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The Lesson of Enron for the Future of MDPs: Out of the Shadows and into the Sunlight

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THE LESSON OF ENRON FOR THE FUTURE OF MDPs: OUT OF THE SHADOWS AND INTO THE SUNLIGHT

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There are lessons to be learned from the Enron debacle,[1] at least to the extent that one is seeking insights about the continuing debate over "when"—and not "whether"—multidisciplinary practice (MDP) rules will finally come to the legal profession.[2]

The irony is that, despite the crushing victory[3] that was supposed to end debate in the ABA House of Delegates (and the legal profession),[4] the steam was recently knocked out of the anti-MDP movement by an unexpected development. In the wake of the House of Representatives'

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1. Debacle does not overstate the case. William C. Powers Jr., author of the *Power's Report*, led Enron's internal investigation of the company's collapse. The report concluded, among other things, that in an attempt to stop financial hemorrhaging elsewhere:

> [o]ther transactions were implemented—improperly, we are informed by our accounting advisers—to offset losses. They allowed Enron to conceal from the market very large losses resulting from Enron's merchant investments by creating an appearance that those investments were hedged—that is, that a third party was obligated to pay Enron the amount of those losses—when in fact that third party was simply an entity in which only Enron had a substantial economic stake. We believe these transactions resulted in Enron reporting earnings from the third quarter of 2000 through the third quarter of 2001 that were almost $1 billion higher than should have been reported.

Enron's Many Strands: Excerpts From the Report of a Special Committee Investigating, *Enron*, N.Y. TIMES, Feb. 3, 2002.

2. As used here, multidisciplinary practice (MDP) is a law firm structure through which lawyers—freed of the prohibition under ABA Model Rules of Professional Conduct Rule 5.4 (1983) [hereinafter Model Rule 5.4], forbidding lawyers from sharing fees with nonlawyers, but still subject to all other rules of lawyer professional responsibility—are permitted to have nonlawyer professionals as partners. *See infra* note 4. Such an MDP might exist in either a regular or a nonregular form, which is to say, supervised by a lawyer or by a nonlawyer, respectively, but its primary characteristic is that, while lawyers alone provide legal services, all work together as professional equals to deliver client services.

3. *See* John Gibeaut, *House of Delegates Vote Crushes Chances for MDP*, A.B.A. J., Sept. 2000, at 92.

4. The American Bar Association House of Delegates voted by a margin of more than three to one to reject the recommendation of the Commission on Multidisciplinary Practice calling for a repeal of Model Rule 5.4, which would have permitted lawyers and any judicially approved professionals to join in equity partnerships. *See* ABA House of Delegates, unedited transcript of MDP debate (July 2000), *at* http://www.abanet.org/cpr/mdp_hod_transc.html. *See also* Burnele V. Powell, *Looking Ahead to the Alpha Jurisdiction: Some Considerations That the First MDP Jurisdiction Will Want to Think About*, 36 WAKE FOREST L. REV. 101-02 (2001).

vote,[5] our Canadian neighbors, the only lawyers in the world that even American lawyers would concede are as moral, ethical, and professional as they, adopted what was virtually the same rule that the ABA House had rejected, allowing MDPs.[6]

But the first lesson of Enron is that everyone is now trying to spin the Enron story. Enron has become a guaranteed laugh-line—proof positive that any result we wish for can in fact be attained if only we do the math using mirrors, magic dust, and voodoo.

Confirming Enron's capacity to generate a laugh is the Internet headline parodying a recent movie. It simply read: "Crouching Profits, Hidden Debt: What happened and what does government have to do with it?"[7]

A close second was from cybersatirist Bob Hirschfeld:

"Ken Lay's testimony before congress is being referred to as the story of "take the money *Enron*."[8]

But nobody is going to have the last word before Jay Leno. We hear from Leno that:

> Dick Cheney finally responded today to demands that he reveal the details of the Enron meetings. This is what he said. He met with unnamed people, from unspecified companies, for an indeterminate amount of time at an undisclosed location. Thank God he cleared that up. I'm ready to move on.[9]

But, perhaps, the most ironic bit of humor comes from the University of Houston Communications Network Online. There, in the boldest red ink you will ever see, was the announcement of the "2000 Enron Teaching Excellence Awards." The story recounted how a winning law professor, among others, had been awarded a $5000 teaching award for using his sense of humor to spark law students' interest in traditionally dry topics,

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5. The recommendation before the ABA House, in pertinent part, would have "permit[ted] lawyers to share fees and join with nonlawyers in a practice that delivers both legal and nonlegal professional services ("Multidisciplinary Practice" or "MDP") provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services." Commission on Multidisciplinary Practice, *Report to the House of Delegates (July 2000)*, Recommendation 1, *at* http://www.abanet.org/cpr/mdpfinarep2000.html [hereinafter MDP Final Report to House of Delegates].

6. Canadian Bar Association, MDP Resolution 00-03-A (Aug. 2000), *available at* http://www.cba.org/EPIIgram/November2000/Resolution_00-03-A.asp.

7. Political Humor, About: With Donald Kurtzman, *Daily Feeding Frenzy: Latest Political Quips*, *available at* http://politicalhumor.about.com/library/bldailyfeed3.htm.

8. *Id.*

9. *Id.*

such as security financing, business torts, and sales and leasing."[10]

The report went on to relate that one student admirer had described the professor as an example of how law school should always be taught, observing that: "I really appreciate his practical approach to the law. He presents cases to demonstrate how law is applied, not as the source of learning."[11]

It seems that only Arthur Andersen has fallen as low. Indeed, you know that you have hit bottom when it's the politicians who are making jokes about you. President Bush used a great line: "The good news is that the Iraqis have agreed to allow the UN to audit their arms production. The bad news is that they want Arthur Anderson to handle the audit."[12]

But the truth is that the Enron bankruptcy is no laughing matter. The reality is that the seventh largest company in the United States declared what was then the largest Chapter 11 bankruptcy in history. After overstating annual income by 600 million dollars a year, Enron has finally owned up to the existence of offshore, off-book, sham companies that it was using to hide debt.[13] Beyond the money, thousands of lives have been turned upside down[14] or, in some instances, irreparably ruined.[15]

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10. http://www.uh.edu/uhcnonline/2000enron.htm (May 3, 2000).

11. *Id.*

12. *Id.*

13. In their helpful historical account of the secret machinations that brought about Enron, Kurt Eichenwald and Diana B. Henriques noted that the creation of two off-shore entities, Chewco and JEDI, eventually came to the attention of Thomas H. Bauer, a partner in Andersen LLP in Washington, D.C. Bauer recognized the quandary: If the "side deal had shifted the ownership of Chewco away from independent investors," that, in turn, meant "Chewco—and even JEDI—had never been independent entities. Instead, all of Enron's transactions with them had simply been transactions with itself." If that was the case, they were dealing with possibly criminal acts. Kurt Eichenwald & Diana B. Henriques, *Enron's Many Strands: The Company Unravels; Enron Buffed Image to a Shine Even as It Rotted From Within*, N.Y. TIMES, Feb. 10, 2002, at A1. Similar offshore entities were also the focus of others, including Sherron S. Watkins, an Enron vice president. In her February 14, 2002, testimony before a hearing of a House Energy and Commerce subcommittee, she explained her efforts to bring her concerns to Kenneth Lay, Enron's Chairman and CEO:

> My main point to Mr. Lay was that by this time Raptor owed Enron in excess of $700 million under certain hedging agreements. My understanding was that the Raptor entities basically had no other business aside from these hedges; therefore, they had collectively lost over $700 million. I urged Mr. Lay to find out who lost that money. If he discovered that this loss would be borne by Enron shareholders, via an issuance of stock in the future, then I thought we had a very large problem on our hands. I gave Mr. Lay my opinion that it is never appropriate for a company to use its stock to affect its income statement.

Enron's Many Strands; *'Lone Voice': Excerpts From Testimony of Executive Who Challenged Enron*, N.Y. TIMES, Feb. 15, 2002, at C7.

14. Many Enron employees were outraged at the fact that during the period when the price of their Enron stock holdings were precipitously declining, they were forbidden by the company to sell their stock. This so-called "lockdown" forced Enron employees—employees who on average had more than 60% of their 401(k)s in Enron stock—to lose as much as 90% of the value of their shares. Richard

When the laughter stops, when the stocks rebound (or, when the money is reinvested in the next hot company), when the hurt subsides, when the lives of the individuals and families are returned to equilibrium, it will be time for a full post-mortem.[16] In advance of the reports of the congressional committees, the filing of Justice Department charges, and the political finger-pointing,[17] I would like to sound a warning bell for the legal profession that, if not heeded, I predict will tomorrow make us as clearly deserving of a Jay Leno punch line as the accounting profession is today.

In short, I want to remind the profession about what it already knows about this scandal and, most scarily of all, what we do not yet know.

First, let's consider what we know. We know that the two main villains in this scandal are two of the nation's largest and most prestigious businesses. Enron Corporation was the seventh-largest corporation among the Fortune 500, and Arthur Andersen was one of the Big Four accounting firms. Each has now become a poster child for American corporate

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A. Oppel, Jr., *Enron's Collapse: The Overview; Auditor Received Warning On Enron Five Months Ago*, N.Y. TIMES, Jan. 17, 2002, at A1.

15. One lead made the point succinctly: "At the end of a week of high drama in Houston and Washington, J. Clifford Baxter, a former Enron vice chairman, was found dead in his locked car not far from his home in a Houston suburb. It was ruled a suicide." Tom Redburn, *Enron's Many Strands: The Week That Was; A Suicide and a Resignation as the Formal Inquiries Get Under Way*, N.Y. TIMES, Jan. 27, 2002.

16. The *New York Times* editorialized:

> The real scandal, as is often said during these post-mortems, may have been what was legal. How could Enron rely on hundreds of sham offshore subsidiaries to avoid paying income taxes in four of the last five years? How could thousands of employees' retirement savings be threatened by their employer's collapse? Who was overseeing the accountants, the financial world's overseers?

Editorial, *The Enron Hearings; Cleaning Up After the Debacle*, N.Y. TIMES, Jan. 20, 2002, at D12. The editorial went on to note that efforts at a full accounting would follow from a previous House Energy and Commerce Committee hearing on the accounting issue and would be followed by a Senate Governmental Affairs Committee hearing. *Id.*

17. Discussing the lead partner on the Enron audits, David B. Duncan, who was fired after being accused of orchestrating the shredding of audit documents related to the Enron Corporation, Richard Oppel, Jr., writing for the *New York Times*, provided a useful and graphic portrayal of the events building in Washington:

> [Duncan] met for the second time this week with officials from the Justice Department, which is conducting a criminal investigation of Enron's collapse. On Monday—the day before Andersen fired him—Mr. Duncan met with Justice Department officials as well as staff members from the S.E.C. and agents from the F.B.I., according to people close to the inquiries. This afternoon, he spent more than four hours answering questions from eight investigators for the House Energy and Commerce Committee, one of several panels in Congress reviewing Enron's demise. Flanked by his lawyers, Mr. Duncan was not sworn, but he was warned not to give false statements to Congress. There was no discussion of giving him immunity for his testimony, investigators said.

Oppel, *Enron's Collapse*, *supra* note 14.

culture. Enron has come to stand for the most arrogant kind of corporate greed,[18] Arthur Andersen for the kind of hold-your-nose-and-grab-the-money conflicts of interest[19] that has similarly made American lawyers less respected over the past two decades.[20]

We also know that the prestigious Vinson & Elkins (V&E) law firm will, at the end of the day, be shown to have taken not simply one free bite, but at least two oversized gulps.[21] First, it advised Enron regarding the legitimacy of Enron's proposed securitization plans. Then, as the legitimacy of those plans was being called into question, and as it became clear that there were serious questions about whether Enron had failed properly to account for the debt generated by the transactions, it took a second tasty gulp. V&E agreed to conduct a review of the very structures it had helped to set in place.[22]

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18. It was not simply that Enron aggressively pursued profit or even that it was willing to take great risk. What raised even more concerns was its willingness to provide favored investors with briefings that were not generally available. This "information gap between partnership investors and public stockholders," placed strains on Enron, as the parent corporation, to stem losses that ultimately Enron would be required to pay off in its stock. Diana B. Henriques & Kurt Eichenwald, *A Fog Over Enron, And the Legal Landscape*, N.Y. TIMES, Jan. 27, 2002, at C1. *See supra* note 13 (transactions with itself).

19. *Id.* ("The firms act both as independent auditors—which companies must have, by federal law—and consultants on tax and technology issues.")

20. *See, e.g.*, *The Image of Lawyers*, *at* http://www2mnbar.org/benchbar/2000/apr00/survey-sez_400.htm (76% of respondents agreed that public resentment of lawyers' fees and income account for a significant part of lawyers' negative public image); John S. Athens, *Woe Unto You Lawyers—The Tarnished Image—Part II, Its Causes*, *available at* http://www.family.org/cforum/attorney/truth/a0014530.html (noting that high legal fees are most frequently complained of); Charles A. Maddock, *Lawyers' Image: The ABA Perspective*, *available at* http://www.altmanweil.com/about/articles/archive/article.cfm?ArticleID=108 (noting that the public perceives that lawyers are focused on billable hours and revenue rather than solving problems).

21. Here is how the *New York Times* described what should have been the impact of the Watkins letter:

> But this letter was not some mundane complaint. The writer described in detail problems with Enron's partnerships, problems that the letter claimed would cause huge financial upheavals at the company in as little as a year. "I am incredibly nervous that we will implode in a wave of accounting scandals," the letter's author wrote. "Skilling is resigning for 'personal reasons,' but I think he wasn't having fun, looked down the road and knew this stuff was unfixable and would rather abandon ship now than resign in shame in two years."
>
> Mr. Lay took a copy of the letter to James V. Derrick Jr., Enron's general counsel, who agreed it needed to be investigated. They decided to assign the task to Vinson & Elkins—which had helped prepare some of the legal documents for some of the partnerships. Enron wanted answers fast, and told the outside lawyers not to spend time examining the accounting treatment recommended by Arthur Andersen—although that was the heart of the letter's warnings.

Eichenwald & Henriques, *Enron's Many Strands*, *supra* note 13.

22. Evidence is now coming out that indicates Watkins' view was also shared among a number of the 200 lawyers within Enron's own legal staff. In his article for the *National Law Journal*, David Hechler quotes one lawyer as saying: "'Clearly, if you were going to do an in-depth investigation into

We know, furthermore, that Enron engaged Arthur Andersen to act both as Enron's auditor and its business consultant.[23] It was an arrangement that is apparently blessed by generally accepted accounting practices, but one that has been roundly condemned by everyone except the accounting industry. It is as though the accounting profession has had a pimple on its nose for a decade, but they still have not seen it.[24]

Further still, we know that on Thursday, February 14, 2002, Enron executive Sherron Watkins told Congress that she warned then-Chairman Kenneth Lay the previous summer that investors were being misled by inflated profit statements.[25] Despite that, Watkins told legislators that she "never heard reassuring explanations."[26]

In sum, no matter how we consider it, smell,[27] taste,[28] sight,[29] or

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those structures . . . and you wanted that to be particularly rigorous, you would not use the firm involved in structuring them.'" David Hechler, *Enron's Legal Staff Battered, Confused*, NAT'L L.J. (Feb. 4, 2002), *available at* http://www.nlj.com/special/0204enron.shtml. "'It was absolutely against any common sense,' says another who works abroad. 'I don't have to be a lawyer to determine that.'" *Id.* Hechler quotes another attorney: "'You have to realize that [General Counsel James V.] Derrick was asleep at the wheel. He can't have a memo coming out criticizing these structures. So he hires his old firm.'" *Id.*

Still, the most devastating question put by Hechler is the one that now begs our attention: Even assuming that only a couple of dozen of the two hundred-plus lawyers at Enron knew about the decision to give Vinson and Elkins a second bite: "Did any Enron lawyers complain to Derrick at the time?" *Id.*

It is as dismaying as it is regrettable, but to date it appears that nobody did.

23. *See* ROBERT BRYCE & MOLLY IVINS, PIPE DREAMS: GREED, EGO, AND THE DEATH OF ENRON (chronicling the corruption of the Enron Corporation through the illicit sexual affairs of the company's top echelon) and Diego Ribadeneira's book review of *Pipe Dreams*, Diego Ribadeneira, *How Questionable Business Decisions and a Culture of Corrpution Did Enron In*, BOSTON GLOBE, Dec. 4, 2002, at E7, where Ribadeneira observes:

> Bryce also recounts the appalling lack of oversight of Enron's venal bookkeeping by his accounting firm, Arthur Andersen. As is now well known, Andersen also received lucrative consulting fees from Enron, so it had little incentive to diligently audit the firm's finances. "By the late 1990s Andersen had become so reliant on Enron that it simply could not afford to lose the company as a client," Bryce writes. "Enron understood that and used that fact to its advantage." The ties between the two were so tight that Andersen's lead partner on the Enron account worked out of Enron's building.

24. The Commission on Multidisciplinary Practice was not alone in recognizing that the image of the accounting profession was being scarred by its tolerance of such an obvious conflict of interest. As the Commission reported: "In a letter from the Office of the Chief Accountant (OCA) of the Securities and Exchange Commission (SEC), this Commission was advised that the SEC has asked the Independence Standards Board (ISB) to place the topic of legal advisory services on its agenda." The MDP Report, *infra* note 45.

25. *See supra* note 13.

26. *Enron's Many Strands; 'Lone Voice': Excerpts from Testimony of Executive Who Challegned Enron*, N.Y. TIMES, Feb. 15, 2002, at C7 (Sherron Watkins' statement before leaving of House Energy and Commerce Subcommittee as recorded by the Federal News Service).

27. *See supra* note 16 (the real scandal is "what was legal").

28. *See supra* text accompanying notes 21-22 (two big gulps).

29. *See supra* text following notes 9-10 (red-bannered teaching award).

sound,[30] we can already say that as bad as we know Enron is today, we also know that it has the potential to become quite a bit worse.[31]

Beyond this summary, we also know that there is still plenty that we *do not* know.

To begin with, on the most revealing issue of what went wrong at Enron, we do not know the answer to the classic *Watergate* question: What did Kenneth Lay,[32] Jeffrey K. Skilling,[33] J. Clifford Baxter,[34] and Andrew S. Fastow[35] know, and when did they know it. For the time being, Lay has exercised his right to remain silent, so it may be a very long time before we know anything substantial.[36]

We also do not know why Arthur Andersen continued to give Enron clean audits, despite their concerns about whether Generally Accepted Accounting Principles would require that investors be provided enough notice about the status of the company to be able to decide whether investing would be prudent.[37]

Most importantly, what we do not know about either Enron or Arthur Andersen is what, if any, role lawyers in the firms[38] played in facilitating

30. *See supra* text accompanying notes 17-18 (a warning bell).

31. Every large institution, whether an underwriter or partnership investor, that was aware of material information withheld from Enron investors could find itself in court, securities lawyers said. Already, they said, lawyers who specialize in suing corporations are discussing which investors, institutions and advisers are potential defendants.

"The image I have in my mind is a long, long line of the wealthy and the powerful who made money out of these deals, all set up to hand it over to the people who lost everything in their Enron investments," said Mr. Moriarty, the Houston lawyer. "This is what the Marines like to call a target-rich environment." Henriques & Eichenwald, *A Fog Over Enron, supra* note 18.

32. Lay was Enron's Chairman and CEO at the time of the company's bankruptcy.

33. Skilling was Enron's Chief Executive Officer, but quit prior to the company's bankruptcy.

34. Baxter was a former Enron Corporation Vice Chairman who apparently committed suicide following the company's bankruptcy. Jim Yardley, *Critic Who Quit Top Enron Post Is Found Dead*, N.Y. TIMES, Jan. 26, 2002, at A5. *See supra* note 15.

35. Fastow was Enron's former Chief Financial Officer.

36. "Lay told a Senate hearing that he was 'deeply troubled' by asserting his constitutional right under the Fifth Amendment not to answer questions about the financial dealings that led to Enron's bankruptcy—a collapse that devastated thousands of workers and investors and rattled Wall Street." Susan Schmidt, *Enron's Lay Declines to Talk, But Senators Say A Lot to Him: Ex-Company Leader Hears Barbs, Claims Fifth Amendment Right*, WASH. POST, Feb. 13, 2002.

37. Enron might argue that the information potential partnership investors got was not important enough to require disclosure. But lawyers said the fact that Enron disclosed the information to them at all would be evidence in itself that such details were material.

"Given that they give the information to somebody else as part of their bargain to raise money for another deal, there is a strong likelihood that it would reach the materiality level," said Stanley Arkin, a corporate and securities lawyer in New York. Henriques & Eichenwald, *supra* note 18.

38. *See* Daly, *infra* note 48, discussing relative sizes of accounting firms, law firms, and the 1500 lawyers within the law offices of Arthur Andersen Corporation, *citing* Annual Survey of the Nation's Largest Law Firms, NAT'L L.J., Nov. 16, 1998, at C5. The two largest firms are Baker & McKenzie with 2,343 lawyers and Jones, Day, Reavis & Pogue with 1,276. *But see supra* note 22 and

the creation and operation of Enron's offshore businesses. Nor do we know what role lawyers may have played in some of Enron's other activities, such as the shredding of documents in an apparent effort to frustrate an expected criminal investigation.

Finally, we must consider that there is another dimension—neither past nor future—that challenges a full understanding of the Enron-Authur Anderson story. Understanding conduct in this dimension is cruicial precisely because so little can be known about it. Indeed, for the legal profession, the tragedy of Enron is not what we already know it is what we do not yet know but can reasonably expect eventually to learn.

I began worrying about the lawyers operating in the unobservable dimension (the lawyers whom I have regularly referred to as the lawyers engaged in "gray lawyering") even before the time that I was asked to serve on the ABA Commission on Multidisciplinary Practice.[39] During my tenure, however, I came to understand that the Commission would not be seen in its fullest light for some time to come. In this regard, it would be like the Kutak Commission (in its call for a comprehensive rethinking of the ethical premises and problems of the legal profession[40]), the Commission on Nonlawyer Practice (in its call for the expansion of permissible activities by nonlawyers in order to increase the public's access to the justice system and to affordable assistance with its legal and law-related needs[41]), and the McKay Report (in its call for totally open lawyer disciplinary proceedings[42]).

Contrary to the kind of knee-jerk, head-in-the-sand response that usually accompanies pleas for reform, I predict that, despite what may be the legal profession's initial reaction, the Enron scandal will eventually prove to be a catalyst for lawyer multidisciplinary practice reform. This reform will be second only to the reform of the accountants' auditing/consulting rule mentioned above.[43]

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accompanying text (nobody complained).

39. Elsewhere I have observed that "the legal profession may well have lost its chance to address the only concern arising during the entire three-year MDP debate about which proponents on all sides found agreement: that something must be done about the increasing phenomenon of "gray lawyering." Powell, *Looking Ahead*, *supra* note 4, at 100-15 n.50.

40. *See* Chair's Introduction, ABA Commission on Evaluation of Professional Standards, ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983).

41. *See* Summary of Recommendations, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS, A REPORT WITH RECOMMENDATIONS (1995).

42. *See* American Bar Association, Recommendation 7, Access to Disciplinary Information, LAWYER REGULATION FOR A NEW CENTURY, REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992).

43. *See supra* notes 23-24.

I assert, second, that upon the conclusion of the Enron debacle, each of the rationalizations to which opponents of MDP pointed two years ago[44] will have proven demonstrably false in the real-life test of Enron.

Third, and finally, I assert that the one thing that will become clear when the dust settles after Enron is that if the legal profession had put the multidisciplinary practice safeguards in place two years ago when it had the opportunity to do so, Enron would probably not have happened.

Before I go on, however, let me be quick to point out that when I endorse lawyer multidisciplinary practice reform, I am speaking essentially of the initial proposal advanced by the MDP Commission (MDP-I).[45] MDP-I was met by opposition that, first, made many outrageous misrepresentations about it, and then fell back on the tried-and-tested strategy of ABA House of Delegates debate: it stalled for time.[46]

Still, I endorse MDP-I today with fervor equaled only by my rejection of the weak political compromise cobbled together by the Commission in hopes of finding common ground with the MDP opponents.[47] What the Commission never understood was that it should have taken the opponents at their word: that they were committed to ending any discussion of MDP, no matter its merits.[48]

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44. For an expanded discussion of the key critiques of the Commission's report, see generally Burnele V. Powell, *Flight from the Center: Is It Just or Just About Money?*, 84 MINN. L. REV. 1439, 1455-64 (2000) (noting that neither the supposed risk to the core values of the profession, the presumed economic inability of lawyers to operate in the marketplace, nor the likely unwillingness of the courts and regulatory agencies to confront a Big Four accounting firm provided a reasonable basis for opposing MDPs).

45. The ABA Commission on Multidisciplinary Practice Report to the House of Delegates (Aug. 1999), *at* http://www.abanet.org/cpr/mdpfinalreport.html [hereinafter the MDP Report].

46. It should be noted for historical accuracy that in placing the MDP Report on the ABA House of Delegates Agenda, the Commission had always intended to withdraw it. The purpose for scheduling it for debate was to assure that the membership understood that the debate had progressed to a point when a serious proposal was in play. MDP opponents, however, in a brilliant tactical move, refused to allow withdrawal of the resolution without being afforded time to debate it. As a result, debate ensued in which the report's supporters argued that the report should be withdrawn from further debate and the opponents argued that the report should be withdrawn with the problematical condition that it not be brought back before the House until it was vetted with everyone who might oppose it. For a summary of this "non-debate" debate, see Powell, *Flight from the Center*, *supra* note 44, at 1455.

47. The MDP Report, *supra* note 5.

48. No stronger evidence of that intent should be needed than the resolution (and supporting report) that New York State Bar Association (NYSBA) President Steven C. Krane placed before the ABA House of Delegates on October 30, 2001. Although the report characterized the resolution as provid[ing] a clear ethical framework for lawyers or law firms owning and operating nonlegal businesses and for lawyers or law firms wishing to form contractual relationships with nonlegal professionals or nonlegal professional service firms, the resolution, in fact, did nothing more than recycle a proposal previously adopted, July 24, 2001, by the Presiding Justices of the Appellate Division of the Supreme Court, effective on November 1, 2001. Rather than allow for the establishment of MDPs, the NYSBA proposal merely restated the scope of contractual relationships

I turn, then, to my prediction that the Enron Scandal will prove to be a catalyst for lawyer multidisciplinary practice reform. While it is understandable why the expectation is high that there will be reform of the accountants' standards of ethics, the conventional view holds that "It is they, and not we."

The legal profession points, as the MDP Commission did two years ago, to the unavoidable conflict that exists when an accounting firm is engaged to review the books of a company in aid of the need for public accountability and, at the same time, is engaged by that same company as a consultant charged with the task of expanding the company's business in a variety of ways.[49] What is ironic is that it was the very identification of this conflict that opponents of MDP used against the Commission by asserting that the Commission had failed to propose rules in MDP-I that would have outlawed the practice. Of course, the Commission never had claimed or wanted the power to supplant the regulatory function of the Securities and Exchange Commission. It was therefore understandable to all who actually wanted the issue addressed—as opposed to those engaged in political posturing—that the proper disposition was the one the Commission advanced: point to the fact that the SEC had already advised the Commission that, it had jurisdiction, and would resolve the matter.[50]

Notwithstanding the need to correct the auditing/consulting rule, there remains another area that accountants must reform. The heart of the problem is that accountants reject the notion of the unitary firm. In such a view, all conflicts are personal. Thus, when Arthur Andersen is engaged to represent Alpha Auto Co., it can also represent Beta Auto Co. so long as the accountants operate behind firewalls on a need-to-know basis. In the instances of both the conflicting functions situation (auditing/consulting) and the conflicting interest situation (simultaneous representation of competitors), as I will make clear shortly, the rule should prohibit current accountant behavior, at least to the extent that such behavior involves the work of lawyers.

But again, the legal profession's hands are not clean with respect to

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that lawyers in New York (and elsewhere) have always had available, and declared—"Schazaam!"—that such side agreements constitute MDPs. *But see* The MDP Report, *supra* note 45, at C2-C4. *See also* Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217 (2000) (providing summary of various models for lawyer-nonlawyer cooperation in the delivery of professional services).

49. *See supra* note 24 and accompanying text.

50. *See supra* note 24 and accompanying text (general awareness of longstanding problem). *See also* MDP Final Report to House of Delegates, *supra* note 5 (SEC action).

either of these conflicts. The problem, as I have alluded to earlier, is the existence of "gray" lawyers.[51] Many know that Arthur Andersen is already one of the world's largest law firms.[52] What we do not yet know is precisely how many lawyers[53] were working at Enron before the collapse. I submit that if there was even a single lawyer working for Enron outside its corporate counsel's office that is too many. What I suspect, however, is that just as we have seen the radical expansion of the number of lawyers going to work in accounting firms such as Arthur Andersen, there has been a corresponding rise in the number of lawyers operating as gray lawyers in the rest of corporate America.

By "gray lawyers," I am talking about those lawyers who do not practice law, but who practice tax advising, business consulting, economic planning, business advising, and the like. They are lawyers because they continue to hold licenses as lawyers, but, and here the only check is their self-description, they are not practicing law. Or should I say, at least, they do not wish to be regulated as though they are practicing law.

It is, moreover, the reality of these gray lawyers that spurs my second assertion: that each of the rationalizations to which opponents of MDP pointed two years ago has proven demonstrably false in the real-life test of Enron.

Those close to the debate will recall that MDP opponents adopted an almost jingoistic posture in their opposition to any change that would allow lawyers and other professionals to join together as economic equals. They claimed that such professional cooperation would undermine the core values of the legal profession, in that it would allow lawyers to engage in conflicts of interest to the detriment of their clients, prevent lawyers from maintaining the confidences and secrets of their clients, undermine lawyers' capacity to provide competent representation, and destroy the commitment to community represented by the obligation of lawyers to provide *pro bono* legal representation.[54]

When MDP proponents pointed out that the Commission had, in fact,

51. *See supra* note 39 and accompanying text (gray lawyers).

52. *See supra* note 38 and accompanying text.

53. Here my interest is in the total number of licensed attorneys, whether or not they were a part of the corporate counsel office. *But see supra* note 22 (200 Enron lawyers).

54. *See* Powell, *Looking Ahead*, *supra* note 4, at 104 ("[I]f the decision to permit MDPs is to turn on the question of the legal profession's commitment to protecting its core values—protections for confidentiality, the avoidance of conflicts of interest, the exercise of competency, and the protection of the legal culture—those values cannot legitimately include a fifth "C," the commoditization of clients."). Note, too, that the obligation to act *pro bono publico*, Model Rule 6.1 is an obligation of conscience, if an obligation at all.

made no recommendation that would change any rule of the ABA Model Rules of Professional Conduct (except to lift the relatively recently created bar under Model Rule 5.4, prohibiting the sharing of fees with nonlawyers) the opponents simply sighed and repeated their claims. In the repeating, however, there was always a story. It was a story that harkened back to the long-lost golden era of law practice, when lawyers working in large law firms guarded the virtue of the legal profession and the backsides of their clients. Lawyers were not simply agents, they served as the consciences of their clients and the legal profession. Corporate and government counsel were acknowledged to exist, but were still not fully trusted. What had to be avoided at all costs was to allow lawyers to be sullied by sharing fees with nonlawyers. Such sharing, without anything else, was the equivalent of abandoning one's client for lucre.

This simplistic notion of the legal profession worked on two levels. First, opponents to lawyers sharing fees with other professionals were freed from the obligation to make any case other than the argument that things are perfectly fine now, so there is no need for change. Furthermore, at a second level, the opponents of MDP would claim that the already-existing safeguards also protected the economic interests of lawyers. In a world where even the largest law firms were unlikely to be able to compete against the deep-pocket economic interest of even a small international accounting firm, a line—any line—had to be drawn.

The problem with this argument can be summed up in one name: Vinson & Elkins. What the Enron scandal means, at the very least, is that the presumed protection of the golden era ethos provides no safeguard for either clients or the legal profession. Vinson & Elkins, a large, well-respected, powerful law firm, I remind you, was not an MDP operating under the supposed thumb of Arthur Andersen or Enron. Vinson & Elkins was the independent, outside counsel. The tragedy of Enron, though, may well be that when the story broke of who was protecting the interest of the client, we discovered that the interest of the client (*viz.*, the Enron Corporation, itself) was not protected by outside counsel, nor by inside corporate counsel, but by a business operative, Enron Vice President for Corporate Development Sherron Watkins.[55]

55. After nearly a decade at Enron, she was high up enough, or grumpy enough, to send the boss a pull-no-punches, put-it-on-record letter telling him—for a very detailed seven pages—that his company was more or less a Ponzi scheme, and it sounds like she knew she wasn't telling him anything he didn't already know. She was circumspect enough to do some networking across the fence at Arthur Andersen and put the same concerns to Andersen's Enron man, David Duncan, and two other partners.

Consider that fact for a moment. The opponents of MDP would have us believe that no one inside the corporation, no one beholding to an international accounting firm, no one who did not have independent ownership of a firm, could be expected to protect the interest of clients. Today, however, the evidence confirms what the Commission always said it would: there is no immutable connection between ownership and professional independence.[56] It is not the origin of one's income that counts; rather, it is the source of one's values. Vinson & Elkins had all of the safeguards that the Golden Era protection rationale cites as determinative.[57] Sherron Watkins had none. The MDP proposed by the Commission would have had even more such safeguards than either Vinson & Elkins or Sherron Watkins.

The irony of the weak whistle blower brings me to my third point. I have urged that the one thing that will become clear when the dust settles over Enron is that if the legal profession had put the multidisciplinary practice safeguards in place two years ago, when it had the opportunity to do so, Enron would probably not have happened.

The answer comes down to understanding what an MDP is and, conversely, what it is not. Thus far, I have proceeded on the assumption that everyone understands that a multidisciplinary practice is like a

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Frank Pellegrini, *Person of the Week: "Enron Whistleblower" Sherron Watkins*, Time Online Edition, *at* http://www.time.com/time/pow/article/0.8599,194927.00.html (Jan. 18, 2002).

56. Stuart S. Prince, Comment, *The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245, 246 (2000):

> Those who oppose the recommended changes to the Model Rules cite many potential pitfalls of practicing law in the MDP setting. In particular, critics of MDPs believe that conflicts of interest between lawyers and their non-lawyer partners will often arise; that confidentiality duties of lawyers will conflict with those of non-lawyers; that lawyers will not be able to use independent judgment because of financial pressures; and that the attorney-client privilege will be eroded because of potential confidentiality breaches. In addition, some members of the ABA fear that the financial pressures within MDPs will diminish lawyers' commitment to pro bono work. Finally, opponents fear that MDPs will have an adverse impact on the fiscal health of existing law practices, although many lawyers dispute this assertion.

See also Robert K. Christensen, *At the Helm of the Multidisciplinary Practice Issue After the ABA's Recommendation: States Finding Solutions by Taking Stock in European Harmonization to Preserve Their Sovereignty in Regulating the Legal Profession*, 2001 BYU L. REV. 375, 398-400 (2001); Michael W. Loudenslager, *Cover Me: The Effects of Attorney-Accountant Multidisciplinary Practice on the Protections of the Attorney-Client Privilege*, 53 BAYLOR L. REV. 33 (2001). But, more optimistically, see Daly, *supra* note 38, at 226, 263-69 (assessing the rewards and risk of MDPs).

57. Indeed, even the Commission was prepared to give a pass to the traditional law-firm structure. Although it proposed that nonregular MDPs—those headed by a lawyer—were to be free of the certification-audit requirement, it would have imposed such an obligation on MDPs headed by nonlawyers. *See* Powell, *Looking Ahead*, *supra* note 4, at 1451-53 ("[T]he requisite demonstrated commitment to the lawyer standards of professional conduct would be established in a different way.").

traditional law firm, merely an administrative and accounting form. It differs from a traditional law firm, however, in one key respect and might differ, depending on the organizers, in a second respect. The first point of contrast with a traditional law firm is that the lawyers in an MDP may share equity with any other professional who is a member of the MDP, including nonlawyers, if the highest court in the jurisdiction authorizes the lawyer to join with such a professional.[58] In all other respects, however, an MDP would look and operate exactly like a traditional law firm. Moreover, there are very intrusive qualification and oversight provisions that would guarantee that the operation of the MDP is as described here.[59]

On that latter point of qualification and oversight provisions, the detail to keep in mind is that the right of a lawyer to operate as an MDP is a qualified one. To use the shorthand of the Commission's discussions, any attorney might request authority to organize as an MDP, but only those lawyers who first established that they could meet the qualifying requirements of certification and audit would be allowed to do so.[60]

But I previously noted that there is one other respect in which an MDP might differ from a traditional law firm. That situation might arise if the MDP were authorized to be owned[61] by a nonlawyer, which is to say by some other professional whom the highest court in the jurisdiction has approved as eligible to be part of an MDP.[62] Thus, unlike MDPs that look

58. The oversight of MDPs, like the oversight of traditional law firms, rests ultimately with the highest court of the jurisdiction.

59. One commentator has summarized the certifications required by the ABA Commission on Multidisciplinary Practice:

> The MDP will not interfere with a lawyer's independent professional judgment and will establish procedures to protect such independent judgment;
>
> The MDP will establish procedures to segregate client funds as required by the legal profession; All members of the MDP providing/assisting in the delivery of legal services will abide by the lawyer's/legal rules of professional conduct;
>
> The MDP will acknowledge the lawyers' unique role in society and in the administration of justice including rendering pro bono publico services;
>
> The MDP will annually review all above procedures for effectiveness and amend as needed; and
>
> The MDP will file a certification annually with the appropriate court and permit the court to conduct audits of the MDP while bearing the costs of any such audits.

Marc N. Biamonte, *Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C. L. REV. 1161, 1173 (2001).

60. *See* The MDP Report, *Recommendation 14*, *supra* note 45.

61. For our discussion purposes, "owned" means having more than 50% of the equity interest or the right to control a lawyer.

62. The Commission ultimately abandoned the audit and certification provision, deciding not to include them in its final Recommendation to House of Delegates. *See* MDP Final Report to the House of Delegates, *supra* note 5.

like the traditional law firm (except for, of course, the professional partner), the nonregular MDP would have to meet a further substantial requirement.

More specifically, nonregular MDPs could qualify to operate only if they cleared the audit and certification requirement, which would require that a firm prepare a self-study report describing in detail its proposed standards and procedures of operation. Thereafter, the firm would be audited by outside lawyer experts[63] to determine whether the proposed safeguards and procedures were, in fact, in place and workable.

Note, too, that the cost of the certification and audit process would be borne by the MDP petitioner. Further, the self-study certification and audit would be as probing as the highest court in each jurisdiction required in order to satisfy itself that adequate safeguards for the public, the courts, and the legal profession existed. Finally, authorization for a nonregular MDP to operate could be made conditional or otherwise limited in terms of authority, function, duration, or the like.

Perhaps now it becomes clear why I have asserted that the Enron scandal could not have happened if an MDP had been imposed on Enron (or for that matter on Arthur Andersen). If the Supreme Court of the State of Texas, for example, had said to all lawyers working at Enron that you must either join the staff of in-house counsel, organize yourself as an MDP, or relinquish your license to practice law in this jurisdiction, the result would instantaneously have been the virtual deputizing of a host of whistle-blowers in the corporation.[64] There simply would have been no place to end-run!

Rather than the gray world of lawyers practicing "not-practicing," a single regulatory regime would govern.

In concluding, let me suggest what I believe to be the real lesson of Enron—the one that is likely to be missed in the distrust and disillusionment that is the immediate aftermath of Enron's collapse. What should not be missed is that both Enron and Andersen still have available those same safeguards that I previously suggested would have precluded

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In a search of a political deal before the ABA House of Delegates, the Commission abandoned the regulatory distinction between regular MDPs—those controlled by lawyers—and nonregular MDPs—those controlled by nonlawyer. For a discussion on the differences between regular and nonregular MDPs, see Powell, *Flight from the Center*, *supra* note 44, at 1452.

63. These experts would serve, generally, as masters, working under the supervision of the lawyer disciplinary program.

64. It is conceivable, too, that other jurisdictions might also have mandated their lawyers to either organize as MDPs or relinquish their licenses. Regardless of the course taken, the resulting scrutiny would have achieved its purpose.

the ability of gray lawyers to operate at Enron.[65] Although the MDP Commission anticipated that the certification and audit procedure would be imposed as a *quid pro quo* for permission to establish an MDP, the reality is that the power voluntarily to practice law in a transparent manner was, and remains, available to the Enron Corporation and all others wishing to underscore their commitment to serving the interest of clients in a quality manner. The fact is, just as there must be an Alpha Jurisdiction—a first jurisdiction to adopt MDP procedures that allow lawyers and other professionals to work together in partnerships—there must also be an Alpha Corporation—one that embraces the ideal of having its lawyers step out of the gray shadows and into the sunlight where the highest fiduciary obligations are pursued in behalf of clients. As Enron proceeds in bankruptcy to reorganize, no matter the ultimate result, it will find itself much the poorer if it fails to reorganize the way in which its lawyers interact with each other, other professionals and, most importantly, clients.

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65. *See supra* note 59 and accompanying text.