



WHITE-COLLAR CRIME

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The 'Andersen' Decision: Its Effects on 18 USC §1519 and Attorneys

In its effort to convince the U.S. Supreme Court not to consider the *Arthur Andersen* case, presaging the Court's opinion, the government announced that "[m]ost federal prosecutors will henceforth use §1519—which does not require proof that the defendant engaged in 'corrupt persuas[ion]'"—to prosecute document-destruction cases."¹

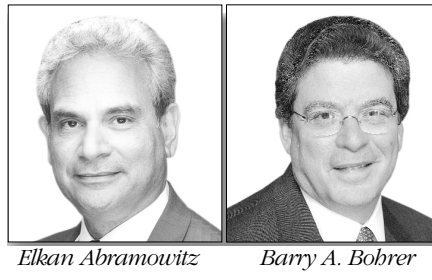
Enacted as part of the Sarbanes-Oxley Act after the Andersen/Enron facts took place, and partly in response to them, 18 USC §1519 contains far broader language than 18 USC §1512(b), the obstruction-of-justice statute the government used to convict Andersen.

This article considers the differences between the two statutes and what impact the Andersen decision may have on application of §1519 and on the role of attorneys in interpreting the law and advising clients in the business context.

The 'Andersen' Opinion

In *Arthur Andersen LLP v. United States*,² a unanimous decision by Chief Justice William Rehnquist issued on May 31, just five weeks after oral argument, the Supreme Court reversed the accounting firm's conviction for witness tampering, holding that the jury instructions "failed to convey properly the elements of a 'corrupt[ly] persuas[ion]' conviction under §1512(b)."

Section 1512(b)(2) was directed at anyone who "knowingly uses intimidation or physical force, threats, or corruptly persuades another person...with intent to...cause or induce any person to...alter, destroy, mutilate, or



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conceal an object with intent to impair the object's integrity or availability for use in an official proceeding."

The Court focused on what it means to "knowingly...corruptly persuad[e]," concluding that the phrase required proof of "conscious wrongdoing." The Court held that the "outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing." It was "[i]ndeed...striking," the Court found, "how little culpability the instructions required."

Particularly troubling to the Court was the fact that, under the district court's instruction, Andersen could have been convicted for merely "impeding" the government's factfinding ability. Persuading a person to withhold documents from the government "is not inherently malign," the Chief Justice wrote, citing as an example a manager who "instruct[s] his employees to comply with a valid document retention policy under ordinary circumstances." The court also made a point of noting that document-retention policies, "which are created in part to keep certain information from getting into the hands of others, including the [g]overnment, are common in business." Thus, while the Andersen opinion on its face turned on the narrow issue of jury instructions, it was an endorsement of document-retention policies executed under "ordinary circumstances."

The Court held that the instructions were "infirm for another reason"—they failed to require "any nexus between the 'persuas[ion]' to destroy documents and any particular proceeding." The opinion noted that the government had "relie[d] heavily" on §1512(e)(1), which states that an official proceeding "need not be pending or about to be

instituted at the time of the offense." However, the Court held, the statute is not violated by "someone who persuades others to shred documents under a document-retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material."

Section 1519

Section 1519 differs from §1512 in several significant ways. Section 1519 provides, in part, that "whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record...with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States ...or in relation to or contemplation of any such matter or case" will face imprisonment of up to 20 years.

One important difference is that, although both sections have a requirement that the destruction be done "knowingly," §1519 does not require that it be done "corruptly." Section 1519 also specifically refers to "imped[ing]" an investigation. Thus the government may argue that the language in Andersen—indicating that impeding an investigation is not sufficient grounds for a conviction under §1512—may be distinguishable under §1519. Courts that have any doubt about how to interpret "impede" under §1519 may look to the court's dissection of the term in Andersen: "'impede' has broader connotations than 'subvert' or even 'undermine'... and many of these connotations do not incorporate any 'corrupt[ness]' at all." The court equated "to impede" with "to interfere with or get in the way of the progress of" or "hold up" or "detract from."

Another area for concern under §1519 is that it could be applied to a defendant, protected under Andersen, who "does not have in contemplation any particular official proceeding." The Senate Report³ makes clear that the intent of the statute was "not to include any technical requirement...to tie the obstructive conduct to a pending or imminent proceeding or matter." The report further clarifies that the fact that the statute prohibits acts done "in relation to or in contemplation of" a matter means that "the timing of the act

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in relation to the beginning of the matter or investigation is also not a bar to prosecution." Section 1519, according to the report, also was "meant to do away with the distinctions...between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries."

Although predicting what sort of impact the Supreme Court's decision in *Andersen* will have on lower courts' interpretations of §1519 is difficult at best, the court's language gives some guidance to lower-court judges. As to the distinction between "knowingly" and "corruptly," the court explained: "[K]nowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness," whereas "[c]orrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil." Section 1512 "provides the mens rea" with the term "knowingly." The Justices found that it "ma[de] sense both linguistically and in the statutory scheme" to join the two meanings together, "allow[ing] §1512(b) to reach only those with the level of 'culpability...we usually require in order to impose criminal liability.'" This language suggests that, even without the "corruptly" component requiring evildoing of some sort, a court could find that §1519 does not lack a mens rea component requiring some knowledge of wrongdoing.

The language in the Senate Report—and in §1519 itself—leaves less room for a defendant to mount a defense based on lack of knowledge of a pending proceeding; arguably an investigation need not even have commenced. However, the Court was troubled in *Andersen* by the lack of "any nexus between the 'persua[sion]' to destroy documents and any particular proceeding," even though §1512(e)(1) states that an official proceeding "need not be pending or about to be instituted at the time of the offense." The Court's strong language on this point provides a basis for a §1519 defendant to argue against the statute's applicability as well.

In interpreting the term "impede" in §1519, courts may construe the statute against the background language in *Andersen* even though it was interpreting §1512. While the Court defined terms such as "impede" and "knowingly" in a very specific way, leaving little room for interpretation, the Court throughout the opinion also emphasized that document-retention policies are staples of corporate America. These "common" policies are not "wrongful"—even though they are "created in part to keep certain information from getting into the hands of others, including the [g]overnment." Similarly, the Court made specific reference to the propriety of a corporate supervisor enforcing a company document retention policy in "ordinary circumstances."

These endorsements provide ammunition for defendants indicted under §1519, notwithstanding its literal reading. For example, the government may now argue that a defendant who knew of a potential

government investigation but who destroyed documents or ordered their destruction before any such inquiry was commenced technically comes within the reach of the language of the statute. Defendants will be quick to remind courts that the *Andersen* Court emphasized that a document-retention policy, which has the effect of preventing material from reaching the government, is not by itself a criminal violation. In-house compliance attorneys are on some level always mindful of the threat of potential government inquiries. This awareness should not put them at risk of a violation of §1519 every time they implement a document-retention policy or order a document destroyed.

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In this regard, a key aspect of the *Andersen* opinion must be borne in mind: the Court endorsed a manager's instruction to employees to comply with document-retention policies under "ordinary circumstances." The Court gave no further clarification of the meaning or import of that phrase. Of course, questions will arise about what constitutes "fair warning" that changes the "ordinary circumstances," in turn requiring a suspension of a policy that might result in further document destruction.

Effects on Attorneys

Lawyers and their clients need to be cautious about reading too much into *Andersen*. Lawyers will continue to function as gatekeepers in the wake of *Andersen* but will need to be particularly careful about: (1) spelling out the goals of document-retention programs, (2) implementing those programs and enforcing them on a regular basis and (3) suspending document-retention policies when necessary. As always, advice to clients needs to be particularized on a case-by-case basis.

Amicus briefs filed by The National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers in the *Andersen* case warned of the dire consequences to attorneys if the Supreme Court were to affirm the U.S. Court of Appeals for the Fifth Circuit's and the government's reading of §1512:

expanding the definition of "corruptly persuades" to encompass persuasion "having an improper purpose" to impede the fact-finding of an official proceeding would "potentially criminalize" a broad range of legitimate attorney advice and appropriately zealous advocacy."⁵

It would "chill zealous legal representation, create potential conflicts between counsel and client, and undermine faith in the privacy of attorney-client communications."⁶

Although the Supreme Court reversed the Fifth Circuit and recognized the potentially chilling effects that a broad application of the obstruction laws may have on legitimate advocacy, courts faced with §1519 cases would be wise to keep these warnings in mind. Should courts choose to interpret *Andersen* narrowly and §1519 broadly, we may still face the chilling effects described in the amicus briefs.

Conclusion

The *Andersen* decision is important for many reasons, not least of which is that it indicates the Supreme Court's willingness to step forward to check the potential political excesses of the Department of Justice, which has been advocating aggressive positions on gatekeeper/privilege issues. The price of moving a case from the criminal to the civil sphere is now the waiver of privilege.

It will be interesting to see how *Andersen* affects debate and decision-making in the upper echelons of the Justice Department, especially in light of its new attorney general and new assistant attorney general for the criminal division.

Even prior to the *Andersen* decision, the Department of Justice appeared to be wisely making increased use of alternatives to indictments for corporate entities, such as nonprosecution agreements and pretrial diversion agreements.⁷

Better decision-making and analysis will avoid future debacles such as Arthur Andersen and will put lawyers rendering legitimate advice and engaged in appropriately zealous advocacy at greater ease, thus facilitating more effective representation.

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1. Brief for the United States in Opposition, *Arthur Andersen LLP v. United States*, No. 04-368, 2004 WL 2825876 (Dec. 8, 2004).

2. 125 SCt 2129 (2005).

3. S. Rep. No. 107-146 (2003) (statement of Sen. Leahy).

4. Quoting *United States v. Aguilar*, 515 US 593, 602 (1995).

5. Brief of Amicus Curiae New York Council of Defense Lawyers in Support of Petitioner, *Arthur Andersen LLP v. United States*, No. 04-368, 2005 WL 435901 (Feb. 22, 2005).

6. Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioner, *Arthur Andersen LLP v. United States*, No. 04-368, 2005 WL 435903 (Feb. 22, 2005).

7. Marcia Coyle, "Andersen Retrial Unlikely as Government Increases Use of Alternatives to Indictment," *New York Law Journal*, June 9, 2005.

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