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DIAMOND DUST

by K. Kay Shearin

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FOREWORD

0: Paragraph 1 I didn't do very much research for this book --

mostly I looked up spellings or dates in a dictionary or my 1972 'Funk & Wagnall's New Encyclopedia', but I also reviewed documents I wrote or received that described events at the time -- because it's an account of what I've seen and experienced myself. Where I've repeated something someone else told me, I've tried to identify that source and the circumstantial evidence that makes me believe it, and I haven't included anything that I don't affirmatively think is true.

0: Paragraph 2 Many of the things I've said here are unflattering to someone, but nothing here is actionable defamation, partly because what I've said is true and partly because it's already been published in transcripts of in-court testimony that are public records. Nobody put me up to writing this, and I can't imagine very many people could be happy that I have, but I wanted the catharsis of packaging these memories into a bundle so I can walk away from it and get on with my life.

0: Paragraph 3 Nearly thirty years ago a mentor said to me, "There are two kinds of people in the world: those who get ulcers and those who give them to others., Which do you want to be?" It took me some years to master the technique, but now I usually manage to get aggravations out of my system instead of brooding on them. Oysters can turn their irritants into pearls, and I'd like to salvage some pearls of wisdom from mine.

0: Paragraph 4 Many of my attitudes were shaped by my mother's sister. My mother's abuse made any healthy relationship between us impossible, so for about ten years from my parents' divorce when I was thirteen, Aunt Ruth was in many ways my real parent. She was amoral and apolitical and a lot like "Auntie Mame," and she taught me to evaluate things for myself and to measure them against my own standards and experience. If she were still alive, she'd be proud of me for writing a book, but she wouldn't understand that it's payment of a moral debt.

0: Paragraph 5 My late Aunt Frances would, though. My father's mother died when I was an infant, so her youngest sister filled the place of a grandmother for me. She was famous within the family for putting the words on people, and her words were often unsuitable for polite society. From her I learned to call a spade a blankety blankety spade and to stand up to anyone who had done me or mine wrong. One of my warmest memories is of the time I blessed Aunt Frances out for an insensitive remark she had made about my father in front of him, and she admitted she had been out of line. That was the rite of passage that marked my arrival into adulthood.

0: Paragraph 6 I believe most problems between people result from a failure to communicate. On the theory that "If you're not part of the solution, you're part of the problem," this book is my effort to communicate.

K. Kay Shearin
Elsmere, Delaware
June 1992

CHAPTER I. The lay of the land

1: Paragraph 1 Delaware is the opposite of the old cliche: not much to visit, but a great place to live. To Amtrak passengers in the northeast corridor, it's a station between Baltimore and Philadelphia; to drivers on Interstate 95, it's not even a wide place in the road between Washington and New York; to its residents, it's one of the best-kept secrets around -- a pearl not to be cast before swinish outsiders.

1: Paragraph 2 As nearly as anyone knows, the state's population is somewhere around 700,000. Although it's the second smallest state in area and has only three counties, there is a marked polarity between the relatively urbanized northern tip of the state, where most of the population is concentrated in Wilmington, and what they often call "slower Delaware," usually defined as "below the [Chesapeake & Delaware] canal."

1: Paragraph 3 Someone seeking a symbol of Wilmington to put on souvenirs -- in case anyone would ever want a souvenir of Wilmington -- would probably pick the equestrian statue of Declaration of Independence signer Caesar Rodney that usually stands in Rodney Square, a grassy one-block plaza in the middle of town. He was the hero who had gone home to die but returned to Independence Hall to cast the tie-breaking vote in the Delaware delegation in favor of the Declaration; we're still arguing about whether he died of cancer or syphilis.

1: Paragraph 4 They took his statue down a year or so ago to fix it, and its massive plinth looks like a ruin standing across the street from the Hotel du Pont that takes up most of the block on the west of the Square. The block east of the Square is occupied by the Public Building housing the state trial courts for the county. Facing the Square on its south is the public library, and on its north is the headquarters of Wilmington Trust Company, the favorite bank of the duPont family and E. I. du Pont de Nemours & Company, Inc. Standing in Rodney Square, you're physically less than five miles from New Jersey, ten from Pennsylvania, and fifteen from Maryland, but in most ways you're in a different world.

1: Paragraph 5 Until about two decades ago the duPonts ran Delaware as a company town, and they ran a tight ship. For example, once upon a time du Pont wanted to hire a high-level executive; a candidate and his family passed muster, and he was offered the position. He said the only problem with moving to Delaware was that his daughter was taking ice skating lessons and hoped someday to qualify for the Olympics, and there was no teacher of that caliber in Delaware. Today there are, at the two Olympic-sized rinks down the road from Wilmington in Newark; one is where Calla Urbanski and Rocky Marvel trained for the 1992 Winter Olympics.

1: Paragraph 6 I heard that story in 1974 from the people who interviewed me for a job on the professional staff of the University of Delaware, whose main campus is in Newark. Their theme was that Delaware was, and would remain, the kind of place where I would want to be, because du Pont would always exert its influence to insure that Delaware was the kind of place the kind of people it wanted to attract would want to live.

1: Paragraph 7 They also explained to me that U. of D. was a private, not a public, school because if it were public it would be subject to the federal anti-segregation laws, and nobody wanted that. So in an arrangement that may be unique, and which is often called "semi-private," instead of making the school the state university and having the legislature appropriate money from the general treasury for it, each year the General Assembly votes for a voluntary donation to the private school, on behalf of the taxpayers of Delaware, out of the treasury.

1: Paragraph 8 Partly because of its small size, and partly because of du Pont's historic paternalism, Delaware in general, and Wilmington in particular, don't suffer today from the problems that plague so many parts of our country, especially the major cities. And the problems Delaware does have are largely the result of du Pont's abdication of that r le, leaving the kind of power vacuum that inevitably attracts scoundrels to public office.

1: Paragraph 9 Delaware's economy is, of course, the product of that political situation. Du Pont is by far the greatest economic power in the state, but Hercules Incorporated and ICI Americas Inc. are players, too, especially in Wilmington. Downstate is agricultural, except for the summer shore resorts, just north of the border with Maryland, at the other end of the ferry from Cape May, New Jersey. Peaches and other fruit were a big cash crop early in this century, but a blight killed most of the orchards, some of which are still standing, eerily beautiful, like rows of surreal black skeletons. Today much of the country's scrapple is made in Delaware, but the main agribusiness is the "chicken factories" where poultry is processed and packaged for supermarkets -- some people will tell you lower Delaware is God's country, but many will tell you it's Frank Purdue's.

1: Paragraph 10 Although there is a big Air Force base in Dover, the federal government is a relatively minor economic force, so federal pork barrels don't influence Delaware politics much. State and local governments don't employ a lot of people, and many government employees, even some of the highest elected officials, are allowed to have private employment at the same time, so political pigs have access to slop from other sources, not just the public trough. The office of Attorney General, for example, is established in the state constitution; the AG heads the Department of Justice, is elected in a statewide election every four years, and stands third in line to become governor if something happens to the governor, the lieutenant governor, and the secretary of state. The AG can invalidate state statutes simply by issuing a written opinion, and no criminal complaint can even be filed,

much less prosecuted, without the AG's approval; in short, as Delaware's lawyer, the AG has complete control over all legal processes that involve the state government.

1: Paragraph 11 Incumbent AG Charles M. Oberly III, first elected in 1982, shortly started publishing a newsletter as a private business. Questions were raised as to whether that was ethical or even lawful, but Oberly exercised his power to rule it was okay. That's what they mean by, "There's no excuse for losing if you're keeping score." Today that newsletter, which reports the rulings in some cases in Delaware courts, is written by Deputy AGs and typed by secretaries in the Dept. of Justice, both in the course of their public employment. But the subscription money goes to Oberly personally, and although the quality of the newsletter is poor, compared to competing publications, the subscription price is lower, too, because Oberly doesn't have the same production costs as his competitors, and some of his subscribers have told me they see it as legal insurance -- they've noticed the Dept. of Justice is more attentive to the needs of subscribers, and they more often enjoy favorable results in legal proceedings, than nonsubscribers.

1: Paragraph 12 Oberly has rejected offers to purchase his newsletter business for more than it's worth, because he wants to keep that ostensibly legitimate mechanism for collecting money from the citizens he's pledged to serve. You get what you pay for. That story was told to me by several persons, including some of the competing publishers, who had offered to buy Oberly out, while I was working for them, but many other elected officers have lucrative private sidelines. The county Recorder of Deeds and Register of Wills, for example, both have private law practices besides those elective, salaried positions that provide them offices and staffs in the public buildings in Wilmington.

1: Paragraph 13 So does the Public Defender, who is appointed, not elected. Lawrence M. Sullivan has been Delaware's PD for more than twenty years, and most indigent criminal defendants in state court are represented by one of his deputy PDs, who also have private law practices on the side. The poor quality of these representations have been an open scandal for years: In 1981, in an opinion in 'Waters v. State', published at 440 'Atlantic Reporter' 2d 321, the Delaware Supreme Court took Sullivan to task for trying to shirk responsibility for the inadequacy of the legal services he provided. It has been traditional for the PDs to divert defendants who can come up with any money, usually from their families, to their private practices; a very few indigent defendants, usually repeat offenders who learned the first time around how much help the PD is, demand and get independent lawyers appointed and paid by the court.

1: Paragraph 14 The defendants stuck with the PD are often worse off than if they had no lawyer at all, because they rely on the bum advice they get from a lawyer who gets paid the same salary no matter how much or little time he spends on their case and resents taking the time away from his private practice, where he can bill by the hour. Take the case of Susan J. Scott, for example: On 20 September 1986 she fatally shot

her live-in boyfriend who had been violently assaulting her for the five years they had been together. She was arrested, charged in Delaware Superior Court with first-degree murder and possession of a deadly weapon during the commission of a felony.

1: Paragraph 15 She was represented by one PD for about a year, and then he left the PD's office, so her case was assigned to another deputy PD named Duane D. Werb. Although he knew there was evidence supporting Scott's self-defense claim, Werb advised her that the "battered woman defense" wouldn't fly in Delaware, that there wasn't enough evidence to prove self defense at trial, that proving self defense couldn't clear her of the lesser included offense of manslaughter, and that if she pled guilty to manslaughter she would receive a sentence of three and a half to seven years in prison. So on 26 May 1988, a week before her trial was supposed to start, Scott took Werb's advice and pled guilty to manslaughter; she was sentenced to twenty-five years in prison.

1: Paragraph 16 Then Scott's family managed to scrape up the money to hire New Orleans lawyer Richard Ducote, with a national reputation for representing battered women, to try to get her sentence reduced. On 19 July 1989 Judge John E. Babiarz Jr., who had accepted Scott's guilty plea and sentenced her, reversed her conviction in a written opinion ruling that Werb had committed legal malpractice by giving her advice that was blatantly wrong on three separate points of law. The two charges against her were reinstated, and Scott's trial was scheduled for 16 October. That morning the deputy AG offered another plea agreement: If she would plead guilty to manslaughter, she would be sentenced to three years, which was how long she'd been in maximum security by then. So she pled guilty and was immediately released from prison.

1: Paragraph 17 Scott wanted to sue the PD for legal malpractice, and Ducote was willing to represent her in that suit, but he had trouble finding a member of the Delaware bar willing to go up against the PD, and he had to have a Delaware lawyer to act as local counsel because he wasn't licensed to practice law here. He finally asked the Delaware ACLU for help, but all they did was give him my name; I agreed to be local counsel in the case, and that's why I came to know about it.

1: Paragraph 18 On 15 August 1991 we filed Scott's civil complaint in Superior Court, against Sullivan and Werb. Remember that the prosecutor in the criminal case had been the AG and that a Superior Court judge had already ruled the PD committed legal malpractice. Now the AG appeared on behalf of the PD, because the AG is the lawyer who represents all state employees, and Superior Court Judge Vincent J. Poppiti summarily dismissed the complaint: He ruled that because Scott had pled guilty to manslaughter, the same as she did on Werb's advice, she could not have been harmed by any wrong advice he gave her! That dismissal was recently affirmed by the Delaware Supreme Court.

1: Paragraph 19 That story illustrates not only the incestuous (if not downright masturbatory) nature of Delaware's criminal justice system but also the distinctive feature of Delaware civil litigation: Most participants in civil litigation are from out of state, and they have to

pay featherbedding Delaware lawyers to hold the courthouse doors open for them.

1: Paragraph 20 A couple of years ago the American Bar Association rated Delaware as fourth in the country in the number of lawyers per capita, and that's true as far as the numbers go, but it gives a false impression: Many of the lawyers in Delaware are employed in companies other than law firms, so they're not available for hire by other clients; many of the lawyers working in banks or other companies are not admitted to the Delaware bar, so they couldn't go into private practice anyhow. Unlike many states, Delaware no longer cuts lawyers from other states any slack in getting into the Delaware bar, and every candidate for admission has to take the same bar exam and perform the same clerkship, no matter how long the person may have been a lawyer (or even a judge) elsewhere. This anti-carpetbagger rule was made by the all-lawyer state Supreme Court, not the nearly lawyer-free legislature (now 1 of 21 senators; 1 of 41 representatives), and ensures that there won't be too many lawyers (about 1900 now) compared to the amount of business, but it has the effect of decreasing competition, and I firmly believe that free-market competition is always good and is what made this country great.

1: Paragraph 21 In many places, the lawyers who make the most money are the ones who do personal injury litigation -- that's why you see so many commercials for that kind of business wherever lawyers are allowed to advertise on television. PI lawyers usually work for a contingency fee (often a third of the amount recovered), meaning they get paid only if they win, and the plaintiff doesn't pay any up-front legal fees. That's why there's too much litigation in this country: No matter how bogus the suits are, a lawyer who files enough of them will sometimes hit the jackpot; defendants often settle for nuisance value to avoid the humongous legal expenses they will incur even if they end up winning, and it doesn't cost plaintiffs anything to sue, so if they lose they're not out anything, and if they win they come out ahead.

1: Paragraph 22 In Delaware it's not like that. The big-ticket legal cases here are not over personal injuries but over corporation law, and we have a special court for litigating corporation cases, the Chancery Court. Chancery or equity court started in England in the late 1300s and over the centuries developed a separate structure similar to that of the so-called law courts, and certain types of cases became associated with one or the other. By the time America was settled, it was established that criminal prosecutions and civil suits for money damages were legal cases, while probate, adoptions, and civil suits for injunctions were equity cases. One of the main distinctions between them was that there were no juries in chancery.

1: Paragraph 23 A trustee is a person who has agreed to hold or manage property for someone else's benefit, and anything to do with trusts is within the equity court's jurisdiction. The idea of a corporation is that its directors are trustees for its stockholders, managing the money they paid for their shares for their benefit, so any litigation over corporate affairs is a chancery case.

1: Paragraph 24 The federal District Courts have both legal and equitable jurisdiction, but only in cases where there is federal jurisdiction over the subject matter, of course, and most states have similarly combined the two courts into one, although some states maintain a distinction between the law division and equity division of the court. In Delaware the Superior Court has jurisdiction over cases that are legal only and the Chancery Court has jurisdiction over every case where either the subject matter or the relief sought includes any equitable component.

1: Paragraph 25 So in Delaware if you want to sue your neighbor for the cost of fixing your garage when he overshot his driveway and smashed into it, you do that in Superior Court; if you want to enjoin him from driving across your property in the future, you do that in Chancery; and if you want to do both in one suit, you have to do that in Chancery, too, because the Chancery Court has jurisdiction over legal claims related to equitable claims, but the Superior Court doesn't have jurisdiction over equitable claims related to legal ones.

1: Paragraph 26 The Chancery Court now has five judges: Chancellor William T. Allen, who is rated one of the best chancellors in living memory, and four vice chancellors of varying lesser ability. Most of the cases that come to them involve either trusts or corporations, and there are no juries, so they make all the decisions in every case, and that gives them an awful lot of experience. Unfortunately it's like what John F. Kennedy said about the difference between ten years of experience and one year of experience ten times: They keep getting cases that are exactly the same except for the name of the corporation. I often wonder why they're still writing opinions from scratch when they come to the same result and take so long; they have word processors, so they should load standard paragraphs and then do their opinions by selecting from a menu.

1: Paragraph 27 There are, after all, only two possible rulings on a motion for anything -- it's either granted, or it's denied -- and the recurring issues have well established standards the court is required to consider. Probably the most frequent issue they decide is the motion for preliminary injunction: Every time the Wall Street Journal says there's going to be a tender offer for a company, at least one of its stockholders files a class action to enjoin the deal. There are three points a party has to prove to get a preliminary injunction, so the Chancery Court should have a one-page preliminary injunction opinion form that has, for each of those three questions, a "no" box and a "yes" box with a blank next to it for the judge to fill in the fact that proved that point. Then the word processor could spit out the standardized preliminary injunction opinion with those customizations -- "You may have already won a preliminary injunction, Plaintiff Insert Name Here" -- and citations to the latest precedents on each point.

1: Paragraph 28 So why don't they do that, if it would be easier and faster? Because the big legal business in Delaware is corporation litigation, and nobody here wants to streamline the process and so cut

down on the profits from it. Most lawyers in Wilmington (which is the bulk of the lawyers in Delaware, using that word in several different senses) are or want to be local counsel for out-of-state lawyers in corporation cases; the ethics rules governing lawyers say they can't split fees except in the same proportions they split the work, and the only work local counsel can usually claim to do is supply the expertise on local practice and precedents. Because the procedural rules in Superior Court are very similar to those of the federal courts, and the Chancery Court rules are virtually identical to the federal rules, lawyers from anywhere in the country already know as much as they need to about local practice here, so all that's left for local counsel to do is provide gossip about the judge or other lawyers in the case and citations to prior opinions that have not been published in the national reporters. So Chancery Court issues tons of opinions that aren't published, say the same thing over and over again, and give local counsel the right to claim a large percentage of the fee for reviewing pertinent opinions.

1: Paragraph 29 Delaware is the corporation capital, and some writers have said corporation whore, of the country: More corporations are chartered here than in all the other states put together, and Delaware actively encourages that with its laws governing corporate affairs and taxes. When you're going to sue a corporation, you have a choice about where to do it, and one of the choices is always a court in the state where the corporation is chartered, whether it does any business there or not. So most corporations can be sued in Delaware because they're incorporated here.

1: Paragraph 30 Until November 1991 everybody knew a corporation could always sue somebody else in the state where the corporation plaintiff was chartered, but then the Superior Court handed down a decision throwing out a case filed by a Delaware corporation against a whole slew of insurance companies for not covering claims against the plaintiff for hazardous waste dumps. The Chancery Court would never have made a ruling like that, and the lawyers here are hopping and howling at the prospect of losing the chance to be local counsel in some of those cases -- they're trying to get the legislature to pass a law guaranteeing the "right" of a Delaware corporation to drag defendants into Delaware courts whenever they want to.

1: Paragraph 31 Remember that most Delaware lawyers want to be local counsel in corporate cases, and a lawyer who goes up against corporations will be blacklisted and never be hired to represent corporations. A plaintiff in a personal injury suit sues whoever did the injury, but in effect the suit is usually against an insurance company -- in a car accident case, it's the auto insurance; in a medical malpractice case, its the doctor's professional insurance; in a product liability or slip-and-fall case, it's the casualty insurance; and in tender-offer cases, it's the directors' E&O insurance -- so insurance companies pay the lawyers in many cases. The bottom line is that a person in Delaware who wants to file a personal injury suit can't usually find a good lawyer here to do it, because the lawyers don't want to go up against the insurance companies and run the risk of never being

hired by those companies in the future.

1: Paragraph 32 The United States was founded on the idea of individuals' rights, but in Delaware corporations count for more than people do now. Take the top state officials: The governor and lieutenant governor are elected separately, so we can, and recently did, have a governor who was a Republican and a lieutenant who was a Democrat. The governor appoints the Secretary of State, who regulates corporations -- entities that contribute lots of money to campaigns but can't vote and usually aren't in Delaware anyhow. If something happens to incapacitate the governor and lieutenant governor, the Secretary of State becomes governor; if something happens to him, the AG elected by the people becomes governor. That shows that Delaware puts the interests of corporations ahead of the interests of voting individuals. Thomas Jefferson and Abraham Lincoln must be spinning in their graves.

1: Paragraph 33 My civil procedure professor used to joke about the "lawyers' full-employment act," and nowhere does that concept command more respect than in Delaware. Non-Delaware lawyers working inside companies here usually don't bother to apply for admission to the Delaware bar, and swell its ranks, because the Bar Association and every other privilege extended to lawyers is equally open to lawyers working, but not admitted to practice, here. One reason there are never very many lawyers in the General Assembly is that there are not enough lawyer to spare -- you can make a lot more money double-billing clients in Wilmington than driving down to Dover to sit in the legislature.

1: Paragraph 34 Ever since 'Marbury v. Madison' it's been accepted that the judiciary can overrule the executive, but in the federal system Congress can usually overrule the Supreme Court legislatively. But in Delaware if the legislature passes a law that disfavors lawyers or that lawyers disfavor, the AG invalidates it; so, contrary to the theory of tripartite government with checks and balances, we have a member of the executive exercising ultimate control over the legislature. Spin, Tom. Spin, Abe. Spin, spin, spin.

1: Paragraph 35 One novel aspect to the old-boy network in Delaware is that it's easier here for a woman to become a judge than a senior partner in a big law firm. Although there has not yet been a female justice on the Supreme Court, there are women on the benches of the other courts. With two notable exceptions, they are mostly women who had been with largish local firms long enough that the firms faced the prospect of making them senior partners, and that wouldn't do; so the senior partners used their influence to have the women appointed judges, because Delaware is a state where judges are appointed, not elected. The two exceptions are Vice Chancellor Carolyn Berger, whose husband Fred S. Silverman is AG Oberly's right-hand-man and actually runs the Dept. of Justice, and Judge Jane R. Roth, who is now on the bench of the Third Circuit federal appellate court but was until recently one of the federal District Court judges here and whose husband is Delaware's Republican in the U. S. Senate, William V. Roth Jr.

1: Paragraph 36 So the legal system in Delaware is like a medieval

fiefdom. He who pays the piper calls the tune, and here that's the out-of-state corporations and their lawyers. The citizens are in the same predicament as the serfs when itinerant knights employed by absentee overlords rampaged across the land, destroying crops, herds, and sometimes the villeins themselves while fighting each other over esoteric points of honor nobody ever explained to the peasants because it had nothing to do with them anyhow.

CHAPTER II. The best politicians money can buy

2: Paragraph 1 A people gets the kind of government it deserves and deserves the kind of government it gets. If you believe in karma, you have to wonder what evil deeds Delawareans committed in former lives to deserve the kind of government they've got.

2: Paragraph 2 Although parts of the story were told to me by various people, the following account of what happened in 1966 and 1976 is taken mostly from Joseph Donald Craven's 1978 book 'All Honorable Men'. There are many parallels between this book about what happened to me at E. F. Hutton and that book about what happened to him in the antiwar movement in Delaware.

2: Paragraph 3 Craven was a lawyer who was elected AG in 1954, the only Democrat to win that office between 1912 and 1974. Despite having been a stalwart Democrat from childhood, by 1966 Craven realized that, no matter whether the players labeled themselves Republicans or Democrats, in Delaware there was only one political party, and that was the Establishment. So he helped start the Constitution Party to run antiwar candidates for the U. S. Senate and House in that year's election. AG David P. Buckson and both Senators then were Republicans, and the Congressman and Governor were Democrats.

2: Paragraph 4 At that time Delaware had no provision for independent candidates or write-in votes, so the only way a person could be a candidate was to be nominated by a political party. Under the law in effect since 1955, to rate a place on the ballot for its nominee a party had to submit petitions signed by 500 citizens of one county and 250 citizens each of the other two counties; that's what minority parties had been doing for a decade to be on statewide ballots, but none of their candidates had gotten as many as 500 votes, so they hadn't been a real threat to the Establishment.

2: Paragraph 5 In March the Constitution Party put an announcement in the newspaper and started collecting signatures door-to-door. In May the Democrats introduced in the General Assembly a bill changing the law to require any new political party to submit signatures of 50 citizens of each senatorial district, and each of those signers had to be registered to vote but not registered as a member of any other political party. There were then only four categories for registration: Democrat, Republican, Independent, and Decline; so the signatories had to be

registered as Independents or Declines.

2: Paragraph 6 The last date for changing registrations that year was 23 July. The General Assembly Would adjourn on 17 June, and the state constitution provided that no bill could become law after the Assembly adjourned unless the Governor signed it within 30 days of the adjournment. The senate passed the bill on 6 June, and the house on 16 June; the Governor didn't sign it until 21 July, which was 34 days after the legislature adjourned and only 2 days before the deadline to change registrations.

2: Paragraph 7 Of course the Constitution Party did not have enough signatures of voters not registered as Democrats or Republicans, so the elections clerks refused to include its candidates on the ballots. The Party sued those clerks in Superior Court, which kicked the case upstairs to the state Supreme Court; although by law the AG is required to represent all public officers, in this suit the clerks were represented by William S. Potter who happened to be Delaware's Democratic National Committeeman, and he had also been the lawyer who had won the earlier case ruling that the AG had to represent public officers, so he must have known what he was doing was illegal.

2: Paragraph 8 There were three justices on the panel that heard the case: Chief Justice Wolcott was a friend of Potter's and a former partner in Potter's firm who was appointed by the former governor, the same Democrat who had appointed Justice Carey and was a close friend of Lyndon Johnson's, and Justice Herrman had been appointed by the Democrat who was then governor. On 14 October the court ruled unanimously against the Constitution Party and never addressed the fact that the bill under which the clerks rejected the Party's petitions hadn't ever become law because the governor waited too long to sign it.

2: Paragraph 9 It was too late by then to appeal that decision to the U. S. Supreme Court before the 8 November election. The polls showed the Republicans' incumbent candidates for Senator and AG leading, and the Democrats' incumbent candidate for Representative was ahead of the Republican. On 28 October the Constitution Party publicly asked its supporters to vote for the Republican candidates. The Republicans won all six statewide offices by the largest margins in Delaware's history, ten times what the Democrats' majorities had been in 1960. Ironically enough, in sending that message to the supposedly warmongering Democrats, Delawareans elected to Congress a Republican who campaigned on a platform that LBJ had not been warlike enough in Vietnam: now-Senator Roth.

2: Paragraph 10 In October 1968 the U. S. Supreme Court invalidated as unconstitutional an Ohio statute that prevented write-in votes and required all parties except the two major ones to submit petitions to get a candidate on the ballot. In 1974 the U. S. Supreme Court invalidated as unconstitutional a California statute that kept an independent candidate from being on a ballot without a political party's endorsement. Those rulings ['Williams v. Rhodes', 393 U.S. 23 (1968); 'Storer v. Brown', 415 U.S. 724 (1974)] meant Delaware's whole election

law, in effect since 1955, was unconstitutional.

2: Paragraph 11 Sordid as it is -- and that was just the, you should pardon the expression, high points of what happened -- that story by itself might not prove how the Establishment pulls together to disenfranchise Delawareans, but then it happened again:

2: Paragraph 12 In the spring of 1976 Joseph F. McInerney was unsuccessful in getting the Democrats' nomination for the U. S. Senate, so he started the Delaware Party, and in May it nominated him and other candidates for that November's election. In June the General Assembly passed, and the Democratic governor signed, a bill changing the law so as to make it harder for the Delaware Party to get its candidates on the ballot. The Party then asked Democratic AG Richard R. Wier Jr. for a ruling on the constitutionality of that law, and on August 30 he issued a written opinion to the state election commissioner citing 'Williams' and 'Storer' and ruling the new law valid; remember that in Delaware the AG's opinions have the force of law.

2: Paragraph 13 On 31 August McInerney sued the election commissioner and other officials, in federal court in Wilmington, to put him on the ballot as the nominee of the Delaware Party. AG Wier, representing the defendants, conceded without argument that the new Delaware statute was unconstitutional. On September 14 the federal court invalidated the statute and ordered the elections officials to put McInerney on the ballot. Two years later AG Wier ran for re-election, and that's where Craven's book ended.

2: Paragraph 14 In the 1982 election, two Democrats were elected who figure prominently in this book: Oberly became AG by a margin of 1177 votes over the Republican, with the American Party candidate and the Libertarian Party candidate totaling 1565 votes, and Thomas R. Carper became the Congressman, with Roth elected to the Senate.

2: Paragraph 15 That was around the time Carper divorced his first wife. I haven't heard any rumor that he beats his current wife, but several people who were their neighbors have told me he used to beat his first wife, and in their written settlement agreement he paid extra for her promise not to mention it anymore, and they said they knew that from their own observations and from what she told them. During the 1990 campaign, Carper's opponents' campaign managers told me that was true and that they had documentation that as early as his college days he beat up on the women he dated before he was married.

2: Paragraph 16 When I was checking dates for this section, I couldn't find the date of that divorce, so I called the public library in Wilmington and asked. That library's research desk is superlative -- they take inquiries over the phone, and they've often answered such obscure trivia questions for me that I was almost embarrassed to ask them. After researching the question for most of a day, they called back to say Carper's divorce was between 1982 and 1984, but they couldn't find any reference to it anywhere, and they'd even called the local newspaper.

2: Paragraph 17 I hadn't really cared at first, but that made me start wondering: 'Who's Who' includes divorce dates in its listings (mine's in there), everybody knows Carper's been divorced, he's held high federal office since 1982, and he's already announced he's the Democratic candidate for governor this year, so he's a public figure whose biographical statistics are in the public domain -- why the mystery? So I called his office here and asked what year he divorced his first wife, and his staff got all bent out of shape. They asked for my name, and I wouldn't give it, but I told them I was a registered voter who wanted to know. That drove them crazier. When one of them asked why I wanted to know, I said it was biographical info for an article I'm writing about the candidates in this year's election. Not only wouldn't they tell me when the divorce was, but then they wouldn't even talk to me anymore and said I couldn't talk to anyone but Carper's press secretary in Washington! Now I'm very curious about what Carper is trying to hide.

2: Paragraph 18 Anyhow, in 1986 Oberly was re-elected AG with 915 votes more than the Republican, and American Party candidate David S. DeRiemer got 1133 votes. DeRiemer is a colorful character, a businessman from the southern part of the state who feels so strongly about his rights that in 1988 he went to jail rather than agree the state could require him to have its permission, in the form of a driver's license, to drive a car. He's not a lawyer, and he doesn't drive anymore. His platform was to do away with the Federal Reserve Bank, but he never explained how Delaware's AG could affect the Federal Reserve; he has himself told me all the federal courts in the country are illegal because they're supposed to be the judicial branch, but they've gone over to the executive branch, as evidenced by the fact that they all have U. S. flags with gold fringes around them, and only the executive branch is allowed to have gold fringes on its flags.

2: Paragraph 19 After the 1986 election, DeRiemer joined the Libertarian Party, and he wanted to be its AG candidate in 1990. I didn't know about that in late 1989 when the Delaware Libertarian Party asked me to be its AG candidate, and I'd already agreed before I found out. Meanwhile, Oberly had decided to run for a third term: No Delaware AG had ever run for a third term, although nothing in the state constitution or laws forbids it; before Oberly, the only three who had run for a second term were: Buckson, who cashed in on the 1966 Republican landslide; Wier, who lost to Richard S. Gebelein in 1978; and Gebelein, who lost to Oberly in 1982 and is now a Superior Court judge.

2: Paragraph 20 In the grand tradition of Delaware politics, where the Establishment closes ranks against outsiders of any political persuasion, Oberly played both ends against the middle by cutting deals with both the Democrats and the Republicans to get re-elected. I heard each of the following stories from more than one member of the old guard of the respective party, who resented the way Oberly used the power of his office to preempt their parties out from under them, as well as from various lawyers and reporters who were outside observers.

2: Paragraph 21 Delaware law limits a governor to two four-year terms. In 1988 Republican Michael Castle was re-elected, and Republican Dale E. Wolf was elected lieutenant governor. The lt. governor had been Democrat S. B. "Landslide" Woo, so called because he won by a handful of votes on the recount of the 1984 election, but in 1988 he ran against Roth for the Senate.

2: Paragraph 22 Delaware has some fairly specific campaign-financing laws on its books, but like many sections of the Delaware Code, those statutes are considered unconstitutional, and therefore unenforceable, except when Oberly wants to convict a potential political rival. He is on record calling those statutes invalid insofar as they limit the amount he, as a candidate, can spend on his campaign. One provision prohibits campaign contributions of more than $1000 to statewide candidates.

2: Paragraph 23 In 1988 Castle's campaign committee had more than enough money for his re-election, but Wolf's didn't have enough for his harder-fought campaign, so Castle's committee covered some of Wolf's campaign expenditures, and the Democrat Wolf beat filed a complaint for violation of that provision. You know who enforces those laws: AG Oberly. He had spent the past couple of years convicting the Democrats who had controlled the state party of picayune violations of the contribution laws, so they were forced out of politics and, in one or two cases, went to jail. Now the Democrats wanted him to turn that same law against Wolf, who was being groomed to be the Republicans' candidate for governor in 1992.

2: Paragraph 24 The deal Oberly made with the Republicans was that he would clear Wolf of those charges, and the Republicans would run a nonviable candidate for AG in 1990, and if Wolf became governor in 1992 he would appoint Oberly a judge. After the Republicans did indeed nominate a stalking horse, Wilmington lawyer F. L. Peter Stone, on 1 May 1990 Oberly issued an opinion clearing Wolf. How the Democrats did howl! But the funniest part is that Wolf's other political problems caught up with him, and the Republicans dumped him and nominated Realtor B. Gary Scott. And Buckson got thrown off the bench of the Family Court for running for it without first resigning.

2: Paragraph 25 One of the reasons I believe that story is it fits all the circumstantial evidence. There's no question Oberly has admitted publicly he wants to be a judge when he leaves the AG's office. Had the Republicans wanted their AG candidate elected in 1990, Gov. Castle could have appointed Oberly a judge in 1989 and then appointed a Republican to fill out the term, and that Republican would have come into the 1990 campaign as an incumbent and surely have won re-election. But the charges against Wolf were still pending, and more Delaware voters are registered as Democrats than as Republicans: They would have resented Oberly's selling them out, if he dismissed those charges on his way out or the new AG dismissed them on the way in, and so voted against Wolf as a backlash. Nor is there any other reasonable explanation for nominating Stone, who is a nice guy but doesn't know which end is up; there were Republicans who had not only sufficient legal experience but

also the required public relations skills: They should have nominated DAG M. Jane Brady to run against Oberly instead of against Senator Joseph R. Biden.

2: Paragraph 26 The deal Oberly made with the Democrats was he would help Carper oust the existing state party leaders, and if Carper was elected governor in 1992 he would appoint Oberly a judge. The Democrats were mad at Oberly for prosecuting party leaders, some for petty campaign financing violations and others for drunk driving. When Oberly was himself arrested for drunk driving, however, he had the charges dropped, and when his chief deputy Silverman was charged with hit-and-run, they'd had those charges dropped, too. Carper couldn't have taken over the party if Oberly hadn't cleared the way for him: The criminal prosecutions not only removed some major players but also intimidated everyone who was left. You could have made a fortune selling Maalox to Delaware Democrats between 1988 and 1990. Wilmington plumber Daniel D. Rappa made a valiant, but doomed, last-ditch effort by running against Carper in the 1990 primary.

2: Paragraph 27 No sketch of Delaware's political scene would be complete without some mention of the media situation: There is no television station in Delaware, and there are no competing newspapers. Most people have cable tv, and there's only one carrier serving each area; downstate gets broadcast channels from Salisbury MD, and Wilmington gets the Philadelphia PA channels and the NJ PBS channel. The ABC and PBS stations in Philly have studios in Wilmington, but Delaware and southern New Jersey get short shrift in the coverage on all Philly stations. (Northern Jersey gets just as little coverage from the New York City stations that supposedly serve it.) With an antenna in Wilmington you can pick up the Baltimore channels.

2: Paragraph 28 The cable carrier in Wilmington is Heritage, and downstate it's mostly Storer. The utilities commission that set the terms with the carriers sold out the citizenry by not providing for free public access. There's only leased access, and Heritage keeps raising its rates and downgrading its production services, thus decreasing access.

2: Paragraph 29 There's only one daily newspaper left in Wilmington, the 'News Journal' owned by Gannett, and the 'Delaware State News' is published in Dover. There are several radio stations around the state, and they're the best source of local Delaware news.

2: Paragraph 30 The 'News Journal' is the handmaiden of the Establishment and generally manipulates its coverage to present the party line. During the 1990 campaign it endorsed Oberly and mostly ignored my candidacy except for an occasional deliberate distortion of the facts. The PBS station reneged on its promise to include me in its candidates' debate, apparently on Oberly's instructions, and the ABC station refused to let me debate Oberly and Stone, but after I complained to the FCC, the station put me on for an equal amount of time weeks later. Storer refused to accept my commercials until the FCC told them the law required them to, but they still refused to sell me the

time slots I wanted. The radio stations were unfailingly cooperative, and WILM was unexpectedly supportive. At a candidates' debate sponsored by a radio station in Dover I met the president of Delaware's chapter of NOW, and he endorsed me on the air after the debate. In May 1991 I ran into him, and he said afterward Oberly called him and said as AG he could make things bad for NOW for endorsing me. I was flattered.

CHAPTER III. The chits hit the fan

3: Paragraph 1 In early 1984 I was living in Maryland and working as a tax law editor at the Bureau of National Affairs, an employee-owned publishing house in Washington originally related to 'U.S. News & World Report', but I was looking for another job; I liked the one I had, but it didn't pay enough. One of the people I'd sent a r sum was David J. Garrett, a partner at the Wilmington law firm Potter, Anderson & Corroon, who had led a seminar I'd taken on estate and gift taxation.

3: Paragraph 2 At work one day I got a phone call from a man who said he was Paul Butler with E. F. Hutton Trust Company, and I might be interested in a job he had open. In those days, when Hutton talked, people still listened. Butler said he'd had lunch with Garrett, who told him I was looking for a job, and the one at Hutton wasn't the kind I'd talked to Garrett about, but he'd like to tell me about it. We discussed it a little, and when he invited me to Wilmington for an interview, I accepted.

3: Paragraph 3 At the interview, Butler outlined the Trust Company's history: After some months of handling only pension trusts, the Trust Company wanted to get into personal trusts, so it had hired Butler away from one of the local banks to head the personal trust department; he'd come on board the beginning of 1984 and had been trying to hire two people to work for him: one to stay inside and mostly draft documents, which is what they were considering me for, and one to travel around the country teaching Hutton's brokerage house employees about trusts. In a year or so they might add an office on the West Coast, and in about three years Butler would be retiring; I figured that would give me time to learn what I needed to from Butler, and I'd either get to run the West Coast Office or get his job when he left. What they were proposing was a new concept in personal trusts, and I really liked the idea of getting in on the ground floor of that, but with such a big company behind us that we could afford to do it right.

3: Paragraph 4 At that interview I met Jay Abbes, the Trust Company's CEO, and I may have met Bill Hitchcock, its president and COO. I felt uncomfortable with Abbes; at first I thought he'd taken a dislike to me, but then I decided it was Butler he was down on, and I'd just wandered into the firing line.

3: Paragraph 5 They offered me the job, with a salary I probably couldn't have refused even if I hadn't liked the job so much, and I

accepted, to start work a few weeks later on 30 April. I gave notice at BNA and started a Wilmington realtor looking for a house. On my next-to-last day of work at BNA, they threw me a going-away party, and I got home in one of those mixed moods: touched by how happy my BNA friends were for me and sad to be leaving them but excited about the prospects at Hutton.

3: Paragraph 6 There was a message on my answering machine from Abbes asking me when I'd been planning to start work, telling me Butler was leaving in a reorganization that would eliminate the job he'd hired me for, and saying we could discuss it when I got to Wilmington. Fat chance! I felt like I'd been punched in the stomach, and I couldn't wait that long to know whether I still had a job at Hutton, so I called Abbes back right then. He kept talking around most of what I wanted to know, but he did confirm that I still had a job, on the same terms, but that it would be a different job: Butler would be staying on for a few months, but then I'd be in charge of personal trusts; and I'd still come on as assistant corporate secretary, but when Butler left I'd succeed him as secretary.

3: Paragraph 7 So from the first day I reported to work at Hutton, I already knew there was a lot of internal political stuff going on behind the scenes, and I kept my eyes and ears open in self defense. I learned overlapping parts of the following story from Abbes, Hitchcock, and the Trust Company's other directors, from Hutton people in New York and around the country, from Wilmington lawyers in several of the firms hired to charter the Trust Company, from the Delaware bank examiners who audited the Trust Company, from the documents setting up Hutton Trust Company and Hutton Bank that Hitchcock showed me, and from the Trust Company's corporate records that were turned over to me when I became secretary.

3: Paragraph 8 The entity most people thought of as E. F. Hutton, the one that advertised in the commercials about people listening, was the brokerage firm whose real name was E. F. Hutton & Co. Inc. It was a Delaware corporation all of whose stock was owned by E. F. Hutton Group Inc., a Delaware holding company whose stock was publicly owned and traded on the New York Stock Exchange. So if you bought Hutton stock, you were buying shares of Group, but if you bought stock through a Hutton office, it was Hutton & Co. that was your broker.

3: Paragraph 9 Hutton Group also owned some other corporations, including E. F. Hutton Life Insurance Company and some investment managers and funds. The chairman of Hutton Group's board of directors was Robert Fomon, and the president of Hutton & Co. was Scott Pierce, who was then-VP George Bush's brother-in-law.

3: Paragraph 10 Much of the money in this country is in pension plans, most of them now "qualified plans" under the federal pension laws known as "ERISA." That money isn't tied up, out of circulation, though -- it's invested in everything from real estate and mutual funds to race horses and precious gems. Managing those investments and doing the paperwork for both pay-ins and pay-outs is also big business, because

the fees for management and administration are usually a percentage of the amount in the fund, and even a small percent of a billion dollars is a lot of money.

3: Paragraph 11 By the early 1980s Hutton, like the other financial institutions, derived a significant portion of its income from pension funds, either as fees for managing the investments by deciding what stocks or bonds to buy or as commissions for being the broker that actually traded the securities. It's a conflict of interests, prohibited by law, for the same entity to manage the investments and get a brokerage commission, for the same reasons it's now illegal for a Justice of the Peace's salary to be a percentage of the traffic fines the JP imposes.

3: Paragraph 12 What happens in many companies is that a few, usually senior management, employees are the trustees for the fund, so they make the investment decisions, and the fund has a broker who buys and sells as directed by the trustees. That's the theory, at least, but what often happens is the committee of trustees don't know enough, or have enough time outside of their work, to make investment decisions, so they take the broker's advice, and that's not necessarily bad. But to keep the brokers honest, trustees with good sense often deal with several brokers and play them off against each other, and that's free-market competition and good for everyone except the greedier brokers.

3: Paragraph 13 What Hutton wanted was to become trustee for the pension funds, so it could collect the trustee's fee for managing the investments, and hire only itself as broker, so it could continue to collect the brokerage commission on every transaction. It's like the way they used to catch monkeys for zoos, where they would cut holes, a tad bigger than a grown monkey's paw, in coconuts, empty them out, put some dried rice inside, and chain them to a tree trunk; at night the monkeys would come, reach inside for the rice, not be able to get their fists out, and be sitting there with their paws stuck in the coconuts in the morning, when the hunters would come throw a net over them. The monkeys were too greedy to let go of the rice even to get free, and Hutton was too greedy to let go of the brokerage commissions even to get the larger trustees' fees.

3: Paragraph 14 So someone came up with the brilliant idea to set up a separate Hutton entity to be trustee of the pension funds, and collect fees for that, and put all the brokerage through Hutton & Co. That entity would be E. F. Hutton Trust Company, and to be able to act as trustee it would have to be some kind of bank. Hutton explored incorporating a bank in several states, but the first few didn't have the right combination of state laws and susceptible officials. Then Hutton looked at Delaware, which was offering some tax and legal incentives to lure companies to Wilmington; you may remember that some credit card companies moved their headquarters to Delaware then to take advantage of those incentives and Delaware's statutes allowing special-purpose banks and unlimited interest rates.

3: Paragraph 15 Hutton hired about five different Wilmington law firms, one after another, to charter its bank, but the first four (including Potter, Anderson & Corroon and, as someone told me, Richards, Layton & Finger and maybe Prickett, Jones, Elliott, Kristol & Schnee) were unsuccessful: some because they filed the application, but it was denied, and some because the other banks they represented objected, so they withdrew from filing Hutton's application. I heard that of those four, only Potter Anderson returned Hutton's retainer; the others kept what they'd been paid even though they failed to charter the bank.

3: Paragraph 16 Then Hutton hired the Wilmington office of Skadden, Arps, Slate, Meagher & Flom, by some measures the biggest law firm in the country, and certainly preeminent in corporation law. Two of Skadden's senior partners were Rodman Ward Jr. and Irving S. Shapiro. Ward is a formidable lawyer who coauthors one of the leading treatises on corporation law; he's also an interesting person, but he's so smart he sees what's coming so many moves ahead of where you are that it's scary sometimes. Shapiro is either a fool or senile, but he used to be du Pont's CEO, so he's an 800-pound gorilla in Delaware; if you want to see what the Second Coming will be like, just watch how everybody here acts around Shapiro. His value at Skadden is not his minimal ability as a lawyer but his clout with the authorities.

3: Paragraph 17 Shapiro first got the other banks in town, and their Delaware Bankers' Association, to back off in their opposition to letting Hutton in, and then he got Delaware's Bank Commissioner John E. Malarkey to grant Hutton two applications: one for a bank and the second for the Trust Company. Hutton Bank never did much, but Hutton considered using it in several packages that didn't get off the drawing board; we discussed such plans as having it lend money to customers who would then use that money to buy stock or insurance from Hutton, either directly or through trusts at Hutton, for example.

3: Paragraph 18 The Bank's affairs were handled by its two officers: the Trust Company's president Hitchcock and Richard Roeder at Hutton in New York. Hitchcock showed me the papers setting up the Bank, and Roeder and I had some discussions about it, but I didn't pry into the matter, because it wasn't my problem. I do remember that what business the Bank did was a few loans to some Hutton VIPs, but there were some legal irregularities about the situation, and a major reason we didn't do more with the Bank was that if it got active those defects might come to the attention of the regulatory authorities when they audited. Some of the irregularities had to do with doing business before the law was changed to allow it, and when the law was changed, it didn't cover Hutton Bank, but I'll come back to that later.

3: Paragraph 19 Once Shapiro got the Trust Company chartered as a Delaware limited-purpose trust company in July 1982, other Skadden lawyers prepared the usual corporate start-up documents and turned them over to Hutton. From then on, Hutton would call Skadden only when Hutton got into trouble with Commissioner Malarkey and couldn't get out of it without Shapiro's influence.

3: Paragraph 20 Hutton hired Hitchcock to be nominal head of the Trust Company; he had worked for State Street Bank in Boston for a long time, and Hutton brought in an outsider to be president so it would look as if the Trust Company was separate from the brokerage firm. In fact, though, as vice-chairman of its board James C. Lockwood was in charge of the Trust Company. Lockwood was the head of Hutton & Co.'s Consulting Services Division, a group that mostly charged fees for advising people which investment managers to hire: If the manager hired was a Hutton subsidiary, then Hutton got the management fee, and if the manager was not a Hutton affiliate, it brokered the investments through Hutton, so Hutton got the brokerage commissions. It was CSD's relationships with the pension funds that sparked the idea of the Trust Company, and Lockwood was responsible for it. He and two of his CSD executives, John Ellis and Len Reinhart, were on the Trust Company's board of directors by the time I got there.

3: Paragraph 21 Lockwood and the rest of CSD would come to Wilmington to share space with the Trust Company, and they would both move into offices in a new building on the Market Street Mall next to the Grand Opera House the day I started work in 1984, but when the Trust Company started in summer 1982 it was just Hitchcock and a few female clerical employees. He selected a software system called SEI and started accepting pension trusts.

3: Paragraph 22 Under the governing laws, regulations, and guidelines, as a trustee the Trust Company had to make both investment decisions and pay-out decisions in the best interests of the trust's beneficiaries, but Hutton never intended for the Trust Company to make those decisions, so no mechanisms were ever set up for them. Instead, once an account executive from the brokerage firm would sign a trust client up with the Trust Company, the Trust Company would make whatever investments and distributions that AE told it to: That violated the laws requiring a trustee to exercise responsibility for the trust and also the laws against self-dealing.

3: Paragraph 23 Hutton had picked Hitchcock thinking he was too wimpy to give Lockwood any back-talk but experienced enough to run the operation -- they were only half right: Hitchcock lacked the intestinal fortitude to do anything but follow orders, and without experienced bankers making the management decisions, he was useless. Lockwood lacked the banking experience to know what bank operations were supposed to look like, so he couldn't direct Hitchcock in enough detail, and then Lockwood suddenly fell sick -- I think it was a heart attack, but then he had prostate trouble, and he was incapacitated for many, many months -- and nearly died; when it was feared he would die, or at least never be able to work again, it was necessary to put someone else in charge of the Trust Company.

3: Paragraph 24 So Hutton promoted Abbes, who had been on the board since the beginning; he replaced Lockwood as vice-chairman and CEO on 12 October 1983, Hitchcock remained president and COO, and Thomas P. Lynch of Hutton Group remained chairman. Abbes was a company man in every respect, so he followed Hutton's policy of not telling anyone more than

he had to: In Hutton's world, managers didn't let subordinates know what was going on so they couldn't demand a piece of the action for carrying out the schemes, and they didn't put anything in the record that would expose their superiors to liability; when there was a problem, the middle-level manager would take the fall, and whatever higher-ups he was protecting would make sure he had a soft place to fall, often as a consultant to one of the investment management firms Hutton dealt with, if it wasn't possible to move him someplace else within Hutton itself.

3: Paragraph 25 Hutton Trust was never anything but a fa ade of a trust company -- there was no substance to it, and not even much form. It performed no personnel functions, for example, and had no operational bank accounts and no petty cash. When an employee was hired, Hutton & Co.'s forms for a brokerage firm employee were completed and forwarded to New York, and then the person went on the payroll and was paid on Hutton & Co. checks. All reimbursements and employee benefits came from Hutton & Co.

3: Paragraph 26 Each of Hutton & Co.'s branch offices had a coded office i.d. number comprising one letter [out of eleven or twelve possibilities] designating the geographical region and two digits identifying the specific office, and that code was used as an address for telexes as well as an administrative identifier. The Trust Company was treated as a branch office of Hutton & Co. with the code V48, because we were office #48 in the national region; that's what went on all our personnel and payroll records. Hutton's brokerage office in Wilmington was coded A81, because it was office #81 in the Atlantic region; it was a satellite of the Philadelphia office coded A09. There were two brokerage offices in Washington DC, coded C16 and C18 because they were in the Central region, C20 was in Alexandria VA, and C32 was in Bethesda MD.

3: Paragraph 27 Hutton Trust rented a couple of safe deposit boxes and opened three checking accounts, but those weren't operating accounts -- they were for payment of trust distributions. So when someone was supposed to get a pension payment from a fund trusteed at Hutton Trust, Hutton & Co. would deposit enough money in one of those accounts to cover the payment, and Hutton Trust would cut a check to the pensioner, but not necessarily in that order. Where would Hutton & Co. get the money? Out of the pension fund, of course. Wasn't Hutton Trust the trustee and supposed to be holding the fund? Of course that's what was supposed to be happening, but in fact Hutton & Co. never let Hutton Trust near any money except to launder the pay-outs, and that's what's wrong with this picture.

3: Paragraph 28 When Hitchcock set up the Trust Company's computerized accounting system, it was designed to track what happened in the brokerage firm's computerized system, but there was no electronic connection between the two. SEI is a perfectly good trust banking software system used by many banks, including some of the best in Wilmington; it has all the capability any trustee needs, but it's only as good as a user programs it to be, and Hitchcock didn't program it to

do much of what it could, and that requires some explanation.

3: Paragraph 29 For every brokerage customer at Hutton & Co. there was an account in the firm's computer to track the trades. That computer account included the customer's name, address, and social security number as well as the office's code, the AE's code, and the account number; it could be accessed from a Hutton terminal anywhere in the world, but only the AE could authorize trades in the account. Whenever a trust account was opened at Hutton Trust, Hitchcock's clerks would set up an SEI account under the same number as the brokerage account and enter whatever information they were given about the assets in the trust. If there were assets that weren't securities -- such as gemstones, real estate deeds, or promissory notes -- they might be listed in the SEI account, but of course they would not be included in the brokerage account. When securities were bought or sold in the brokerage account, Hutton Trust would usually get notice of the trade, and Hitchcock's clerks would keyboard that information into the SEI account. But if assets other than securities were sold, there was no way for the Trust Company to know, because that didn't go through the brokerage firm's computer, so the assets wouldn't be removed from the SEI account; and if anything was bought outside of the brokerage account, including mutual funds that kept their own accounts, the brokerage firm's computer would report the pay-out of funds, and the SEI account would track that, but whatever assets were bought with the funds would never appear in either account, so according to our records part of the trust's value would have simply disappeared.

3: Paragraph 30 The important point is that there never were any assets at the Trust Company. All the assets were in the brokerage accounts at Hutton & Co., and all the Trust Company ever had was the phantom SEI accounts supposedly reflecting whatever happened in the brokerage accounts. The companies the trusts belonged to got monthly statements from the brokerage firm and monthly statements from the Trust Company, and if they didn't match, the customers were likely to complain to their AEs, who would usually complain to the Trust Company.

3: Paragraph 31 The monthly statements from SEI were printed in bulk by SEI and delivered to us in boxes, and Hutton & Co. sent us copies of the monthly brokerage statement in each account that was coded as a trust account. After the AEs started complaining, when there were discrepancies between the two statements Hitchcock and his clerks would white-out the parts of the SEI statements that didn't match and type in the information from the brokerage statement, because they knew whatever the brokerage statement said was what had actually happened in the account. But they changed only the paper statements and never put the changes in the computer!

3: Paragraph 32 It doesn't take an Einstein to figure out that once the two statements for a trust got out of sync, they would stay that way until at least one of the computerized accounts was changed to bring them back into agreement, but that concept seems to have been beyond everyone at the Trust Company. By the time I got there in spring 1984, it was taking about a week each month to white-out and retype the SEI

statements for the month, and that's a week with everyone in the operations dept. working all day and half the night and most of the weekend, which added up to a lot of overtime.

3: Paragraph 33 There was also the problem, actually several problems, that the Trust Company wasn't keeping any tax records. For one thing, even though the pension trusts were exempt from paying income tax, they still had to file information returns about their transactions each year, and you have to keep track of the tax basis of a pension trust's assets, because at some point you end up distributing those assets, and you have to know what they're worth for tax purposes then. But the Trust Company wasn't keeping those records, and the customers kept complaining they couldn't get the information for their annual Forms 5500.

3: Paragraph 34 A second aspect of the problem was that Hutton Trust had about a dozen "collective funds" that were like mutual funds in that the assets from a lot of separate pension plans would be pooled and invested, and the profits would be prorated among the participating plans. Those were perfectly legal entities, authorized by the Internal Revenue Code and called "pooled income funds," and they're tax-exempt, but they have to file information tax returns every year so the IRS can make sure they're complying with all the applicable ERISA and tax laws. But Hutton had never filed any tax returns for any of its collective funds because neither Hitchcock nor anyone else at Hutton knew they were supposed to.

3: Paragraph 35 The third part of the problem didn't appear until we started doing personal trusts, and that was that non-pension trusts have to file tax returns every year and pay taxes on their profits. So just as any individual or corporate taxpayer has to, a non-ERISA trust has to keep track of its tax basis for assets and report not only its income from its investments but also its capital gain on the sale of those assets. And Hitchcock hadn't activated the fields to keep track of the tax basis and fair market value of trust assets, because that information didn't appear in the brokerage firm's computer.

3: Paragraph 36 Compounding that was the fact that a trust usually has "income beneficiaries," who get the income for some definite or indefinite period of time, and "remaindermen," who get what's left at the end of that period. A trustee is required by law to keep track of the trust's capital and income separately, because the trust's beneficiaries have different interests, with the income beneficiaries entitled to the income and the remaindermen entitled to the capital. The fiduciary accounting is worse than the London 'Sunday Times' crossword puzzle, and it's absolutely impossible without the records, but Hitchcock hadn't activated the required data fields in SEI, and neither he nor any of his clerks knew how to keep the records.

3: Paragraph 37 The complexity of the record-keeping and tax-reporting is a large part of the reason fiduciaries get paid such juicy trustees' fees, but somehow that concept had escaped the rocket scientists at Hutton, too. Another reason for the fees is that trustees

have to make some hard decisions about distributing money from trusts: Many trust documents give the trustees a lot of discretion about making both investments and pay-outs, and if you've ever been in the middle of a family squabble over a legacy you can appreciate that trustees earn their fees. But Hutton skipped over those difficulties by letting the AE on each account make all the investment and pay-out decisions, so all Hutton Trust had to do to "earn" its fee was white-out and retype the statements.

3: Paragraph 38 Three unrelated examples will show you why I often felt as if I was working in a Three Stooges comedy instead of a bank:

3: Paragraph 39 Congressman James T. Broyhill of North Carolina had his share of the money from selling his family's furniture business that he needed to put in a blind trust to avoid conflicts of interest in voting on legislation. Federal regulations cover such trusts and require annual reports, and because such a trust isn't a qualified plan under ERISA, it was considered a personal trust at Hutton Trust. When Broyhill's money came in, Butler decided to avoid any appearance of self-dealing between Hutton Trust and Hutton & Co. by putting it in a non-Hutton mutual fund; Butler chose one, and the AE executed the trade by paying the money out of the brokerage account to the mutual fund, and that was the last we heard of it. Several months later, after Butler was gone from the Trust Company, the AE and Broyhill's lawyer started bugging me to submit the required report, and I couldn't find the assets -- I found Butler's note in the file saying which mutual fund he had picked, but when I asked that mutual fund, they denied having any account in either Broyhill's name or Hutton Trust's. I finally submitted the report anyway -- after all, as far as Broyhill was concerned the trust was deaf and dumb as well as blind, and it was easy to find out what dividends the fund had paid since the date the money disappeared in that direction -- and things were quiet for several months until Broyhill decided he wanted to move the trust somewhere else because we weren't cooperative enough about providing information about it. It took several weeks, but the AE finally found the account at the mutual fund, under Hutton & Co.'s name, closed it, and turned the proceeds over to Broyhill's lawyer. What's really funny, or scary, is when the AE found the account at the mutual fund, it was one of three in Hutton & Co.'s name with no indication of what customer they belonged to, and he just left the other two sitting there.

3: Paragraph 40 Mr. & Mrs. Burchard were a retired couple in about their 80s, each of whom had a trust, and most of the assets in the trusts were shares in a bank (I think it was in Illinois, but it might have been somewhere else in the Midwest) that Mrs. Burchard's father had founded and Mr. Burchard had been president of. They had retired to Arizona, and an AE in Hutton's Mesa office talked them into moving their trusts to Hutton Trust so he could sell the stock and use the proceeds to buy them some annuities from Hutton Life Insurance; the commissions AEs got for selling Hutton insurance were even higher than their brokerage commissions. By the time I found out about the trusts, the AE had already sold the stock, and when I told him annuities were an improper investment for the Burchards, he told me not to worry -- the

insurance company wouldn't issue annuities on people their age, so he was going to sell them annuities on their son's life, and when they died the son would inherit and sell the policies and invest in something else, and the AE would collect a commission on each transaction! That struck me as an archetypical example of "churning" an account, which means repeatedly liquidating investments and reinvesting the assets to collect commissions on the new investments. I got into trouble with Abbes for it, but I went over the AE's head to his branch office manager, and the BOM did keep the AE from tying the assets up in insurance. For some reason, every few months the two Burchard trusts would pop up as exceptions in another internal audit, and I'd get a phone call from some Hutton employee somewhere in the country, and I'd explain what happened, and that person wouldn't bother me about it again. Then one day I got a phone call from a bank officer at the Illinois bank whose stock they'd owned; when the bank had gone to hold its annual stockholders' meeting, the Burchards hadn't voted the stock, and without it the bank didn't have a quorum, because between them they'd owned the majority of the stock. So the bank president had phoned the Burchards and found out what the AE had done and was doing, and he threatened to sue on behalf of the Burchards. I don't know how that situation finally came out, but I've often wondered.

3: Paragraph 41 Mary Alice Anthony had left a trust for her two sons and their children, and an AE in Hutton's Hyannis MA office talked one of the sons, Julian Kaiser, into moving "his" half of the trust to Hutton by promising Kaiser to pay him as much of the trust's income as he wanted. The trust document provided for pay-outs to Kaiser, who was a doctor, or his children if they needed them, and "need" was determined under Connecticut law. Kaiser's children appeared to need the money more than he did, especially as we found in the computer about four brokerage accounts in his name with substantial stock holdings in them, but the AE kept paying Kaiser all the income, and Abbes and Hitchcock kept letting him, although I kept putting memos in the file saying that was wrong, and the bank examiners kept saying in their audit reports it was wrong. In February 1986 one of Kaiser's children wrote to Hutton Group's then-CEO threatening to sue for the mishandling of the trust, but I never heard how that came out, either.

3: Paragraph 42 Those three situations -- involving trusts worth more than a million dollars and trustees' fees of tens of thousands -- are just the kind of problems any rational person would expect from not having any mechanism for Hutton Trust to track trust assets or supervise investments or distributions, but Hutton still shrugs them off as "typical back-office problems in a new venture" according to Shapiro's testimony on 1 October 1991.

3: Paragraph 43 Besides the comic relief, Hutton also provided some romantic interest: One of the CSD units was Hutton Portfolio Management, and it was headed by Greg Phipps, whom I found very attractive, but when I not too subtly let him know I was interested, he rather more subtly let me know he wasn't, so I didn't embarrass either one of us by pushing it. For the most part, Hutton employees didn't have much class -- which isn't to say they weren't great to work with

and fun to party with, because they were, and the people were part of what I really loved about working there -- but Phipps used an Imari cup for his tea, even when he was alone in his office, you know what I mean? Once when we went to Hutton headquarters in New York to meet with some customers about bringing a big trust in, he took me on a walking tour around Wall Street, including Trinity Church and the Stock Exchange, and told me their history.

3: Paragraph 44 HPM, the program he ran, supervised AEs who had qualified to act as investment managers, instead of brokers, for their customers' Hutton accounts. So if an account was signed up for HPM, the AE made the buy-sell decisions and executed the trades but received a fee that was a percentage of the account's value instead of commissions on each transaction. Phipps handpicked the AEs who got into the program and supervised their training and their performance, and it was a class act all the way.

3: Paragraph 45 One of the times he had me speak to a group of HPMers about using trusts and the Trust Company was in Washington DC on 20 September 1984. It was one of those several-day affairs including training sessions and field trips, and one of the trips the day I was there was to the Capitol to meet one of Delaware's Senators and ride the little train under the building. But when we got to the Capitol, there'd been a bombing in Lebanon or someplace, and the Senators were taking turns being briefed in the little dome-of-silence room that doesn't hold very many at a time, and the Senator couldn't make it, so he'd asked Congressman Carper to meet with us instead.

3: Paragraph 46 I'd never taken much of an interest in politics, and although I'd moved to Delaware on 30 June and had recently registered to vote, I didn't yet know the name of our only Representative, but I did know we had only one. When he finally showed up in the small room where we were having soft drinks and cookies, he had his notebook under his arm, and I swear I thought the name on it was "Crapper," but I soon picked up that it was actually Carper.

3: Paragraph 47 He made conversation with the group, much of it about finances -- we'd just heard a lecture at the Federal Reserve -- and there was some kidding that the HPMers were from other states, so he was wasting his electioneering on them, and I said, "Well, I'm registered to vote in Delaware," and Carper joked, "Then I'll ignore these men and just talk to you." A little later, after he was told I was one of Hutton Trust's officers, Carper drew me a little aside and started explaining why he was having trouble getting the legislation we wanted through the Banking Committee. At first I didn't have the faintest idea what he was talking about, but the way you find things out is by listening, so I did. When I got back I talked to Hitchcock about it, and he told me Carper was trying to get federal legislation passed that would extend to Hutton Trust and Hutton Bank -- because they had been chartered outside the period to which the "non-bank bank" legislation applied -- and then I was able to make sense of what Carper had said about grandfathering.

3: Paragraph 48 That was around the same time that Hutton Trust acquired a new personal trust client, a corporation named International Development Programs Inc., the chairman of whose board was Wilbur Mills. An AE named John Jennison, in Hutton's C18 office in D.C. where Perry Bacon was BOM, had a client named Barton F. Walker Jr., who was president of Walker & Walker Associates, Inc., in Maryland and one of IDP's principals, so Walker had brought IDP to Jennison. IDP's president was Thomas M. Owen, whose phone numbers were in Virginia, and its lawyer was Francis L. Jung, who was also general counsel to American Pacific Trading Co. in D.C. The chairman of AmPac's board was Conrad K. Hausman, who was also one of IDP's principals. The other two IDP principals I dealt with were E. Doug Ward, executive vp of Astrotech International Corp. in Pennsylvania, and Daniel Craig, president of Norsud Corp. in California.

3: Paragraph 49 The companies these IDPers headed manufactured aircraft, and maybe tanks, guns, and other war toys -- they had mostly been pilots in WWII and/or the Korean Conflict, and Hausman had worked for Alexander Haig in Vietnam and then at the White House. Owen had been on LBJ's re-election committee, and he told some of the best war stories I ever heard: some about the parties his cousin Tallulah Bankhead used to throw, some about his misadventures as a pilot during the war, some about LBJ, and all of them hilarious.

3: Paragraph 50 IDP's 'raison d' tre' was to borrow money from the pension funds of companies that manufactured industrial, agricultural, and defensive equipment (which we took to mean aircraft, tanks, guns, and related paraphernalia), invest it in U. S. Treasury notes, and lend the interest to developing Third-World nations (mostly in the Middle East and Central America) that would use the money to buy industrial, agricultural, and defensive equipment (wink, nudge), probably from the companies that had anted up their pension funds. They explained to us that this was all part of President Reagan's plan to cut back on foreign aid from the U.S. government and get the private sector more involved; they said they had the required approvals and gave us phone numbers at the State Dept. and White House to check them out, but Abbes forbade me to do any checking: He said the only checking would be by Hutton & Co.'s president Pierce through Barbara Bush to her husband the VP, and then later he told me we had not just their approval but their encouragement.

3: Paragraph 51 But the reason IDP had come to the Trust Company then, as they told us, was that they couldn't pry any money loose from the pension funds -- remember I said that's where most of the investment money in the country is, but the trustees have to meet the high standards the law imposes on fiduciaries -- so they'd gone looking for money overseas and found some: The royal family of Saudi Arabia had a lot of money to invest but couldn't be seen to do so because of the Islamic prohibition against usury, so they had created something called the Crusader Trust, run by one of the big Swiss banks fronting for them. The Crusader Trust was willing to lend IDP $100 million for some number of years I've forgotten now, but the Swiss bank insisted on having an American financial institution hold the bag, and IDP had been up one

side of Wall Street and down the other and been turned down everywhere. Then Bush asked Pierce to have Hutton do it, and Fomon agreed and told Abbes to take care of it. It was, of course, a personal trust, so it fell squarely in my lap, and I had most of the dealings with IDP.

3: Paragraph 52 The last week of October 1984 I had to go to Basel, Switzerland, on rather short notice to meet with Owen, Hausman, Walker, Ward, Craig, and someone from the Swiss bank, and that's when I finally saw the printout of how the transaction was supposed to work. There were two kinds of problems with it: One was that the bank wanted Hutton to sign as the one liable for paying the interest for the term of the loan and paying back the principal in Swiss francs at the end, so we would in effect be guaranteeing not only the interest rate on Treasuries but also the exchange rate, and we wouldn't; the other was that there were so many finders' fees and up-front points to be paid to the various players that it would take every bit of income from the Treasuries, compounded by being repeatedly reinvested over the term of the loan, to get the principal back to the amount to be repaid, and that didn't leave anything to pay the income taxes with. When I pointed that out, Owen said, "But we don't want to pay any income taxes," and I said, "Nobody wants to pay income taxes, but how do you expect to get out of it?" So they put me on the telephone to Mills -- whom they always referred to as "the Chairman" with such reverence that Abbes tried teasing them once by referring to Fomon the same way, but they were not amused -- back in the States to find out what the story was on taxes. That was the only time I ever talked to him, and he didn't have any idea how to get out of the taxes, either, but he said he'd get the guys there working on it.

3: Paragraph 53 While I was in Basel -- I went on Saturday the 27th and came back on Halloween of 1984 -- IDP took very good care of me, and except for when I went back to my hotel to sleep and a couple of hours the last afternoon when I walked around town, I was always with one of more of them. One evening Owen wanted to drive to Zurich for dinner at the Dolder Grand Hotel, so three of us went with him -- that's a whole story of its own, with Owen driving like Barney Oldfield on the autobahn and me falling back on my college German to navigate from an outdated map in the dark! While we were at the Dolder, Owen told us about the last time he'd been there, when he'd run into the exiled Shah of Iran and they'd talked about the good old days.

3: Paragraph 54 One day we drove across the corners of Germany and France on a little sightseeing excursion whose purpose seemed to be to let me see everybody's passports when we crossed the borders. They'd been hinting pretty hard that Hausman was CIA, but I kept acting like I hadn't caught on, and a day or so later Walker finally took me to brunch alone and just told me, but the two things I learned from their passports were that Hausman did, indeed, carry a diplomatic passport and that most of them, especially Owen and Walker, had been in and out of Iran a lot of times over the past year or so.

3: Paragraph 55 One evening when I got back to my hotel after dinner, there were some urgent messages from Abbes to call back, so I did, and because of the time difference he was still in the office. He

got one of Hutton & Co.'s lawyers in New York on the phone with us to read us the riot act for my being there when the last thing the Legal Dept. had told me on Friday was not to go -- they kept referring to IDP's plans as "gun-running" and wanting us to drop IDP as a client, but all we did was quit telling them stuff that was only upsetting them -- but Bacon and Abbes had both told me later on Friday to go anyhow, with authority from Pierce and Fomon, and Jennison bought my ticket and wired me the money for traveler's checks. I'll always cherish the part of that phone conversation when Abbes asked the lawyer what they were afraid of, and he answered that after turning my head by getting me away from my own turf and into exotic surroundings IDP might get me to agree to something, to Hutton's detriment, that I wouldn't agree to at home; Abbes said, "If you think that, you don't know Kay very well!" Abbes knew, from trying to himself, it's virtually impossible to get me to do anything I don't intend to, and it really touched me to know he had so much faith in me, because by then I had a lot of regard for him, and I still do.

3: Paragraph 56 Some months later we started to realize why the Legal Dept. had been so hot about IDP when it hit the papers that Hutton had been involved in the money-laundering scheme the media called "the pizza connection." IDP kept talking to us for months about doing a deal, but nothing ever came of it.

3: Paragraph 57 Then on 2 May 1985 Pierce entered Hutton & Co.'s guilty plea to 2000 counts of federal mail and wire fraud in what came to be referred to as "the check-kiting." Too much has been written about that for me to have to describe it here; suffice it to say that Hutton had for several years taken advantage of the float on checking accounts by drawing checks to customers on accounts in banks at the other end of the country from where the customers were and then depositing the money to cover the checks later. Many of the AEs were shaken that Hutton had been doing anything so blatantly against both the law and the customers' interests, but I was surprised they were surprised, because it was the same thing Hutton was still doing through the Trust Company, and it was in keeping with everything I'd seen of the way Hutton was run.

3: Paragraph 58 Hutton was fined $2 million and agreed to pay up to $8 million in restitution to the banks, but Abbes and the other Hutton higher-ups I dealt with laughed that off as "chump change" compared to the amount Hutton had gained from it. They were, however, concerned that VP Bush was pissed off at the political flak he was taking for protecting Hutton, so they decided to hire a prominent Democrat to repair the political fences; they ended up paying former AG Griffin Bell about $2.5 million to handle the damage control. I can't help wondering if all the members of Congress who were shouting so loud then for someone at Hutton to go to jail would feel the same way now that their own check-kiting at the House bank has come to light. And if Carper hadn't known all along that what Hutton was doing was pretty shady, he has to have known it by the summer of 1985, but he kept trying to help Hutton get more favorable treatment under the federal banking laws.

3: Paragraph 59 Do you remember in "My Fair Lady" when Professor Higgins said, "The French don't care what they do, as long as they pronounce it correctly"? That's Hutton all over -- they didn't care that they broke the law, but they got all bent out of shape that the media reported they did. Here's Shapiro's October 1991 testimony about the check-kiting and related scandals: "Hutton had had a very bad press because of some federal charges, and they were very sensitive about adverse publicity." "Hutton had had a series of bad newspaper notices and was very sensitive to criticism in the press." Apparently the only lesson Hutton learned was that federal felony charges are bad publicity. Other than that, Mrs. Lincoln, how did you like the play?

CHAPTER IV. A crock of malarkey

4: Paragraph 1 Meanwhile, back at the ranch, the plot was thickening: Hutton Trust was getting into trouble of its own.

4: Paragraph 2 The day I reported to work at Hutton Trust I was assigned to handle the transfer of assets for the Vietnamese Orphans' Trust: In April 1975 a number of children were being flown out of Vietnam to be adopted in North America and Europe when a hatch blew off the C-5A, so it crashed near Saigon, injuring many of the children permanently. In settlement of the litigation on behalf of the 45 survivors who were adopted in the U.S., Lockheed Aircraft Corporation had paid $13.5 million into a trust to provide compensation and the costs of medical treatment to the children for the rest of their lives.

4: Paragraph 3 The case had been in federal court in D.C., and a lawyer in the D.C. law firm McDermott, Will & Emery was appointed "co-trustee" to oversee the trust. The complicated trust document called for regular meetings of and reports to the children's parents, and the structure was rather like that of a corporation, with the co-trustee as the board of directors and the beneficiaries as stockholders.

4: Paragraph 4 The lawyer who acted as co-trustee was Charles R. Work, and the trustee had been American Security Bank in D.C., the one that advertised it was on the back of a currency bill. When I was doing my thesis on taxation of trusts and estates for my 1983 Master of Laws in Taxation at Georgetown University Law Center, my thesis advisor had been a senior trust officer from American Security, and he taught me just about everything I knew about the practicalities of banks' administering trusts before I came to Hutton.

4: Paragraph 5 An AE from Hutton's C18 brokerage office in D.C., Tom Clark, had persuaded Work to move the trust, which was down to about $2 million because most of the principal had already been paid to the beneficiaries, from American Security to Hutton Trust. Later on I found in the file the misrepresentations Hutton Trust made to the federal judge to get his approval, saying we were qualified to do business in

D.C. when we were not qualified to do business anywhere but in Delaware, but all I knew the first day was that Butler told me to make arrangements to receive and invest the assets.

4: Paragraph 6 We were going to put the assets in three accounts and invest each separately to provide diversity of the investment portfolio and because part of the principal was earmarked for the trust's day-to-day operating expenses, but part was for long-term investment to cover pay-outs in the distant future, which would diminish continuously. American Security transferred stock to us, and we sold it and invested the proceeds in other securities; it was when that stock started coming in that I found out our SEI system was not programmed to accept data on market and book values of assets.

4: Paragraph 7 It was also when I had my first of many run-ins with Clark, because after I told Hutton's trading desk to invest the proceeds in the non-Hutton securities Butler had chosen to avoid a conflict of interests, Clark told me he had decided to invest in other, Hutton funds that paid him a commission. Abbes ordered me to bust our trades and honor Clark's orders, and I did; Butler was unhappy about it, but he was a lame duck.

4: Paragraph 8 Clark was one of the most obnoxious people I've ever met, and that was his reputation throughout Hutton. One AE who was, like Clark, such a big-volume salesman he was invited to the prestigious annual national meetings/blow-outs Hutton threw for its "Blue Chip" AEs, told me he had met Clark when he roomed with him at one of those conventions: The AE who was assigned to be Clark's roomie didn't want to be in with him, and this guy, who didn't know Clark but figured he could get along with anybody for a few days, agreed to swap room assignments. He told me that he hadn't believed anybody could be as obnoxious as Clark, and he was disappointed in himself to find out much and how soon Clark got on his nerves.

4: Paragraph 9 What's surprising is that anybody like him could make a living as a salesman, but that he managed to make such a good living selling proves a person can overcome really huge handicaps. At one meeting in Abbes's office in January 1985, which may have been the first time I met Clark in person, we were sitting at a small, round table discussing the trust, when Clark suddenly looked at me and asked, apropos of absolutely nothing, "Are you married?" I never found out why he asked, but I knew it was extremely inappropriate, and Abbes nearly threw himself on the table between us because he thought my temper was about to blow -- it's easy to tell when I'm seriously pissed off, because my ears turn red, my jaw muscles tense up, and my voice comes out sort of clipped and grating.

4: Paragraph 10 Hutton Trust was mishandling all the trusts, but the Vietnamese Orphans' Trust became the major bone of contention with the authorities because it had a better paper trail: The parents' committee and the federal court were both actively overseeing its operations, and its documentation was quite explicit about how it was supposed to be handled. I had gone several rounds with Clark and Work in January 1985,

and because of those problems and the ones I described in the prior chapter, I was talking to some of Hutton's internal lawyers and AEs about setting up formal procedures for bringing in and managing trusts, but Abbes forbade me to promulgate any formal rules: He said that if we had written rules, we'd have to abide by them, and that he would not allow me to make rules that would interfere with the AEs' ability to keep treating the trust accounts the way they'd been doing.

4: Paragraph 11 In one of our discussions in his office, Abbes asked me what I thought was going to happen if we didn't set up some formal procedures, and I said the worst-case scenario was that the state bank commissioner would cancel our license to do trust business. He said I was supposed to keep it from coming to that, but if it did, we'd tie the commissioner up in litigation for at least three years, probably longer, and during that time we'd still be making money hand over fist, and when we got thrown out of Delaware we'd move to another state and keep going. That was the first time I was really scared at what I'd gotten myself into, and that's when I vowed not to do anything I could be legally liable for when it came time to throw some underlings to the wolves to protect Hutton.

4: Paragraph 12 In May 1985 the bank commissioner issued his annual audit report on Hutton Trust. Besides describing general problems with documentation and listing several specific trusts where there were problems, the cover letter and the text of the report were mostly about the Vietnamese Orphans' Trust. In the report, which was a confidential document not available to anyone except Hutton Trust's management, the commissioner said:

4: Paragraph 13 "Mr. Work is apparently delegating and carrying out his duties as co-trustee in direct violation of the above captioned agreement . . . File correspondence indicates investment policy decisions are being developed and directed primarily by two non-appointed persons, Mr. Thomas Clark, a sales broker for E. F. Hutton Company and the subject trust accounts' transactions, and Mr. Robert Warden, an associate attorney for Mr. Work's law firm. An apparent case of self-dealing and improper delegation of duties is evident when Mr. Work allows Mr. Clark to direct investment policy for the trust as well as take commissions form the sale of trust investments."

4: Paragraph 14 Keep in mind the timing -- this report came two weeks after the guilty plea to the check-kiting. By now the white-out and retyping of the monthly reports was taking more than a month, so we had trusts that hadn't received a statement from us since at least February. The bank where Hutton Trust had its three checking accounts refused to let us draw any more pension checks on funds that hadn't been deposited yet, so we moved our accounts to a different Wilmington bank.

4: Paragraph 15 And then Clark popped up with the possibility of getting the co-trustee of the trust for the Vietnamese orphans who had been adopted outside the U. S. to move it to Hutton Trust, too! We were trying to get straight with the commissioner about the mishandling of the one we already had, and he was bringing in another, bigger one he

was planning to play just as fast and loose with and so create more problems.

4: Paragraph 16 Then the federal judge in D.C. ordered Hutton to show cause why it shouldn't be removed as trustee in light of the check-kiting. Despite my strenuous objections to Abbes and Hutton's inside lawyers in New York, Hutton represented to the judge that no one at Hutton Trust was involved in the check-kiting, and the two companies were entirely separate. That was enough for the judge, but it didn't happen to be true: The one person who was removed from most of his corporate offices at Hutton Group and Hutton & Co. for his involvement in the check-kiting was Thomas Lynch, who was chairman of Hutton Trust's board of directors. There was also the fact that Commissioner Malarkey had reported that an employee of Hutton & Co. was improperly running the Orphans' Trust. During that summer of 1985, I lay awake a lot of nights looking for a way to keep Hutton Trust out of legal trouble and keep myself from being dragged down, too.

4: Paragraph 17 I'd applied for admission to the Delaware bar and taken the bar exam the end of July, and Rod Ward was my preceptor, so I was frequently discussing with him and with Dave Garrett both Hutton's situation and my own, especially the ethical aspects.

4: Paragraph 18 By the end of September, Hutton Trust was operating with a siege mentality: Hutton Group was interviewing people to replace Abbes and Hitchcock as CEO and president, and several of us vp's, especially Ron Hatton and I, were maneuvering to move up in the shuffle. On 8 October I took a business trip to the Alexandria VA brokerage office, and while I was gone there was a flap about a friend of Hatton's applying for the job of CEO -- Abbes had found out Hatton had told his friend, an officer at a bank in, I think, Pennsylvania, about the opening, and Hutton in New York had interviewed him. It was really funny, but the BOM in Alexandria had filled me in on what was happening at Hutton in New York and why, and that wasn't funny: He and many other BOMs around the country had demanded that Fomon replace Abbes and Hitchcock because Hutton Trust wasn't delivering its statements, and the pension trust customers, who were already nervous because of the check-kiting, were starting to bail out of Hutton in droves.

4: Paragraph 19 Abbes and Hitchcock were upset and taking it out on us, and for the first time it wasn't much fun to work at Hutton Trust. As a lawyer I had a particular problem: The ethics rules prohibited my lying to a court, I was Hutton Trust's lawyer, and I knew it had lied to Judge Oberdorfer about Hutton & Co.'s involvement in managing the Orphans' Trust. I decided the ethics rules required me to tell Judge Oberdorfer the truth, but they didn't require me to lose my job if I could help it. (I'd been looking for another job for months, but I never got any offer.)

4: Paragraph 20 First I telephoned the judge's chambers and talked to his clerk; I said I had a copy of a document that bore on how the trust was being managed, and I wanted to send it to the judge, but I needed to know he wouldn't say who gave it to him. The clerk, who was

probably right out of law school because he had the arrogance and inflated sense of self-importance you often find in new clerks but seldom in the judges themselves, told me anything they received would be made public, and so would the circumstances under which they received it. So much for the direct approach, but in a way that simplified matters for me, because it meant I didn't have to worry about keeping the commissioner's report confidential, because as soon as the judge got it, he was going to make it public anyhow.

4: Paragraph 21 After several more days of thought, I decided the only kind of person I could trust to carry the report to the judge and not say who gave it to him was a journalist, so I called the 'Washington Post' and talked to a reporter there. After several conversations, in which I did not give my name or any information he could trace me by, some days later I agreed to send him a copy of the report, and he promised to take it directly to Oberdorfer; I believed he would, because any good reporter would naturally take it to the judge first and see what happened -- that would make for a better story.

4: Paragraph 22 So I mailed, anonymously, a copy of the bank examiners' report to the reporter and waited to see what would happen, and two things did: First, Hutton bought off the 'Washington Post'! After the 'Post' took the report to the judge and got him worked up, a reporter called Hutton for comment before publishing the story; for about two days Hutton Group's highest officials spent a lot of time on the phone with the 'Post''s owner, and then the 'Post' killed the story. That scared the hell out of me, because I hadn't thought anyone had that much clout, but when the VP's brother-in-law is one of your senior officers, I guess everyone in D.C. listens when you talk.

4: Paragraph 23 The second thing that happened was that on 31 October Oberdorfer issued a notice scheduling a conference for the next week to discuss, among other things, why he hadn't heard about the bank commissioner's report until the reporter showed it to him. The upshot was not only that Hutton lost the European orphans' trust that was coming in, but Work and Hutton were removed as co-trustee and trustee of the one we already had; it was consolidated with the European one all right, but in the hands of the trustees that already had that one.

4: Paragraph 24 Abbes always believed I was the one who leaked the commissioner's report to the 'Post', but he couldn't prove it, and I never admitted it to him. Not that I was ashamed of what I'd done -- quite the contrary, as I'd done what the ethics rules required me to do and the corporate bylaws authorized me, as a vp, to do -- but once the 'Post' knuckled under to Hutton, I knew the undercurrents were too strong for me to keep rocking that particular boat.

4: Paragraph 25 By December Hutton Group had decided to send someone down to Hutton Trust to whip things into shape, and they chose Ken Simon; he had us hire every accountant and accounting clerk the temp agencies in Wilmington could provide, and then we got some from Philly, too, and we started digging out from under the mountain of overdue statements.

4: Paragraph 26 At Hutton Trust's board of directors meeting on 4 December, I got a nasty surprise: As corporate secretary, I was there taking the minutes, and because of how much trouble we were in, Fomon attended the meeting. At one point he asked how our efforts with "the Congressman" were coming, and Ellis answered that we had Carper "under control," that Phipps was telling him what laws we wanted passed, and it was okay to release the campaign contribution Carper was supposed to get for his help.

4: Paragraph 27 During the 1990 campaign, Carper's opponents showed me his campaign-contribution reports from that period, and they reflected two equal contributions from Hutton; I don't remember now -- the amount I think I recall them being was $20,000, but that may have been the total. They told me that when they asked Carper about them, he said the second one was a clerical error, that Hutton had made only one contribution, and he'd later given it back, but when he paid it back it got added to the report instead of subtracted. That, of course, raises the questions of why he gave it back and why he can't tell the difference between adding and subtracting that much money in his checking account records, but with what we know about House banking now and his three bad checks, it's remotely possible.

4: Paragraph 28 But Carper sent me a letter dated 17 February 1987 in which he referred to Phipps as his "friend and supporter," and I know Ellis identified Phipps to Fomon as the bagman who was controlling Carper for Hutton, so I'm left wondering whether Carper is a fool, who didn't know he was being controlled by Phipps, or a liar, who didn't know I knew it.

4: Paragraph 29 Remembering the definition of "honest politician" as one who, once he's bought, stays bought, Carper seems to be an honest politician, and the facts that he's a Democrat and Hutton is a Republican bastion merely reflect the reality that in Delaware party labels don't count for anything, and the Establishment is the only party that does count.

4: Paragraph 30 By February 1986 I was in the position Tom Lehrer described as that of a Christian Scientist with appendicitis: I couldn't afford to quit Hutton Trust until I found another job, and I couldn't get another job because I'd been working for Hutton Trust; if I stayed I might end up in trouble when the authorities found out what Hutton Trust had been doing, and if I left they would certainly blame the illegalities on me when they got caught -- I was, after all, the one who'd been sending memos describing them to our directors and lawyers, so I was the only one on record as knowing what was happening.

4: Paragraph 31 By January Abbes was trying to get me to quit, and he started removing my titles and duties, and under the corporate bylaws he didn't have the authority to do that without a vote of the board of directors. In February I gave Hutton's inside lawyers an ultimatum offering them their choice of three alternatives: One, Hutton could straighten out Hutton Trust and let us start handling the trusts the way

we were supposed to, so no one would get into trouble with the authorities. Two, Hutton could pay me $500,000 and give me a release, saying I wasn't responsible for what had been going on there, and I'd resign and stop talking to the press and anybody else except under subpoena; I thought that was enough to support me until I lived down having worked at Hutton Trust and found another job. Three, I'd sue Hutton and get the court to rule I wasn't responsible for the illegalities at Hutton Trust.

4: Paragraph 32 Then at the beginning of March the bank examiners showed up for their annual audit. On Wednesday, 5 March, John Smith, who was the examiner heading the audit and one I knew from earlier audits, told me they'd want to talk to me the next day; about 2:30 the next afternoon, he phoned me to come to our glass-walled conference room, and I went. I'd hardly sat down and given my name and job title when Hitchcock, who was skittering up and down the hall watching what was going on in the conference room, stuck his head in the door and asked me to step out in the hall; he told me I was not allowed to talk to the examiners without him, and he was too busy to be present that day -- yeah, too busy not letting anyone talk to the examiners. I asked if I should tell them, and he said he would, so I went down the hall to my office.

4: Paragraph 33 A few minutes later Smith walked into my office, handed me a slip of paper with a Dover phone number, and told me to call the bank commissioner's office and make an appointment, because they had to talk to me, especially in light of what had just happened. As luck would have it, I was scheduled to be in Dover the next day to be sworn into the bar, so I called and made an appointment for the afternoon of Friday, 7 March.

4: Paragraph 34 By then it was after 3:00 o'clock. The examiners packed up and left about 4:00 o'clock, and a few minutes later Hitchcock phoned and asked me to come to Abbes's office; I knew Abbes was going to fire me, and he did, telling me to pack up and be out by the close of business that day.

4: Paragraph 35 When Butler had left Hutton Trust -- by which I mean the day he actually left, although he'd been given notice a month or more before -- he'd had a falling out with Lockwood, and Lockwood had made a scene, shouting in the hall and ordering Butler off the premises immediately; it had upset everyone, and then we'd held up Butler's last paycheck, and he'd gone to the state labor board and to a lawyer, and it'd been a mess, both legally and from the employee relations standpoint. I'd always teased Abbes that when it came time to fire me, I expected him to handle it better than that, and he did.

4: Paragraph 36 With the help of my secretary and tax clerk, I packed up my stuff, then I went home and telephoned the 'Wall Street Journal' to tell them what had happened. They ran several stories about it over the next weeks, and the local newspaper picked it up, as did the national wire services. Judge Oberdorfer had put Commissioner Malarkey's 1985 audit report in the court record, so it was a public

record then, and I gave copies to the reporters who asked for it; they wouldn't have printed my allegations about the mishandling of trusts at Hutton if they hadn't seen the evidence, and that report was the most comprehensive part of the evidence.

4: Paragraph 37 On 18 April the 'Wall Street Journal' reported that Abbes and Hitchcock had resigned, but for personal reasons and not because of my accusations, and that Malarkey said he hadn't found "any evidence that the unit mishandled trust assets or violated fiduciary obligations." That was remarkable enough, given that his own report from the year before had listed specific instances of mishandling and fiduciary breaches, but a few weeks later, in "the late spring or early summer of '86," he delivered to Hutton Trust the report of the 1986 audit, the one he'd been conducting when I was fired, and it reported that the same problems cited the year before still existed! But the two audit reports were confidential, so Malarkey could stand up at his press conference and say in public there was no truth to my charges, when his own reports, delivered before and after the press conference, proved what I was saying.

4: Paragraph 38 I'd been taught in law school that a civil lawyer's main function is to avoid litigation, to get cases to settle without going to trial. So I wrote some letters to Hutton asking them to settle my legal claims against them without making me file suit. In a letter dated 22 September 1986, Hutton's new legal vp Stephen J. Friedman called my "demands" extortion and said they were looking into having me disbarred in every jurisdiction where I was admitted to practice law.

4: Paragraph 39 I tried for months to hire a lawyer to represent me, but no one would, and then one of my mentors told me the word was out, and I wouldn't be able to find any lawyer who would sue Hutton for me. So on 31 August 1987 I filed a civil RICO suit against Hutton Group, Hutton & Co., and Hutton Trust in federal court in Wilmington, and I filed it 'pro se', which means for myself, without any attorney representing me.

4: Paragraph 40 I hadn't known much about RICO before 1987, but I'd done enough research to know that was the legal theory I wanted to use: Because I lived in Delaware and all three Hutton entities were Delaware corporations, there wasn't diversity of citizenship, so I couldn't go to federal court unless I raised a federal question, and the RICO statute was federal, so it provided jurisdiction. Also, that statute required the court to award me three times whatever damages I proved I had suffered, plus court costs and attorney's fees.

CHAPTER V. Tilting at windmills for fun and profit

5: Paragraph 1 At the same time the events I've described were happening to me at Hutton Trust, someone else was having a similar experience at another company incorporated in Delaware. Like me he was

a senior executive at a subsidiary of a national conglomerate and a shareholder in the conglomerate, but unlike me he was the CEO of the sub because he'd started the smaller company and sold it to the conglomerate, and his block of the parent's stock was significant. Like me he was dissatisfied with the asinine and illegal way the conglomerate was operating and how it was forcing him to operate the sub, and he'd been telling the national press about it.

5: Paragraph 2 By the summer of 1986 he'd given the conglomerate an ultimatum with three alternatives: Either let him run the sub the way it should be run or buy him out so he could leave, or else he'd sue them. After that his story is vastly different from mine, but then he was H. Ross Perot, the conglomerate was GM, and his sub was EDS.

5: Paragraph 3 GM did buy Perot's GM stock back, and he resigned from EDS and promised to quit criticizing GM, but GM paid him so many millions of dollars that its shareholders sued GM and Perot, calling the payment "hushmail." The Chancery Court has ruled twice in the matter, and the Delaware Supreme Court once, and they're agreed that GM's board acted properly in paying Perot to get out because his grousing was interfering with the way the board was trying to run GM. If it wasn't extortion for him to give GM his ultimatum, and the courts have ruled it wasn't, then it couldn't have been extortion for me to give Hutton the same ultimatum.

5: Paragraph 4 Another situation was shaping up in 1986 that also led to a civil RICO suit for violation of the federal securities laws and for extortion: In 1986 Carl C. Icahn started buying more stock in Viacom International, Inc., and threatened to take the company over; in May Viacom bought back its stock from him, for $79.50 per share when it was trading at $62, and he promised not to buy any more Viacom stock for eleven years. Then Viacom sued him for extorting this "greenmail" from it, the federal court in New York dismissed the suit, and the appeals court affirmed, saying Viacom hadn't been damaged because what it got from Icahn was worth what it paid.

5: Paragraph 5 In its published opinion the district court discussed the difference between "extortion" and "hard bargaining" and concluded that it's not extortion if the person demanding the payment has a right to assert the legal claim he's offering to release in exchange for the payment -- Icahn had the right to try to take Viacom over, and he could release that right in exchange for Viacom's payment. I had a right to sue Hutton for firing me and for ruining my reputation by involving me in its criminal activities, and I could release that claim the same way anyone hurt in a car accident can settle his claim against the driver or his insurance carrier.

5: Paragraph 6 Of course those cases were decided within the past year or two, so when I filed my case in 1987, there were no precedents with such similar facts. I'd like to take credit for behaving so much like the big boys in 1986, but the truth is I wasn't clever enough or experienced enough to have dealt with Hutton the way I did without the expert advice I was receiving, especially that from Dave Garrett, an

expert in trust banking, and Rod Ward, an expert in corporation law. Because Hutton had been their client before I met them, however, and their relationship with me grew out of that relationship with Hutton, they could not represent either one of us in our litigation.

5: Paragraph 7 One reason I say Ward is so smart it's scary is that one day in autumn 1985 I was in his office telling him what was happening at Hutton Trust, and he said, "You know if you have to sue them, I won't be able to represent you." At that point I was so busy fighting alligators I'd forgotten about draining the swamp, and that possibility had never even crossed my mind, but I suddenly saw that I might, indeed, end up suing Hutton, and all the big lawyers would be on their side. But the silver lining to that dark cloud also appeared to me, so I answered, "Yes, but you won't be able to represent them, either." And that's the way it played out a couple of years later.

5: Paragraph 8 In early 1987, while I was still looking for a lawyer to sue Hutton for me, I got another one of those nasty shocks that made me nervous about going up against Hutton: The tv news shows were talking about Iranscam, and I noticed on the ABC news one night (I don't pay much attention to news, but 'Jeopardy!' comes on that channel at the end of the national news) that the IBC statements they were showing were monthly statements from a Hutton & Co. account. Like a light bulb going on over my head in a cartoon, a lot of things I'd seen and heard in dealing with IDP in late 1984 clicked into place, and I realized I'd been mixed up in Iranscam.

5: Paragraph 9 I was really worried then that when I sued Hutton they would accuse me of some criminal violation for having dealt with IDP, and if I got into a pissing contest with Hutton, I was going to be at a distinct disadvantage, so I decided I had to act first. I wrote to the 'Wall Street Journal' reporter who'd reported my firing, telling him what I knew about IDP and asking if he thought it was part of Iranscam or was I just being paranoid; I got a phone call a few days later saying his sources indicated I was onto the real thing. Then I wrote to the Senate Select Committee on Secret Military Assistance for Iran and the Nicaraguan Opposition telling everything I knew about IDP and what I'd done with them; a few days later I got a phone call from one of that committee's staff attorneys checking to see if I had any more information but saying because of the nature of their investigation they wouldn't be able to tell me what came of the leads I gave them.

5: Paragraph 10 At about the same time, I'd tried to file a criminal RICO complaint with the federal prosecutor in Wilmington, because one of the lawyers I'd consulted about representing me was a former federal prosecutor and said the documents I had were sufficient to support an indictment against both Hutton and Malarkey, and I should let the government handle the litigation, because it would be all over the country and take a lot of money. But all U. S. Attorney Bill Carpenter did was send an FBI special agent to talk to me, and he kept nodding off to sleep while I was trying to talk to him about the banking violations at Hutton Trust; when I mentioned Iranscam, however, he perked up, and some days later he came back with his supervisor and asked some more

questions about it. That's how I know I didn't just imagine that IDP was part of Iranscam.

5: Paragraph 11 When Skadden Arps couldn't represent Hutton against me because of its conflict of interest, Hutton hired Morris, Nichols, Arsht & Tunnell; the grown-up lawyer on the case was Thomas Reed Hunt Jr., and the associate who did the scut work was Brett D. Fallon. I'd had vanishingly little practical experience of civil litigation, and I learned a great deal from seeing them work; I wouldn't realize it until later when I saw how bad some of the other lawyers in town are, but in their dealings with me they exemplified the highest standards the bar sets for itself.

5: Paragraph 12 Which is not to say they didn't put up a good fight, but they fought clean and fair, and it never got personal. Even when Hunt told me they were not only going to have the case dismissed but also have the court order me to pay their costs and attorneys' fees, he was a perfect gentleman, and I admired his style. I answered that the most they could do was drive me into bankruptcy, and then I'd load my dogs and my clothes in the car, leave the bank to foreclose on the house, and move in with my parents in Mississippi -- since the kids have moved out, they have three bedrooms and two baths with no one to use them, and there's a motel-sized pool in the back yard, so it wouldn't be too hard a life.

5: Paragraph 13 We futzed around with the litigation for nearly two years, and in March 1989 Judge Joseph J. Longobardi dismissed my complaint for lack of standing, saying I wasn't directly injured by the RICO conspiracy I alleged, and that calls for a little discussion of the RICO statute.

5: Paragraph 14 Congress made the "Racketeer Influenced and Corrupt Organizations" chapter part of the federal criminal code, effective 15 October 1970, to be able to prosecute organized crime for using legitimate businesses as fronts or money laundries for the proceeds of criminal activity. It defines "pattern of racketeering activity" to be at least two felony violations of certain state or federal statutes committed by the same person within 10 years, and at least one act has to have been after this law went into effect. The statute makes it a crime to use money from such racketeering activity to start, buy, or run a business engaged in interstate commerce or to conspire with somebody else to do so.

5: Paragraph 15 Besides being a criminal law, the statute also provides that anybody "injured in his business or property" by a violation of the RICO statute can sue in federal court and "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." The so-called "predicate acts" that form the pattern of racketeering activity include mail and wire fraud ("wire" usually means "telephone"), embezzling from union funds (which some of the pension funds were), and securities fraud.

5: Paragraph 16 I said in my complaint that Hutton Group had set up

Hutton Trust to allow Hutton Group to collect trustees' fees from the same accounts it was collecting brokerage commissions from, through Hutton & Co., but that Hutton Group never made or let Hutton Trust perform the trustees' duties to earn the fees, and that violated the RICO statute. I said that they hired me and the other employees by making us think Hutton Trust was a legitimate company when it wasn't, and that was fraud on us in furtherance of their RICO conspiracy against the trust clients, and firing me to keep me from answering the bank examiners' questions injured me, and therefore I'd been injured in my business or property by their RICO violation, and I was entitled to recover. Judge Longobardi didn't agree.

5: Paragraph 17 I appealed the dismissal to the federal appeals court, which sits in Philadelphia, and served the notice of appeal on Hunt, but then Hutton switched lawyers. That was probably a practical rather than a tactical decision -- Hutton had been bought by Shearson Lehman in 1988, and in fact I'd filed a suit in Chancery Court complaining, among other things, that Shearson didn't pay us shareholders enough for our Hutton stock in their merger because of Hutton's legal liabilities, which Shearson bought along with Hutton's assets -- because Richards, Layton & Finger, the firm that replaced Morris Nichols, had been working for Shearson for some time. Replacing Morris Nichols was a strategic error on Hutton's part, though.

5: Paragraph 18 Although we were litigating a federal claim in federal court, they assigned the case to Anne C. Foster, a lawyer with virtually no experience in federal court who wasn't even admitted to practice in the federal courts yet -- most of her experience was in Chancery Court, in cases alleging breach of the corporate directors' fiduciary duties to the shareholders, where all the corporation has to prove is it had a business reason for doing what it did, and it wins. She has never seemed to grasp the idea that in a RICO suit it doesn't matter why you did it: If you did it, you're guilty. But it probably didn't matter what she thought, because Hutton was always an extremely sexist organization (and Shearson seems to be upholding that tradition), and they would never pay much attention to anything a woman said anyhow -- that was always my problem with Hutton: I couldn't get their attention because they've never to this day taken me seriously.

5: Paragraph 19 There are no trials in appellate court: Both sides submit written briefs, and the court may hold oral argument, but the hearing is just for argument, no testimony or evidence. In this case the court didn't ask for oral argument; we sent in our briefs, and in September 1989 the court issued a published opinion reversing the dismissal and saying I did so have standing to sue Hutton under RICO. Given the appellate court's opinion on the law, all I had to do was prove the facts I'd alleged in my complaint, and I had to win.

5: Paragraph 20 Any reasonable defendant would have settled the case right then, but not Hutton. Two years later, in September 1991, we finally went to trial; not only had Hutton kept sniping at me and squabbling about stuff that didn't matter, but Longobardi had been so cranky to me as to border on hostility.

5: Paragraph 21 Take the famous forged U-4, for example: In the fall of 1985, when I was trying to find another job either inside Hutton or outside it, managers of several Hutton & Co. units were talking to me about coming to work for them, but to share in commissions I'd have to have a "Series 7" license. By then my relationship with Abbes was rather brittle -- because he'd asked me to quit, and I'd not only refused but also told several Hutton & Co. "heavy hitter" AEs who owed me favors, and they'd told Abbes they didn't want me fired because I was helping them so much -- so I sent a memo to Lynch asking him if I could be licensed, and he said I could and forwarded it to the Hutton & Co. department that handled licensing.

5: Paragraph 22 They not only registered me for the exam but also sent me the materials to study for it, as well as the Form U-4 that is the application to be a "registered representative," which is what an AE is and what you have to be to get paid a brokerage commission. You also have to be employed by a member of the Stock Exchange, which Hutton & Co. was, but Hutton Group wasn't, and of course Hutton Trust wasn't. The form had a part the applicant was supposed to fill in, with name, address, employer's name and address, and recent employment history in it, and then there was a part the employer was supposed to fill in and sign; above where the applicant was supposed to sign it recited, among other things, that the applicant agreed to binding arbitration, under the NYSE rules, of any dispute between the applicant and the employer.

5: Paragraph 23 The instructions said fill it in in black ink and print, and we couldn't find a black pen anywhere at Hutton Trust, so Abbes told me to fill it in in blue ink and then make a photocopy and sign that as the original; he also told me to fill in the part he was supposed to do, and when I said the employer was supposed to do that part, he said he was doing it, by having his employee (me) do it, and he was right, so I did. I made the photocopy, and he and I signed it, then I sent it to Hutton in New York.

5: Paragraph 24 After I filed suit, Hutton moved to dismiss on the grounds that I'd agreed to binding arbitration, and they submitted a copy of the U-4 they'd sent to the securities authorities when they registered me. But, lo and behold, where I had accurately printed Hutton Trust's name and address in the block for my employer, someone at Hutton in New York had whited that out and written in Hutton & Co.'s name and address. I still had the original blue-ink version, so I figured I had Hutton by the short hairs: They'd just produced evidence they lied to the securities authorities by mail and telephone, and that was mail and wire fraud, actionable under RICO. But Longobardi keeps saying that I was equally at fault in falsifying the U-4 because I filled in the employer's section!

5: Paragraph 25 There's also the matter of unemployment benefits: Hutton Trust's bylaws defined me as a senior corporate officer and provided that a senior officer could be fired, with or without cause, only by a three-fifths vote of the board of directors. (Abbes kept asking me to resign because he didn't want to have the directors vote on

it; that's how he'd gotten rid of Butler, and then Abbes changed the old board minutes to make it look like Butler hadn't held the offices it required a board vote to terminate.) When I was fired, I filed for unemployment benefits, and Hutton didn't answer the claim; I submitted the newspaper clippings where Hutton said I was fired for making improper demands, and the unemployment office made written findings that didn't amount to cause under Delaware law, so I collected unemployment for much of 1986.

5: Paragraph 26 After I filed suit, Hutton also moved to dismiss on the grounds that I'd been fired for cause, and it submitted minutes of a board meeting ratifying my termination for cause but not saying that the vote was more than a simple majority. Given the bylaws requiring a supermajority vote and the ruling of the unemployment office, which Hutton didn't appeal when it had the chance, Hutton's position had to be rejected as a matter of law, but Longobardi has always treated it as an open question whether I was fired for cause, as Hutton says, or to keep me from talking to the bank examiners, as I say. I could give you more examples of how Longobardi, who's now chief judge for the district, has sided with Hutton to give me a hard time, but you get the idea.

5: Paragraph 27 The trial took most of two days: 30 September and 1 October 1991. I testified the first day, and my cross examination continued into the second day, then Hutton put on four witnesses: one of Hutton's inside lawyers who was still working for Shearson, Abbes, Hitchcock, and Shapiro. Not only did they not contradict my allegations, they actually testified that they were true in every material aspect!

5: Paragraph 28 There were many comical moments: Hitchcock, trying as usual to wimp out from under any responsibility, testified to not having known then or not remembering now most of what I asked him, and Abbes testified to not knowing who had issued his pay checks. While I'd been testifying, I'd several times tried to introduce a subject, like Lockwood's tantrum when he fired Butler, and Foster had objected, and Longobardi had ruled it out; then her witnesses got on the stand and testified to it for me. The way Longobardi fawned all over Shapiro would have been funny if it weren't so pathetic: The only thing more disgusting than having to watch a federal judge suck up to anybody that much is having the guy he's sucking up to be your opponent's star witness.

5: Paragraph 29 I was suspicious of my good fortune when the first three witnesses not only didn't counter my evidence but actually supported my case, but then Shapiro took the stand and did so much to help me that I considered whether I was dreaming, and the alarm clock would go off any minute for me to get up and go to the real trial. Malarkey was dead by then, and I'd figured there was no way to prove who was responsible for his lying to the press -- saying there was no truth to my charges when his own reports documented everything I was saying -- so I hadn't even included any defamation claims in my complaint, but the appellate court had ruled that "loss of earnings, benefits, and reputation constitute self-evident injury as in any standard wrongful

discharge action." My reputation had certainly been injured by his making me out to be a liar, but I doubted I'd be able to blame Hutton for it -- I'd expected Hutton to be smart enough to say Malarkey must have done that on his own, so Hutton wasn't liable to me for it.

5: Paragraph 30 But Shapiro testified -- voluntarily, on direct examination, in answer to Foster's questions, and before I even started to cross examine him -- that he was the one who suggested that Malarkey tell the reporters that! That admission meant Hutton was liable for the deliberate injury to my reputation, because one of the federal civil procedure rules says that if you prove something at trial that you didn't put in your complaint, it shall (not "may" but "shall") be treated as if you did include it in your complaint. That was like Christmas coming early, but then it got even better.

5: Paragraph 31 Shapiro had testified on direct examination that when Malarkey issued his 1986 audit report on Hutton Trust, it showed the same problems that had been described in the 1985 report, what Shapiro helpfully described as the kind of problems you'd expect from having brokerage people trying to run a bank. I'd never seen the 1986 report, and I hadn't asked for it during discovery because it was written after I'd been fired, so I knew Longobardi would rule I couldn't have it, and I'd hate like the devil to give either him or my opponents the satisfaction of keeping me from getting something I want. But I knew the federal evidence rules pretty well, and one of them says if a witness looks at a document to refresh his recollection before testifying, you get to see it.

5: Paragraph 32 So I asked Shapiro if he'd reviewed any documents in preparation for testifying, and Bingo! He admitted to reviewing the commissioner's 1986 report, I asked for it, and Longobardi said they had to let me see it; Foster objected and kept dithering about it being too late for me to make a request for Hutton to produce documents, but that just showed she didn't understand the rules of evidence. Moments like that made the trial truly memorable.

5: Paragraph 33 Neither Hutton nor I had asked to have a jury for the trial: I didn't, because I thought the breaches of fiduciary duty, both the trustee's duties and the directors' duties, were too technical for many jurors to care about, and I wasn't sure a jury would see me as a sympathetic plaintiff; you'd have to ask Hutton why they didn't want a jury. Besides, a jury comes back with a verdict, and you're pretty much stuck with it, but when you have the judge decide the case, he has to issue an opinion setting forth his reasons, and if you appeal his ruling, the appellate court goes over his reasoning as well as his result. And whatever his shortcomings of intellect and temperament, Longobardi used to be a vice chancellor and so must have a solid background in both types of fiduciary breach.

5: Paragraph 34 At the end of the evidence on 1 October, he gave us an expedited schedule for filing our written arguments because, he said, he wanted us all "to deal with this while it's hot and fresh in our minds." The last brief was submitted on 7 December 1991; as I write

this, in June 1992, we're still waiting for him to deliver the verdict.

5: Paragraph 35 I know that he'll have to give us a decision sooner or later, and then one or both of us may appeal it, so this litigation may drag on for several more years, but it will eventually be over, and I'll be able to get on with my life. In the hope that this year will see the end of this case, which has cluttered up my present and future for more than six years, I've written the story now, for two reasons: Personally, when the case finally ends, I don't want to have to think about it anymore; politically, this information should be stirred into the mix upon which we'll base our electoral decisions in November. new Longobardi would rule I couldn't

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