

## Smoking E-Mails

Janet Novack, 10.03.05

### **KPMG's Tax shelters weren't too bright. Its internal memos on the shelters were really dim-witted.**

In April 2002 a KPMG executive sent an internal e-mail to 33 recipients reporting, matter-of-factly, that the firm had just given a purposely incomplete list of tax shelter clients to the Internal Revenue Service. This prompted another KPMGer to e-mail vice chairman Jeffrey Stein: "Given the sensitivity of this situation, should we be putting all this in print?" Good question.

Stein and seven other former KPMG tax advisers have pleaded not guilty to conspiracy to commit tax fraud. Much of the government's case--which led KPMG to admit to criminal wrongdoing and agree to pay \$456 million--is built on e-mails that would make any defense lawyer cringe. "The e-mails are smoking guns," says McAllen, Tex. plaintiff lawyer Edmundo O. Ramirez, who wrested settlements for shelter clients out of KPMG after uncovering damaging e-mails in discovery proceedings.

Now Ramirez and other lawyers representing users of KPMG's 1998 OPIS shelter have asked a Florida court to sanction the firm for "spoliation" of evidence. They allege that in June 2000 employees improperly destroyed electronic and hard copies of 800 e-mails relating to OPIS. Surviving e-mails, they note, indicate the document purge was done in "contemplation of future IRS controversy and litigation." In a statement, KPMG said any e-mail deletion was done before the IRS had issued it summonses or investor lawsuits had been filed and was "consistent with" its document-retention policy.

The law is "up in the air" about whether and when a civil defendant who hasn't yet been sued, but has reason to think he might be, can delete e-mails, observes Blank Rome partner D. Christopher Ohly. But given the difficulty of deleting all copies anyway, warns the former prosecutor, "anyone in business ought to understand that once the 'send' button is pressed, your words can come back on you. E-mails are powerful evidence of one's state of mind.

" In the KPMG criminal case, various messages seem to show higher-ups overriding internal objections that its shelters didn't work, concluding potential profits outweighed the risk of penalties for flouting IRS rules and blithely contradicting representations made in legal documents supporting the shelters. Incredibly, even after the IRS began investigating KPMG as a shelter promoter--and after Arthur Andersen's indictment made clear the risk of destroying documents when the government is investigating--partners hit "send."

So why would savvy professionals (five of the indicted former KPMGers are lawyers), knowing they were skating close to the line, write such damaging stuff? New York Law School professor Tanina Rostain, who has studied KPMG's shelter business, chalks it up to a sense of "invincibility" that was part of the culture. "They just thought they were smarter than the IRS and would never get caught," she says.