ARTHUR ANDERSEN AND THE TEMPLE OF DOOM

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"We just received a message from Saddam Hussein. The good news is that he's willing to have his nuclear, biological and chemical weapons counted. The bad news, is he wants Arthur Andersen to do it."
-George W. Bush, 2002[1]

I. INTRODUCTION

The story of Nancy Temple ("Temple") and Arthur Andersen ("Andersen") is infamous in legal ethics.[2] Temple was the in-house lawyer that advised Andersen's employees to shred documents on the eve of the Security and Exchange Commission's ("SEC") investigation of Enron Corporation ("Enron").[3] Temple's advice triggered a string of events that culminated in the needless demise of America's fifth-largest accounting firm.[4]

By contrast, my Arthur Andersen story is unknown, until now that is. In late 1999, I was offered the position on Andersen's in-house staff that Temple ultimately accepted.[5] I declined the offer, for I suspected that

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1. President Bush told this joke at a charity dinner in January 2002. Barbara E. Martinez, *On the Menu: Patriotism And Pretzels; At This Year's Alfalfa Club Dinner, An Evening of Stand-Up Comity*, WASH. POST, Jan. 28, 2002, at C01.

2. For instance, I attended a video seminar in Abingdon, Virginia on November 15, 2006 entitled "E-Discovery and the New Federal Rules: A Legal and Technological Survival Kit." At the start of the seminar, the instructor displayed a picture of a well dressed woman and asked: "Does anyone recognize this woman? She has become the poster-child for spoliation." That woman was Nancy Temple.

3. *See infra* Section II.

4. *See infra* Section II.

5. *See infra* Section V.A..

Andersen was not seeking an independent, legal advisor as much as a legal yes-man (or yes-woman, as the case may be). In particular, I sensed that Andersen's in-house lawyers were expected to "rubber-stamp" all transactions, regardless of ethical or legal propriety.[6] History proved my suspicions prophetic.[7]

In this article, I posit that Andersen collapsed not because of greedy partners or unethical lawyers – though both groups undoubtedly contributed to such failure – but because Andersen had an environment in which in-house attorneys were either unable or unwilling to render the type of professional, independent legal advice required of attorneys. Andersen seemingly expected its employees, including in-house counsel, to protect the "firm" and its clients at all costs, legal or otherwise.[8] Temple apparently strived to meet such expectations and, by so doing, destroyed the firm.[9] In the end, though, it was Andersen's corporate culture – and not Nancy Temple – was Andersen's "Temple of Doom."[10]

If Andersen's in-house lawyers had been encouraged or, at the very least, permitted to render independent legal advice, Andersen would not have been convicted of obstruction of justice and, perhaps, would have survived the Enron scandal. At its moment of truth, Andersen needed an independent, professional legal advisor, but Andersen's culture chased such lawyers (including me) away.[11] Andersen then turned to Nancy Temple, and the rest is history.

Unfortunately, Andersen's use or misuse of in-house attorneys is not uncommon in corporate America.[12] In-house attorneys are often thrust into positions in which independent legal advice is neither sought nor

6. *See infra* Section V.A..

7. *See infra* Section V.B.; *see, e.g.* N. Craig Smith & Michelle, *From Grace to Disgrace: the Rise & Fall of Arthur Andersen*, 1 J. BUS. ETHICS EDUC., 91, 104 (noting removal of Andersen partner from Enron account in 2001 for refusing to "rubber stamp" aggressive accounting practices).

8. Like many law and accounting firms, Andersen was called the "firm" by its employees. BARBARA L. TOFFLER, FINAL ACCOUNTING: AMBITION, GREED, AND THE FALL OF ARTHUR ANDERSEN, 3 (2003).

9. *See infra* Section V.B..

10. According to the former head of Andersen's Ethics and Responsible Business Practices Group, "Arthur Andersen's culture was founded squarely on the idea of shaping people to the Firm." TOFFLER, *supra* note 8, at 2, 25.

11. *See, e.g.*, TOFFLER, *supra* note 8, at 23 ("Andersen was beginning to have a problem with turnover . . ., and it was gaining a reputation as a place that trained all the best employees in every *other* accounting firm.") (emphasis in the original).

12. *See, e.g.*, *Apple Woes Said Still Being Investigated*, AFX NEWS LIMITED, Jan 12. 2007, *available at* http://www.abcmoney.co.uk/news/1220075412.htm (an in-house attorney at Apple Computer, Inc. allegedly falsified records to cover up back-dating of stock options).

expected.[13] In such cases, the lawyer fails to serve the crucial gate-keeping function expected of the legal profession and, consequently, the client is unlikely to receive candid legal advice.[14] Hopefully, corporations will heed the lesson of Nancy Temple and Arthur Andersen.

Section II of this article will describe the events that led to the collapse of Andersen. Section III will examine the legal and ethical propriety of those events. Section IV will explain the duties, both legal and business, of in-house attorneys. In Section V, I will attempt to demonstrate, through my own personal experience and subsequently disclosed evidence, that Andersen's collapse was caused by a culture in which in-house attorneys were neither expected nor, for all practical purposes, permitted to render independent legal advice.

II. ARTHUR ANDERSEN'S DEMISE

The accounting firm of Arthur Andersen was founded in 1913 as Andersen, DeLany, & Co.[15] In 1918, the firm changed its name to Arthur Andersen & Co.[16] Until 2002, Andersen was one of the world's largest accounting and consulting firms.[17] It was a "$9 billion 'big five' accounting firm with hundreds of partners and more than 28,000 U.S. employees,"[18] and 85,000 global employees.[19]

For several decades, Andersen was the auditor for many of the world's most reputable companies.[20] By the late 1990s, however, the SEC began to investigate a number of Andersen's clients.[21] Shortly before Enron's collapse, two large Andersen clients – Waste Management and Sunbeam – were involved in notorious accounting scandals.[22] In June 2001, Andersen

13. *Id*.

14. *Id.*

15. Wikipedia, *Arthur Andersen*, http://en.wikipedia.org/wiki/Arthur_Andersen (last visited Aug. 19, 2006). Not coincidentally, Andersen was founded in the inaugural year of the federal income tax. SUSAN E. SQUIRES ET AL., INSIDE ARTHUR ANDERSEN: SHIFTING VALUES, UNEXPECTED CONSEQUENCES, 29 (2003).

16. Wikipedia, *supra* note 15.

17. *Id.*

18. John Hasnas, *The Significant Meaninglessness of Arthur Andersen LLP v. United States*, 2004-2005 CATO SUP. CT. R. 187, 192 (2005).

19. TOFFLER, *supra* note 8, at 4.

20. *See* Wikipedia, *supra* note 15.

21. TOFFLER, *supra* note 8, at 145-56 (noting SEC investigations of Waste Management, Sunbeam, and the Baptist Foundation of Arizona during the late 90's – all of which were Andersen clients).

22. Tom Fowler, *Andersen Guilty: Outcome Viewed as Final Blow for Firm*, HOUS. CHRON., JUNE 16, 2002, at 1A. "[I]n July 2001, the SEC sued five officers of Sunbeam Corporation and

settled a dispute with the SEC over Andersen's auditing of Waste Management Corporation.[23] Andersen paid $7 million – the largest monetary settlement in the history of the SEC – to resolve the dispute, and Andersen was censured by the SEC.[24] As part of the settlement, Andersen was permanently enjoined from violating federal securities laws;[25] this injunction would later be used as a reason for indicting Andersen in the Enron scandal.[26] Shortly after Enron's collapse, two additional Andersen clients – WorldCom and Qwest – were involved in historic accounting scandals.[27]

Enron started as a natural gas pipeline operator but "transformed itself" into an energy trading and investment conglomerate in the 1990's.[28] During this time, "Andersen . . . audited Enron's publicly filed statements . . . [while simultaneously] provid[ing] internal audit[ing] and consulting services" to Enron.[29] Enron was Andersen's largest client,[30] accounting for $58 million of Andersen's revenue in 2000.[31] More than 100 Andersen employees worked on the Enron account, many inside Enron's Houston headquarters.[32] In addition, there was a revolving door between Andersen and Enron, as dozens of Enron's financial executives and accountants were former Andersen employees.[33] Suffice it to say, Enron and Andersen had a

the lead Andersen partner on its audit." United States v. Arthur Andersen, L.L.P., 374 F.3d 281, 285 (5th Cir. 2004), *rev'd on other grounds*, 544 U.S. 696 (2005).

23. Fowler, *supra* note 22.

24. *Andersen*, 374 F.3d at 285. Enron and Worldcom were among Andersen's four largest accounts. *See* TOFFLER, *supra* note 8, at 142.

25. TOFFLER, *supra* note 8, at 214.

26. *See id.* at 149-50.

27. *See Worldcom Chief Refuses to Testify*, BBC NEWS, July 8, 2002, http://news.bbc.co.uk/1/hi/business/2115579.stm; *The Coprorate Scandal Sheet*, FORBES.COM, Aug. 26, 2002, http://www.forbes.com/2002/07/25/accountingtracker.html.

28. *Andersen*, 374 F.3d at 284. Prior to 1986, Andersen was the auditor for InterNorth, one of the two utility companies that merged to form Enron. SQUIRES ET AL., *supra* note 15, at 10. Thus, Andersen had considerable experience auditing utility companies prior to Enron. SQUIRES ET AL., *supra* note 15, at 11..

29. *Andersen*, 374 F.3d at 284. "Enron was Arthur Andersen's dream client . . . [with] a seemingly unquenchable thirst for both audit and consulting services from the Firm." TOFFLER, *supra* note 8, at 141.

30. Hasnas, *supra* note 18, at 187-88.

31. *Andersen*, 374 F.3d at 284; Andersen projected that Enron would account for more than $100 million in 2001. *Id*.

32. *Id*. *See also* SQUIRES ET AL., *supra* note 15, at 126 (noting that Andersen had its own floor at Enron's headquarters.).

33. *Andersen*, 374 F.3d at 284; *see also* Matthew J. Barrett, *The SEC and Accounting, in Part Through the Eyes of Pacioli*, 80 NOTRE DAME L. REV. 837, 884 (2005).

> To exacerbate the problem, the Big Five typically encouraged their employees, especially those not likely to become partners, to take jobs with clients or potential clients when they left the firm. The resulting 'revolving door' between Andersen and

very "close relationship."[34]

By the late 1990s, Enron began to employ aggressive accounting methods, including the use of special purpose entities ("SPEs").[35] Andersen helped Enron establish the SPEs, which were designed to remove liabilities from Enron's balance sheet; thus, artificially inflating Enron's profits.[36] Enron's use of SPEs violated Generally Accepted Accounting Principles, a fact known to Andersen.[37] The market began to suspect problems at Enron in early 2001, causing Enron's stock to drop by at least 50% between January and August 2001.[38]

In August 2001, Enron's collapse accelerated.[39] "On August 14, . . . Jeffrey Skilling, Enron's CEO, resigned."[40] A few days later, Sherron Watkins, a senior accountant at Enron (and a former Andersen auditor), blew the whistle by informing Kenneth Lay, Enron's Chairman, and two senior Andersen accountants that Enron was ready to "implode in a wave of accounting scandals."[41] At this point, Andersen created an internal "crisis-response" group, which included Temple, an in-house lawyer in Andersen's Chicago office.[42] Temple was a Harvard Law School graduate who had practiced for several years at the Chicago law firm of Sidley & Austin[43] prior to joining Andersen's in-house staff in 2000.[44]

> Enron only weakened the auditor's appearance of independence. Between 1989 and 2001, eighty-six people left Andersen to work for Enron. Andersen alumni at Enron included Richard A. Causey, its chief accounting officer and a former Andersen audit manager; Jeff McMahon, Enron's treasurer; and Sherron Smith Watkins, the vice president who unsuccessfully tried to blow the whistle on Enron's aggressive accounting. Employees at Enron often referred to Andersen as 'Enron Prep.'

Id.

34. *Andersen*, 374 F.3d at 284.

35. *Id.* at 284-85.

36. *Id.* at 285.

37. *Id.* at 285.

38. *Id.* at 285.

39. *Id*. at 298 ("Enron filed for bankruptcy on December 2, 2001.").

40. *Andersen*, 374 F.3d at 285. Jeffrey Skilling was later convicted of fraud and conspiracy and received a twenty-four year prison sentence. Patrick Condon, *Ex-Enron CEO Skilling Gets Prison Delay:Ex-Enron CEO Jeffery Skilling Gets Delay Before Starting Prison Sentence*, ABC NEWS, Dec. 12, 2006, http://abcnews.go.com/Business/wireStory?id=2718129 .

41. *Andersen*, 374 F.3d at 285.

42. *Id*.

43. In May 2001, Sidley & Austin merged with the law firm of Brown & Wood, and changed its name to Sidley Austin Brown & Wood LLP. About Sidley, http://www.sidley.com/about/about.asp (last visited Aug. 19, 2007). On January 1, 2006, the firm changed its name to Sidley Austin LLP. *Id.*

44. Tom Fowler, *The Pride and the Fall:A Year Ago, Enron's Crumbling Foundation was Revealed to All When the Company Reported its Disastrous Third-Quarter Numbers. Its Growth-At-Any-Cost Culture Led it to Bankruptcy and—Ignominty..*, HOUS. CHRON., Oct. 20, 2002, at 1A; Ameet Sachdev, *Scandal and Upheaval: Corporate America's Image Suffers from Probes,*

On October 9, Temple had a meeting with Andersen's senior in-house counsel in which she noted that an SEC investigation of Enron and Andersen was "highly probable."[45] Yet the very next day, Michael Odom ("Odom"), the senior Andersen partner on the Enron account, sent an email message to Andersen personnel urging them to comply with Andersen's document retention policy,[46] noting "if it's destroyed in the course of normal policy and litigation is filed the next day, that's great . . . we've followed our own policy and whatever there was that might have been of interest to somebody is gone and irretrievable."[47]

"On October 12, Temple entered the Enron [matter] into Andersen's internal tracking system . . . , [identifying] it [as a] government regulatory investigation."[48] Nonetheless, on that very same day, Temple sent an email to Odom suggesting that it might be useful to "consider reminding the engagement team of our documentation and retention policy."[49] Odom forwarded Temple's email to David Duncan ("Duncan"), Andersen's audit partner on the Enron account.[50] As he later explained, Duncan felt "justified" destroying documents based on Temple's email.[51] Duncan entered into a plea agreement with the government under which he agreed to plead guilty to one count of obstruction of justice.[52] At the Andersen trial, Duncan testified on direct examination that "I obstructed justice, . . . I instructed people on the (Enron audit) team to follow the document-retention policy, which I knew would result in the destruction of

Charges and Andersen's Conviction, CHI. TRIB., Dec. 31, 2002, at B1; Simon Romero, *10 Enron Players: Where They Landed After the Fall*, N.Y. TIMES, Jan. 29, 2006, at B8.

45. *Andersen*, 374 F.3d at 285-86. Temple also noted that there was a "reasonable probability" of a restatement of Enron's earnings, which probably constituted a violation of the Waste Management settlement agreement. *Id.* at 286.

46. Andersen's document retention policy provided:

> (1) Material pertaining to each engagement will be contained in one central file (hard copy and/or electronic). (Section 3.1). (2) This central file will not include any personal or gratuitous information. (Section 3.1) (3) Engagement information is the property of the AA BU and will not be copied or electronically transferred to personal files of any AA personnel. (Section 3.10) (4) Only final documents will be retained; drafts and preliminary versions of information will be destroyed currently. (Section 3.5).

Id. Fearing that "the firm [was] retaining too much information," Andersen changed its document retention policy shortly after the Sunbeam and Waste Management accounting scandals. TOFFLER, *supra* note 8, at 163.

47. *Andersen*, 374 F.3d at 286.

48. *Id.*

49. TOFFLER, *supra* note 8, at 214. The second sentence of the October 12th email stated: "It will be helpful to make sure that we have complied with the policy." *Id*.

50. *Id.* at 210, 214.

51. *Id.* at 214, 221.

52. Kristen Hays, *Witness Admits Shredding*, ALB. TIMES UNION, May 14, 2002, at A9.

documents."[53] "Obviously, [Duncan continued,] the thought of litigation, whether [with] the SEC or some other kind, was on our minds when we destroyed the documents."[54]

Meanwhile, Enron was set to announce its third quarter results, which reflected a $1.01 billion charge.[55] Enron proposed to identify the charge as "non-recurring."[56] Andersen advised Enron by email that such phrase was "misleading," but Enron nevertheless used it in the third quarter results.[57] Andersen's only response to Enron's public use of "non-recurring" was a suggestion by Temple that Andersen delete the term "misleading" from its email correspondence with Enron.[58] Temple also suggested that her name be removed from the emails.[59]

The SEC sent a letter to Enron after it issued its final releases on October 16th informing Enron that the SEC had commenced an informal investigation, and that an additional accounting letter would follow.[60] "Andersen received a copy of the [SEC] letter on . . . October 19[th]."[61] The following morning a "crisis group" conference was called and Temple reminded everyone "to make sure to follow the [documentation and retention] policy."[62] "On October 22[nd], Enron publicly acknowledged that the SEC had [started an informal investigation]."[63] On October 30th, the SEC sent Enron a letter informing it that a formal investigation had begun and requesting accounting documents.[64] Andersen continued, however, to destroy documents.[65]

As it turned out, Andersen personnel heeded the advice of its in-house attorney, as noted by the Fifth Circuit:

> Throughout this period Andersen's Houston office shredded documents. Government witnesses detailed the steady shredding and deletion of documents and the quantity of paper trucked away from the Houston office. Almost two tons of paper were shipped to Andersen's main office

53. *Id*.

54. TOFFLER, *supra* note 8, at 221.

55. United States v. Arthur Andersen, L.L.P., 374 F.3d 281, 285 (5th Cir. 2004), *rev'd on other grounds*, 544 U.S. 696 (2005).

56. *Id*.

57. *Id*.

58. *Id.*

59. SQUIRES ET AL., *supra* note 15, at 18.

60. *Andersen*, 374 F.3d at 286.

61. *Id.*

62. *Id.*

63. K.C. Goyer, *Nancy Temple's Duty: Professional Responsibility and the Arthur Andersen Verdict*, 18 GEO. J. LEGAL ETHICS 261, 279 (2004).

64. *Andersen*, 374 F.3d at 286.

65. *Id*.

> in Houston for shredding. The government produced an exhibit at trial charting the time and quantity of the carted waste paper from January 2001 through December of that year. The pounds carted remained fairly steady at a rate under 500 pounds, but spiked on October 25 to just under 2500 pounds.[66]

In addition, more than 30,000 emails and computer files were deleted.[67] In the end, documents supporting the final audit were retained but, in accordance with Andersen's document retention policy, drafts, notes, and other non-supporting documents were destroyed.[68] "The shredding continued until the SEC [issued a] subpoena for records."[69] Andersen received a copy of the subpoena on November 8th, after which it advised its personnel to cease shredding documents.[70]

On March 7, 2002, Andersen was indicted for obstructing an official proceeding of the SEC in violation of 18 U.S.C. section 1512(b)(2).[71] In effect, Andersen was charged with "witness tampering," because, at that time it destroyed Enron's records, document destruction in anticipation of an SEC civil investigation was not considered a crime.[72] In particular, the indictment accused Andersen of:

> [C]orruptly persuading one or more Andersen personnel to withhold, alter, destroy, or conceal documents with the intent to impair their availability in an official proceeding. That proceeding, which the government said Andersen knew was imminent and inevitable, was an investigation by the SEC into the relationship between Enron and Andersen, from whom Enron obtained accounting, auditing, and consulting services.[73]

For all practical purposes, the indictment destroyed Andersen in a matter of weeks, as "its clients fled the firm and the firm was forced to slash

66. *Id.*

67. SQUIRES ET AL., *supra* note 15, at 4.

68. Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry on Enron: Firm Informs U.S. It Will Give Up Auditing Public Companies*, N.Y. TIMES, June 16, 2002, at 1 ("This policy required that final memorandums and documents be placed in the work papers maintained by the accountants, while all other records – including e-mail messages, notes and draft memorandums – be destroyed.").

69. *Andersen*, 374 F.3d at 286.

70. *Id*. at 286-87.

71. *Id.* at 284.

72. Hasnas, *supra* note 18, at 189. In light of Enron, Congress enacted § 1519 of the Sarbanes-Oxley Act, *see* SQUIRES ET AL., *supra* note 15, at 151, which punishes "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object 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." 18 U.S.C. §1519 (2002).

73. *Andersen*, 374 F.3d at 284.

its workforce and sell off its component services in response."[74] The departing clients included long-term, Fortune 500 clients like Colgate-Palmolive and Merck.[75] Moreover, Andersen's overseas offices quickly moved to sever ties with their U.S. parent,[76] with entire country groups – *e.g.*, Spain and Chile – leaving Andersen to join other large accounting firms.[77]

In the first criminal trial resulting from Enron's collapse, the government's case against Andersen focused on Temple's October 12, 2001 email to Odom, which suggested that it might be useful to "consider reminding the [Enron] engagement team of our documentation and retention policy."[78] The government argued "that this [email] was code for instructing the engagement team to commence shredding."[79] By contrast, Andersen's defense was that it was legally permitted to destroy internal documents until the SEC notified Andersen that it was the subject of a proceeding.[80] Indeed, Andersen claimed its destruction of Enron documents was nothing more than a long overdue house cleaning project,[81] although an Andersen partner later admitted that the motivation for such shredding was to prevent "extraneous information" from falling into the hands of plaintiffs' attorneys.[82]

Asserting her rights under the Fifth Amendment, Temple refused to testify at Andersen's trial.[83] In January 2002, however, Temple testified before a subcommittee of the Energy and Commerce Committee of the House of Representatives.[84] At that hearing, Temple claimed that at the

74. Hasnas, *supra* note 18, at 192.

75. TOFFLER, *supra* note 8, at 218.

76. Goyer, *supra* note 63, at 262.

77. TOFFLER, *supra* note 8, at 220.

78. 3 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES AND FEDERAL COPORATE LAW § 1:188 (2d ed. 2007).

79. *Id.* After trial, the government's lawyer stated that Temple was "at the crux of the coverup." Sachdev, *supra* note 44.

80. Goyer, *supra* note 63, at 281. Andersen truly believed it was innocent and was willing to bet its life to prove it. SQUIRES ET AL., *supra* note 15, at 129.

81. Goyer, *supra* note 63, at 282. According to the former head of Andersen's Ethics and Responsible Business Practices Group, the shredding of documents at Andersen was anything but routine: "[I]t would have been quite an unusual day if, in Chicago or in New York, people had suddenly begun to shred like mad." TOFFLER, *supra* note 8, at 47.

82. Tom Fowler, *Andersen Tries to Explain So-Called Smoking Guns*, HOUS. CHRON., MAY 29, 2002, at 1B.

83. Tom Fowler, *Fastow Seeks to Avoid Testifying in Civil Suits*, HOUS. CHRON., June 22, 2002, at 1C.

84. *Panel Suggests Perjury by Andersen's Counsel*, LOS ANGELES TIMES, Dec. 18, 2002, at C5; David Ivanovich & Michael Hedges, *Pressure Builds on Andersen Lawyer: Panel Urges Criminal Inquiry*, HOUS. CHRON., Dec. 18, 2002, at 1C.

time she sent the October 12 email she did not anticipate an SEC investigation.[85] After all the facts became public, the House subcommittee urged the Department of Justice to charge Temple with perjury, stating: "Plain and simple, we do not believe Ms. Temple told the truth, the whole truth and nothing but the truth. . . . From our perspective, there were some glaring inconsistencies in her statements."[86]

On June 15, 2002, a jury in the United States District Court for the Southern District of Texas found Andersen guilty of violating 18 U.S.C. section 1512(b)(2).[87] The jury ostensibly based its decision on Temple's emails.[88] According to one of the jurors, "[w]e wanted to find Andersen not guilty and find that [it] stood up to Enron. . . . But it's clear [that Temple] knew investigators were coming and was telling [Andersen] to alter the evidence."[89] Another juror stated, "it came down to Nancy Temple. Bless her heart, she shouldn't have done it."[90]

The SEC does not allow convicted felons to audit public companies.[91] Thus, shortly after the conviction, Andersen informed the SEC that it would cease practicing before it on August 31, 2002, thus ending Andersen's nearly century-old auditing practice.[92] On October 16, 2002, the judge imposed the maximum sentence on Andersen: a $500,000 fine and five years' probation.[93]

The Fifth Circuit affirmed the conviction on June 16, 2004.[94] On May

85. Ivanovich & Hedges, *supra* note 84, at 1.

86. *Id.*

87. United States v. Arthur Andersen, L.L.P., 374 F.3d 281, 284 (5th Cir. 2004), *rev'd on other grounds*, 544 U.S. 696 (2005).

88. Mary Flood, *Andersen Guilty: Decision by Jurors Hinged on Memo*, HOUS. CHRON., June 16, 2002, at 1A ("[The jurors] keyed on an Oct. 16 email from Nancy Temple . . . [noting] that it was a 'smoking gun.'")

89. Tom Fowler, *Lawyers Fear Legal Impact of Andersen: They Ask if Advice Might be a Crime*, HOUS. CHRON., June 25, 2002, at 1B.

90. Flood, *supra* note 88.

91. *See* SEC Rules of Practice, 17 C.F.R. § 201.102(e)(2) (2006)

> Certain professionals and convicted persons. Any attorney who has been suspended or disbarred by a court of the United States or of any State; or any person whose license to practice as an accountant, engineer, or other professional or expert has been revoked or suspended in any State; or any person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission. A disbarment, suspension, revocation or conviction within the meaning of this section shall be deemed to have occurred when the disbarring, suspending, revoking or convicting agency or tribunal enters its judgment or order, including a judgment or order on a plea of nolo contendere, regardless of whether an appeal of such judgment or order is pending or could be taken.

Id.

92. BLOOMENTHAL & WOLFF, *supra* note 78.

93. TOFFLER, *supra* note 8, at 6.

94. United States v. Arthur Andersen, L.L.P., 374 F.3d 281, 281 (5th Cir. 2004), *rev'd on*

31, 2005, the United States Supreme Court reversed Andersen's conviction, holding that the instructions given to the jury did not accurately reflect the *mens rea* requirement of 18 U.S.C. section 1512(b)(2),[95] but by this time Andersen had, for all practical purposes, ceased to exist.[96] At the time of this article, Andersen has only 200 employees who focus exclusively on handling pending civil suits.[97]

It is now clear that Andersen was facing substantial civil and regulatory liability in the Enron matter.[98] But such exposure did not destroy Andersen.[99] Rather, Andersen was destroyed by the criminal indictment and conviction,[100] which were based on Andersen's destruction on Enron-related documents between October 16 and November 9, 2001.[101] During that time, Andersen's in-house lawyer acknowledged that an SEC investigation was "highly probable," but she nevertheless advised Andersen personnel to shred Enron documents.[102]

The next section of this article will establish that, even assuming no violation of 18 U.S.C. section 1512(b)(2), Temple's advice was contrary to established legal and ethical principles. This will be followed by an attempt to answer the question of why a highly educated, experienced lawyer would engage in such unethical conduct.

III. THE PROPRIETY OF ANDERSEN'S DOCUMENT DESTRUCTION

Andersen's in-house lawyer advised it to destroy documents after acknowledging that an SEC investigation was "highly probable."[103] At trial, Andersen defended the document destruction by asserting that it was legally permitted to destroy internal documents until the SEC notified Andersen that it was the subject of a proceeding.[104] The law is clear, however, that such destruction was nothing more than "spoliation" and, as such, was unethical and, perhaps, illegal.[105]

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other grounds, 544 U.S. 696 (2005).

95. Arthur Andersen, L.L.P. v. United States, 544 U.S. 696, 706, 708 (2005).

96. *See Arthur Andersen, LLP*, HOOVER'S IN-DEPTH COMPANY RECORDS, Nov. 30, 2005, *available at* 2005 WLNR 19257761.

97. *Id*.

98. *Id*.

99. *See Andersen*, 374 F.3d at 285, n.1.

100. *See Arthur Andersen, LLP*, *supra* note 96.

101. *See Andersen*, 374 F.3d at 285 n.1.

102. *Id.* at 285-86.

103. *Id.* at 285-86.

104. Goyer, *supra* note 63, at 281.

105. *See* JAMES S. GORELICK ET AL., DESTRUCTION OF EVIDENCE §§ 3.8-3.9 (1989); *see also*

Spoliation is "the destruction or significant alteration of discoverable evidence in the face of 'pending, imminent, or reasonably foreseeable litigation.'"[106]

> While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.[107]

Spoliation interferes with the proper administration of justice by giving one party an unfair advantage over an adversary.[108] In the most egregious instances, it amounts to "a form of cheating which blatantly compromises the ideal of the trial as a search for truth," expropriating the injured party's legal remedy.[109] In other words, spoliation creates an imbalance between litigating parties;[110] consequently, "spoliators should not benefit from their wrongdoing, as illustrated by 'that favourite maxim of the law, *omnia presumuntur contra spoliatorem.*'"[111]

A. The SEC's Investigation Was Foreseeable

"Absent actual notice, all forms of spoliation liability turn on foreseeability."[112] Gorelick's *Destruction of Evidence*, the leading treatise on spoliation, provides that when a complaint or subpoena has not yet been served and "there is no specific statutory or other legal duty between the parties, the question is whether it is 'reasonably foreseeable' that [litigation] will ensue and that the evidence will be discoverable in connection with that suit."[113]

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18 U.S.C. § 1519.

106. Jeffrey S. Kinsler & Anne R. Keyes MacIver, *Demystifying Spoliation of Evidence*, 34 TORT & INS. L.J. 761, 763 (1999) (citing GORELICK ET AL., *supra* note 105, at § 3.11). *See also*, BLACK'S LAW DICTIONARY 1437 (8th ed. 2004).

107. Wm. T. Thompson Co. v. General Nutrition Corp., Inc, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

108. *See* Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991).

109. *Id.*

110. *Id.*

111. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (citing 1 SIR T. WILLES CHITTY ET AL., SMITH'S LEADING CASES 404 (13th ed. 1929)).

112. Kinsler & Keyes, *supra* note 106 at 764. "Actual notice means more than service of process." *Id.* at 763 n.11. *See, e.g.*, Computer Assoc. Int'l, Inc. v. Am. Fundware, Inc., 133 F.R.D. 166, 168-69 (D.Colo. 1990) (indicating that pre-litigation correspondence constitutes actual notice of litigation). *Id.* at 763 n.11.

113. Kinsler & Keyes, *supra* note 106 at 764 (citing GORELICK ET AL., *supra* note 105, at §

Although "foreseeability" may and often does occur before the actual commencement of litigation, "[t]here appear to be no cases extending the foreseeability requirement to a remote possibility of future litigation."[114] "In *Willard v. Caterpillar*,[115] for example, the defendant . . . destroyed documents, in the ordinary course of business, relating to a thirty-five-year-old product over which it had never been sued."[116] "Such destruction did not constitute spoliation of evidence because, in the court's view, the mere possibility of future litigation was not enough."[117]

Hence, "the duty to preserve evidence prior to the filing of a lawsuit typically . . . [does not arise until a] party is on notice that the litigation is likely to be commenced."[118] "This notice usually occurs when [a person] is served with either a judicial or administrative complaint, but it also may occur as a result of prelitigation communication . . . ."[119] The issue of whether a company must maintain documents prior to actual notice of litigation arose in *Scott v. IBM Corp.*[120] In that case, an employee (Scott) brought an action against his former employer (IBM) for discrimination.[121] The suit arose out of IBM's decision to layoff Scott as part of a company-wide reduction-in-force ("RIF").[122] Prior to the suit, IBM destroyed documents related to the RIF.[123] The court held that such destruction warranted sanctions because the detailed nature of the destroyed documents themselves demonstrated that IBM was "on notice of the sensitive nature of the layoff."[124] Moreover, the court concluded:

> [W]hile litigation was not guaranteed, it could be viewed as reasonably foreseeable. IBM managers knew that Mr. Scott, if not others included in the RIF, were protected by federal employment discrimination laws. Mr.

3.11).

114. Kinsler & Keyes, *supra* note 106 at 764. *See, e.g.*, Willard v. Caterpillar Inc., 48 Cal. Rptr. 2d 607, 626 (Ct. App. 1995), *overruled on other grounds by* Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511 (Cal. 1998).

115. *Willard*, 48 Cal. Rptr. 2d 607, *overruled on other grounds by* Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511 (Cal. 1998).

116. Kinsler & Keyes, *supra* note 106 at 764; *Caterpillar*, 48 Cal. Rptr. 2d at 608, 623.

117. Kinsler & Keyes, *supra* note 106 at 764; *Caterpillar*, 48 Cal. Rptr. 2d at 626.

118. Kinsler & Keyes, *supra* note 106 at 764. S*ee, e.g.*, *In re* Hechinger Inv. Co., 339 B.R. 332, 338 (D. Del. 2006) (ruling that spoliation sanctions not appropriate where documents were destroyed as part of routine practice); Nye v. CSX Transp., Inc., 437 F.3d 556, 569 (6th Cir. 2006) (holding spoliation sanctions inappropriate where evidence was routinely destroyed and before defendant was notified of claim).

119. Kinsler & Keyes, *supra* note 106 at 764.

120. Scott v. IBM Corp.,196 F.R.D. 233, 246 (D.N.J. 2000).

121. *Id.* at 235.

122. *Id.* at 235-36.

123. *Id.* at 239.

124. *Id.* at 249.

> Scott had made previous claims of race discrimination within IBM, and thus IBM had ample notice that it was discharging a potentially litigious employee when it fired him. Common sense would dictate preserving all helpful documentation when dealing with the discharge of a[n] employee with a litigious history.[125]

Similarly, in *Sanchez v. Stanley-Bostich, Inc.*,[126] the court approved an adverse inference instruction against plaintiff Sanchez based on spoliation.[127] Sanchez claimed that he was injured while using the defendant's (Stanley's) staple gun.[128] After the accident, Sanchez's lawyer instructed him to take photographs of the staple gun at issue, but neither Sanchez nor his lawyer did anything to preserve the gun itself.[129] The Court was asked to determine "whether Sanchez had an obligation to preserve the gun for Stanley's use."[130] Answering this question affirmatively, the court held:

> The obligation to preserve evidence may arise before the filing of a complaint where a party is on notice that litigation will likely be commenced. Here, at the time the photographs were taken Sanchez had already retained counsel, and indeed was acting at his direction. Clearly, the photographs were taken in preparation of a possible lawsuit. Yet, Stanley was not informed of the anticipated claim.[131]

Likewise, in *Valentine v. Mercedes-Benz Credit Corp.*,[132] the court sanctioned the plaintiffs (the Valentines) for spoliation of evidence.[133] The Valentines claimed that at the time they destroyed evidence, a suit had not been filed and thus litigation was not foreseeable.[134] The court disagreed, concluding:

> It is impossible to credit plaintiffs' argument that they were under no duty to preserve evidence because they were not on notice that litigation would ensue. Valentine had been injured in an accident whose cause was being investigated. Within days of the accident, his wife, who is also a party to this litigation, photographed and videotaped the scene of that accident. Finally, it was plaintiffs who commenced the litigation.[135]

125. *Id.* at 249.
126. Stanley v. Stanley-Bostitch, Inc., No. 98 Civ. 0494 LMM (S.D.N.Y. Aug. 23, 1999).
127. *Id.* at 6.
128. *Id.* at 1.
129. *Id.* at 2.
130. *Id.* at 4.
131. *Id.* at 4 (citations omitted).
132. Valentine v. Mercedes-Benz Corp., No. 98 CIV. 1815(MBM) (S.D.N.Y. Sept. 30, 1999).
133. *Id.* at 6.
134. *Id.* at 3.
135. *Id.* at 3.

The Valentines, therefore, "failed to preserve evidence in reasonably foreseeable litigation," thus warranting spoliation sanctions.[136]

Scott, *Sanchez*, and *Valentine* illustrate, as demonstrated above, that litigation may become foreseeable long before a complaint or subpoena is served.[137] In *Sanchez* and *Valentine*, for example, the plaintiffs were preparing their own cases for litigation and simultaneously destroying relevant evidence.[138] This spoliation authority existed at the time Andersen destroyed Enron's documents.[139] But Andersen nonetheless committed the same sin as the plaintiffs in *Sanchez* and *Valentine*: It destroyed documents at the very same time it was preparing its own case.[140]

Prior to sending the October emails, Temple acknowledged that an SEC investigation has "highly probable" and identified the Enron matter as a "regulatory investigation" for billing purposes.[141] The SEC investigation of Enron, therefore, was foreseeable at the time Temple instructed Andersen's employees to destroy documents.

B. Andersen's Duty

Storage of documents and other records is expensive and burdensome. Thus, a company ordinarily may destroy documents pursuant to a document retention policy that is reasonable and evenly applied.[142] The Supreme Court has observed that document retention policies "are common in business" and that it was not illegal "for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."[143] Once litigation becomes foreseeable, however, a company has a duty to preserve relevant documents.[144] This duty is

136. *Id.* at 5-6.

137. *See supra* pp. 109-11 and notes 119-36.

138. *See supra* p. 110 and notes 129 & 135.

139. *See supra* notes 126 & 132.

140. United States v. Arthur Andersen, L.L.P., 374 F.3d 281, 285-86 (5th Cir. 2004), *rev'd on other grounds*, 544 U.S. 696 (2005).

141. *Id.* at 286.

142. For example, Federal Rule of Civil Procedure 37(f) recognizes this principle with regard to electronically stored information. FED. R. CIV. P. 37(f), That rule provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." *Id.*

143. *Andersen*, 544 U.S. at 704..

144. Kinsler & Keyes, *supra* note 106 at 761. As used in spoliation law, the term "documents" is interpreted at least as broadly as it is in Federal Rule of Civil Procedure 34, which defines documents as "documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data

comprised of several components.[145]

1. Duty to Notify Personnel

When litigation is foreseeable, corporations have a duty to notify all relevant personnel of the potential litigation.[146] Sanctions have been invoked, for example, where a company failed to make reasonable efforts to communicate the presence of pending or future litigation to employees responsible for implementing routine document destruction.[147] In *Telectron, Inc. v. Overhead Door Corp.*,[148] the court found the defendant corporation to have deliberately maintained internal secrecy regarding an antitrust suit and that "a desired byproduct of [the defendant's] internal secrecy about the suit was a pervasive state of ignorance[] . . . about the sorts of documents which fell within the scope of Telectron's discovery requests."[149] This ignorance resulted in the routine destruction of relevant records.[150]

Moreover, spoliation sanctions are not limited to intentional failure to notify employees.[151] In *In re Prudential Insurance Co. of America Sales Practice Litigation*,[152] an insurance company in ongoing litigation recognized its legal obligations to preserve evidence, yet carelessly failed to communicate the presence of critical court orders to personnel responsible for routine document disposal.[153] As a result, uninformed employees in its Boston branch continued to apply the company's policy, thereby destroying a number of documents subject to preservation orders, and the company suffered $1 million in sanctions for its "grossly negligent" conduct.[154]

compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form." FED. R. CIV. P. 34(a).

145. *See infra* pp. 112-14.

146. *See* Teletron, Inc., v. Overhead Door Corp., 116 F.R.D. 107, 123 (S.D. Fla. 1987).

147. *Id.* at 123, 126.

148. *Teletron*, 116 F.R.D. 107.

149. *Id.* at 123. *See also* Austin v. Coin Devices Corp., 651 N.Y.S.2d 33, 33 (App. Div. 1996) (holding that routine destruction after suit was filed warranted sanctions where defendants offered no excuse for such destruction and failed to timely notify the court of the destruction).

150. *Teletron*, 116 F.R.D. at 123.

151. *See infra* notes 152-54.

152. *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598 (D.N.J. 1997).

153. *Id.* at 612, 616.

154. *Id.* at 608-09, 616-17.

2. Duty to Suspend Document Destruction Policy

When litigation becomes foreseeable, a corporation has a duty to suspend its document retention and destruction plan.[155] In *Lewy v. Remington Arms Co.*,[156] the Eighth Circuit cautioned that adherence to a reasonable retention policy may not be justifiable in the presence of reasonably foreseeable litigation:

> [E]ven if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy. For example, if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.[157]

Remington Arms demonstrates the possibility that automatic adherence to a retention policy may, under certain circumstances, be demonstrative of intentional spoliation of evidence.[158] It is not enough for a retention policy to be reasonable on its face; routine, evenhanded document disposal might not be defensible where litigation is reasonably foreseeable.[159]

Blinzler v. Marriott International, Inc.[160] exemplifies the risks corporations face for failing to suspend document destruction plans.[161] In that case, the defendant hotel destroyed its phone logs thirty days after the failure of one of its clerks to promptly call an ambulance that resulted in the death of a guest.[162] The defendant contended that such destruction took place in the ordinary course of business and pursuant to an established practice.[163] However, on the night in question, the decedent's wife had repeatedly inquired of Marriott personnel whether the ambulance had yet been called.[164] The court viewed these requests as notice to the hotel that future litigation was likely and upheld the evidentiary rulings applied by the trial court.[165]

Likewise, in *Computer Associates International, Inc. v. American*

155. *See* infra pp. 113-14 and notes 156-70.
156. Lewy v. Remington Arms Co., 836 F.2d 1104 (8th Cir. 1988).
157. *Id.* at 1112.
158. *See id.* at 1112.
159. *See id.* at 1112.
160. Blinzler v. Marriot Int'l Inc., 81 F.3d 1148 (1st Cir. 1996).
161. *Id*. at 1158-59.
162. *Id*. at 1150, 1158.
163. *Id.* at 1158.
164. *Id*. at 1150.
165. *Id.* at 1159.

Fundware, Inc.,[166] the defendant had a policy of destroying previous versions of software source codes, a policy that the court did not find "inherently wrongful."[167] Under the circumstances, however, the company was under a duty to suspend its policy and preserve the evidence.[168] Destruction of the source code at issue occurred subsequent to the filing of plaintiff's complaint even though pre-litigation discussions had made clear that the code would be critical evidence in upcoming litigation.[169] The court granted a default judgment for the plaintiff on "the issue of liability."[170]

3. Duty to Consistently Apply Document Retention Policy

Another improper application of an otherwise reasonable document retention policy is the unusual or sporadic destruction of documents.[171] Indeed, culpability or actual knowledge of likely litigation is frequently inferred from sporadic destruction, disposal of documents in a manner inconsistent with the requirements of an established policy, or any other kind of extraordinary document disposal.[172]

Capellupo v. FMC Corp.[173] is an obvious example of document destruction under circumstances that strongly indicated that the company was on notice of impending litigation and acting in bad faith.[174] In that case, a senior official of the defendant employer was warned by an employee that she intended to file a class action gender discrimination suit.[175] The official, in turn, informed others, and various memoranda were exchanged regarding the possible suit.[176] Company management responded by implementing a broad policy of document destruction on the eve of the lawsuit, resulting in the destruction of material evidence.[177] The court found that the company was on notice once the information had filtered through upper management and immediately prior to the implemented

166. Computer Assoc. Int'l Inc. v. Am. Fundware, Inc., 133 F.R.D. 166 (D. Colo. 1990).
167. *Id.* at 168.
168. *Id.* at 169.
169. *Id.* at 169.
170. *Id.* at 170.
171. *See, e.g.*, Capellupo v. FMC Corp., 125 F.R.D. 545. (D. Minn. 1989).
172. *See id.* at 552.
173. *Capellupo*, 125 F.R.D. 545.
174. *Id*. at 546.
175. *Id.* at 546.
176. *Id.* at 547.
177. *Id.* at 548 & n.5, 550-51.

policy of destruction.[178] As a result, the court awarded considerable monetary sanctions to the plaintiff, doubling the fees and costs.[179]

C. Ethical Violations

In light of the authority available at the time Andersen's in-house counsel advised its employees to destroy documents, it is clear that such advice was contrary to the law of spoliation.[180] The SEC investigation was certainly foreseeable, but, instead of advising its employees to suspend routine document destruction, Andersen's in-house lawyer wrongfully advised its employees to accelerate such destruction.[181] As such, she violated Model Rule 3.4(a), which provides that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."[182] Temple also violated Model Rule 8.4(a), by "knowingly assist[ing] or induc[ing] another" to "violate or attempt to violate the Rules of Professional Conduct"[183] and Model Rule 8.4(d) by "engag[ing] in conduct that is prejudicial to the administration of justice."[184] The fact that senior Andersen partners may have ordered, either explicitly or implicitly, Temple to send the destruction emails does not excuse her ethical lapse.[185]

At the time of the October emails, Temple had previously acknowledged that litigation with the SEC was "highly probable."[186] At this point, Temple had a duty to: (1) notify all relevant personnel that an

178. *Id.* at 550.

179. *Capellupo*, 125 F.R.D. at 553.

180. *See* GORELICK ET AL., *supra* note 105; *see also* Nesson, *supra* note 108.

181. TOFFLER, *supra* note 8, at 214.

182. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2003); *see also* ILL. RULES OF PROF'L CONDUCT R. 3.4(a)(1) (2007) (incorporating verbatim Model Rule of Professional Conduct 3.4(a)).

183. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2003); *see also* ILL. RULES OF PROF'L CONDUCT R. 8.4(a)(2) (2007) (incorporating rule substantially similar to Model Rule of Professional Conduct 8.4(a)).

184. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2003); *see also* ILL. RULES OF PROF'L CONDUCT R. 8.4(a)(5) (2007) (incorporating a rule substantially similar to Model Rule of Professional Conduct 8.4(d)).

185. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2003); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (1980) ("In his representation of a client, a lawyer shall not[] . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.").

186. United States v. Arthur Andersen, L.L.P., 374 F.3d 281, 286 (5th Cir. 2004), *rev'd on other grounds*, 544 U.S. 696 (2005).

SEC investigation was likely, and (2) suspend – not accelerate – Andersen's document retention policy.[187] She failed in both respects.[188]

D. Ethical Obligations

What would Nancy Temple's ethical obligations have been had she properly refused to participate in the destruction of Enron's documents assuming the destruction, nevertheless, took place? Illinois Rule of Professional Conduct 1.13(b) (2001 and now) would have required her to consider several measures, including: (1) asking the people involved in the destruction to reconsider their actions; (2) advising those persons to seek a separate legal opinion as to the propriety of their actions; and, as a last resort, (3) referring the matter to higher authority (e.g., senior partners or general counsel) at Andersen and, if necessary, all the way up to Andersen's CEO.[189]

Would such measures have averted the destruction of Enron's documents? The answer is almost assuredly no.[190] After all of the evidence became public, it is clear that Andersen would have proceeded with the destruction of Enron's documents with or without Temple.[191] It also is difficult to imagine Andersen's employees heeding the advice of in-house counsel to reconsider their actions or seek a separate legal opinion.[192] It is even more difficult to envision senior Andersen partners putting a halt to such destruction, as the evidence indicates that the destruction was known, if not approved, by Andersen's senior management. Thus, it is quite unlikely that the measures prescribed by Rule 1.13(b)[193] would have resolved the matter.

What, then, could Nancy Temple have done? According to Illinois Rule 1.13(c), as well as Model Rule 1.13(c), she could have resigned as

187. *See* MODEL RULES OF PROF'L CONDUCT R 1.13(b), 3.4(a) (2003).

188. *See Andersen*, 374 F.3d at 286. Notably, Andersen had a history of concealing investigations and litigation from its employees. *See, e.g.* TOFFLER, *supra* note 8, at 148 (noting that Andersen failed to inform its employees of a multi-year SEC investigation and of its role in the Waste Management accounting scandal until the dispute was settled).

189. *See* ILL. RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

190. *See* TOFFLER, *supra* note 8, at 6 ("[Andersen] had become a place where the mad scramble for fees had trumped good judgment").

191. *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 483 (2006).

192. *See* SQUIRES ET AL., *supra* note 15, at 3 (noting Andersen's culture of blind compliance with firm policy).

193. *See* ILL. RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

Andersen's counsel.[194] But could she have disclosed the document destruction to the SEC or other authorities? Model Rule 1.6, as it existed in 2001, says no; indeed, any such disclosure would have constituted an ethical violation.[195] The Illinois version of Rule 1.6 (2001 and now), however, is not so clear, as it provides: "A lawyer may use or reveal[] . . .the intention of a client to commit a crime."[196] Thus, if the destruction of Enron's documents was criminal, Temple could have revealed it to the SEC. But, the Supreme Court ultimately determined that the destruction was not criminal; thus, any disclosure by Temple would have violated Illinois Rule 1.6.[197] As a consequence, it seems that Temple's only recourse was to resign (after refusing to participate in the destruction).[198]

Would the answer be the same today, 2007, for an in-house attorney who learns of an Enron-like document destruction? No. First, the Sarbanes-Oxley Act criminalized the destruction of documents in anticipation of an SEC civil investigation.[199] Secondly, Model Rule 1.13 was amended in 2003 to read that, if:

> (1) despite the lawyer's efforts . . . the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.[200]

194. ILL. RULES OF PROF'L CONDUCT R. 1.13(c) (2007); MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2002).

195. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2000).

196. ILL. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (2007) (last amended Feb. 2, 1994).

197. Arthur Andersen LLP v. United States, 544 U.S. 696, 708 (2005).

198. *See* ILL. RULES OF PROF'L CONDUCT R. 1.13(c) (2007) (effective Aug. 1, 1990).

199. Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes Oxley Anti=Shredding Statue, 18 U.S.C. § 1519*, 89 Cornell L. Rev. 1519, 1521-22 ("The Sarbanes Oxley Act of 2002 added a new anti-shredding provision, 18 U.S.C. § 1519, to the rooster of federal obstruction-of-justice statutes."). 18 U.S.C. § 1519 punishes "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object 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." 18 U.S.C. § 1519 (2002).

200. MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2003). Similarly, Model Rule 1.6 now provides:

> A lawyer may reveal information relating to the representation of a client to the extent the

As a result, a lawyer practicing in a jurisdiction that has adopted the 2003 amendments to Rule 1.13 would be permitted to reveal the illegal destruction of documents to the appropriate authority if the lawyer reasonably believed such disclosure was necessary to prevent substantial injury to the organization.[201] The result would be the same in Illinois, although it has not adopted the 2003 amendments to Rule 1.13, because Illinois's version of Rule 1.6 provides that "[a] lawyer may use or reveal[] . . . the intention of a client to commit a crime."[202] Thus, both the Illinois Rules and the Model Rules now allow – but do not require – disclosure of illegal document destruction.[203]

The preceding ethical obligations, of course, are premised on the assumption that Nancy Temple refused to participate in the destruction of Enron's documents. Nothing in this section legitimizes or excuses a lawyer's *participation* in document destruction.

IV. DUAL ROLES OF IN-HOUSE COUNSEL

In-house lawyers serve one master but in two inherently conflicting roles.[204] On the one hand, they are lawyers and, as such, are expected to provide objective legal advice, including advice that may alienate their clients.[205] On the other hand, in-house lawyers are employees and receive most, if not all, of their compensation from one client.[206] Is it possible for someone to be both a legal gatekeeper and corporate employee, particularly in an environment where employees are punished for dissenting?[207]

> lawyer reasonably believes necessary[] . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; [or] to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2003).

201. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2003).

202. ILL. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (2007).

203. *See* ILL. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (2007); MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2003).

204. *See* Grace M. Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535, 554 (1992).

205. *Id*. at 553.

206. *Id*.

207. This issue is not limited to hypothetical fact patterns. While I was writing this article, I received an email from a former student who had just been offered an in-house position. Concerned about the dual and, perhaps, conflicting roles of in-house attorneys, he wrote:

> On the one hand I am an employee of the company[;] on the other I am their counsel (once in practice), but at the same time I must maintain my autonomy as an attorney and may not

A. Legal Advisor

Rule 2.1 of the Model Rules of Professional Conduct requires lawyers to "exercise independent professional judgment and render candid advice."[208] This duty is reinforced by Model Rule 5.4(c), which provides that a lawyer must exercise "professional judgment" in the representation of clients.[209] These rules require independence from outside interference as well as independent judgment, for an attorney must be able to evaluate legal matters with "a dispassionate and disinterested eye."[210]

A lawyer is more than a zealous advocate of clients; a lawyer is an officer of the court.[211] Thus, "[e]motional detachment is essential to the lawyer's ability to render competent legal services."[212] As traditionally stated, a lawyer "must obey his [or her] own conscience and not that of his [or her] client."[213] Such "objectivity [requires] the ability to distance oneself from personal and client desires in order to evaluate the effect of potential actions on clients, third parties, and the legal system."[214] If a lawyer loses such objectivity–for example, by associating too closely with a client – the lawyer may be unable to abide by the ethical duties he or she owes to courts and third parties.[215]

Unfortunately, the duty of independent professional judgment occasionally conflicts with a client's desires.[216] As a gatekeeper for the justice system, a lawyer is often required to say "no" to clients.[217] The comments to Rule 2.1 make such duty clear:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the

accept direction from my bosses if I feel that it will put the company at risk. I risk either my job or my license by doing either. Interesting conundrum.

208. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003).

209. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2003).

210. *See* Giesel, *supra* note 204, at 553.

211. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (2003)

212. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992).

213. ABA CANONS OF PROF'L ETHICS, Canon 15 (1956).

214. Fred C. Zacharias, *Reconciling Professionalism & Client Interests*, 36 WM. & MARY L. REV. 1303, 1307 (1995).

215. *See id*. at 1304.

216. *See id.*

217. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt.1 (2003).

advice will be unpalatable to the client.[218]

In other words, lawyers must stress and, to the extent possible, ensure compliance with the law.[219] "Flavoring advice, telling clients what they want to hear in order to confirm their pre-conceived notions or to insure a continued relationship is prohibited by [Rule 2.1], as such conduct constitutes neither the exercise of independent judgment nor the rendering of candid advice."[220] Moreover, if a lawyer knows that a client is proposing a course of action that is likely to result in "substantial adverse legal consequences," the lawyer has an affirmative duty to warn the client, regardless of whether the client has sought advice on such course of action.[221]

The duty of independent professional judgment is difficult for all lawyers, but it is especially troublesome for in-house attorneys.[222] "Conventional skepticism about the capacity of in-house corporate lawyers to exercise independent professional judgment focuses on the exclusivity of their relationship with a single client (their employer), which calls into question the feasibility of withdrawing from representation if professional norms so require."[223] If an outside attorney disagrees with a client, the most that will occur is loss of a single client, but if an in-house attorney disagrees with a client, the attorney risks losing his or her sole source of revenue.[224] Thus, like an outside attorney with only one or two major clients, "the economic pressure on in-house attorneys as a class[] . . . create[s] an atmosphere in which those attorneys may subordinate standards of responsibility more often."[225] Stated differently, an attorney is much less likely to succumb to a client's unethical instructions if the attorney has other sources of revenue.[226]

218. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt.1 (2003).

219. *See id.*

220. LEE BEARMON & R. SCOTT DAVIS, 2 SUCCESSFUL PARTNERING BETWEEN INSIDE & OUTSIDE COUNSEL § 31.22 (Robert L. Haig ed., 2007), *available at* SPARTNER § 31:22 (Westlaw).

221. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2003).

222. *See, e.g.*, JOHN K. VILLA, 1 CORPORATE COUNSEL GUIDELINES § 3.6 (2006), *available at* CORPCG § 3:6 (Westlaw).

223. Deborah A. DeMott, *The Discreet Roles of General Counsel*, 74 FORDHAM L. REV. 955, 967-68 (2005).

224. Giesel, *supra* note 204, at 536 ("In-house attorneys have a very different calculus. If ethical conduct results in loss of the client, in-house counsel becomes unemployed. Loss of the attorney's one and only client reduces profitability to zero. Exalted statements that most in-house counsel possess such high ethical standards that economic pressure cannot sway them, no matter how great, are, unfortunately, suspect.").

225. *Id.* at 536-37.

226. *Id.*, at 536.

In-house lawyers, however, have advantages over outside counsel.[227] Despite the inherent conflicts associated with such positions, in-house lawyers are uniquely positioned to give sound legal advice to clients, as they typically have full knowledge of their clients' business and personnel, as well as, the transaction at hand.[228] As such, they are better suited to practice preventive law, addressing legal issues at the formative stage.[229]

This close relationship with the client, however, is a double-edged sword. There is a belief that in-house attorneys are more susceptible to ethical lapses than outside lawyers.[230] This susceptibility arises in part from the close working relationship in-house lawyers have with executives in the company.[231] Moreover, some in-house attorneys receive bonuses and stock options that are linked to the employer-client's profits.[232] At some point, nearly everyone is susceptible to such economic pressures.

1. Independent, Professional Judgment

There is little authority addressing an in-house attorney's duties under Model Rule 2.1.[233] The most direct authority is a Connecticut Bar Association Ethics Opinion, in which the Bar was asked by a government in-house attorney to opine on whether an attorney violates his or her ethical obligations by changing a legal conclusion at the direction of a non-lawyer supervisor who disagrees with that attorney's assessment of a particular legal scenario.[234] The Bar answered the question affirmatively, citing Rule 2.1 and stating that if a non-lawyer supervisor directs a lawyer to "make a statement that, in the exercise of [the lawyer's] professional judgment, [the lawyer] believe[s] to be untrue. . . . [the lawyer] must decline to do so."[235]

Thus, Rule 2.1 prohibits non-lawyers from interfering with an attorney's independent legal judgment.[236] The Supreme Court of Tennessee

227. *Id.* at 537 ("[T]he secluded nature of the in-house situation reduces the malpractice threat and the chance of independent reports to the bar.").

228. *Id.* at 544.

229. *See id.* at 544.

230. Giesel, *supra* note 204, at 536-37.

231. *Id.* at 547.

232. *See* Z. Jill Barclift, *Corporate Responsibility: Ensuring Independent Judgment of the General Counsel – A Look at Stock Options*, 81 N.D. L. REV. 1, 8 (2005).

233. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003).

234. Conn. Comm. on Prof'l Ethics, Informal Op. 00-9 (2000), *available at* 2000 WL 1370788.

235. *Id.*

236. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-354 (1987) (agreement between lawyer and medical-legal consulting firm that limits lawyer's ability to

applied this principle to a case challenging an insurer's use of in-house counsel to represent policyholders and, in so doing, stated: "The employer cannot control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion with regard to the representation. Any policy, arrangement or device which effectively limits, by design or operation, the attorney's professional judgment . . . is prohibited . . . ."[237]

Additionally, Rule 2.1 has been used in situations in which a lawyer's relationship with a client hindered the lawyer's ability to render independent, professional advice.[238] For example, prior to the adoption of Model Rule 1.8(j),[239] it was considered a violation of Model Rule 2.1 for a lawyer to have a sexual relationship with an existing client.[240] The ABA explained such violation as follows:

> Emotional detachment is essential to the lawyer's ability to render competent legal services. . . . It can be difficult, however, to separate sound judgment from the emotion or bias that may result from a sexual relationship. A lawyer involved in a sexual and emotional relationship with a client may encounter particular difficulty in providing the "straightforward advice" which "often involves unpleasant facts and alternatives that a client may be disinclined to confront." Because of a desire to preserve the relationship, the lawyer may "be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." Thus, a lawyer who engages in a sexual relationship with a client during the course of representation risks losing the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment.[241]

Based on this reasoning, lawyers have been disciplined under Rule 2.1 for having sex with clients,[242] except where such sexual relationships existed prior to the attorney-client relationship.[243] Although a sexual

choose expert witnesses for clients violates Rule 2.1).

237. *In re* Youngblood, 895 S.W. 2d 322, 322, 328 (Tenn. 1995). *See also In re* Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806, 815 (Mont. 2000).

238. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992).

239. MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (2003) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.").

240. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992).

241. *Id*. (quoting the commentary to Model Rule 2.1).

242. *See, e.g.*, Oklahoma Bar Ass'n v. Anderson, 109 P.3d 326, 331 (Okla. 2005); *In re* DeFrancesch, 877 So. 2d 71, 77 (La. 2004).

243. *See, e.g.*, Horaist v. Doctor's Hosp. of Opelousas, 255 F.3d 261, 268 (5th Cir. 2001) (noting that a lawyer is not disqualified where sexual relationship with client predated attorney-client relationship).

relationship is more intimate than an employment relationship, both relationships involve a level of control that potentially hampers independence.[244]

2. No Recourse for Wrongful Termination

In-house counsel's lack of independence is exacerbated in jurisdictions that refuse to recognize the right of in-house lawyers to assert wrongful discharge claims against their employers.[245] In such states, an in-house attorney may be fired without recourse for refusing to act in a manner that violates ethical or legal obligations.[246] Accordingly, it has been argued that an in-house attorney pressured to perform an unethical act has two unattractive choices: perform the unethical act or quit his or her job without legal recourse.[247]

Realistically, these were the choices facing Temple prior to the Enron debacle. In 1991, the Illinois Supreme Court refused to recognize the tort of wrongful termination for in-house attorneys, concluding:

> Generally, a client may discharge his attorney at any time, with or without cause. This rule applies equally to in-house counsel as it does to outside counsel. Further, this rule "recognizes that the relationship between an attorney and client is based on trust and that the client must have confidence in his attorney in order to ensure that the relationship will function properly." "As stated . . ., the attorney is placed in the unique position of maintaining a close relationship with a client where the attorney receives secrets, disclosures, and information that otherwise would not be divulged to intimate friends." We believe that if in-house counsel are granted the right to sue their employers for retaliatory discharge, employers might be less willing to be forthright and candid with their in-house counsel. Employers might be hesitant to turn to their in-house counsel for advice regarding potentially questionable corporate conduct knowing that their in-house counsel could use this information in a retaliatory discharge suit.[248]

Thus, in light of the evidence described in Section V of this Article, it is safe to assume that Temple would have been fired or demoted if, in accordance with existing legal and ethical principles, she had opposed the

244. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992); Giesel, *supra* note 204, at 547.

245. *See, e.g.*, Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991)

246. *Id.*

247. *Id* (acknowledging this argument while holding that in-house counsel have no choice but to abide by their ethical obligations).

248. *Id.* (citations omitted).

destruction of Enron's records.[249] In such a case, Temple would have lacked any legal recourse, since Illinois in-house lawyers may be fired for refusing to violate legal or ethical principles.[250] The pressure to approve the document destruction, therefore, must have been unbearable.

B. Business Person

In-house counsel's role becomes much more difficult when the attorney becomes part of a business team or serves in a business role.[251] The pressures to go along, no matter the legality, are overwhelming, including the pressure to be responsive, the desire to be a team player, the desire to become a full-fledged member of the team, and the pressure not to appear difficult.[252] "[T]o the extent [in-house] counsel . . . [becomes a] member of the . . . management team, . . . counsel may be reluctant to jeopardize ongoing membership in the team."[253]

This is partly caused by the blurry line between legal representation and business.[254] The confusing role of in-house counsel is "exacerbated" when such attorneys are included in business teams,[255] as they:

> [T]end to feel as though they are integral members of a team, and their goals are centered on furthering the long-term success of the corporate enterprise. The lawyers "view themselves as facilitators and expeditors of their employer's goals to a greater extent than many outside lawyers would." Inside lawyers are often reminded that they are part of the corporate team and rewarded when they act as "team players."[256]

An attorney's objectivity may be at great risk if he or she becomes involved in business decisions.[257] The conflicting roles of in-house counsel are most evident when in-house counsel is involved in the planning stages of business decisions, for:

> [I]t becomes harder to challenge – indeed, even to see – fundamental assumptions about the way that a company operates. Biases to defend a course of action become even stronger when we have participated in the

249. *See supra* Part V.

250. *Balla*, 584 N.E.2d at 110.

251. DeMott, *supra* note 223, at 968-99.

252. *See id.* at 968.

253. *Id.* at 968.

254. John H. Ogden, *Legal & Business Functions: Corporate Counsel Juggling Multiple Roles*, 10 ACC DOCKET 22, 22 (1992).

255. Steven N. Machtinger & Dana A. Welch, *In-House Ethical Conflicts: Recognizing and Responding to Them*, 22 ACC DOCKET 23, 30-31 (2004).

256. Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 206-07 (2001) (footnotes omitted).

257. *Id.* at 207-08.

> decision to embark on that course of action. . . . So the tension is this question: how can a well-integrated (and therefore presumptively subjective) member of corporate management, as in-house counsel must be to be effective, ever claim to provide what the Rules (Model Rule 2.1), our ethics, and our clients demand: "independent," candid legal advice?[258]

"In-house attorneys may not be as likely to perceive ethical problems because they may identify closely with the employer-client or agents of the employer-client."[259] This is particularly true if the in-house counsel is asked to give legal advice on a project that he or she helped build.[260] "[T]o the extent general counsel participates at an early stage in shaping major transaction and corporate policy, counsel's ability to bring detached, professional judgment to bear in assessing their legality may be compromised, especially when the question of legality is tinged in shades of gray as opposed to black and white."[261] It is very difficult to objectively evaluate one's own work.

The lack of objectivity also increases if the in-house lawyer holds a "business" title, such as CEO, COO, or Executive Vice President.[262] In addition, objectivity is at risk if in-house counsel reports to or is evaluated by a non-lawyer, as "inside lawyers face stronger pressures to conform to the wishes and objectives of managers who have the authority to hire and fire them."[263]

V. THE CAUSE OF ANDERSEN'S COLLAPSE

Arthur Andersen, the founder of the accounting firm of the same name, was by all accounts a highly ethical person who stressed ethics and values to his employees.[264] It has been reported, for example, that a twenty-eight-year-old Arthur Andersen was confronted with an ethical dilemma similar to the Enron debacle.[265] A railroad executive threatened to pull his business

258. Machtinger & Welch, *supra* note 255, at 27 (footnote omitted).

259. Giesel, *supra* note 204, at 537.

260. DeMott, *supra* note 223, at 968.

261. *Id.*

262. *Id.* at 969.

263. Kim, *supra* note 256, at 204.

264. Linda Klebe Treviño, *Out of Touch: The CEO's Role in Corporate Misbehavior*, 70 BROOK. L. REV. 1195, 1204-05 (2005).

> Andersen, who headed the firm until his death in 1947, was a zealous supporter of high standards in the accounting industry. A stickler for honesty, he argued that accountants' responsibility was to investors, not their clients. . . . Leonard Spacek, who succeeded Andersen at the founder's death, continued this emphasis on honesty.

Wikipedia, *supra* note 15.

265. Treviño, *supra* 264 at 1205.

if Arthur Andersen did not approve the railroad's questionable books.[266] Andersen refused, saying "[t]here's not enough money in the city of Chicago[] . . . to induce me to change that report!"[267] Not surprisingly, Andersen lost the railroad's business, but he was later vindicated when the railroad filed bankruptcy.[268]

In 1932, Arthur Andersen stated "[t]o preserve the integrity of his reports, the accountant must insist upon absolute independence of judgment and action."[269] Arthur Andersen passed such ethical beliefs on to later generations of Andersen partners, who were fond of saying "integrity mattered more than fees."[270] With a motto of "[t]hink straight, talk straight,"[271] the firm, prior to the late 1980s:

> [R]egularly broke lockstep and spoke out against accounting abuses or bad policies. It risked the wrath of its clients, the government, and its rivals to push for what its leaders felt was right. Sometimes, that meant losing lucrative fees. Other times, it meant gaining enemies. But everyone agreed that Arthur Andersen was a place with courage.[272]

How, then, did an accounting firm with such ethical roots make such unethical decisions in October 2001? The answer is that "[b]y the late 1980s standards throughout the industry fell" as accountants became unwilling to upset their clients.[273] This was particularly true at Andersen, which was known for having the highest billings and highest profits per partner of the Big 5 firms.[274] Unlike the early days when integrity mattered more than fees, by the 1980s fees mattered far more than integrity at Andersen.[275] Andersen "had become a place where the mad scramble for fees trumped good judgment."[276] As a result, Andersen employees – including in-house counsel – were expected to facilitate every client's, particularly Andersen's largest client – Enron's, wishes regardless of ethical or legal propriety.[277] "The worst possible sin [one] could commit at Arthur

266. *Id.*

267. TOFFLER, *supra* note 8, at 12.

268. *Id.*

269. *Id.* at 16.

270. *Id.*

271. *Id.*

272. *Id.* at 13. "For much of the 1990s – arguably the most critical period in Arthur Andersen's history – the Firm was rudderless, its core values of integrity, stewardship, and public responsibility replaced by greed." *Id.* at 13.

273. Wikipedia, *supra* note 15.

274. *Id.*

275. Wikipedia, *supra* note 15.

276. TOFFLER, *supra* note 8, at 6.

277. *Id.* at 62.

Andersen[] . . . was to upset the client – even if [the client] desperately needed to hear the bad news."[278]

As stated in the introduction of this Article, my theory is that Andersen's demise was caused by its cult-like corporate culture.[279] I submit that Nancy Temple had only two choices in October 2001 – instruct Andersen's employees to destroy documents or quit her job without legal recourse. Andersen's culture permitted no middle-ground.[280] My theory is supported by three types of evidence, each of which is described below.

A. My Arthur Andersen Experience

In the fall of 1999, I received a call from a former law firm colleague, who was then a senior in-house attorney at Andersen, inviting me to apply for a position in Andersen's in-house counsel's office. At that time, Andersen had about 20 in-house lawyers, mostly at its Chicago headquarters. I was told that Andersen was looking for a litigation attorney with about ten years of large firm experience. I graduated from law school in 1989 and had practiced for several years at Chicago's second largest law firm.

The Andersen position sounded interesting. I had experienced two extremes in my legal career: large firm practice and full-time law school teaching.[281] I enjoyed the excitement and, dare I say, compensation of practice and the low-stress environment of teaching, so I thought an in-house position might present the best of both worlds – the excitement and remuneration of large firm practice, but with far less stress. Accordingly, I faxed my resume to Andersen.

Although it seemed irrelevant at the time, I had just co-authored a comprehensive article on spoliation of evidence that focused on the issue of when litigation becomes "foreseeable" for purposes of suspending a document retention plan.[282] If Andersen had read and followed the guidelines prescribed by this article, it may have survived the Enron debacle. I later learned, however, that Andersen had "no respect for expertise,"[283] so my knowledge of spoliation law probably would not have impressed Andersen.

278. *Id.* at 63.

279. *See supra* Part I.

280. *See* TOFFLER, *supra* note 8, at 63.

281. I had also taught Professional Responsibility on several occasions at Marquette University Law School.

282. *See* Kinsler & Keyes, *supra* note 106, at 761-83.

283. TOFFLER, *supra* note 8, at 123.

Shortly after faxing my resume, Andersen called to schedule an interview. This first interview lasted the better part of a day, during which I met most of Andersen's in-house legal staff, including, as I recall, Don Dreyfus, one of Andersen's top lawyers.[284] I was struck by a couple of things. First, everyone I met stressed that there was no room for individualism at Andersen; everyone had to be part of the "team."[285] I had heard this at other employers – indeed, it is commonplace in corporate America, but Andersen's in-house staff seemed to take it to a new, cult-like level.[286]

My second observation was just how little Andersen valued its attorneys. For instance, Andersen's in-house attorneys did not have individual offices, but worked in a cubical jungle. When I inquired as to the reason, I was told that this was designed to ensure equality, although the head of the department – who was not a lawyer – had a large, plush individual office. I was also concerned about the lack of confidentiality in the cubicals, as everyone would be able to eavesdrop on your conversations. In reply, I was told that "there were no secrets" at Andersen.

Although I met nearly all of the in-house staff at my first interview, I was told that a second interview would be necessary, because an in-house lawyer could not be hired until he or she was "approved" by every single in-house attorney. I found this a bit odd and extremely inefficient, but I agreed to return for a second interview. This time around I met more of the in-house staff, and was told again that at Andersen the team is far more important than the individual. At this second interview, I also noticed that Andersen's in-house lawyers seemed to have little interest in legal issues or the practice of law; all of the conversations focused on Andersen's employee benefit plans such as "flex-time," maternity leave, and the ease of working at Andersen compared to large law firms.

At the end of this interview, I was expecting a decision, but instead received an invitation for a third interview, since there were still a couple of team members I had yet to meet. I accepted the invitation for a third interview and met more of Andersen's in-house attorneys. At the end of the third interview, Andersen extended a "conditional" offer of employment – conditioned on my acceptance of a fourth interview during which I would meet with one last team member. I had never heard of any job requiring three lengthy interviews, much less four, so I hesitated to return. At this point I was told that a "team player" would have no objections to a fourth

284. *See also id.* at 154.

285. *See also id.* at 44 ("[T]he individual had little recognition at Arthur Andersen.").

286. *See also id.* at 39.

interview.[287] Well, I guess I am not a team player, because I declined the conditional offer and washed my hands of Andersen.

Until late 2001, I never thought much of my interview at Andersen. I was comfortable with my decision to walk away. When I first learned of Andersen's role in the Enron scandal, it affirmed my decision to reject Andersen's offer of employment. When I later learned that Temple accepted the job I had declined, it greatly reaffirmed my decision.

With the benefit of hindsight, it is clear that I made the right decision. At the time I declined Andersen's offer, I sensed that Andersen was not looking for an independent legal advisor as much as someone with a law degree who would be willing to sign off on any transaction. Andersen's attack on my loyalty for hesitating to accept a fourth interview, for example, convinced me that independence was not tolerated at Andersen. It also convinced me that I did not want to be a member of the Andersen team.

B. Andersen's "No Dissent" Culture

As one commentator recently observed, Andersen did not fail because of one or two "bad apples."[288] Nancy Temple was not a rogue employee, as "[s]uch conduct would have been practically impossible to pursue in an environment involving real attention to public duties."[289] The decision to commit spoliation may have started with Temple, but its implementation was company-wide:

> Temple thought of the idea of pushing compliance with the moribund document policy and suggested it to her colleagues, some of whom seconded her recommendation, but she did not follow up or supervise the destruction in Houston. Houston partners received the suggestion and decided on their own to organize many employees there to shred documents, without further consulting the hierarchy in Chicago. At the same time, other senior partners in Chicago followed Temple's suggestion, recommending it to others and destroying their own Enron-related documents, but without further consulting her or being aware of the destruction in Houston.[290]

Moreover, hardly anyone questioned, much less opposed, Temple's

287. I later learned that anyone who questioned Andersen policy was labeled a non-team player. *See id.* at 57.

288. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 482 (2006).

289. *Id.*

290. *Id.* at 482 n.49.

instructions.[291] "Over a dozen of Andersen's most senior global managers were party to discussions in which pursuit of the mostly ignored document policy was urged, and dozens more of the firm's lower level employees carried out the work of purging the record, without objection."[292] The document destruction was not limited to Andersen's Houston office; Enron records were also destroyed in Chicago, Portland, and London.[293] When David Duncan instructed his staff to destroy Enron's documents:

> No one asked Duncan to explain further[] . . . . None of the staff asked whether what they were doing was wrong. No one questioned whether what he or she w[as] doing might be seen as an obstruction of justice. Andersen staff just reacted, following orders without question. They were complying with a firm policy.[294]

But, then again, who would "question someone who could 'make' you, or, if not, discard you like so much trash?"[295] Andersen employees were generally inclined to violate legal and ethical principles if asked to do so by a partner.[296] Therefore, it is not surprising that Andersen employees were frequently referred to as "Androids,"[297] since for an "Android[] the idea of challenging [a] partner was downright unthinkable."[298]

The lack of regard for law and ethics was not limited to the business side of Andersen.[299] The lawyers also had a tendency to look the other way.[300] According to Barbara Toffler, when Andersen's general counsel was confronted with an obvious case of overbilling, he said "[n]othing. He just stood there."[301] Such universal disregard for ethical and legal standards could have only occurred in an environment where dissent was quashed:

> For most of [Andersen's] existence, this was not a place where independent activities were tolerated or encouraged. It was a culture in which everyone followed the rules and the leader. When the rules and leaders stood for decency and integrity, the lockstep culture was the key to competence and respectability. But when the game and the leaders changed direction, the culture of conformity led to disaster. . . . This was a

291. *Id.* at 483.
292. *Id.* at 483 n.52.
293. SQUIRES ET AL., *supra* note 15, at 3.
294. *Id.*
295. TOFFLER, *supra* note 8, at 40.
296. *Id.* at 192-93.
297. SQUIRES ET AL., *supra* note 15, at 53.
298. TOFFLER, *supra* note 8, at 67.
299. *See, e.g., id.* at 3.
300. *See, e.g., id.* at 3.
301. *Id.* at 3.

culture so strong that most individuals were helpless to change things.[302]

This proves what I suspected during my interviews: Andersen expected everyone to protect the firm and its client at all costs and, as shown below, punished those who dissented.[303]

C. The Punishment of Dissenters

Andersen had an "up or out" environment, in which employees either moved up the ranks or were moved out of the firm.[304] By the late 1990s, the sure and possibly only way for Andersen employees to move up the ranks was "to keep both their bosses and the people at Enron happy" and the sure way was to approve every transaction.[305] By contrast, the sure way for Andersen employees to move out of the firm was to dissent to an Enron transaction.[306] At Andersen, displeasing "Crown Jewel" clients was a cardinal sin, and Enron was the Crown Jewel of Crown Jewels.[307]

The experience of Andersen partner Carl Bass exemplifies the "yes-man" culture at Andersen.[308] Bass was a senior partner in Andersen's Houston office.[309] He served on the prestigious "Professional Standards Group [(PSG)], an internal team of accounting experts that reviewed" and approved troublesome "accounting issues" confronting local offices.[310] "For decades, the [PSG's] word was accepted as law at Andersen."[311]

Enron was considered one of Andersen's "highest-risk clients."[312] In February 2001, Bass, who had been assigned "to monitor . . . high-risk audit[s], strongly objected to Enron's accounting."[313] Bass's objection was overruled by local partners in the Houston office; Andersen was the only

302. TOFFLER, *supra* note 8, at 34.

303. *See* TOFFLER, *supra* note 8, at 101 ("[I]t was verboten to upset the client.").

304. Barrett, *supra* note 33, at 884.

305. *Id.* At Andersen, "clients had become to valuable to defy. . . . [Y]ou could best serve the client—and therefore, keep the client—by keeping it happy." TOFFLER, *supra* note 8, at 62.

306. *See* TOFFLER, *supra* note 8, at 212.

307. *Id.* at 63, 141.

308. *Id.* at 212.

309. John A. Byrne, *Fall from Grace*, BUS. WEEK, Aug. 12, 2002, at 50; Kurt Eichenwald with Floyd Norris, *Early Verdit on Audit: Procedures Ignored*, NY TIMES, June 6, 2002, at 6.

310. Byrne, *supra* note 309.

311. Delroy Alexander et al., *Ties to Enron Blinded Andersen: Bonded by Mutual Interest and Money, Managers Buckled Before the Houston Energy Trader Even When Deals Seemed Questionable. Firm Couldn't Say 'No' to Prized Client*, CHI. TRIB., Sept. 3, 2002, at S1. "For many Arthur Andersen partners, ignoring [the] PSG's opinion was unthinkable." SQUIRES ET AL., *supra* note 15, at 126.

312. SQUIRES ET AL., *supra* note 15, at 126.

313. Byrne, *supra* note 309.

Big Five accounting firm that allowed local partners to overrule the PSG.[314] Thereafter, Bass continued to object to Enron's accounting and, not surprisingly, tensions grew between Bass and Enron.[315] Enron "considered him a roadblock to their rapid fire deal-making."[316] Rather than stand up for Bass – a member of the PSG – Andersen, in an unprecedented move that was protested by most of the members of the PSG, demoted Bass by removing him from all oversight of the Enron account.[317] Bass, it seems, was demoted for being "too rules-oriented."[318] The demotion was no small matter, as it apparently was approved by Andersen's CEO Joe Berardino.[319]

Bass paid the price for saying "no" to a rogue client.[320] At least two other Andersen accountants – Jennifer Stevenson and Pattie Grutzmacher – were also removed from the Enron engagement for challenging Enron's use of SPEs.[321] Undoubtedly, these demotions sent a clear message to all Andersen employees, presumably including Temple. As one Andersen employee later explained: "[I]f you didn't act a certain way . . . it could jeopardize your existence on the Enron engagement."[322] The message was clear: "Keep the client happy, no matter what the consequences."[323]

In this environment, how could one expect Nancy Temple, a relatively junior in-house lawyer who had recently been assigned to the Enron account, to say "no" to Enron or senior Andersen partners when she had recently witnessed the demotion of a senior partner for the very same act? The demotions of Bass, Stevenson, and Grutzmacher prove that Andersen did not want independent, professional advice. Thus, Andersen's culture presented Temple with an excruciating dilemma: protect Andersen by instructing its employees to destroy Enron's documents or destroy her career. Unfortunately, she chose the former and, ironically, destroyed Andersen.[324]

314. *Id.*

315. Alexander et al., *supra* note 311.

316. *Id.*

317. SQUIRES ET AL., *supra* note 15, at 126.

318. Tom Fowler, *Prosecution Rests; Pressure Doesn't: Attorney for Andersen Gets Licks In.*, HOUS. CHRON., May 28, 2002, at 1B.

319. Paul B.W. Miller & Paul R. Bahnson, *The Spirit of Accounting: The Answer Is in Truth, Not Detailed or Broad Standards*, ACCT. TODAY, Oct. 7, 2002, at 14.

320. SQUIRES ET AL., *supra* note 15, at 126.

321. Stephan Landsman, *Death of an Accountant: The Jury Convicts Arthur Andersen of Obstruction of Justice*, 78 CHI.-KENT L. REV. 1203, 1210 (2003).

322. Alexander et al., *supra* note 311.

323. TOFFLER, *supra* note 8, at 212.

324. *See id.* at 160-61.

VI. CONCLUSION

The Article is entitled "Arthur Andersen and the Temple of Doom." But Nancy Temple was not Andersen's "Temple of Doom"; Andersen's "Temple of Doom" was its corporate culture, a cult-like culture in which in-house attorneys were not free to render independent legal advice.[325] It was this culture – and not greedy partners or unethical lawyers – that doomed Andersen to a needless death.

If Andersen's in-house lawyers had been encouraged or, at the very least, permitted to render independent legal advice, Andersen would not have been indicted and convicted of obstruction of justice and, perhaps, would have survived the Enron scandal. At its moment of truth, Andersen needed an independent, professional lawyer familiar with the law of spoliation and not afraid to do the right thing. I believe I was such a lawyer at the time I interviewed with Andersen in late 1999, but Andersen's culture chased me and probably others away. Andersen then turned to Nancy Temple, and the rest is history.

What makes me believe that if I had been in Temple's position I would have done the right thing? First, I was quite familiar with the law of spoliation by 1999. I had just co-authored a comprehensive article that examined the issue: When is litigation foreseeable for purposes of spoliation?[326] So there is no doubt that I would have *known* the right thing to do.

But would I have *done* the right thing? My handling of a prior ethical dilemma convinces me that I would have done the right thing. In the late 1990s, I was asked to work on a case with one of my firm's senior partners. The case involved a dispute over a non-compete contract. We represented the employee in the dispute, who intended to argue that the contract was unenforceable. However, early in the litigation I learned that our firm had drafted the non-compete contract—not for the employee, but for the employer who was a former client. When I raised the potential conflict of interest, I was told that we no longer represented the employer and thus there was no conflict. In response, I explained that Model Rule 1.9 prohibits the representation of clients in matters adverse to former clients if the matters are substantially related.[327] I was then told that the matters were

325. *See id.* at 39.

326. Kinsler & Keyes, *supra* note 106 at 761-83.

327. MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2003)

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

unrelated, which I found incredible since they both involved the same contract.

The billing partner told me that he would take full responsibility for any ethical problems, but I still had my doubts. Fortunately, my firm had an "ethics" partner who was responsible for resolving troublesome ethical issues. Although I realized that I might jeopardize my relationship with the billing partner, I discussed the issue with the ethics partner, who agreed with me. The ethics partner "overruled" the billing partner, and the firm withdrew from the representation. Not surprisingly, my relationship with the billing partner and some of his colleagues was never the same.

Thus, considering my knowledge of spoliation law and my handling of prior ethical dilemmas,[328] I feel confident that if I had been in Nancy Temple's position I would have refused to participate in the destruction of Enron's documents and, presumably, Andersen would have survived the Enron debacle. Of course, I would have been *persona non grata* at Andersen, but there are some things more important than a job.

The moral of Nancy Temple and Arthur Andersen is a simple one. Although in-house attorneys are employees, they are first and foremost lawyers and, as such, are expected to render independent, professional advice. If a business creates an environment in which its in-house attorneys are afraid to dissent, it will not attract the best legal talent and, more importantly, it will not receive the best legal advice. The quality of legal advice and advisors, as Arthur Andersen sadly discovered, may be the difference between life and death.

Id.

328. My involvement in another ethical dilemma also is instructive. In 1997, we represented a brokerage firm in mediation with a couple of its former employees. Prior to the mediation session, the mediator asked the parties to exchange two-page "position" papers. In addition, the mediator asked each of the parties to send him a confidential one-page statement setting forth its clients settlement range. Our opposing counsel mistakenly faxed both the position paper and confidential statement to us. Upon discovering the error, we stopped reading the confidential statement and undertook research to determine the proper course. Ultimately, we determined that our ethical obligation was to return the confidential statement without reading it and to notify our client of the situation. A few years later, the ABA adopted a similar position in Model Rule of Professional Conduct 4.4(b), which provides "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Model Rules of Prof'l Conduct R. 4.4(b) (2003).