

**CASE STUDY: ARTHUR ANDERSEN CONVICTION UNDER § 1512**

The following materials may assist students in working through some of the questions raised above and should provoke consideration of when lawyer's advice should be sanctioned as obstruction. This case study includes the indictment of Arthur Andersen, LLP, for obstruction, the specific jury instructions on obstruction given in the case, excerpts from Andersen's Motion for Judgment of Acquittal or a New Trial and from the Government's memorandum in response to the defense motion, a brief description of the court's ruling on this motion, and the trial exhibits that are referenced in the brief (the critical exhibit, GX 1018B, as well as GX 1025E, DX 476, and GX NT 1009 (Nancy Temple notes dated Oct.9, 2001)).

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS

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UNITED STATES OF AMERICA

INDICTMENT

- against -

Cr. No. H-02-121

ARTHUR ANDERSEN, LLP,

T. 18, U.S.C., §§ 1512 (b)(2)  
and 3551 *et seq.*)

Defendant.

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THE GRAND JURY CHARGES:

I. *ANDERSEN AND ENRON*

1. ARTHUR ANDERSEN, LLP ("ANDERSEN"), is a partnership that performs, among other things, accounting and consulting services for clients that operate businesses throughout the United States and the world. ANDERSEN is one of the so-called "Big Five" accounting firms in the United States. ANDERSEN has its headquarters in Chicago, Illinois, and maintains offices throughout the world, including in Houston, Texas.

2. Enron Corp. ("Enron") was an Oregon corporation with its principal place of business in Houston, Texas. For most of 2001, Enron was considered the seventh largest corporation in the United States based on its reported revenues. In the previous ten years, Enron had evolved from a regional natural gas provider to, among other things, a trader of natural gas, electricity and other

commodities, with retail operations in energy and other products.

3. For the past 16 years, up until it filed for bankruptcy in December 2001, Enron retained ANDERSEN to be its auditor. Enron was one of ANDERSEN's largest clients worldwide, and became ANDERSEN's largest client in ANDERSEN's Gulf Coast region. ANDERSEN earned tens of millions of dollars from Enron in annual auditing and other fees.

4. ANDERSEN performed both internal and external auditing work for Enron mainly in Houston, Texas. ANDERSEN established within Enron's offices in Houston a work space for the ANDERSEN team that had primary responsibility for performing audit work for Enron. In addition to Houston, ANDERSEN personnel performed work for Enron in, among other locations, Chicago, Illinois, Portland, Oregon and London, England.

## II. *THE ANTICIPATION OF LITIGATION AGAINST ENRON AND ANDERSEN*

5. In the summer and fall of 2001, a series of significant developments led to ANDERSEN's foreseeing imminent civil litigation against, and government investigations of, Enron and ANDERSEN.

6. On or about October 16, 2001, Enron issued a press release announcing a \$618 million net loss for the third quarter of 2001. That same day, but not as part of the press release, Enron announced to analysts that it would reduce shareholder equity by approximately \$1.2 billion. The market reacted immediately and the stock prices of Enron shares plummeted.

7. The Securities and Exchange Commission ("SEC"), which investigates possible violations of the federal securities laws, opened an inquiry into Enron the very next day, requesting in writing information from Enron.

8. In addition to the negative financial information disclosed by Enron to the public and to analysts on October 16, 2001, ANDERSEN was aware by this time of additional significant facts unknown to the public.

- The approximately \$1.2 billion reduction in shareholder equity disclosed to analysts on October 16, 2001, was necessitated by ANDERSEN and Enron having previously improperly categorized hundreds of millions of dollars as an increase, rather than a decrease, to Enron shareholder equity.

- The Enron October 16, 2001, press release characterized numerous charges against income for the third quarter as "non-recurring" even though ANDERSEN believed the company did not have a basis for concluding that the charges would in fact be non-recurring. Indeed, ANDERSEN advised Enron against using that term, and documented its objections internally in the event of litigation, but did not report its objections or otherwise take steps to cure the public statement.

- ANDERSEN was put on direct notice of the allegations of Sherron Watkins, a current Enron employee and former ANDERSEN employee, regarding possible fraud and other improprieties at Enron, and in particular, Enron's use of off-balance-sheet "special purpose entities" that enabled the company to camouflage the true financial condition of the company. Watkins had reported her concerns to a partner at ANDERSEN, who thereafter disseminated them within ANDERSEN, including to the team working on the Enron audit. In addition, the team had received warnings about possible undisclosed side-agreements at Enron.

- The ANDERSEN team handling the Enron audit directly contravened the accounting methodology approved by ANDERSEN's own specialists working in its Professional Standards Group. In opposition to the views of its own experts, the ANDERSEN auditors had advised Enron in the spring of 2001 that it could use a favorable accounting method for its "special purpose entities."

- In 2000, an internal review conducted by senior management within ANDERSEN evaluated the ANDERSEN team assigned to audit Enron and rated the team as only a "2" on a scale of one to five, with five being the highest rating.

- On or about October 9, 2001, correctly anticipating litigation and government investigations, ANDERSEN, which had an internal department of lawyers for routine legal matters, retained an experienced New York law firm to handle future Enron-related litigation.

### III. *THE WHOLESALE DESTRUCTION OF DOCUMENTS BY ANDERSEN*

9. By Friday, October 19, 2001, Enron alerted the ANDERSEN audit team that the SEC had begun an inquiry regarding the Enron "special purpose entities" and the involvement of Enron's Chief Financial Officer. The next morning, an emergency conference call among high-level ANDERSEN management was convened to address the SEC inquiry. During the call, it was decided that documentation that could assist Enron in responding to the SEC was to be assembled by the ANDERSEN auditors.

10. After spending Monday, October 22, 2001 at Enron, ANDERSEN partners assigned to the Enron engagement team launched on October 23, 2001, a wholesale destruction of documents at ANDERSEN's offices in Houston, Texas. ANDERSEN personnel were called to urgent and mandatory meetings. Instead of being advised to preserve documentation so as to assist Enron and the SEC, ANDERSEN employees on the Enron management team were instructed by ANDERSEN partners and others to destroy immediately documentation relating to Enron, and told to work overtime if necessary to accomplish the destruction. During the next few weeks, an unparalleled initiative was undertaken to shred physical documentation and delete computer files. Tons of

paper relating to the Enron audit were promptly shredded as part of the orchestrated document destruction. The shredder at the ANDERSEN office at the Enron building was used virtually constantly and, to handle the overload, dozens of large trunks filled with Enron documents were sent to ANDERSEN's main Houston office to be shredded. A systematic effort was also undertaken and carried out to purge the computer hard-drives and E-mail system of Enron-related files.

11. In addition to shredding and deleting documents in Houston, Texas, instructions were given to ANDERSEN personnel working on Enron audit matters in Portland, Oregon, Chicago, Illinois and London, England, to make sure that Enron documents were destroyed there as well. Indeed, in London, a coordinated effort by ANDERSEN partners and others, similar to the initiative undertaken in Houston, was put into place to destroy Enron-related documents within days of notice of the SEC inquiry. Enron-related documents also were destroyed by ANDERSEN partners in Chicago.

12. On or about November 8, 2001, the SEC served ANDERSEN with the anticipated subpoena relating to its work for Enron. In response, members of the ANDERSEN team on the Enron audit were alerted finally that there could be "no more shredding" because the firm had been "officially served" for documents.

*THE CHARGE: OBSTRUCTION OF JUSTICE*

13. On or about and between October 10, 2001, and November 9, 2001, within the Southern District of Texas and elsewhere, including Chicago, Illinois, Portland, Oregon, and London, England, ANDERSEN, through its partners and others, did knowingly, intentionally and corruptly persuade and attempt to persuade other persons, to wit: ANDERSEN employees, with intent to cause and induce such person to (a) withhold records, documents and other objects from official proceedings, namely: regulatory and criminal proceedings and investigations, and (b) alter, destroy, mutilate and conceal objects with intent to impair the objects' integrity and availability for the use in such official proceedings.

(Title 18, United States Code, Sections 1512 (b)(2) and 3551 *et seq.*)

A TRUE BILL

\_\_\_\_\_/s/

FOREPERSON

JOSHUA R. HOCHBERG  
ACTING UNITED STATES ATTORNEY  
SOUTHERN DISTRICT OF TEXAS  
LESLIE CALDWELL  
DIRECTOR, ENRON TASK FORCE

By: \_\_\_\_\_/s/\_\_\_\_\_

Samuel W. Buell  
Andrew Weissmann  
Special Attorneys  
Department of Justice

IN THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT  
OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA

vs.

CRIMINAL NO.  
H-02-121

ARTHUR ANDERSEN, LLP

*COURT'S INSTRUCTIONS TO THE JURY*

\* \* \*

**Specific Instructions**

The indictment charges in relevant part:

On or about and between October 10, 2001, and November 9, 2001, within the Southern District of Texas and elsewhere, including Chicago, Illinois, Portland, Oregon, and London, England, ANDERSEN, through its partners and others, did knowingly, intentionally and corruptly persuade and attempt to persuade other persons, to wit: ANDERSEN employees, with intent to cause and induce such persons to (a) withhold records, documents and other objects from official proceedings, namely: regulatory and criminal proceedings and investigations, and (b) alter, destroy, mutilate and conceal objects with intent to impair the objects' integrity and availability for use in such official proceedings.

(Title 18, United States Code, Sections 1512(b)(2) and 3551 *et seq.*)

Title 18 U.S.C. § 1512(b) provides that:

Whoever knowingly \* \* \* [and] corruptly persuades another person, or attempts to do so, with intent \* \* \* to cause or induce any person to withhold \* \* \* a record, document, or other object from an official proceeding, [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding \* \* \* [shall be guilty of a crime].

In order to prove Andersen guilty of violating this provision, the government must prove each of the following two elements beyond a reasonable doubt:

First: That on or about the dates charged, the Andersen firm, through its agents, corruptly persuaded or attempted to corruptly persuade another person or persons; and

Second: That Andersen, through its agents, acted knowingly and with intent to cause or induce another person or persons to (a) withhold a record or document from an official proceeding, or (b) alter, destroy, mutilate, or conceal an object with intent to impair the object's availability for use in an official proceeding.

An "official proceeding" is a proceeding before a federal court, judge, or agency. In this regard, you are instructed that the Securities and Exchange Commission, otherwise known as the "SEC," is a federal agency, and that an "official proceeding," for this case, is a proceeding before a federal agency, such as the SEC. A proceeding before a federal agency includes all of the steps and stages in the agency's performance of its governmental functions, and it extends to administrative as well as investigative functions, both formal and informal. For purposes of this case a civil law suit brought by private litigants is not an official proceeding.

For the first element, to determine whether Andersen corruptly persuaded "another person," an employee or partner of Andersen is considered "another person." To "persuade" is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word "corruptly" means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding. In order to establish this corrupt persuasion element, the government must prove that the agent of Andersen who engaged in the persuasion, not the other person persuaded, possessed the improper purpose. The improper purpose need not be the sole motivation for the defendant's conduct so long as the defendant acted, at least in part, with that improper purpose.

Thus, if you find beyond a reasonable doubt that an agent, such as a partner, of Andersen acting within the scope of his or her employment, induced or attempted to induce another employee or partner of the firm or some other person to withhold, alter, destroy, mutilate, or conceal an object, and that the agent did so with the intent, at least in part, to subvert, undermine, or impede the fact-finding ability of an official proceeding, then you may find that Andersen committed the first element of the charged offense.

The second element of the charged obstruction offense is that Andersen, through its agents, acted knowingly and with the intent to cause or induce another person to withhold a record or a document from an official proceeding,

or to alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding.

An act is done with the intent to impair the integrity or availability of a document or object only if it is undertaken with the specific purpose of making the document or object unavailable for use in an official proceeding. However, the government is not required to prove that Andersen's sole or even primary intent was to cause another person to make a document or object unavailable for use in an official proceeding. You may find that this intent element has been established if you conclude that Andersen acted, at least in part, with the intent to cause another person to make a document or object unavailable for use in an official proceeding.

In order to establish that Andersen committed the charged offense, it is not necessary for the government to prove that an official proceeding was pending, or even about to be initiated, at the time the obstructive conduct occurred. Nor is it necessary for the government to prove that a subpoena had been served on Andersen or any other party at the time of the offense. The government need only prove that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served.

Furthermore, it is not necessary for the government to prove that Andersen knew that its conduct violated the criminal law. Thus, even if Andersen honestly and sincerely believed that its conduct was lawful, you may find Andersen guilty if you conclude that Andersen acted corruptly and with the intent to make documents unavailable for an official proceeding.

Moreover, the government is not required to prove that Andersen was successful or likely to succeed in subverting, undermining, or impeding the fact-finding ability of an official proceeding. Nor is the government required to prove that Andersen was successful or likely to succeed in making documents unavailable for that proceeding. It is Andersen's purpose and intent, not the success of its effort, that the government must prove as elements of the charged offense.

The indictment charges the defendant with committing the offense in two different ways. The first is that the defendant sought to withhold a record or a document from an official proceeding. The second is that the defendant sought to alter, destroy, mutilate, or conceal an object with intent to impair the object's availability for use in an official proceeding.

The government does not have to prove both of these methods for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt on one method or the other is enough. But in order to return a guilty verdict, all twelve of you must agree that the same method has been proved. All of you must agree

that the government proved beyond a reasonable doubt that the defendant sought to cause another person to withhold a record or a document from an official proceeding; or all of you must agree that the government proved beyond a reasonable doubt that the defendant sought to cause another person to alter, destroy, mutilate, or conceal an object with intent to impair the object's availability for use in an official proceeding. Of course, you may unanimously agree that the government did or did not prove beyond a reasonable doubt both methods.

It is a crime for anyone to attempt to commit a violation of certain specified laws of the United States. In this case, Andersen is charged with both obstructing an official proceeding and with attempting to do so. You may find Andersen guilty if the government proves beyond a reasonable doubt that Andersen either attempted to obstruct an official proceeding or that it actually did so.

For you to find Andersen guilty of attempting to obstruct an official proceeding, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That Andersen, through its agents, intended to obstruct an official proceeding; and

Second: That Andersen, through its agents, did an act constituting a substantial step toward the commission of that crime that strongly corroborates the defendant's criminal intent.

You will note that the indictment charges that the offense was committed "on or about" a specified date. The law only requires a substantial similarity between the dates charged in the indictment and the proof in the case. Thus, it does not matter if the indictment charges that a specific act occurred on or about a certain date, and the evidence indicates that, in fact, it was on another date. The law only requires substantial similarity between the dates alleged in the indictment and the dates established by testimony or exhibits. Accordingly, the government need only prove beyond a reasonable doubt that the defendant committed the crime on or about and between October 10, 2001 and November 9, 2001 the dates stated in the indictment.

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment.

If a defendant is found guilty, it is my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter into your consideration or discussion. \* \* \*

## ARTHUR ANDERSEN CASE STUDY

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA,

v.

CR. A. H-02-0121

ARTHUR ANDERSEN, L.L.P.,  
Defendant,ANDERSEN'S MOTION FOR JUDGMENT  
OF ACQUITTAL OR A NEW TRIAL

Arthur Andersen LLP hereby moves for judgment of acquittal under Fed. R. Crim. P. 29 or, in the alternative, for a new trial under Fed. R. Crim. P. 33. For numerous reasons, the jury's verdict is insupportable.

*First*, the members of the jury may have made clear, in repeated and consistent post-verdict comments, that they convicted Andersen on the basis of conduct that is not criminal, that was not alleged in the indictment to be an act of obstruction, and that was not argued by the government during trial to constitute illegal "corrupt persuasion." It is extremely rare, if not unprecedented, for jurors spontaneously to announce, in unequivocal terms, that their verdict rested on a legally invalid ground. The jurors also made clear that they rejected the allegations that the government did advance. In these extraordinary circumstances, it is plain that the government has not proved its case. The conviction therefore should be set aside in the interests of justice.

*Second*, the need for relief is especially compelling because, even if the Court ignores the jurors' self-described repudiation of the government's theory of the case, the prosecution's evidence was insufficient to sustain the conviction. That unquestionably is so under a proper reading of the law relating to "corrupt persuasion" and "official proceeding," which we have set out in detail in prior filings: there is absolutely no evidence that anyone at Andersen used improper methods to persuade others to destroy evidence or that an official proceeding was ongoing or scheduled at the time of the alleged obstruction—both of which are elements of the offense under 18 U.S.C. § 1512(b). Moreover, even under the law as set forth in the jury charge given by the Court, a reasonable jury could not have found that anyone at Andersen acted with the intent to subvert, undermine, or impede the factfinding functions of the SEC. Against this background, Andersen should be granted either a judgment of acquittal or a new trial.

### A. Factual Background

As the Court is aware, the government charged Andersen with obstructing an official proceeding by undertaking, over a specified two-week period, a massive effort to *shred documents and delete electronic records* to keep them from the SEC. According to the indictment, on October 23, 2001, "ANDERSEN partners assigned to the Enron engagement team launched \* \* \* a wholesale destruction of documents at ANDERSEN's offices in Houston, Texas" Indictment, ¶ 10. The indictment states that Andersen employees "were inserted \* \* \* to destroy immediately documentation relating to Enron, and to work overtime if necessary to accomplish the destruction." *Id.* Following these orders, the indictment contends, Andersen employees shredded "[t]ons of paper" and undertook a "systematic effort" to "purge the computer hard-drives and E-mail system of Enron-related files." *Id.* The indictment further alleges that "instructions were given to ANDERSEN personnel working on Enron audit matters in Portland, Oregon, Chicago, Illinois, and London, England, to make sure that Enron documents were destroyed there as well." *Id.* ¶ 11. The indictment focuses entirely on the alleged *destruction* of documents as the only relevant criminal acts and cites no instance in which an Andersen partner or employee asked another individual to *alter* a document.

In a series of extraordinary, public post-trial comments, however, no fewer than six of the jurors have reported that the jury did *not* accept the government's allegations or theory of the case. Instead, the jurors uniformly have stated that, however much some of them individually may have been moved by other aspects of the government's evidence, an essential element of their decision to convict was their agreement that one Andersen partner engaged in a *single* act involving a *particular* e-mail. As the jurors explained it, their ultimate unanimous verdict rested on their conclusion that an e-mail from [Andersen in-house counsel and partner] Nancy Temple corruptly persuaded David Duncan[, Andersen's partner in charge of the Enron account,] to alter a draft memorandum to the file describing his conversations with Enron officials about Enron's October 2001 earnings release. Mr. Duncan had circulated to several Andersen partners, including Ms. Temple, what he characterized as a "[f]irst draft of [a] memo regarding [the] press release discussion for your comments." The Temple e-mail on which the jury focused responded to this message, providing "a few suggested comments for consideration" regarding Mr. Duncan's draft. Gov't Ex. 1018B. These comments recommended "deleting reference to consultation with the legal group and deleting [Ms. Temple's] name on the memo" to avoid "a waiver of the attorney-client privilege" and to decrease the risk that Ms. Temple would be called as a witness. *Id.* The e-mail also "suggested deleting some language that might suggest we have concluded the release is misleading." *Id.*

As four jurors explained at a press conference immediately after the verdict "it was [government exhibit] 1018A [that underlay the conviction]. \* \* \* That's what we focused on." Ex. 1, at 12. The jury's foreman elaborated: "It's against the law to alter that document." *Id.* at 14; *see id.* (juror agreeing that "this come[s]

down to the term alter"); *id.* at 12 (jury's unanimous agreement "came back to" Andersen's decision "to alter documents"); *id.* at 13 (juror agreeing "[t]hat says it all, 1018A, I believe"); *id.* at 15 (jurors agreeing that the document that "was altered improperly" was the "[d]raft" memo); *id.* at 17 (several jurors declaring it "exactly right" that, because "the question is the altering of that document, that David Duncan was the one persuaded"). Other jurors, separately interviewed by the press, have given identical explanations for the verdict. *See, e.g.*, J. Glater & J. Schwartz, *Jurors Tell of Emotional Days in a Small Room*, N.Y. TIMES, June 17, 2002, at A-1 4 (Ex. 2) (juror stating that "Nancy Temple was found guilty of altering one document" and that "[o]ne person did one thing and tore the whole company down"). These post-trial quotations from the jurors have been extensively reported. For a small sample, see, *e.g.*, T. Fowler, *Andersen guilty*, HOUS. CHRON., June 16, 2002, at 1 (Ex. 3); C. Johnson, *Memo Turned the Tide in Andersen Trial*, WASH. POST., June 17, 2002, at A-5 (Ex. 4); L. Girion, *Verdict Puts Ex-Auditor in a Tough Spot*, L.A. TIMES, June 17, 2002, at C-1 (Ex. 5); J. Weil *et al.*, *In Andersen Case, Single E-Mail Led to Guilty Verdict, Jurors Say*, WALL ST. J., June 17, 2002, at A-1 (Ex. 6); C. Bryan-Low, *Andersen Jury's Foreman Was Last to Be Persuaded*, WALL ST. J., June 17, 2002, at C-13 (Ex. 7); M. Flood, *Decision by jurors hinged on memo*, HOUS. CHRON., June 16, 2002, at 1 (Ex. 8); B. Jeffreys, *Alteration of Internal Document Led to Finding Against Andersen*, June 18, 2002, available at <http://www.law.com/jsp/printerfriendly.jsp?c=LawArticle&=PrinterFriendlyArticle&cid=1024078849643> (Ex. 9).

After the verdict, the government endorsed this rationale for convicting Andersen. At a post-trial press conference, prosecutor Andrew Weissmann stated that the memo "was an important piece of proof, because it showed a draft document that was more truthful than the final document." G. Farrell, *Impact to reverberate from Wall Street to D.C.*, U.S.A. TODAY, June 17, 2002, at 3B (Ex. 10). Mr. Weissmann also told the press that it was "a perfect illustration of Nancy Temple and others getting rid of drafts and sanitizing the record. That document was devastating." J. Weil, A. Barritonuevo, & C. Bryan-Low, *The Downfall of Andersen Was Sealed by Single E-Mail*, WALL ST. J. EUR., June 17, 2002, at A1 (Ex. 11). Prosecutor Sam Buell stated that the e-mail was "one of the critical pieces of evidence" because it demonstrated that "Arthur Andersen was papering the file" and was "acting to protect themselves, not the public." *Id.*

### **B. The Jury Convicted Andersen For Engaging In Lawful Conduct**

The jurors' articulation of the way in which they reached their conclusion leaves no doubt that the verdict was illegitimate. The jury would not have come to a unanimous verdict (other than "not guilty") absent the jurors' agreement that Ms. Temple "corruptly persuaded" Mr. Duncan to redraft his October 15 memo. But that conduct was not, and was not alleged in the indictment to be, an illegal act of obstruction. By itself, that conclusion requires setting aside the verdict. At the same time, the jury's comments confirm, as we argue more fully below, that a

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<sup>1</sup>The correct reference actually is to government exhibit 1018B.

searching review of the government's evidence simply does not establish the elements of the charged offense. On examination the government's case brings to mind Virginia Woolf's famous observation: there is no "there" there. Because there is no legitimate basis for the verdict, the Court should enter a judgment of acquittal pursuant to Rule 29 or grant Andersen a new trial under Rule 33.

*1. The Temple e-mail on which the jury based its verdict was not criminal*

To begin with, Ms. Temple's action in proposing edits to Mr. Duncan's memo—the foundation for the verdict—does not fall within the plain terms of Section 1512(b), for several reasons. *First*, the jury convicted Andersen because it believed that Ms. Temple corruptly persuaded Mr. Duncan to "alter" his draft memo. Section 1512(b) does indeed make it a crime to corruptly induce another to "alter \* \* \* an object" with the intent to "impair the object's integrity or availability for use in an official proceeding." Ms. Temple, however, plainly did not urge Mr. Duncan to "alter" a document within the meaning of the statutory term. The word "alter" means "to change some of the elements or ingredients or details *without substituting an entirely new thing* or destroying the identity of the thing affected." See *United States v. Edwards*, 1993 WL 219830, \* 1 (4th Cir. June 22, 1993) (quoting BLACK'S LAW DICTIONARY 77 (6th ed. 1990)) (emphasis added); see also *United States v. Hall*, 801 F.2d 356, 359 (8th Cir.1986) (to alter means "to cause to become different in some particular characteristic \* \* \* without changing into something else") (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 73 (1971)); *Smith v. United States*, 74 F.2d 941, 942 (5th Cir.1935) (to alter means "to change without destroying the identity of the thing changed"). Changing the hard-copy original of a document by, for example, whiting out the date and substituting a false one may alter the document in this sense. But *suggesting edits* to a draft memorandum explicitly circulated for that purpose—an action that will lead to creation of a *new draft*—plainly does not.

Moreover, wholly apart from the dictionary definition of the word "alter," the formative, non-final character of a draft like the Duncan memo makes it inappropriate to treat the editing process as criminal obstruction. It would defy common sense to conclude that commenting on a draft document, even for the purpose of putting a better face on some matter pertinent to an official proceeding when the document is given final form, constitutes obstruction of justice. Indeed, if collaboration on the redraft of a document may so easily be deemed a crime, virtually every law firm in the United States engages in criminal conduct every day, every suggested rephrasing of a memo to the file (or of an FBI form 302) relating to a matter that might give rise to litigation could be said to undermine the factfinding function of an official proceeding. That cannot be what Congress had in mind when enacting Section 1512(b).<sup>2</sup>

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<sup>2</sup>Imagine, for example, that Mr. Duncan had consulted Ms. Temple *before* he committed his first draft to print, and that she had advised him to leave the word "misleading" out of the document. That conduct certainly would not have been criminal. Or imagine that Ms. Temple was looking over Mr. Duncan's shoulder as he typed the draft memo, at his word processor, that she saw him type in the word "misleading," and that she proposed that he

*Second*, even if Ms. Temple's e-mail somehow could be thought to implicate Section 1512(b) at all, it could not serve as the basis for Andersen's conviction, for it cannot be characterized as "corrupt." Congress expressly directed that the obstruction statutes do not "prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or in anticipation of an official proceeding." 18 U.S.C. § 1515(c). This "safe harbor" provision "excepts bona fide legal representation from all the ways one could be culpable under the statute." *United States v. Kloess*, 251 F.3d 941, 945 (11th Cir.2001). The safe harbor for legal advice is thus "a complete defense to obstruction of justice." *United States v. Kellington*, 217 F.3d 1084,1098 (9th Cir.2000). The provision reflects Congress's recognition that "one who is performing bona fide legal representation does not have an improper purpose" (*Kloess*, 251 F.3d at 948)—even if the attorney acts with the intention of preventing the communication of certain information to an official proceeding. That makes the jury's action here insupportable; as a leading expert on legal ethics recently observed, Ms. Temple's e-mail was precisely "the kind of advice lawyers give clients all the time." Stephen Gillers, *The Flaw in the Andersen Verdict*, NEW YORK TIMES, June 18, 2002, at A25 (Ex. 12).

### ***2. Reliance on the Temple e-mail resulted in a fatal variance from the indictment***

The jurors' comments also make clear that Andersen is entitled to judgment for the additional reason that there was a substantial discrepancy between the evidence and the indictment. An indictment must inform the defendant of the charges against him sufficiently to allow him to prepare an adequate defense at trial. *United States v. Massey*, 827 F.2d 995, 1003 (5th Cir.1987). When "the evidence at trial proves facts other than those alleged in the indictment" there is a "variance" between the evidence and the indictment. *United States v. Ramirez*, 145 F.3d 345, 351 (5th Cir.1998). Such a variance is "material"—and is grounds for reversal—"if it prejudices a defendant's 'substantial rights,' either by surprising the defendant at trial or by placing him at the risk of double jeopardy." *United States v. Baker*, 17 F.3d 94, 98 (5th Cir.1994).

The indictment in this case focused squarely and exclusively on the shredding of documents and deletion of e-mails that occurred between October 10 and November 9, 2001. The indictment did not suggest that any Andersen employee committed a crime by persuading another person to *alter* any document. Indeed, although the indictment referred to Andersen's documentation of its disagreement with the October 16 earnings release, it did so under the heading "anticipation of litigation" to establish that Andersen "was aware by this time of additional significant facts unknown to the public" (Indictment ¶ 8); the indictment nowhere suggested that comments on the release were *themselves* acts of obstruction. Andersen, thus had no notice that Ms.

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delete it. Such conduct also surely cannot be criminal. That Ms. Temple instead saw the first draft of the memo-in-progress and advised Mr. Duncan to leave the word out of the second draft is not different in any meaningful way.

Temple's e-mail of proposed edits could be regarded as a criminal act—let alone that they could be the "one thing" that would tear "the whole company down." Glater & Schwartz, *supra* (Ex. 2).<sup>3</sup>

This variance between the indictment and the evidence was highly prejudicial to Andersen. Because the indictment did not allege that Ms. Temple's e-mail was an act of corrupt persuasion, Andersen was not on notice of this theory of prosecution. Had it been, Andersen would have introduced or highlighted evidence showing that, shortly after making her suggested edits to Mr. Duncan's memo, Ms. Temple forwarded to outside counsel her e-mail correspondence with Mr. Duncan concerning the October 16 press release. In this and other exchanges with counsel during its time, Ms. Temple sought advice on (1) Andersen's legal obligations under the securities laws to alert Enron's directors about Andersen's views regarding the use of the term "non-recurring" in the press release and (2) whether Andersen should ask Enron to obtain guidance from its own outside counsel on this issue. See GX 1018C. This evidence would have demonstrated to the jury that Ms. Temple's comments to Mr. Duncan were not the product of an intent to obstruct an SEC proceeding. Andersen also would have sought an instruction that "the providing of lawful, bona fide, legal representation services in connection with or in anticipation of an official proceeding" is proper, 18 U.S.C. § 1515 (c), and could have presented expert testimony on legal ethics that would have foreclosed the jury's voyage into deep water. Because Andersen plainly would have been entitled to such an instruction and to present such evidence had the government proceeded on the theory that Ms. Temple's legal advice constituted a crime, the prejudicial impact of the variance between the evidence and the indictment is manifest.

\* \* \*

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<sup>3</sup>Similarly, the government nowhere suggested in its opening or closing arguments that Ms. Temple corruptly persuaded Mr. Duncan to alter his memo. Instead, prosecutors cited exhibit 1018B to show that Andersen anticipated an SEC inquiry, that Andersen was insufficiently independent of Enron, and that draft documents are valuable to investigators. See Tr. 6409:23 (Temple is "preparing for battle"); *id.* at 6648:7-12 ("If you were the SEC, would you want this draft?").

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA

v.

CRIM. ACTION  
H-02-0121ARTHUR ANDERSEN LLP,  
Defendant,GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO  
ANDERSEN'S MOTION FOR A JUDGMENT OF ACQUITTAL OR A  
NEW TRIAL

\* \* \*

*POINT TWO**ANDERSEN IS GUILTY OF OBSTRUCTION OF JUSTICE*

ANDERSEN is guilty of obstruction of justice, as the jury found. Even if one considers the impermissible information proffered by ANDERSEN regarding the deliberations, ANDERSEN is guilty as charged.

*A. The Evidence Against ANDERSEN Was Compelling*

\* \* \*

The overwhelming trial evidence clearly supports the jury's guilty verdict, and therefore granting a new trial would be an abuse of discretion. In seeking a new trial and a judgment of acquittal, ANDERSEN focuses on just one aspect of the government's proof—Temple's instructions to Duncan embodied in GX 1018B—and argues that such evidence does not demonstrate that ANDERSEN, through Temple, "altered" a document in violation of Section 1512(b)(2).

ANDERSEN ignores, however, that the proof against it at trial was compelling. In October 2001, ANDERSEN partners and employees in Houston and Chicago resurrected the firm's moribund "document retention and destruction" policy, at a time when the firm knew that an SEC investigation had been launched. Further, that effort targeted Enron-related documents. High-level ANDERSEN partners authored internal communications urging the elimination of "smoking guns" from the ANDERSEN workpapers, which they

said could be devastating to the firm and provide proof of criminal conduct. This policy was put into high gear, for the first time in anyone's memory at ANDERSEN, on October 23, 2001, just one business day after ANDERSEN learned of the SEC investigation into Enron. And David Duncan, the ANDERSEN global managing partner in charge of the Enron account globally, admitted that he obstructed justice by calling for the destruction of documents to keep them from the SEC.

In short, the verdict was amply supported by the proof and ANDERSEN cannot establish a "miscarriage of justice" warranting a new trial or a judgment of acquittal.

*B. The Hearsay Information Proffered by ANDERSEN Supports ANDERSEN's Guilt*

In spite of the overwhelming evidence of its guilt, ANDERSEN argues that the hearsay information from jurors after the verdict demonstrates that ANDERSEN was not properly convicted of a crime. It is wrong.

Even, assuming that the jury based its verdict solely on the instructions by Temple reflected in GX 1018B, and even assuming that such evidence was competent to be considered, ANDERSEN has still properly been adjudged to be guilty as charged. Temple advocated the creation of a deliberately misleading document to supersede a more damaging and accurate draft version which would be destroyed. Temple sanitized the record in order to protect ANDERSEN from outside prying eyes, *i.e.*, the SEC, which she fully expected at the time to be conducting an investigation of ANDERSEN. In sum, Temple was not giving legal advice; she was giving illegal advice.

In contrast to ANDERSEN's new contention in its brief, the testimony about the circumstances surrounding GX 1018B figured prominently in the trial and in the government's jury addresses. The context in which Temple gave the instructions reflected in GX 1018B were thoroughly developed at trial through several witnesses, most notably David Duncan, Benjamin Neuhausen, John Stewart and two SEC representatives. During the summations of the government, Temple's creation of the misleading memorandum was explicitly and repeatedly addressed and argued, among other proof of ANDERSEN's guilt. Indeed, after being directly invited by the prosecution to examine GX 1018B during its deliberations, the jury did just that. The jury asked and received all testimony from Duncan regarding the third-quarter Enron press release.<sup>4</sup>

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<sup>4</sup>In rebuttal summation, the jury was explicitly asked to pay particular attention to GX 1018B as "devastating proof," as it was a perfect example of how a draft document was important to a government investigation, since it revealed the truth far better than a sanitized final version. TR at 6646-48; *see also* TR at 6409-11 (main summation, addressing importance of GX 1018B as evidence of Temple's sanitizing the record in anticipation of litigation).

We briefly summarize that evidence herein to refute the claim now advanced by ANDERSEN that in reaching its verdict the jury cobbled together tenuous and tangential evidence that was never elicited or argued by the government.

Duncan testified that he considered the draft of Enron's third-quarter press release to be misleading because it characterized significant losses as "non-recurring," although they were in core Enron businesses. He brought the draft Enron press release language to the attention of others within ANDERSEN, including Temple. A large conference call was held shortly before the issuance of the press release by Enron on October 16, 2001, at which various ANDERSEN partners, including Temple, discussed Enron's proposed use of the term "non-recurring" to characterize losses of hundreds of thousands of dollars. Neuhausen and Stewart testified that everyone agreed that the proposed press release was "misleading." Neuhausen testified that he too believed that the proposed language was misleading, both because it reflected losses in core businesses and because gains in the same areas had not been characterized by Enron as non-recurring. Neuhausen believed it to be misleading for Enron to characterize bad news as one-time events but good news in the same business area as not non-recurring.

Indeed, Neuhausen explicitly testified that it would not be accurate for a memorandum reflecting ANDERSEN's position to state that the firm had not concluded that the draft press release was misleading. An accurate memorandum would state that the firm had concluded that it was misleading.

As a result of this consensus, Duncan was tasked by the group on the conference call with being its emissary to Enron to apprise it of ANDERSEN's position. Duncan did so, and conveyed to Rick Causey, Enron's Chief Accounting Officer, that ANDERSEN considered the use of the term non-recurring to be misleading and that companies had been scrutinized by the SEC for such conduct. Duncan testified that Temple had conveyed that information to him, since Duncan himself did not know that information. Enron declined to change the release.

Two SEC witnesses testified to the reason ANDERSEN's determination as to whether the release was misleading was important. Under the securities laws, if ANDERSEN determined that Enron was going to commit a materially misleading act, ANDERSEN could face liability if it failed to take adequate steps to have Enron change its course of conduct. Although ANDERSEN voiced its concerns to one Enron official, it did not take the necessary follow-up action, such as going to Enron's Audit Committee, Board of Directors, or reporting Enron to the SEC. Although ANDERSEN voiced its concerns to an Enron official, it did not take the additional steps of either going to Enron's Board of Directors or reporting Enron to the SEC. As such, ANDERSEN's conduct was consistent with overwhelming trial evidence that it had abdicated its role as watch dog in favor of that of a lap dog to Enron, its second largest client worldwide.

With that backdrop, Duncan was told to memorialize what had transpired regarding the Enron third-quarter press release. His draft memorandum, one of the documents comprising GX 1018B, was received by Temple. She responded in an E-mail, which attached a revised version of the Duncan draft memorandum, all of which were included in GX 1018B. In the most critical portion of the E-mail, Temple advised Duncan, "I suggested deleting some language that might suggest we have concluded the release is misleading." And the attached memorandum from Temple deleted, among other things, references to the term misleading.<sup>5</sup>

But, contrary to Temple's E-mail, in fact ANDERSEN had concluded that the term "non-recurring" was misleading and Temple knew it. The revised Temple document demonstrated in concrete terms how a final version of a document was *less* accurate than a draft. It was a dramatic demonstration of how a draft that accurately reflected the facts could be sanitized to paint a rosier picture to the outside world.

ANDERSEN argues that the revised false documentation by Temple cannot constitute obstruction of justice. It is wrong. The statute charged in this case is title 18, United States Code, sections 1512(b)(2)(A) and 1512(b)(2)(B). Those sections make it a crime to, among other things, corruptly persuade a person to "withhold a record, document or other object from an official proceeding," or "alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding."

Temple's actions clearly were an attempt to withhold an object (the draft

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<sup>5</sup>Temple also made other deletions to the draft memorandum. She deleted references to herself and to consultation with the legal group. As to the former, Temple explained that such a reference would increase the likelihood of her being a witness. As to the latter, Temple explained that it was arguably a waiver of attorney-client privileged advice.

Temple's first concern evidenced her awareness that litigation was on the horizon, particularly when considered in light of her many other instructions during this period to delete the names of lawyers *and* non-lawyers from memoranda, so as not to be, in her words, in the "testifying limelight." See GX 1025E (10/25/01 E-mail from Temple explaining her deletion of the names of ANDERSEN non-legal personnel: "I understand that it would be helpful to send a message that the highest levels are addressing this, but I think we should keep them out of the testifying limelight if we can.")

As to Temple's second concern, her reasoning even if credited is seriously flawed. Temple deleted from the draft memorandum the reference to consultation with the legal group. A reader of the final memorandum would thus not know from the face of the memorandum that the legal group was consulted. The "waiver" Temple professed to be concerned about had either occurred already (by Duncan's discussion with Enron) or it had not; the internal documentation could not waive the privilege. It could, however, serve to reveal what truly had occurred.

memorandum) and to alter, destroy, and conceal that object. ANDERSEN's argument that Temple's edits did not "alter" the Duncan draft memorandum tortures the English language and the clear meaning of the statute. In this case, Temple altered the draft version of a document so that the final version of that document—which would serve as the internal ANDERSEN memorandum documenting its position regarding the Enron third-quarter press release—would present a more favorable view of what had transpired and hide the fact that ANDERSEN had concluded that Enron's press release was misleading. She thus clearly altered and attempted to alter the draft documentation. Contrary to ANDERSEN's view, Congress certainly did not mean Section 1512's prohibition on "alter[ing]" a document to apply only to those few companies that may still use whiteout to make changes to typewritten drafts of documents. ANDERSEN cites no court that has adopted such an absurd interpretation of the alteration prong of Section 1512 (b)(2)(B). The statute applies equally well to attempted obstructive changes and alterations made to an object that resides in electronic form in a computer.

In any event, even if (contrary to fact and law) Temple did not "alter" the draft document, she clearly attempted to "withhold," "destroy," and "conceal" that draft document, since the jury could readily infer that she intended her final version to supersede the draft memorandum, which would be discarded. *See, e.g.*, GX 1018B (A-004625) (Temple wants her name deleted from the draft memorandum so she will not be a witness, a position that would be meaningless if the draft memorandum were intended by her to be retained); DX 476 (Temple E-mail to Stewart, dated 10/14/01, regarding deletion of draft documents by implementation of document policy); GX NT1009 (10/9/01 Temple notes reflecting view that an SEC investigation was "highly probable").<sup>6</sup>

ANDERSEN additionally argues that Temple's instructions regarding GX 1018B cannot support a Section 1512 conviction because she did not act "corruptly," but rather provided "lawful, bona fide legal representation services in connection with or anticipation of an official proceeding," within the meaning of 18 U.S.C. § 1515(c). ANDERSEN's argument is without merit and, in any event, is forfeited.

ANDERSEN asserts that had it been aware that guilt could be premised upon Temple's instructions embodied in GX 1018 it would have taken certain

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<sup>6</sup>ANDERSEN's hypothetical scenarios regarding actions Temple could have taken with respect to the draft memorandum, set forth in footnote 2 of its brief, are unenlightening and inapposite. If Temple instructed Duncan before or during the creation of the *draft* memorandum to change it so it was deliberately factually inaccurate she would still be guilty of obstruction of justice. There is no meaningful difference between (a) ANDERSEN's hypothetical scenarios, (b) coaching a witness to lie, and (c) the actions that Temple in fact took and which were proven beyond a reasonable doubt at trial. All are prohibited by the obstruction statutes. 18 U.S.C. §§ 1512(b)(1), 1512(b)(2)(A), 1512(b)(2)(B) and 1503.

steps, such as seeking additional jury instructions and adducing additional proof. This assertion is made in an unsworn claim in a brief, with no factual support for the position advanced. In fact, the trial record and pre-trial proceedings clearly reveal that ANDERSEN was well aware of the proof that the government intended to offer in this regard and ANDERSEN obviously cannot deny that it was in court when Messrs. Duncan, Neuhausen, and Stewart testified about the third-quarter press release and when GX 1018B was offered. Yet ANDERSEN's current claim was never raised before or during the trial, even though the proof regarding the third-quarter press release and GX 1018B was elicited throughout the trial and argued repeatedly in summation. Moreover, ANDERSEN never sought or moved for a bill of particulars from the government. Having failed to make any such motion or to object to this proof, ANDERSEN cannot now successfully claim that it was surprised by the proof at trial and did not anticipate this line of evidence. In short, ANDERSEN has forfeited its claim.

In any event, even if not forfeited, ANDERSEN's claim is without merit. Section 1515(c) does not exempt all comments and conduct by a lawyer from the reach of the obstruction statutes. Rather, it is an affirmative defense that states no more than the rather self-evident proposition that legal representation that is both "lawful" and "bona fide" is not punishable. *See United States v. Kloess*, 251 F.3d 941, 946-47 (11th Cir.2001)<sup>7</sup>; *United States v. Kellington*, 217 F.3d 1084, 1098-1101 (9th Cir.2000). Temple's revised memorandum and E-mail to Duncan were not legal advice—it was a deliberate effort by her to mislead. As such, it was neither "lawful" or "bona fide." A lawyer may not lawfully counsel her client to engage in fraud.

Moreover, assuming *arguendo* that there was error in the Court not instructing the jury on a defense not raised by ANDERSEN, any such error was clearly harmless. The jury was well aware that Temple was a lawyer for ANDERSEN, and that it was ANDERSEN's position that Temple was doing her job when she e-mailed her comments on the draft document to Duncan. If the jury's guilty verdict was, as ANDERSEN argues, premised on this conduct, then the jury necessarily disbelieved ANDERSEN's characterization of Temple's conduct as innocent, and instead believed that Temple acted with corrupt intent. It is this "corrupt endeavor to obstruct the administration of justice that transforms [an attorney's] traditional litigation-related conduct into criminal violations of the law." *United States v. Cueto*, 151 F.3d 620, 633 (7th Cir.1998). Lawyers charged with criminal offenses based on work-related conduct regularly raise the claim that their conduct simply constituted zealous advocacy within the bounds of lawful legal representation. The courts have ruled, however, that "notwithstanding that the means used by the [lawyer-defendant] might be regarded as lawful, if viewed in a vacuum, clear proof of improper motive could surely serve to criminalize

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<sup>7</sup>While the government disagrees with the *Kloess* Court's *dicta* that the government bears the burden of persuasion on a Section 1515(c) affirmative defense, that issue was not advanced by ANDERSEN and is not necessary to this Court's determination and therefore we do not address it further at this time.

that conduct." *United States v. Cintolo*, 818 F.2d 980, 993 (1st Cir.1987) (finding attorney's litigation-related conduct constituted an obstruction of justice under 18 U.S.C. § 1503); see *Cueto*, 151 F.3d at 631 ("Otherwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress [the obstruction statutes] if employed with the corrupt intent to accomplish that which the statute forbids.").

ANDERSEN also claims that there was an impermissible variance between the Indictment and the proof at trial. This claim, too, is forfeited, for the same reasons noted above.

In any event, even if not forfeited, there was not an impermissible variance between the Indictment and the proof at trial. ANDERSEN was charged with obstruction of justice between October 10, 2001, and November 9, 2001, and is responsible for the actions of its partners in carrying out such obstruction. Indeed, a partnership such as ANDERSEN could only act through its personnel and Temple was one such actor as she was a partner in its Chicago headquarters. ANDERSEN well knew from (at the very least) our detailed pre-trial submissions that the government would claim that Temple—who was at the heart of ANDERSEN's obstruction—attempted in mid-October 2001 to have ANDERSEN's lead Enron engagement partner withhold, alter, conceal and destroy documents.<sup>8</sup> Such proof went to the heart of the charged attempt to obstruct justice within the meaning of section 1512, was hardly a surprise to ANDERSEN, and was not objected to by ANDERSEN. \* \* \*

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<sup>8</sup>In fact, as ANDERSEN concedes, the Indictment even specifically references the internal ANDERSEN discussions about the Enron third-quarter press release.

**District Court Order filed Sept. 11, 2002**

The district court denied Andersen's motions. First, it noted that

Andersen attempts to persuade the Court that the jury found Andersen guilty of legal conduct upon evidence that is clearly inadmissible under Federal Rules of Evidence 606(b). That rule specifically prohibits an inquiry into the validity of a verdict, consideration of the testimony, affidavit, or statement of a juror "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any juror's mind or emotions or influencing the juror to assent or dissent from the verdict \* \* \* concerning the juror's mental processes in connection therewith\* \* \* " \* \* \*

The fact that six jurors spoke eagerly to the press concerning their views of the evidence, their perspectives, or their often contradictory impressions of the deliberations process do not, as Andersen concedes, present evidence of extraneous influence or the type of extraordinary prejudice that would allow the Court to open to scrutiny the deliberation process. Rule 606(b) is clear on its face.

Memorandum and Order, Criminal No. H-02-121 (filed Sept. 11, 2002), at 1, 2-3. The Court then rejected Andersen's argument that the evidence was insufficient to support its guilt, stating:

The fact that the jury took nine days to reach its verdict does not, as Andersen argues render the conviction "as marginal a successful prosecution as could be imagined." The standard is not marginal success, but whether the evidence presented by the Government is sufficient to support the jury's verdict. The case presented to the jury met that standard.

*Id.* at 3-4.

To: David B. Duncan  
CC: Michael C. Odom@ANDERSEN WO; Richard Corgel@ANDERSEN WO; Gary B. Goolsby@ANDERSEN WO  
BCC:  
Date: 10/16/2001 08:39 PM  
From: Nancy A. Temple  
Subject: Re: Press Release draft  
Attachments: ATTBICIQ; 3rd qtr press release memo.doc

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Dave -- Here are a few suggested comments for consideration.

-I recommend deleting reference to consultation with the legal group and deleting my name on the memo. Reference to the legal group consultation arguably is a waiver of attorney-client privileged advice and if my name is mentioned it increases the chances that I might be a witness, which I prefer to avoid.

-I suggested deleting some language that might suggest we have concluded the release is misleading.

-In light of the "non-recurring" characterization, the lack of any suggestion that this characterization is not in accordance with GAAP, and the lack of income statements in accordance with GAAP, I will consult further within the legal group as to whether we should do anything more to protect ourselves from potential Section 10A issues.

Nancy

To: Michael C. Odom@ANDERSEN WO, Richard Corgel@ANDERSEN WO, Nancy A. Temple@ANDERSEN WO, Gary B. Goolsby@ANDERSEN WO  
cc:  
Date: 10/16/2001 05:00 PM  
From: David B. Duncan (Mailed by: Shannon D. Adlong)  
Subject: Press Release draft

First draft of memo regarding press release discussion for your comments.

Page 1 of 1

A-004625

00105469

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Memo

ANDERSEN

230pm/ d:\aces\ memos to The Files\3rd qtr press release memo.doc

Date October 15, 2001  
Subject Enron Press Release Discussions  
Page 2 of 1

To The Files

**Draft**

From David B. Duncan  
Date October 15, 2001  
Subject Enron Press Release Discussions

On Friday evening, October 12, 2001, I received a draft of Enron's anticipated press release regarding third quarter 2001 results indicated Enron's intentions to record numerous charges against income for the quarter totaling approximately \$1 billion on an after-tax basis. The charges were described as "non-recurring" in the draft.

Enron had sometimes used this description in past press releases. In such cases, we had always informed management that, although we understood that press releases were the Company's responsibility, we did not advise the use of "non-recurring" as a description and were concerned it could potentially be misunderstood by investors. We pointed out that such items are, more often than not, included in normal operating earnings in the GAAP financial statements. We also insisted that the Company not use such a description in public filings with which we may have some association (i.e., in 10-Q and 10-K MD&A information). Whether because of our views or otherwise, management has generally described these or similar items as "Items Impacting Comparability in such public filings".

Because of the magnitude of the anticipated third quarter 2001 charges and because they were being described as "non-recurring" in the draft release, I shared excerpts of the draft with Mike Odom, Rich Corgel and Gary Goolsby of our practice risk management group and Nancy Temple of our legal group for advice regarding this situation.

After discussion with the above individuals, on Sunday, October 14, I spoke with Rick Causey, Enron's Chief Accounting Officer, about the company's presentation approach. I told Rick that, while we recognized that press releases are solely the Company's responsibility, we had strong concerns that the presentation of the charges as non-recurring could be misconstrued or misunderstood by investors. I also informed him that we were aware of enforcement actions undertaken against companies by the SEC in cases where they believe such a presentation was materially misleading. Our advice was that the Company should consider changing the presentation or should otherwise undertake whatever procedures they might deem necessary, including the involvement of counsel, to ensure they did not consider the presentation to be misleading. Rick acknowledged my advice.

On Monday, October 15, 2001, the night before the release, I inquired of Rick what procedures may have been performed. He responded that he had raised the issue internally and that the press release had gone through "normal legal review".

The release was issued early Tuesday, October 16, 2001, with essentially the original presentation.

Date October 15, 2001  
Subject Enron Press Release Discussions  
Page 3 of 1

cc: Mike Odom  
Rich Corgel  
Gary Goolsby  
Nancy Temple

# Memo

ANDERSEN

To The Files

Draft

From David B. Duncan

Date October 15, 2001

Subject Enron Press Release Discussions

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The release was issued early Tuesday, October 16, 2001, with essentially the original presentation.

cc: Mike Odom  
Rich Corgel  
Gary Goolsby

236.pdf duncan: memo to The Files/3rd qtr press release memo.doc

**Andersen**

---

To: David W. Tabolt@ANDERSEN WO  
cc:  
Date: 10/25/2001 04:53 PM  
From: Nancy A. Temple, Chicago 33 W. Monroe, 50 / 11234  
Subject: Re: Enron

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On the cc list, can we take off Andrews and Peard and Dreyfus and Goolsby? If they are on this, that increases their likelihood of being a witness. I understand that it would be helpful to send a message that the highest levels are addressing this, but I think we should keep them out of the testifying limelight if we can.

To: Nancy A. Temple@ANDERSEN WO  
cc:  
Date: 10/25/2001 04:11 PM  
From: David W. Tabolt, Chicago 33 W. Monroe, Octel: 50 / 19000 OFFICE: 312 931 9000  
Subject: Enron

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Following is a draft of a note for distribution to all partners regarding Enron. I would appreciate your comments.

October 25, 2001



**Update on recent issues relating to Enron**

**John Geron**  
Managing Practice Director - ABA Solution Segment

**Steve Goddard**  
Office Managing Partner -- Houston

**Dave Duncan**  
Global Management Partner -- Enron

In recent days, you may have read news coverage about a sharp drop in the market value of Enron, ~~one of the firm's largest clients~~. Questions have been raised by Wall Street analysts and in the media about certain of Enron's financial dealings involving complex third-party transactions involving the company's Chief Financial Officer. The U.S. Securities and Exchange Commission has initiated an informal inquiry into these dealings. And the company has replaced its CFO.

Enron's difficulties were triggered by last week's announcement that it would take a \$1 billion charge related to certain impaired assets, losses in its broadband and technology investments, and the early termination of its structured finance arrangements with third parties. In shareholder lawsuits

filed against the company, investors allege, among other things, that the company did not properly account for impaired assets. Because we are the auditor for Enron, we do want you to know the following:

**For Internal Use Only**

- Enron is a client of our firm.
- As the company's auditor, we were consulted on the accounting for the transactions in question. These were very complex and sophisticated transactions. Our Professional Standards Group was consulted on aspects of these transactions. [I recommend having PSG review this sentence or, alternatively, stating: "We consulted internally regarding these transactions."]
- The transactions with two limited partnership that have been the subject of news coverage and details of the participation of CFO Andrew Fastow in these two limited partnerships were known to Enron's Board of Directors and Audit Committee.
- Details of the transactions, including the fact that a senior officer of the company was an officer of these limited partnerships, also were disclosed to investors in the footnotes to Enron's 1999 and 2000 annual reports.

*In Enron's 1999 Annual report, the company said in discussing "Related Party Transactions:"*

In June 1999, Enron entered into a series of transactions involving a third party and LJM Cayman, L.P. (LJM). LJM is a private investment company which engages in acquiring or investing in primarily energy-related investments. A senior officer of Enron is the managing member of LJM's general partner. . . . Management believes that the terms of the transactions with related parties are representative of terms that would be negotiated with unrelated third parties."

*In Enron's 2000 Annual report, the company said in discussing "Related Party Transactions:"*

In 2000 and 1999, Enron entered into transactions with limited partnerships (the Related Party) whose general partner's managing partner is a senior officer of Enron. The limited partners of the Related Party are unrelated to Enron. Management believes that the terms of the transactions with the Related Party were reasonable compared to those which could have been negotiated with unrelated third parties."

- ~~Management has asked for our assistance with the SEC's inquiry. Members of the Enron engagement team and other senior partners are working to help the company's financial team prepare its response.~~ [Actually, management has told us now that its attorneys have told them not to talk to us on details until the attorneys sort a few things out because anything they discuss with us is not privileged, so it's unclear what role we will play. The company also will need to present its own response and I don't want plaintiffs' lawyers to use language like this to argue that we're responsible for what the company says.]

- We are treating this as a sensitive matter, with the active involvement of a core consultation team including ABA Leadership and Practice Directors, Risk Management, Legal, the Professional Standards Group and Communications.

#### **What Should You Say If Asked:**

If you are asked about the Enron matter by a client or audit committee, please limit your comments to the following points:

- Enron is a client of our firm.
- As the company's auditor, we were consulted on the accounting for the transactions in question. These were very complex and sophisticated transactions.
- The transactions that have been the subject of news coverage and details of the participation of Enron's CFO in these two limited partnerships were known to Enron's Board of Directors and Audit Committee.
- Details of the transactions, including the fact that a senior officer of the company was an officer of these limited partnerships, were disclosed to investors in the footnotes to Enron's 1999 and 2000 annual report.
- Given the confidential nature of our client relationship, I hope you will respect the fact that we are unable to go into more detail.

#### **If the Media Ask You Questions:**

Do not discuss this matter with the media. As a matter of policy, only designated spokespersons may discuss sensitive matters with the media. All media inquiries about the Enron matter are to be referred immediately to David W. Tabolt in Chicago (312-931-9000).

#### **Background from Enron on the Matter:**

The following Frequently Asked Questions were excerpted from Enron's website:

Here are answers to some most frequently asked questions about current issues regarding

#### **What is LJM?**

LJM was a private equity fund formed by Andy Fastow.

#### **What was Enron's relationship with LJM?**

LJM was a source of equity funding for Enron projects and investments. Enron did not have to offer any projects to LJM, and transactions with LJM were only undertaken when management (other than Andy Fastow) had concluded the terms were in the best interest of Enron and its shareholders.

#### **Were the arrangements approved?**

Enron's Board of Directors reviewed and approved Enron CFO Andy Fastow's participation in the LJM partnerships and found that his participation was not contrary to the best interests of Enron and its shareholders. There was never any obligation for Enron to do any transaction with LJM. Enron and its Board established special review and approval processes with its senior

management to ensure that each transaction with the LJM partnerships was fair, in the best interest of Enron and its shareholders, and appropriately disclosed. External auditors and legal counsel also reviewed these transactions.

**What did you receive from the SEC?**

The SEC contacted Enron by phone, fax and letter, requesting that we voluntarily provide information regarding certain related party transactions.

**When did you receive the request from the SEC?**

We were initially contacted in the afternoon of Wednesday, Oct. 17, with follow-up on Thursday afternoon, Oct. 18.

**What did you do about the request from the SEC when you received it?**

An informal inquiry is not a material event; however, because of the high visibility of Enron and the recent public spotlight on the company, we convened a meeting of our Board as soon as possible. We recommended that we announce the SEC request; the Board agreed, and we made the release prior to the market opening on Monday, Oct. 22, 2001.

**What are you going to do about the request?**

We are cooperating fully with the SEC and see the request as an opportunity to put this issue behind us.

**Please explain the \$1.2 billion reduction to shareholders equity.**

A structured finance vehicle, in which LJM was an investor, was established to mitigate volatility associated with certain of Enron's merchant investments, including investments in The New Power Company, technology and other investments of Enron.

In conjunction with the September 2001 termination of these vehicles, Enron recorded a \$1.2 billion reduction in shareholders' equity and a corresponding reduction in receivables. These adjustments were the result of Enron's termination of obligations to deliver Enron shares in future periods. Although this obligation totaling approximately 62 million shares was reflected in our fully diluted shares outstanding calculation for the third quarter, these shares will no longer be included in this calculation as a result of the termination of this vehicle.

As always, we appreciate your discretion and cooperation in these matters.

Steve

Dave

cc: C.E. Andrews

Larry Rieger  
Rich Corgel  
Bill Peard  
Don Dreyfus  
Gary Goolsby  
David Tabolt  
John Stewart

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Nancy A. Temple

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To: John E. Stewart  
CC: Amy A. Ripepi@ANDERSEN WO; Donald Dreyfus@ANDERSEN WO  
BCC:  
Date: 10/14/2001 05:30 AM  
From: Nancy A. Temple  
Subject: Re: Conference call  
Attachments:

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I believe that is why the prior drafts of this memo over the past couple of weeks have not included any reference to consultation with or concurrence by PSG. I also believe that people reviewing the memo asked why PSG was not referenced at all in the draft because the intent ultimately was to make sure that PSG was consulted and concurred with the content. So the team might have added that reference in response to that comment. (When PSG was not cc'd on the draft, the implication was that the engagement team did not intend to consult with the PSG prior to finalization of the memo, which also was misleading.)

If the document is clearly marked draft and we follow our policy which is not to retain drafts once the memo is finalized, we can mitigate the risk of confusion at a later date. As for the current implication when a draft is circulated among an internal group, one recommendation might be to bracket the reference to PSG concurrence to suggest that that concurrence is not finalized yet or to include in a cover note when the draft is circulated that the team intends to seek PSG consultation and concurrence but that the team has not had time to send it to PSG and discuss all of the issues yet so PSG might have additional comments. I think given the timing on this one, the participants on the call today will understand that PSG might not have signed off on the memo and that is why you are participating to communicate PSG's views.

To: Amy A. Ripepi@ANDERSEN WO  
cc: Nancy A. Temple@ANDERSEN WO, Donald Dreyfus@ANDERSEN WO  
Date: 10/13/2001 02:24 PM  
From: John E. Stewart, Chicago 33 W. Monroe, 50 / 72335  
Subject: Re: Conference call

I agree.

To: Nancy A. Temple@ANDERSEN WO  
cc: Donald Dreyfus@ANDERSEN WO, John E. Stewart@ANDERSEN WO  
Date: 10/13/2001 02:19 PM  
From: Amy A. Ripepi, Chicago 33 W. Monroe, 50 / 77258  
Subject: Re: Conference call

I'd like to suggest that in a draft memo the engagement not refer to other partners as having concurred with the content. Rather, I suggest that indication of concurrence wait until the "consulting" parties have reviewed the memo and provided concurrence. I think it is a bit risky to have drafts that indicate concurrence. It sends the wrong signal to others reviewing the memo and also implies that concurrence is not under debate. I'm happy to communicate this directly to the engagement team, but wanted to first see if you agreed.

To: William E. Swanson@ANDERSEN WO, Michael C. Odom@ANDERSEN WO, D. Stephen Goddard Jr.@ANDERSEN WO, Michael M. Lowther@ANDERSEN WO, John J. Geron@ANDERSEN WO, Gary B. Goolsby@ANDERSEN WO, Lawrence A. Rieger@ANDERSEN WO,

Richard Corgel@ANDERSEN WO, Donald Dreyfus@ANDERSEN WO, Nancy A. Temple@ANDERSEN WO, John E. Stewart@ANDERSEN WO, Richard R. Petersen@ANDERSEN WO, Amy A. Ripepi@ANDERSEN WO, Benjamin S. Neuhausen@ANDERSEN WO

cc:

Date: 10/13/2001 01:51 PM

From: Debra A. Cash, David B. Duncan Houston, 237 / 2344

Subject: Conference call

Attached is the latest draft of the Raptor impairment memo along with the call in information for the conference call for 9 am central time tomorrow.

For international 1-334-264-8326

For domestic 1-888-422-7132

passcode 784268 for all participants

(host code 425999 - Duncan only in case you need to make any changes)

(Following attachment was removed: Raptor Summary - Monte Carlo.xls)

(Following attachment was removed: Raptor Detail (4).doc)

(Following attachment was removed: EnronNoteImpairmentMemo(4)-HOLLY.doc)

Oct. 9, 2001  
NAT Notes

A-004522

Enron.

(1)

10/9/01. Lauther, Oden, Duncan, Cash, Porges, Godby, Geron,  
Godard-Swanson

Cashin

M. R  
mos.

DD - additional facts, trading prices.  
- Monte Carlo results.

R: If take cum. hrs @ 6/30 508 hrs,  
part offset by 300 Enron cashin.  
208 → but 37 written down

3/31		37.	
6/30	val allow.	30.	508
			(300)
			(30)
			<u>178</u>
	MC 30%		(81)
			<u>97.</u>
			pre-tax.

3/31

MC not 100% but closer.

5/15

8/15

MC a little lower b/c stocks trending  
downward.

One view: (Mike Oden)

1/01 - Basket indicated w/o when BK + other public co.  
prices ↓.

8/15 - Collateral balance < loan for 49 mos.

Don't get to MC methods

②

JG: If 2 cos file BK in 1/01, know before 10-K filing, shouldn't you take into acct in 12/31/00?

JG: At 12/31, public's w/in 9-mo. view. And even as of 3/31/01, when filing 10-K, all 3 publics still de-S.MC last day at or above inception price -> 9 mo's. ok. from 8/4/00 to 5/4/01.

∴ moved 100 MM to 12/31/00, occurred in 10 but considered as of 12/31/00.

Then 3/31/01 -> 5/15/01 filing: Publics not perm. impair at that time (9 mo.).

Still use MC concept - Still argues Catalytic Active Power still w/in 9 mo's. problem is Arici + private.

466  
(300)  
(37)  
-----  
145 incl. Catalytic & AP.  
(145)  
-----  
0.

MC: 3/31 125      30% imp. level. DNK how much is Arici.  
5/15 95

→ If apply MC to everything, \$4 MM problem at 3/31/01.

9 mo's - as of B/S or filing date?

Gen: at 3/31/01, no material impairment

Can get to \$4mm impairment w/ MC.

Plus Aici - 9 mos hasn't elapsed yet (5/4/01).

Duncan: Really db \$24 @ 3/31/01.

Probably need to push 2Q BK into 1Q. (\$38mm)

466
+ 31
<hr/> 497
(300)
<hr/> 197

LR  
 Can be tax effected?  
 Duncan - correct - Not Capital

6.4mm / MC  
 (125)  


---

 72  
 (34)  


---

 38  
 x.6  


---

 \$21.0

pre tax.      net of tax 405  
 net of tax 5%.

1Q - marginally immaterial.

2Q.

~~508~~  
(300)  
~~168~~  
/

508  
(300) Euro.  
(30) Reserve  
(81) MC

(9)

97  
x .6  
58.2 after tax

2Q net inc.  
after tax -  
- 400 MM.

15%

Pull Catalytic. }  
+ Active ?

If impaired < 6-9, assume decline is temporary.  
(M&I in portfolio).

3Q event: on all publics, past 9 mos.  
+ co has announced liquidn.  
↳ actually did liqu. then - before 9/30.

Can we take out "not technically correct".

A-004526

Mike - Reptor 1 on q-by-q basis + use Dave's schedule

Very - ~~cl~~ P56 re ~~the~~ temp. - still have to do smthg  
to value MC was the only method.  
over than temp - use screen price.

clean financials  
to be shared  
P56

Enron

TC Jim + Tim

10/9/01.

Look-back rule?

Call SEC on no-name basis?

Issue Review report? 2D-aggregation method?

If PSG says not technically correct, restate unless SEC agrees.

- Highly probable some SEC investig.
- Even w/ PSG airt, nar. possib. will force a restat. w/o PSG airt, restat + probability of charge of violation CTD in WM. Firm subj of CTD viol + 102(e). Senior people in same position.

[ Either PSG or team is right.

If deals w/ ye 2000 - add contemporaneously. This will supersede - incorrectly worded. Here is what was discussed

→ If other memos in 2000 still in draft. Check our policy re incorrect da?

(A) Discard + replace w/ '00 date.

(B) Dual date.

(C) ... ..

Corgel, Meier, Grotzky

~~9:44 pm~~

Dreyfus - leaving early Wed.

not in for 1 week.

Home Thurs, Fri. + weekend.

Mon - to England.

Edin Dan Culp. If he shares JF view of world.

Jim - Thurs. am 9: - Phoenix -

12:30

Mon. in pm.

Fri. am - 8am PT

Mon - fly to SF

Sat am - flying home

Sun. am Bernolita.

Mon - netp.