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The Enron "What-If?" The Other Multidisciplinary Practice Story
By Seth Rosner

Here's what might have happened had the ABA House of Delegates approved the recommendations of the ABA Commission on Multidisciplinary Practice and adopted amendments to the Model Rules of Professional Conduct:

Within a week after the American Bar Association House of Delegates acted, Arthur Andersen acquired and merged with Dewey Cheatham and Howe, one of the largest law firms in the United States. Although DC & H was headquartered in Chicago, it had a very substantial presence in Houston, Texas. The combination of DC & H's 1,200 lawyers and Andersen's existing U.S. roster of over 5,000 lawyers easily created the largest law practice group in the United States.

Naturally enough, Kenneth Lay, Chairman and CEO of Enron Corporation, was delighted since Enron had for years retained Andersen (pre-Andersen Consulting) for some heavyweight consulting work and as Enron's auditors, and DC & H had been an important outside counsel to Enron.

The notion of "one-stop shopping" for all of Enron's professional services was a very appealing one: all of Andersen's professionals were familiar with every aspect of the Company and knew the other Andersen professionals working on the account, which eliminated the learning curve so costly to the Company when a new matter arose. The arrangement just seemed to work.

As Enron grew—and its growth was truly explosive—the professional services Andersen was called upon to provide also grew, at times it seemed exponentially. And so did Andersen's fees, to the delight of the firm that had to triple the size of its Houston, Texas, office. Enron's top management didn't care how much it paid in professional fees: there was a river of gold flowing by, and if Andersen professionals were helping pull out bucketfuls for the managers, what did it matter if Andersen dipped a few buckets into the river?

When junior Andersen lawyers examining draft partnership agreements and related contracts questioned the propriety of Enron senior managers creating partnerships in which they took personal interests and pointed out the clear and blatant conflicts of interest, senior Andersen lawyers answered that the transactions had been reviewed and approved by Andersen auditors. They didn't say that Enron was so important an Andersen client that the firm couldn't afford to lose the Company.

When junior Andersen auditors raised the very same questions and further pointed out that taking these partnership liabilities off the Corporation's balance sheet would be flagrantly misleading to creditors, shareholders, and the Securities and Exchange Commission, their seniors said that Andersen lawyers had reviewed the transactions and found them to be in strict compliance with SEC regulatory requirements and that, in any event, the soaring price of Enron's shares was a guarantee that these liabilities could not come back to bite Enron. They also neglected to mention the critical importance of Enron to the financial future of the firm.

Well, we all know what happened. The events were not only predictable, but they also were in fact predicted by the ardent opponents of the first Report of the ABA Commission on Multidisciplinary Practice in August 1999. Only no one ever imagined that any professional defalcation and corporate collapse could be on Enron's scale.

Of course, only a part of our story is true. . .

The multidisciplinary practice so ardently sought by the Big Five accounting firms and by many others was also opposed by the SEC, which stated formally that it would not countenance an audit performed for a client for whom the audit firm also rendered legal services. (Too bad that at the same time the Commission didn't include consulting services as well.) The organized bar made clear that the Rules of Professional Conduct in effect in every jurisdiction continued to prohibit integrated multidisciplinary practice.

As a result of Enron's collapse, of the indictment of Arthur Andersen, the personal and corporate wrongdoing that appears to be implicated, and the huge liability exposure that looms, most accounting firms that have not already spun off their consulting practices are doing so now.

But it is far from time for lawyers to be smug about the MDP matter. The economic pressures and, yes, the greed of some lawyers, as well as accountants and consultants, can induce lawyers and other professionals to wink and approve of borderline or even clearly improper client conduct when the costs of not doing so are perceived to be too high: we can't afford to lose the client, we can't afford to upset the client, ergo, we can't even raise the question.

The profession owes a great deal to those lawyers and state and local bar associations that vigorously opposed MDP when it came to the floor of the House of Delegates and to those House members who said: "Not in our profession."

We all talk about bottom lines. Here are the bottom lines: 1) losing a $1 million or $10 million a year client is far better than looking at a $300 million liability judgment or settlement; 2) it's a lot harder to tell a client that it has been violating the law and risking enormous damage when you have failed to tell that to the client the first time it occurs (Neville Chamberlain discovered a similar truth at Munich in 1938 to the regret of the entire world); and 3) at least as important, telling the client that it is doing wrong and insisting on corrective action is simply the right thing to do.

Biographical Statement
Rosner was liaison from the ABA Board of Governors to the MDP commission from 1997-2000. The Chair of the SLD Ethics and Professionalism Committee, he has spent 40 years on ethics committees of the ABA and the New York State Bar. Currently, a major part of current practice is counseling lawyers and law firms on ethics and professionalism and appearing as an expert witness.

Display Quotation
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