & E.A. Torriero, *Repeat Offender Gets Stiff Justice; Sins of Past Come Back to Haunt Firm*; *Andersen's Leaders Believed the Firm Would Survive Enron's Collapse, But Federal Prosecutors Found No Reason for Mercy*, CHI. TRIB., Sept. 4, 2002, at 1.1; John A. Byrne, *Fall From Grace*, BUS. WEEK, Aug. 12, 2002, at 50; Kurt Eichenwald, *Andersen's Past Stumbles Haunt It in Court*, N.Y. TIMES, Mar. 15, 2002, at C1; *Execution Before Trial*, *supra* note 23.

179. He acknowledged his concern in a September, 2001 memo that predated the Enron shredding. The memo continued that the firm must scrutinize its clients more closely and be willing to "walk away from those that present unacceptable risk." Ken Brown, *Andersen Memo Urged Caution With Risky Clients*, WALL ST. J., Apr. 12, 2002, at A14.

180. *See* Chertoff Letter, *supra* note 83, at 2 (rejecting Andersen's claim and stating that "Andersen's reputation is in jeopardy because of its underlying misconduct, not because of the government's enforcement of the laws against that misconduct").

The court-appointed examiner in the Enron bankruptcy proceedings found substantial evidence that Andersen: (1) engaged in "a concerted effort over a period of years" to assist Enron in various ways to create a materially misleading portrayal of Enron's income, cash flow, and financial position;

TABLE 2
RECENT INVESTIGATIONS OF ARTHUR ANDERSEN CLIENTS[181]

CLIENT	INVESTIGATION	AGENCY
Baptist Foundation of Arizona*[182]	Ponzi Scheme/Concealing Losses	State Regulators, State Attorney General, State Prosecutor
CMS Energy*[183]	Overstated Revenue by $4.4 Billion in 2000 and 2001	SEC, CFTC,[184] U.S. Attorney
Dynegy*[185]	Sham Trades to Inflate Revenue	SEC, CFTC, DOJ, State Regulators

(2) "breached its duty of care and was negligent" in performing some of its work for Enron; and (3) while possessing actual knowledge of wrongful conduct on the part of Enron executives, "aided and abetted Enron officers in breaches of fiduciary duty." Final Batson Report, *supra* note 58, Appendix B (Role of Andersen), at 2. The bankruptcy judge recently gave Enron's creditors permission to name more defendants—including two law firms and Arthur Andersen—in the creditors' suit for fraud and negligence. Eric Berger, *The Fall of Enron; Creditors Get Permission To Sue Related Defendants*, HOUSTON CHRON., Dec. 2, 2003, Bus. Sec., at 4.

The court-appointed examiner in the WorldCom bankruptcy proceedings also found a number of problems with Andersen's audit work, including: (1) failing to design and implement adequate audit procedures; (2) allowing WorldCom management to wield inappropriate influence over the audit process; (3) relying too heavily on WorldCom managers' integrity; and (4) failing to inform the Audit Committee and WorldCom management of significant audit-related issues. Second Interim Report of Dick Thornburgh, Bankruptcy Court Examiner, In re: Worldcom, Case No. 02-15533 (AJG) at 198-212 (Bankr. S.D.N.Y. June 9, 2003). In his final report, the examiner concluded that: (1) Andersen committed professional malpractice by negligently performing WorldCom's audit work; (2) a trier of fact would likely find Andersen negligent even though WorldCom's senior officials deceived Andersen a number of times; (3) Andersen's negligence compounded the injuries WorldCom suffered, because "without such negligence, WorldCom's improper accounting could not have gone undetected for so long;" and (4) Andersen's negligence placed it in breach of its WorldCom contracts. Third and Final Report of Dick Thornburgh, Bankruptcy Court Examiner, In re: WorldCom, Case No. 02-15533 (AJG) at 19-29, 297-98 (S.D.N.Y. Jan. 26, 2004). *See also* Dennis K. Berman, Jonathan Weil, & Shawn Young, *MCI Examiner Criticizes KPMG on Tax Strategy*, WALL ST. J., Jan. 27, 2004, at A3.

181. Asterisk indicates that one or more individuals have been indicted in connection with the fraud. *See* Brickey, *From Enron to WorldCom*, *supra* note 2, at app. A.

182. Craig Harris, *Restitution a Long Shot in State's Fraud Cases*, ARIZ. REPUBLIC, June 23, 2003, at D1; Jonathan Weil, *U.S. Will Argue Andersen Knew of Missteps: Andersen, in Reversal, Agrees To Pay to Settle Suit by Baptist Group*, WALL ST. J., May 7, 2002, at C1.

183. Chip Cummins & Jonathan Friedland, *CMS Energy Admits 'Round Trips' Lifted Its Trading Volume*, WALL ST. J., May 16, 2002, at A1; Russell Gold, *Energy Firms Face FERC Order*, WALL ST. J., May 1, 2003, at A14; Russell Gold, *El Paso Corp. To Pay $20 Million in Settlement: CFTC is Still Investigating 25 Other Energy Firms in Price-Fixing Probe*, WALL ST. J., Mar. 27, 2003, at C3.

184. Commodities Future Trading Commission.

185. Laura Goldberg & Tom Fowler, *Trio Indicted in Dynegy Deals: Former Executives Hatched Fraud Scheme, Prosecutors Say*, HOUSTON CHRON., June 13, 2003, at 1; Rebecca Smith, *Fraud Charged Against Former Dynegy Employees*, WALL ST. J., June 13, 2003, at B2.

CLIENT	INVESTIGATION	AGENCY
Enron*[186]	Inflated Earnings and Off Book Special Purpose Entities	SEC, DOJ[187]
Freddie Mac[188]	Smoothing Earnings	SEC, DOJ, Office of Federal Housing Enterprise Oversight (OFHED)
Global Crossing*[189]	Accounting Practices and Network Swaps to Inflate Revenue	SEC, DOJ
Halliburton[190]	Method of Recording Revenue	SEC
McKesson*[191]	Inflated Revenue and Earnings	SEC, DOJ, U.S. Attorney

186. *In re* Citigroup, Inc., Order Instituting a Public Administrative Proceeding Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order and Other Relief, Exchange Act Release No. 34-48,230, 80 SEC Docket 2116 (July 28, 2003); Complaint, SEC v. J.P. Morgan Chase & Co., H-03-2877 (MH) (S.D. Tex. July 28, 2003); Complaint, SEC v. Howard H-03-0905 (Harmon) (S.D. Tex. Mar. 12, 2003); Complaint, SEC v. Fastow, H-02-3666 (Andrew) (S.D. Tex. Oct. 2, 2002); Complaint, SEC v. Kopper, H-02-3127 (S.D. Tex. Aug. 21, 2002). *See also supra* note 114.

187. Department of Justice.

188. Patrick Barta & John D. McKinnon, *Freddie May Have Understated Profits By Up to $4.5 Billion*, WALL ST. J., June 26, 2003, at C1.

189. Andrew Backover, *Report Mostly Clears Global of Wrongdoing*, USA TODAY, Mar. 11, 2003, at B3.

190. Susan Warren, *Halliburton Nears Settling Lawsuits*, WALL ST. J., June 2, 2003, at B5.

191. Jason Hoppin, *In the McKesson Case, Prosecutors Allege Active Participation by Top Lawyer*, LEGAL TIMES, June 16, 2003, at 28.

CLIENT	INVESTIGATION	AGENCY
Peregrine Systems[192]	Inflated Revenue by $509 Million in 3 years	SEC, DOJ
Qwest Communications*[193]	Inflated Revenue in 2000 and 2001	SEC, DOJ, U.S. Attorney, State District Attorney
Sunbeam[194]	Accounting Fraud	SEC, DOJ
Waste Management[195]	Inflated Revenue by $1.43 Billion from 1993-1996	SEC
WorldCom*[196]	Concealed Losses and Inflated Revenue by $1.38 Billion in 2001	SEC, DOJ, U.S. Attorney

192. *Ex-Exec Pleads Guilty in Peregrine* Case, L.A. TIMES, June 17, 2003, at C13; SEC v. Peregrine Sys., Inc., SEC Charges Peregrine Systems, Inc. with Financial Fraud and Agrees to Partial Settlement, Litig. Release No. 18205A, 80 SEC Docket 1711 (June 30, 2003) [hereinafter SEC Charges Peregrine]; SEC v. Spitzer, SEC Charges Former Peregrine Systems Sales Vice President with Financial Fraud, Insider Trading, Litig. Release No. 18191, 80 SEC Docket 1460 (June 16, 2003); SEC Charges Former Company Treasury Manager with Participating in Peregrine Systems Financial Fraud, Litig. Release No. 17859A, 78 SEC Docket 2958 (Nov. 25, 2002); Complaint, SEC v. Spitzer, 03-CV-1178-IEG (NLS) (S.D. Cal. June 16, 2003); SEC v. Gless, Matthew Gless: SEC Charges Former Peregrine CFO with Financial Fraud, Litig. Release No. 18093, 79 SEC Docket 3153 (Apr. 16, 2003).

193. Dennis K. Berman & Deborah Solomon, *Ex-Executives Are Indicted in Qwest Probe*, WALL ST. J., Feb. 26, 2003, at B1; Indictment, United States v. Graham (indictment filed in the United States District Court for the District of Colorado) (D. Colo. Feb. 5, 2003) (on file with author); SEC v. Joel M. Arnold et al., SEC Litig. Release No. 17996, 79 SEC Docket 2073 (Feb. 25, 2003).

194. Cassell Bryan-Low, *Deals & Dealmakers: More Sunbeam Officials Settle*, WALL ST. J., Jan. 28, 2003, at C5. SEC v. Dunlap et al., Former Arthur Andersen Auditor and Two Additional Former Sunbeam Officers Settle SEC Charges, Litig. Release No. 17,952, 79 SEC Docket 1553 (Jan. 27, 2003); Former Sunbeam Officers Settle, *supra* note 35; Patrick Danner, *Sunbeam Under U.S. Scrutiny*, MIAMI HERALD, Sept. 10, 2002, at 1.

195. SEC Settlement Release, *supra* note 25; SEC v. Buntrock et al., Waste Management, Inc. Founder and Five Other Former Top Officers Sued For Massive Earnings Management Fraud, Litig. Release No. 17,435, 77 SEC Docket 695 (Mar. 26, 2002).

196. Final Judgment as to Monetary Relief, SEC v. WorldCom, Inc., 02-CV-4963 (JSR) (S.D.N.Y. July 7, 2003) (on file with author); Consent Decree, SEC v. WorldCom, 02-CV-4963 (JSR) (S.D.N.Y. May 21, 2003) (on file with author); Complaint, SEC v. WorldCom, Inc., 02-CV-4963 (JSR) (S.D.N.Y. June 26, 2002) (on file with author); SEC v. Myers and Yates, Two Former WorldCom Executives, Are Permanently Enjoined from Committing Securities Fraud and Other Violations, and Barred from Acting as Officers or Directors of a Public Company, Litig. Release No. 17,842, 78 SEC Docket 2810 (Nov. 15, 2002); SEC v. Vinson & Normand, SEC Charges Two Former WorldCom Accountants, Betty Vinson and Troy Normand, with Participating in Multi-Billion Dollar Financial Fraud, Litig. Release No. 17,783, 78 SEC Docket 1786 (Oct. 10, 2002).

The Department of Justice has also brought criminal charges against five WorldCom executives.

Perhaps the most fundamental concern about Andersen's strategy is its potential impact on the justice system. One might reasonably conclude that Andersen endeavored to try its case in the court of public opinion.[197] Given the high probability that related civil and criminal charges would be filed, there was a real danger that the presentation of spurious versions of the facts and the law could influence the collective memory of witnesses and jurors concerning subtle but critical points.[198]

The dispute over the government's issuing post-indictment grand jury subpoenas to Andersen partners is an instructive case in point. Despite the heated rhetoric, the controversy was not so much about whether the government was entitled to seek the partners' sworn grand jury testimony as it was about when prosecutors were privileged to do so. Andersen argued that a few-month delay until the criminal trial was over would do no harm.[199]

But the government voiced legitimate concerns about Andersen's concerted effort to "flood the public record" with slanted and inaccurate claims.[200] Andersen's barrage of misleading statements had real potential to influence the recollections and testimony of witnesses—some of whom might themselves be targets of related investigations.[201] Justice Department lawyers worried that some of Andersen's suggested versions of facts bordered on witness coaching[202] and feared the firm's concerted

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See Indictment, United States v. Sullivan (indictment filed in the United States District Court for the Southern District of New York) (S.D.N.Y. Aug. 28, 2002) [hereinafter Sullivan Indictment] (on file with author); Information, United States v. Myers, 02-CR-1261 (S.D.N.Y. Sept. 25, 2002) [hereinafter Myers Information] (on file with author); Information, United States v. Vinson, 02-CR-1349 (S.D.N.Y. Oct. 10, 2002) [hereinafter Vinson Information] (on file with author); Information, United States v. Normand (information filed in the United States District Court for the Southern District of New York) [hereinafter Normand Information] (on file with author).

WorldCom's recent settlement of an SEC suit exacted a financial penalty that is seventy-five times larger than any fraud penalty ever paid to the SEC. Barnaby J. Feder, *WorldCom Agrees to Pay $750 Million In S.E.C. Suit*, N.Y. TIMES, July 8, 2003, at C6.

197. Indeed, Andersen's response to the accusation that the firm's highly public campaign bordered on witness coaching was that the firm was "merely defending itself in the court of public opinion." *Andersen Auditor Talks*, *supra* note 59.

Cf. MODEL RULES OF PROF'L CONDUCT R. 3.6 (1983) (imposing restrictions on making extrajudicial statements that a lawyer reasonably should know will be publicly disseminated and will pose a substantial likelihood of materially prejudicing a judicial proceeding, but also permitting publicly disseminated statements that a reasonable lawyer would believe are necessary to protect the client from substantial undue prejudice from recent publicity).

198. Government's Memorandum of Law, *supra* note 105, at 2, 10-11.

199. Andersen's Motion to Quash, *supra* note 100, at 8 (arguing that "[t]here is no danger that the case will grow stale or that the statute of limitations will run" pending Andersen's trial).

200. Government's Memorandum of Law, *supra* note 105, at 2.

201. *Id.*

202. *Id.* at 10.

effort to win public sympathy could taint the jury pool.[203] Gauged from this perspective, the need for prompt grand jury appearances and sworn testimony was all the more compelling.[204]

Apart from the immediate fallout from Andersen's fall, we should not discount the possibility that the Andersen experience may influence the course of future investigations. In that regard, the government's approach to the WorldCom probe is instructive. On June 25, 2002, WorldCom announced that its audit committee had discovered massive accounting fraud that inflated WorldCom's revenue by $3.8 billion.[205] The next day, the SEC filed a civil fraud complaint—at the *beginning* of its investigation—in marked departure from its usual practice.[206] The normal rule is investigate first, litigate second. But the SEC filed the WorldCom complaint at the start of the process because of concerns about possible document destruction.[207] The SEC also simultaneously sought and obtained an injunction prohibiting WorldCom personnel and affiliates from altering or destroying records relating to the case.[208] It is hard to

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203. *Id.* at 2. In a stunning show of hubris, Andersen argued that the inadvertent release of a sealed document the government filed with the court could bias prospective jurors and taint their impartiality. The Wall Street Journal had obtained a copy of the document from the court clerk's office. Nonetheless, Andersen's lawyers claimed that pretrial publicity surrounding recent government leaks called for a six to seven week postponement of the trial to improve the chances that unbiased jurors could be selected to serve. Jonathan Weil, *U.S. Judge Rejects Andersen Request For Delay in Trial*, WALL ST. J., Apr. 29, 2002, at C18; David Barboza and Jonathan D. Glater, *Judge Refuses to Postpone Andersen Trial*, WALL ST. J., Apr. 27, 2002, at B2; *Andersen Bids to Settle*, *supra* note 48; *Two Employees Are Key*, *supra* note 48. Recall that it was Andersen that had insisted on an unusually early trial date, *see supra* note 104 and accompanying text, and that it was Andersen that published full page ads in the Wall Street Journal and the New York Times. *See supra* notes 141-45 and accompanying text.

204. Government's Memorandum of Law, *supra* note 105, at 2. Most pre-indictment interviews of Andersen personnel were unsworn, and many occurred in the presence of adversarial counsel retained by Andersen itself. *Id*. at 11.

Andersen's lead trial lawyer Rusty Hardin told the press that the government's response to the motion to quash grand jury subpoenas showed that the prosecutors were "thin-skinned," and he called the government's argument against granting the motion "the most hypersensitive, nonsensical, First-Amendment-ignorant observation I have ever heard." Kurt Eichenwald & Jonathan D. Glater, *Andersen Plans a Split, As Government Signals Continued Prosecution*, N.Y. TIMES, Mar. 29, 2002, at C1.

205. Simon Romero & Alex Berenson, *WorldCom Says It Hid Expenses, Inflating Cash Flow $3.8 Billion*, N.Y. TIMES, June 26, 2002, at A1; Jared Sandberg, Rebecca Blumenstein, & Shawn Young, *Accounting Fraud at WorldCom Tops $3.8 Billion: Telecom Giant Ousts CFO and Fights for Survival*; *Probe Likely To Widen*, WALL ST. J., June 26, 2002, at A1.

206. SEC v. WorldCom, Inc., 02-CV-4963 (JSR) (S.D.N.Y. June 26, 2002) (on file with author) [hereinafter SEC v. WorldCom]; Simon Romero, *WorldCom Facing Charges of Fraud; Bush Vows Inquiry: S.E.C. Filing Moves Company Ever Closer to Bankruptcy—Trading Suspended*, N.Y. TIMES, June 27, 2002, at A1.

207. SEC v. WorldCom, Inc., *supra* note 206, at 7.

208. Michael Schroeder, *SEC Files Civil Suit Against WorldCom: Agency Moves Quickly After*

imagine that the Andersen experience did not heighten the agency's concerns.[209]

The SEC's first strike approach would have effectively preempted a key part of Andersen's defense strategy from being used in the WorldCom case. The SEC's immediate filing of a formal civil complaint against WorldCom put all concerned parties—including WorldCom auditor Arthur Andersen—on notice that there *was* an official proceeding to obstruct.

The SEC filing also departed from customary practice by seeking a court-appointed monitor pending resolution of the complaint.[210] This is a highly unusual move. Court-appointed monitors are more often sought at the end of civil or criminal proceedings to ensure the implementation of court-ordered reforms. Here, the purpose of the court's appointment of a monitor at the beginning of the suit was to maintain the status quo by preventing the destruction of relevant documents.[211] Thus, it is possible

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Company Disclosures; A $3.8 Billion Scheme, WALL ST. J., June 27, 2002, at A3. The following day, a Mississippi judge issued a ten-day restraining order prohibiting former WorldCom officials and employees as well as WorldCom's former auditor, Arthur Andersen, from destroying documents. *Judge Bars WorldCom, Andersen, From Destroying Documents*, HOUSTONCHRONICLE.COM, June 28, 2002 (on file with author).

209. *See* Sullivan Indictment, *supra* note 196 (charging Scott Sullivan, WorldCom's CFO, and Buford Yates, WorldCom's Director of General Accounting, with conspiracy, securities fraud, and making false SEC filings); Myers Information, *supra* note 196 (charging WorldCom Senior Vice President and Controller David Myers with conspiracy, securities fraud, and making false SEC filings); Vinson Information, *supra* note 196 (charging WorldCom accountant with conspiracy and securities fraud); Normand Information, *supra* note 196 (charging WorldCom accountant with conspiracy and securities fraud). With the exception of Scott Sullivan, all of these defendants have pled guilty. Six months after his initial indictment, prosecutors added bank fraud to the list of charges against Mr. Sullivan. Kurt Eichenwald, *New Charges Against Ex-WorldCom Executive*, N.Y. TIMES, Apr. 17, 2003, at C2; Kara Scannell, *WorldCom Ex-Chief of Finance Faces New Bank Fraud Charges*, WALL ST. J., Apr. 17, 2003, at B2.

Normand, Vinson, and Myers pled guilty as charged, and Yates pled guilty to the conspiracy and securities fraud counts. Sullivan's trial is scheduled to begin April 7, 2004. Dennis K. Berman, Jonathan Weil, & Shawn Young, *MCI Examiner Criticizes KPMG on Tax Strategy*, WALL ST. J., Jan. 27, 2004, at A3.

There were disputed reports about several aspects of the criminal probe. One related to whether Justice Department officials asked WorldCom to halt an internal investigation by an outside law firm. Internal investigations are generally favored responses to corporate crises. Another related to whether the Department asked the law firm conducting the internal investigation not to interview the employee who discovered the fraud and agreed to become a cooperating witness, because of concerns about possible witness tampering. *See* Simon Romero, *Inside Inquiry By WorldCom is Continuing: Company Says It is Working with U.S.*, N.Y. TIMES, July 6, 2002, at B2; Jared Sandberg & Deborah Solomon, *Key Officials at WorldCom Going to the Hill*, WALL ST. J., July 8, 2002, at A17.

210. On July 3, the court appointed Richard Breeden, former Chairman of the SEC, to be the court's eyes and ears during the pendency of the litigation. Kurt Eichenwald & Simon Romero, *Inquiry Finds Effort at Delay at WorldCom*, N.Y. TIMES, July 4, 2002, at C1.

211. *Id*. Apart from ensuring that WorldCom officers and agents would not destroy relevant documents, the monitor's other principal function was to ensure that WorldCom and its affiliates

that the Andersen experience will have unanticipated effects on the future course of enforcement.

And last, there is the question of audience. Andersen presented its case to a broad range of constituencies—including Congress—to garner sympathy for the firm. Andersen strategists undoubtedly did not anticipate the momentum that legislative reform would gain over the summer, or that public zeal for reform would lead to speedy enactment of the Sarbanes-Oxley Act, which has now become law. Sarbanes-Oxley is primarily about corporate governance reform. Its goals include requiring greater accountability on the part of responsible corporate executives and removing the "growing doubt about whether audited financial statements are believable."[212]

But Sarbanes-Oxley is also about being tough on crime.[213] Its criminal provisions create new fraud offenses, enhance criminal penalties for some existing crimes, and enlarge the universe of federal cover-up crimes. Compliments of Sarbanes-Oxley, three Andersen-inspired[214] obstruction of justice statutes "close loopholes" and bypass "ambiguities and technical limitations" in existing obstruction statutes.[215] The new criminal provisions include a "general anti[-]shredding" statute;[216] a new law that requires auditors of public companies—under pain of felony penalties—to preserve audit and review papers for five years to assure their continued availability to regulators and law enforcement authorities;[217] and an anti-retaliation provision that protects whistleblowers who report financial

refrained from making any extraordinary payments to current or former officers, directors, or employees. Devlin Barrett, *Court Picks Former S.E.C. Chairman as the Eyes and Ears of WorldCom*, ST. LOUIS POST-DISPATCH, July 4, 2002, at C7.

212. *Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 60 (2002) (statement of Richard C. Breeden, Chairman Securities and Exchange Commission 1989-1993).

213. Brickey, *From Enron to WorldCom*, *supra* note 2, at 375-81.

214. The Senate Report on The Corporate and Criminal Fraud Accountability Act of 2002, which ultimately was enacted in part as Title VIII and Title XI of Sarbanes-Oxley, specifically refers to Andersen's document destruction and document retention policy in its discussion of why new obstruction of justice laws were needed. The Corporate and Criminal Fraud Accountability Act of 2002, S. REP. 107-146, at 15-16 (2002) [hereinafter S. REP. on FRAUD ACCOUNTABILITY ACT].

215. *Id.* at 14. *See* 3 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY §§ 12:21, 12:22.10, 12:22.30 (2d ed. Supp. 2003).

216. S. REP. on FRAUD ACCOUNTABILITY ACT, *supra* note 214, at 16. *See* 18 U.S.C.A. § 1512(c),(f) (West Supp. 2003) (prohibiting, *inter alia*, personally destroying documents to make them unavailable for use in an official proceeding, whether or not a proceeding is pending, and forestalling a future argument that the actor did not persuade anyone to alter or destroy documents).

217. 18 U.S.C. § 1520 (West Supp. 2003) (requiring retention of corporate audit records for five years, punishing destruction of such records within the five-year term, and forestalling a future argument that the document destruction was routine).

fraud to federal investigators.[218] In sum, Sarbanes-Oxley firmly puts Andersen's legal and factual arguments to rest while placing broad power in prosecutors' hands.

CONCLUSION

Andersen's fall from grace is a cautionary tale. Its history of failed audits reveals a firm culture that encouraged manipulation and deceit. Cast in the most favorable light, Andersen's lax policies and aggressive practices facilitated a massive corporate fraud. When exposure of the fraud became imminent, Andersen's lead Enron engagement partner orchestrated an expedited effort to shred incriminating documents before the investigators arrived. Andersen then sought to save face by publicly impugning the integrity of the investigation, portraying it as a gross abuse of prosecutorial power. All of this in order to save the firm.

As we all now know, Andersen's strategy failed. Its auditing practice is closed, it stands convicted of a federal crime, and its reputation is in shambles. Andersen was unwilling to learn from its past, and—sadly or not—that is the legacy Andersen left behind.

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218. 18 U.S.C.A. § 1519 (West 2003) (prohibiting altering or destroying documents for the purpose of influencing an investigation or the "proper administration of any matter within the jurisdiction of a [federal] department or agency," and forestalling a future argument that there must be a proceeding to obstruct). *See* Brickey, *From Enron to WorldCom*, *supra* note 2, at 365-68, 370.