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Multidisciplinary Practice After *In re Enron*

Should the Debate on MDP Change at All?

By Nancy B. Rapoport

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On Dec. 2, 2001, Enron Corp. filed a voluntary chapter 11 petition in the United States Bankruptcy Court for the Southern District of New York. That petition commenced the largest chapter 11 case in U.S. history,¹ and the story of Enron's meteoric rise in the business world (and its precipitous fall from grace in late 2001) has continued to capture the public's attention.²

Naturally, everyone interprets the case in light of his own experiences: accountants focus on the accounting laws; lawyers focus on the duties of lawyers in representing their clients; and lawmakers focus on possible legislative solutions to prevent future occurrences.³ The Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp., filed with the Bankruptcy Court on Feb. 2, 2002, points fingers at the company, at some of the employees, at the company's accountants, and at the company's lawyers in an effort to determine what

caused its business troubles.⁴ We don't have all of the facts — or any of the answers — yet, and we may not have any answers for a very long time. But the Enron case, even as it stands now, gives us an opportunity to consider whether the current system of inside counsel, outside counsel, separate accountants, auditors, and other professionals, and the like, serves the client better or worse than would a more integrated, multidisciplinary practice (MDP) setting.

In this essay, I won't belabor the points made by both sides of the MDP debate.⁵ The issue of whether state bars should change their rules to permit MDP inevitably raises the passions (and blood pressure levels) of both lawyers and academics.⁶ I simply want to point out that the current structure of several-stops-shopping has some of the same built-in drawbacks as does MDP's one-stop-shopping.

I've weighed in on this issue before, and I won't rehash my claim that legal education fosters a type of thinking in

silos — an assumption that one substantive area never overlaps with another.⁷ But let's think about MDP structure for a bit. The idea of MDP is that a client can seek the advice of professionals trained in several different disciplines, all of whom are practicing together in a single business.

Why might a client want one-stop-shopping for professional services? Clients have come up with several different reasons. For example, clients tend to prefer educating their professionals (lawyers, accountants, etc.)⁸ about particular problems only once, rather than several times (once per category of professional). Moreover, clients hope that, by combining the different disciplines, their lawyers will notice things that their accountants might not; that their accountants might suggest things that their lawyers might not have considered; and that, ultimately, they'll get the best advice possible from a synergy of professional opinions. Finally, I'm sure that clients hope that the fees from

a one-stop shop would reflect some economies of scale that come from shared overhead, eliminated redundancy, and a shorter learning curve.

Why might lawyers resist MDP? The literature abounds with arguments ranging from the fear of losing their professional independence to the fear of becoming irrelevant to clients.⁹ My own take on the independence argument is that our own ethics rules give us protection from any overbearing, evil-hearted nonlawyers.¹⁰

What worries lawyers (or what should worry them) isn't so much the lack of an applicable ethics rule as it is the powerful force of economics. It's hard to say "no" to a client; it's especially hard to say "no" to a client who comprises a significant portion of your business. And when the lawyers and accountants know that there are ways to craft advice in order to make that advice technically legal, then it's even harder to sort out the circumstances under which giving

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that technically legal advice is not the same thing as giving the client complete advice. We are charged with representing our clients to the utmost of our abilities. And our ethics rules permit us to give complete advice — advice that takes into account longer-term issues and issues of morality and non-economic interests.¹¹

My take on the argument that MDP will make us irrelevant is that the argument is eerily reminiscent of the argument of a slide-rule manufacturer who worries about the development of the personal calculator. If the manufacturer doesn't offer what the market wants, slide rules will become irrelevant; if the manufacturer adapts to reflect market demand, then slide rules (or their progeny) won't become irrelevant. Thus, if lawyers aren't

offering clients something distinctive about their type of advice, then they, too, risk becoming extinct as a profession. The fear of irrelevancy is, at its heart, the fear of not being able to demonstrate the quintessential value of the discipline of law¹² and the giving of legal advice.

As we lawyers talk to each other about MDP, and about the sacrosanct nature of lawyer independence, I'm sure that accountants are talking with each other about the sacrosanct nature of their professional advice as well.¹³ I hear good lawyers talk constantly about how frustrated they feel about the deteriorating nature of practice and about how important character and moral issues still are (and should be) to the practicing bar. My guess is that good accountants are having those same discussions with their colleagues.

To me, the real issue is how professionals deliver the best and most complete advice to their clients. Lawyers and accountants will both face the same prob-

lems, including being the bearers of bad news ("no, you can't do that") from time to time. All professionals should be asking themselves whether they want their clients to choose short-term goals over long-term ones; whether they want their clients to choose financial considerations over other types of considerations; or whether they want their clients to listen to a broader view of the issues raised by their clients' specific questions. The question of whether we should permit MDP is, in the end, the wrong question. The real issue isn't as much the structure of the firm(s) that are giving advice but the nature of the advice itself.

My point is that good, fair, and complete advice doesn't have to be a competition between accountants and lawyers.

If lawyers are doing their jobs, they are giving the best possible, well-rounded advice to their clients. And if accountants are doing their jobs, they're giving the same type of advice, accountant-style, to the clients.¹⁴ We have been focusing on MDP as a problem in itself, instead of recognizing the issue of MDP as a symptom of a problem in the current practice of our profession. Once we cut to the chase, we can begin to address the fundamental problem: what kind of advice should we be giving our clients, period?

Notes

1. See Ralph Bivins, *Creditors Get Report from Lay: Back To Basics Enron Will Emerge, He Says*, HOUS. CHRON., Dec. 13, 2001, at Business, 1. ("The \$50 billion bankruptcy is the largest Chapter 11 case ever.")
2. Some websites that have gathered stories on the Enron case include Time: Behind the Enron Scandal, at www.time.com/time/2002/enron; Platts Enron Report, at www.platts.com/features/enron; Findlaw Investigations — Enron, at <http://news.findlaw.com/legalnews/lit/enron>; and NPR: "The Fall of Enron," at www.npr.org/news/specials/enron. See also C-SPAN website at www.c-span.org/enron/index.asp, Hous. Chron. at www.chron.com/content/chronicle/special/01/enron/, and Financial Times at <http://specials.ft.com/enron>, last visited March 20, 2002.
3. See, e.g., Bill Deener, *Will Enron Case Spur Accounting Changes? Reforms Are Needed To Safeguard Investors, Some Analysts Say*, Dallas Morning News, Jan. 16, 2002, at 1D; Patti Waldmeir, *Don't Blame the Lawyers For Enron*, Fin. Times, Feb. 21, 2002; Elaine S. Povich, *After Enron, Lawmakers Weigh Reform*, Newsday, March 19, 2002, at A44.
4. The Report describes the set of interactions leading to Enron's business problems as follows:
The tragic consequences of the related-party transactions and accounting errors were the result of failures at many levels and by many people: a flawed idea, self-enrichment by employees, inadequately-designed controls, poor implementation, inattentive oversight, simple (and not-so-simple) accounting mistakes, and over-reaching in a culture that appears to have encouraged pushing the limits. Our review indicates that many of those consequences could and should have been avoided.
Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp. 16, 2002 WL 198018 (ENRON) (Feb. 2, 2002) [hereinafter Powers Report].
In particular, the Powers Report points to the interaction among the company, the lawyers,

and the accountants: "There was an absence of forceful and effective oversight by Senior Enron Management and in-house counsel, and objective and critical professional advice by outside counsel at Vinson & Elkins, or auditors at Andersen." *Id.* at 11. It is important to remember that the Powers Report represents the conclusions of the report writers and that the report does not represent any final findings of fact or conclusions of law by a court. I am using this language for illustrative purposes only.

4. See Adam A. Shulenburg, *Would You like Fries With That? The Future of Multidisciplinary Practices*, 87 Iowa L. Rev. 327 (2001) (arguing for MDPs); Edith Y. Wu, *Why Say No to Multidisciplinary Practice?*, 32 Loy. U. Chi. L.J. 545 (2001) (arguing against MDPs); Dave Foster, *Get Off My Turf! Attorneys Fight Accountants Over Whether to Allow Multidisciplinary Practice*, 31 Tex. Tech. L. Rev. 1353 (2000) (discussing the attitude of the ABA and the Texas State Bar concerning MDPs).
5. I would, however, be a Bad Dean if I didn't point out a recent Houston Law Review Comment on the subject, though: see Michael W. Price, *Comment, A New Millennium's Resolution: The ABA Continues Its Regrettable Ban on Multidisciplinary Practice*, 37 Houston L. Rev. 1495 (2001).
6. Nancy Rapoport, *Enron an Example: Grads Lost*

in Trees, Hous. Chron., Feb. 24, 2002, at 4H.

7. For simplicity's sake, let's just use accountants and lawyers as my two examples of professionals for the rest of this essay.
8. A significant number of attorneys are presently employed by accounting firms and as corporate inside counsel. See, e.g., Julie Mason, *Houston Law Firm Probed for Role in Fall of Enron*, Hous. Chron., March 14, 2002, at A13 ("Before it went bankrupt, Enron employed about 245 lawyers worldwide, advising the company on the legal aspects of business. With about 145 lawyers in Houston, if it were a private firm it would have been the city's sixth-largest."); John E. Sexton, "Out of the Box" *Thinking About the Training of Lawyers in the Next Millennium*, 33 U. Tol. L. Rev. 189, 191 (2001) ("The total number of lawyers at the Big Five accounting firms now dwarfs the number of attorneys at the five largest law firms in the world. For example, Arthur Andersen has employed more than 3,600 attorneys, 2,800 practicing law outside the United States, and another 750 law school graduates in the United States working in tax and corporate finance."). In January 1999, Price Waterhouse Coopers announced that it intended to be one of the largest law firms in the world by 2002. Craig L. Meadows, *The Future of the Practice of Law*, 43 *Advoc.* 4, 4 (Dec. 2000).

In a conversation that I had with one of our adjunct faculty members, Herb Schwartz, he pointed out to me that MDP benefits the large firm in at least one way that I hadn't considered: it reduces the firm's chance of any alleged conspiracy among professionals, since a single firm with multiple types of professionals can't conspire with itself. If Firm A has accountants, lawyers, and economists, all of whom are giving advice, that is a different situation from Firm A (law), Firm B (accountants), and Firm C (economists) giving advice to the same client.

9. Opponents of MDP worry that, if accountants "run" a firm, then they could ask lawyers to do something unethical under the professional responsibility rules. See Victoria V. Kremski, *Serving Clients in a Multidisciplinary Practice*; 80 Mich. B. J. 32, 34 (Oct. 2001); Wu, *supra* note 6, at 560. Of course, under such a scenario, the lawyer would have to decline such a command or risk disciplinary action. ABA Model Code of Prof'l Responsibility Rule 5.2; Texas Disciplinary Rules of Prof'l Conduct Rule 5.02.
10. See, e.g., Texas Disciplinary Rules of Prof'l Conduct Rule 2.01 cmt. 2:

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and

ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

11. Not that anyone can define, with particularity, just what "the practice of law" is. People have tried. See Foster, *supra* note 6, at 1356; Price, *supra* note 7, at 1504-06; Susan Schwab, Note, *Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice of Law*, 21 Cardozo L. Rev. 1425, 1442 n.91 (2000). States have tried, too. See, e.g., Tex. Govt. Code Ann. § 81.101-104 (2002). Section 81.101 defines the "practice of law" as:
 - the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

Defining just what it is that lawyers – and only lawyers – do is a subject for another day. I think that it's fair for us to say that part of what we do as lawyers is to separate the legally relevant facts from the legally irrelevant ones; but that's certainly not all that we do as lawyers, and I'd hate for us to limit ourselves by such a definition.

12. See, e.g., American Institute of Certified Public Accountants Code of Professional Conduct, Sec. 55, Art. IV: Objectivity and Independence, available at www.aicpa.org/about/code/article4.htm ("A member should maintain objectivity and be free of conflicts of interest in discharging professional responsibilities. A member in public practice should be independent in fact and appearance when providing auditing and other attestation services.").
13. Of course, legal education would be better off if lawyers were trained to understand what the accountants are saying. See n.8, *supra*.

Nancy Rapoport is the dean of the University of Houston School of Law. The views expressed in this essay are hers alone and do not reflect those of the University of Houston or its faculty and students. The author would like to thank, as always, her best advisor and editor, Jeff Van Niel. Thanks also to Alison Chien, Leslie Griffin, Debbie Hirsch, Rob Reckers, and Harriet Richman for their helpful comments.

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