MDPs DONE GONE: THE SILVER LINING IN THE VERY BLACK ENRON CLOUD

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We almost fell for it. I cannot believe how close we came. "One-Stop Shopping,"[1] "Client Demand,"[2] "The New Paradigm,"[3] "Overdue entry into the 21st Century."[4] The thrashing was almost unbearable. How could lawyers stand in the way of progress? Particularly when such opposition was based, we were told, on a parochial guild mentality,[5] protectionist poppycock simply designed to keep others from snaring market share.[6] The scars from the accusations that we were

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1. Ann Cekola, *Utah State Bar Considers Allowing Lawyers to Team with Other Professionals*, SALT LAKE TRIB., Dec. 24, 2000, at E1.

2. *See, e.g.*, Sam DiPiazza, Jr. Written Remarks at the Open Hearing of the ABA Commission on Multidisciplinary Practice (Mar. 11, 1999), *at* http://www.abanet.org/cpr/dipiazza.html (last visited Sept. 3, 2002) (describing market demand for seamless integrated sources) [hereinafter DiPiazza Written Remarks].

3. *See, e.g.*, James W. Jones, *Future Structure and Regulation of Law Practice: An Iconoclast's Perspective*, 44 ARIZ. L. Rev. 537 (2002).

4. Garret Glass & Kathleen Jackson, *The Unauthorized Practice of Law: The Internet, Alternative Dispute Resolution and Multidisciplinary Practices*, 14 GEO. J. LEGAL ETHICS 1195, 1201 (2001).

5. Lawyers were admonished to "[r]eject 'guild law' restrictions that do not advance the public interest." Kathryn A. Oberly, Written Remarks at the Open Hearing of the Commission on Multidisciplinary Practice at the ABA Midyear Meeting (Feb. 4, 1999), *at* http://www.abanet.org/cpr/oberly1.html (last visited Sept. 3, 2002) [hereinafter Oberly Written Remarks].

6. "[The b]ar has to ask itself what it does for the legal profession as it moves forward if it does not take time to understand the issues and the facts and pay attention to market factors and instead bases its judgment on fear and anxieties and some parochial self-interest." Richard Spivak, Oral Testimony at the Open Hearing of the ABA Commission on Multidisciplinary Practice (Mar. 12, 1999), *at* http://www.abanet.org/cpr/spivak2.html (last visited Sept. 6, 2002) [hereinafter Spivak Testimony].

hiding behind feigned assertions of protecting core values when all we really wanted to protect were our fees are still raw.[7]

Then we found vindication from an unexpected source. I had always assumed the end of multidisciplinary practice (MDP) at the accounting firms would occur because of a major legal malpractice action brought against a few of those 5000 lawyers at the Big Five who disingenuously assert that they are not engaged in the practice of law.[8]

But, no, our good fortune arose elsewhere. Enron proved the death knell of MDPs.[9] Not that this was a total surprise. At least some of us who argued against MDPs pointed out how the Big Five's offering of a department store of financial and other services seriously compromised auditor independence.[10] We argued that accountants' rules about loyalty and confidentiality were inconsistent with the *lawyer's core values* as reflected in our rules of professional responsibility. Similarly, we could not understand how auditors could maintain their professional independence (which bears little resemblance to lawyer's independence)[11] when they were offering all of these other services to their clients, and when the consulting fees outstripped the auditing fees by some extraordinary ratio.[12] And this was to say nothing of what offering legal services would do to auditor independence, given the advocacy nature of legal work compared with the allegedly objective nature of accounting services.[13]

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7. Dan Fischel, former Dean of the University of Chicago Law School, accused lawyers of having "goals . . . no different from any other trade union or interest group pursuing economic protectionism," but cloaking our arguments in rhetoric about professional independence. Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951, 974 (2000).

8. At the time this paper was originally delivered, they were still called the Big Five. Now, with Arthur Andersen a shadow of its former self, they are referred to as the Final Four.

9. It is ironic that Richard Spivak, Arthur Anderson's Tax Division head, once asserted that, "Our clients have benefited, and have not been harmed, as a result of combining diverse competencies." Mr. Spivak also stated, "Business must cater to market demands—we ignore them at our peril." Richard Spivak, Written Remarks at the Open Hearing of the ABA Commission on Multidisciplinary Practice (Mar. 12, 1999), *at* http://www.abanet.org/cpr/spivak3.html (last visited Sept. 6, 2002).

10. *See* Lawrence J. Fox, *Dan's World: A Free Enterprise Dream; An Ethics Nightmare*, 55 BUS. LAW. 1533, 1552–53 (2000).

11. This department store approach probably did not compromise one other "core value" of the auditing profession: "Understanding the market is a CPA core value." Richard Miller, Oral Remarks at the Open Hearing of the ABA Commission on Multidisciplinary Practice (Mar. 12, 1999), *at* http://www.abanet.org/cpr/rmiller.html (last visited Sept. 6, 2002). Right up there with independence, no doubt.

12. *See* Fox, *supra* note 10, at 1534–35. A recent survey by the Philadelphia Inquirer demonstrated that non-audit fees exceeded audit fees, on average, by over 50% nationally, with many companies' ratios vastly exceeding that lofty number. For example, DuPont's audit fees were $6.6 million; its consulting fees to PriceWaterhouseCoopers were $26.9 million, almost 400% higher. Harold Brubaker, *Non-Audit Services Outpace Audits*, PHILA. INQUIRER, May 26, 2002, at E1 col. 6.

13. In trying to resist the MDP tsunami, we were defending the proposition that law firms should be 100% owned by lawyers, a rule the CPAs once had, but had since

Nor do I gloat from the fallout of the Enron debacle. While I often said that the biggest problem of MDPs was their compromise of professional values, I take no delight in Arthur Andersen's pain and the destruction of a once-great firm's reputation. Heaven knows the world will not be a better place with the Final Four.[14] I just wish that the Big Five had collectively listened at an earlier date, abandoned their arrogant business model of one-stop shopping, preserved the integrity of the auditing function, and never brought us to this juncture.

Now the Big Five is running from consulting as fast as it collectively can. External audits of internal audits by the same firm are as dead as Tutankhamun. Consulting services for audit clients have been abandoned as fast as the Taliban abandoned Kandahar. One-stop shopping, synergy and the new paradigm have become the buggy whips of 2002. As a result, the auditors have learned the lesson—so painfully learned the lesson—that professional values cannot be maintained by firewalls and reliance on individual integrity, that maintaining professional values requires institutional safeguards and enforceable rules of general application vigorously enforced by effective regulators.

What lessons will the lawyers draw from this? Already I am hearing the argument that, for the Big Five, MDPs may be a relic of a fast-forgotten, never to be resuscitated era, but that lawyers can still pursue MDPs, if not in partnership with the Big Five, then with other financial service providers.

How shortsighted can we be? How little do we value our own profession's core values—as distinguished from the auditor's core value of auditor professional independence—that we see the accounting profession destroyed, but do not recognize that the exact same fate awaits the legal profession if we compromise our professional principles by pursuing MDPs?

Let us recall what those values are and how they can get trampled when lawyers become just another set of service providers in a financial department store that offers investment advice, life insurance sales, and embalming.

The first is client loyalty. This principle is implemented through two fundamental rules. First, assume I am representing A in A v. B.[15] Without A's permission I may not take on the representation of B in any matter, regardless how unrelated to A v. B.[16] Second, if I may not represent B, neither may anyone else in my practice setting take on a matter for B.[17]

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compromised. In that regard, it is so interesting now to see how glibly Mr. Spivak of Arthur Andersen argued back in 1999 that the old 100% CPA ownership requirements for CPA firms had been relaxed and could be relaxed further "because of a recognition that the requirement is not essential to accomplishing the objective." Spivak Testimony, *supra* note 6. One must wonder whether he has any doubts on that score in 2002.

14. *See supra* note 8 and accompanying text.

15. It does not matter whether the representation is for a transaction, a litigation matter, or some other legal representation, notwithstanding Mr. Jones' assertion that somehow conflicts in the transactional setting are less worthy of recognition. *See* Jones, *supra* note 3.

16. Model Rule 1.7 provides in relevant part:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer

Those late-lamented MDPs, the Big Five, argued that one of the "minor" reforms they would bring to our core values was the elimination of our rules governing imputation.[18] For the Big Five, all conflicts were personal to the individual, and measured by a subjective standard (how do *I* feel about taking on the matter?). We were told by the Big Five that their clients did not have to worry because one person working at the Big Five would never compromise client loyalty simply because others at the same firm were working for the "other side."[19] The Big Five, however, did admit that the clients would not even be informed of the other representation.[20]

Even if, as it now turns out, our MDPs are not going to be formed with the Big Five, none of our other potential partners—American Express, Prudential Financial, Joe's Funeral Home—have rules governing client loyalty that are anything like ours. So, when lawyers form MDPs with these folks, our rules governing loyalty will be one of the first casualties. Even if the lawyers at American Express Legal Beagles were to clear conflicts among its law clients, it would be impossible because their clients are so numerous that they would have to

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> reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation. . . .

MODEL RULES OF PROF'L CONDUCT R. 1.7 (1999) [hereinafter MODEL RULES]. Only Texas, the cowboy state, has a different rule allowing lawyers to be adverse to their own clients, so long as the matters are unrelated. Texas Disciplinary Rule of Professional Conduct 1.06 provides in relevant part "a lawyer shall not represent a person if the representation of that person involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm." TEX. GOV'T CODE ANN. Tit. 2, Subtit. G, App. A, R. 1.06(b)(1) (Vernon 1998). That unfortunate rule has been rejected in the federal courts. *See In re* Dresser Indus., Inc., 972 F.2d 540 (5th Cir. 1992).

17. Model Rule 1.10 provides that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." MODEL RULES, *supra* note 16, at R. 1.10(a).

18. The American Institute of Certified Public Accountant's (AICPA) Code does not impute conflicts to the entire firm. DiPiazza Written Remarks, *supra* note 2. The Big Five would have also eliminated our rules on non-waivable conflicts. *Id.* (arguing that the same firm could represent two competitors for same FCC license with the client's knowledge and permission); *see also* Spivak Testimony, *supra* note 6.

19. "We do not believe that there is a significant risk that the duty of loyalty owed by the individual professional will be compromised." DiPiazza Written Remarks, *supra* note 2.

20. Kathryn Oberly, Oral Testimony at the Open Hearing of the Commission on Multidisciplinary Practice at the ABA Midyear Meeting (Feb. 4, 1999), *at* http://www.abanet.org/cpr/oberly2.html (last visited Sept. 4, 2002) ("What would replace the imputation rule? . . . [D]isclosure at the commencement of the engagement that the professional doesn't know if there are any conflicts within the firm and that if any are identified a firewall will be maintained."). Now that is the kind of assurance guaranteed to inspire client confidence.

turn down too much business.[21] This is the very same reason that the Big Five gave for why they could not clear conflicts.[22]

Would the legal profession be the same without clearing conflicts? Hardly. One need only look at the recent case involving Davis Polk & Wardwell's lawsuit against Federal Insurance, the wholly-owned subsidiary of its long-time client, the Chubb Corporation.[23] Davis Polk filed a lawsuit against Federal Insurance on the same day, but before Davis Polk filed a shelf registration on behalf of Chubb, that described this potential exposure of Chubb's already sued, but not yet notified, subsidiary.[24] Fortunately, the motion to disqualify Davis Polk in that case was promptly granted,[25] but Chubb would have been powerless to rectify this breach of loyalty if the profession abandoned imputation. With two different teams working these matters, and no imputation rule, Davis Polk would have been able to argue that the firm's simultaneous handling of these two matters violated no rules of professional conduct.

How could we claim to be loyal to our clients if that were the regime? Our assertion would ring as hollow as the accountants' claim that they could maintain independence even while the consulting fees they were charging audit clients more than doubled the fees for the audit.[26] If we compromise our values in this way, the first time a law firm that is part of an MDP offers unsatisfactory legal services to a client whose adversary is a customer of the MDP, that fact will be paragraph one in the client's malpractice complaint against the law firm.

The second core value for a lawyer is client confidentiality,[27] and our related assurance to clients that our conversations with them regarding legal advice should be privileged.[28] Today we start from the proposition that all information learned in the course of a representation is confidential, and with the promise that, except under the narrowest of exceptions,[29] lawyers will not disclose confidential

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21. "During my time as a partner in a large, multinational law firm, I observed that the imputation rule significantly impeded our ability to attract and retain business." Oberly Written Remarks, *supra* note 5.

22. *Id.*

23. Davis Polk, Federal's counsel, organized the Chubb Corporation in 1967. J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co., 189 F. Supp. 2d 20 (S.D.N.Y. 2002).

24. *Id.*

25. *Id.*

26. *See* Brubaker, *supra* note 12.

27. Model Rule 1.6(a) provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b). MODEL RULES, *supra* note 16, at R. 1.6(a).

28. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) (collecting cases).

29. Model Rule 1.6(b) provides:

> A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the

client information and even when we do, we will take steps to protect what is disclosed.[30] We also assure our clients that the evidentiary privilege permits them to be candid with us because, as lawyers, we can never be forced to testify about those conversations.

The former MDP stalwarts, the accountants, recognized that this core value of our profession might be compromised a little bit by a merger between lawyers and accountants, but *only* recognized the compromise as to legal representation of public companies, because accountants have a duty either to force client disclosure or to withhold their coveted clean opinion.[31] Then there was this "one instance" in which "the auditor would be required . . . to disclose information that may be confidential."[32] Unfortunately, that one instance is the Private Securities Litigation Reform Act of 1995,[33] a statute applicable to all SEC registrants.

What would happen in a non-accountant MDP? Some of the compromises of confidentiality uniquely raised by the accountants would disappear, but not all. Accountants are not the only professionals with affirmative obligations to disclose. Social workers, psychologists, teachers, physicians, nurses and others have been mandated to report certain matters.[34] More important, there is no investment banker-customer privilege. Thus, to the extent the attorney-client privilege is under attack—and it always is[35]—the fact of lawyers providing services in a multi-service firm will make it too easy to argue that any particular consultation between

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> lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES, *supra* note 16, at R. 1.6(b). In addition, many states have added a third exception relating to disclosure of client fraud, typically but not always when the lawyer's services have been employed. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, ETHICS RULES ON CLIENT CONFIDENCES, 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 135 (2002).

30. The comments to Model Rule 1.6 provide:

> In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

MODEL RULES, *supra* note 16, at R. 1.6 cmt. 18.

31. Roger L. Page, Written Remarks at the Open Hearing of the ABA Commission on Multidisciplinary Practice (Mar. 11, 1999), *at* http://www.abanet.org/cpr/page1.html (last visited Sept. 6, 2002).

32. *Id.*

33. 15 USC § 78u-4 (2002).

34. *See, e.g.*, KY. REV. STAT. ANN. § 620.030 (Michie 2001); MD. CODE ANN., FAM. LAW § 5-704 (2001); N.Y. SOC. SERV. LAW §§ 413–420 (McKinney 2002); TEX. FAM. CODE ANN. § 261.101 (Vernon 2002); Danny R. Veilleux, Annotation, *Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R. 4TH 782 (1989).

35. *See, e.g.*, Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., No. 93 Civ. 5125, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y Jan. 25, 1996).

lawyer and client was related to something other than legal advice. The sanctity of the lawyer-client encounter is thus vulnerable to invasion by the client's adversaries.

Before dismissing this assertion out of hand as no more than hysterical hyperbole, consider the case of Marc Rich, whose lawyers so assiduously sought from then-President William Clinton his now controversial pardon. The prying eyes of a grand jury sought to inquire into Rich's lawyers' activities. The lawyers resisted on the ground of privilege, a not surprising or, in my view, unmeritorious assertion. The court rejected this claim.[36] These lawyers were not lawyering, they were lobbying, the court ruled, and there is no lobbyist-customer privilege; the court's order forced the lawyers to turn over their notes and to testify about their representation.[37] Now, documents relating to the most sensitive discussions and the development of what the lawyers thought was Mr. Rich's legal strategy have been cascading across the pages of America's newspapers.[38]

Would the legal profession be the same without the assurance that our lips are sealed? On this question few disagree. Every practicing lawyer knows how critical the promise of confidentiality is to gaining our clients' trust and fostering their willingness to share their innermost secrets. Moreover, it takes no imagination to envision the lawsuit brought by a disgruntled client against her MDP-headquartered lawyer when the privilege is compromised by the fact that the lawyer's practice setting includes all of these other "professionals."

The third core value of the profession is professional independence. This concept has many facets, and an analysis of several will demonstrate how it could be lost in a non-Big Five MDP. One facet is independence from influences that would compromise our ardor for our clients. This, of course, relates to our rules governing loyalty and we have already seen how that loyalty is compromised when there is no imputation. How concerned will clients be if they are informed their law firm is part of a practice setting that represents the client's adversary? That anxiety will only be heightened when the client is told, as was the accountants' practice, that he or she will not be informed when such a potential indirect adverse conflict does, in fact, exist.[39]

Another facet is independence from the client. This principle empowers lawyers in the face of potential client conduct that is unlawful or imprudent, to tell the client "no" or to go further and resign the representation under certain circumstances and it looks very much like accountant independence—the ability to be free of client influence to do the right thing.[40] The Big Five have taught us all that we need to know about how fragile this independence is. Consider how much trouble they got into by awarding the audit engagement partner a percentage of the

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36. *In re* Grand Jury Subpoenas, 179 F. Supp. 2d 270 (S.D.N.Y. 2001).

37. *Id.*

38. *See, e.g.*, Alison Leigh Cowan, *Panel Says Top Justice Dept. Aide Held Information on Rich's Pardon*, N.Y. TIMES, Mar. 13, 2002, at A23.

39. *See* DiPazza Written Remarks, *supra* note 2.

40. "Half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." MARY ANN GLENDON, A NATION UNDER LAWYERS 75 (1994). The quotation is usually attributed to Elihu Root.

consulting fees the partner was able to generate from his exalted insider position as auditor of the company. Consider also how the Big Five otherwise used the audit engagement as entrée into doubling or tripling audit fees with these other assignments.[41] Now that everyone is questioning whether these other non-audit engagements left us with auditors who were truly independent, the accountants have agreed to stop consulting for their audit clients.[42] Will a lawyer's professional independence be any less compromised when the client, to whom the lawyer is supposed to provide candid advice, is generating out-sized fees for other parts of the financial services firm of which the legal service fees are but a small fraction? It is hardly difficult to imagine the pressure on our future Merrill Lynch lawyer who should resign—under Rule 1.16[43]—to stay the course so that an important customer remains with Merrill Lynch.

Finally, lawyer independence includes lawyer self-regulation. Lawyer self-regulation is partially a myth.[44] However, what is not a myth is the interrelationship between the judiciary and the bar. This interrelationship results in a system of rule-setting and discipline that is very much controlled by lawyers and former lawyers, now judges, who are uniquely sensitive to the special role lawyers play as advocates for their clients and officers of the court.

Is this system of self-regulation likely to be sacrificed by the development of non-Big Five MDPs? The answer is found in the Big Five's experience. As soon as the Big Five MDPs were called to account, the very first casualty was the self-regulation of accountants and the system of peer review that the auditing firms had touted for so long. Not only did Congress[45] and the SEC[46] call for a new regulatory scheme, one independent of the AICPA and any other self-regulating body, but the accountants themselves quickly offered up the end of self-regulation as their first sacrifice to the public opinion gods.[47] The candid presentation of Mr. Doggett at

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41. Perhaps Lynn Turner, the Chief Accountant of the SEC, in discussing this same problem in the context of professional independence of auditors, put it best: "When [audit partners] are a marketing channel, they can't piss off the client; otherwise they can't sell the other services." Stephen Barr, *Breaking Up the Big 5*, CFO MAGAZINE FOR SENIOR FIN. EXECUTIVES, May 1, 2000, at 54, *available at* 2000 WL 15330443.

42. *See, e.g.* Jonathan D. Glater, *Enron's Many Strands: Consulting: Keen Rivalry by Consultants Expected After Auditors' Shift*, N.Y. TIMES, Feb. 22, 2002, at C1.

43. Model Rule 1.16(a)(1) provides: "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law. . . ." MODEL RULES, *supra* note 16, at R. 1.16 (1999).

44. *See, e.g.*, David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992); Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1 (1989).

45. *See, e.g.*, Laura Goldberg, *Enron's Fall Stirs Plans of Reform*, HOUSTON CHRON., Mar. 24, 2002, at A1.

46. *See, e.g.*, Kathleen Day, *Pitt Seeks Higher Standards*, WASH. POST, May 22, 2001, at E01. Ironically, SEC Chairman Harvey Pitt had been a lawyer for many of the Big Five.

47. *See* Goldberg, *supra* note 43.

this conference was a poignant reminder of how sad this loss of self-regulation is viewed by those inside the accounting profession.

Does anyone doubt that this loss of self-regulation would have been avoided if the Big Five had stuck to its collective knitting and avoided the grand world of one-stop shopping? Of course not. Nor should anyone doubt that lawyer regulation by the judiciary would be one of the first casualties of lawyer MDPs. So long as we join ourselves with firms selling non-law products and services, the argument by our elected legislators that these enterprises should be regulated just like any other for-profit enterprise will not only carry considerable merit and weight, but will undoubtedly carry the day.

To argue the lawyers can succeed in an MDP environment when the accountants so dramatically failed does two things. First, it suggests that the accountants' experience carries no lessons for us, a leap of faith that only those who believe in the tooth fairy should be prepared to take. Second, it says that we do not value our own fragile professional principles the way that the world now values accountants' professional independence. But I, for one, think lawyer loyalty, confidentiality, and independence are at least as important as the accountants' objectivity and that we lawyers, as superb advocates, have an obligation to the public and ourselves to seek to preserve them intact.

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It is troubling for the future of our profession that some continue to press blindly for MDPs in the face of the Enron debacle. Equally troubling is an American Bar Association Multijurisdictional Practice Commission proposal to allow lawyers to practice in states to which they have not been admitted, so long as such lawyers limit their activities to those which could be undertaken by a nonlawyer.[48] In my humble opinion, this is not only bad MJP law, but it carries the seeds of our destruction.

There are many activities lawyers undertake that nonlawyers may undertake as well. Accountants give tax advice and even appear in tax court. Licensed patent agents may prosecute patents. Title insurance company clerks and real estate brokers handle real estate conveyances. Investment bankers provide mergers and acquisitions advice. Trust companies provide fiduciary services. The list could go on and on.

The point is that, even though others can provide these services, when lawyers provide them they are the practice of law. Accordingly, clients who seek out lawyers for these services expect them to perform with all the professional accoutrements of the practice of law. Lawyers must deliver these services competently[49] and with diligence,[50] on a conflict-free basis[51] and with a promise to

48. *See* Am. Bar Ass'n, *Interim Report of the Commission on Multijurisdictional Practice, Nov. 2001, at* http://www.abanet.org/cpr/mjp-home.html (last visited June 26, 2002).

49. MODEL RULES, *supra* note 16, at R. 1.1.

50. *Id.* at R. 1.3.

51. *Id.* at R. 1.7–1.10.

preserve confidentiality,[52] charge reasonable fees,[53] keep the client informed,[54] and withdraw from the matter only under certain conditions.[55] Moreover, when lawyers deliver these services and the lawyers violate these rules, the lawyers are subject to discipline. When a lawyer lapses in providing merger advice, for example, we do not decide against disciplining her on the ground that, were she not a lawyer, we would have no jurisdiction over her. Yet that is the flawed public policy principle this exception supports. This policy implies that some legal services for some clients are not entitled to the same protections, as is, for example, oral argument before the United States Supreme Court. It says that what a lawyer does in a state in which she is not admitted does not matter and, thus, does not trigger professional protections, so long as the services performed *could* be provided by a nonlawyer.

The ABA's Multijurisdictional Practice Commission's proposed exception depends on the invidious notion, often advanced in the pre-Enron era by the now not-so-Big Five, that lawyers really are just another set of service providers, that there is nothing special—in the sense of special responsibility—about being lawyers, that our rules of professional conduct are not all that important, and that the sooner we lawyers got off our high falutin' horses the better off we will be. The ABA repeatedly has rejected that idea, most recently in the July 2000 debate on MDPs.[56] The ABA leadership recognized that the profession of law was under attack, threatened with marginalization by those cynical masters of one-stop shopping. It recognized that the best response to that movement was not to compromise our professional values, as the proposed exception certainly does, but to reaffirm those values by requiring lawyers to meet our professional standards regardless of the services the lawyer is providing.[57]

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Before I close, I must respond to several of James Jones' contentions advanced at this symposium. While Mr. Jones, as usual, weaves an artful web, one must not let his dazzling rhetorical conceits obscure the fact that his entire construct is built on false premises. Our rules are not premised on a sole practitioner litigation model.[58] Since 1983, the Model Rules have included an entire section on the counseling function.[59] The Model Code similarly addressed the transactional lawyer.[60] Further, our rules not only apply to lawyers in multiple lawyer practice settings, but our rules governing imputation also require all lawyers in a practice setting to be subject to the same conflicts of interest

52. *Id.* at R. 1.6.
53. *Id.* at R. 1.5.
54. *Id.* at R. 1.4.
55. *Id.* at R. 1.16.
56. *See* Am. Bar Ass'n, *The House Adopted Revised Recommendation 10F, at* http://www.abanet.org/cpr/mdprecom10f.html (last visited June 26, 2002).
57. *See* Am. Bar Ass'n, *Transcript of House Debate, July 11, 2000, at* http://www.abanet.org/cpr/mdp_hod_transc.html (last visited June 26, 2002).
58. *See* Jones, *supra* note 3.
59. MODEL RULES, *supra* note 16, at R. 2.1–2.3 (addressing the lawyer as counselor).
60. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-3, 7-8 (1999).

obligations against which Mr. Jones rails.[61] He, like the Big Five, would adopt an individual lawyer model for loyalty, precisely what the Model Rules rejects. Moreover, the Model Rules explicitly address supervisory lawyer responsibility, an unnecessary provision if the Rules truly were premised on the sole practitioner model.[62]

Mr. Jones also argues that our rules are based on an adversarial model,[63] and that as a result our rules governing loyalty are too strict because they are needed only when lawyers are really adverse, a situation that he claims does not occur outside the arena of litigation.[64] In his argument, Mr. Jones repeats the common mistake of confusing adverse interest with decibel level. When transactional lawyers are representing buyers in negotiations with sellers, even though the parties have come together to try to make a deal, the interests of the parties are as directly adverse as they would be if they were engaged in a bitter lawsuit. Every dollar not paid by buyer is one less dollar in seller's pocket. More important, every representation and warranty not made by seller is one less protection available to buyer.

Finally, Mr. Jones asserts that in the new paradigm, lawyers will stop taking into account solely the best interests of the client and that they will start to recognize that they must consider important interests of society as they represent their clients.[65] However, the ethical lawyer cannot apply that standard to his or her conduct. Whatever outward appearance the lawyer representing a client may assume, the duty of the lawyer must be clear: to represent the client, and only the client, during the representation. If that goal requires the lawyer to exhibit concern for the plight of the other side, if that goal requires the lawyer to concede some point or appear reasonable or act gracious, if that goal requires discussions about fair process and satisfactory results, then that may be perfectly acceptable behavior, but only if its sole purpose is to advance the interests of the client.

The day lawyers embark on any activity—trials, depositions, negotiations, mediation—where the goal is something other than the best interests of the client, that is the day we lose our right to call ourselves lawyers. We then might become judges or mediators or facilitators or convenors, but we will not be officers of the court dedicated to our clients before all others.

CONCLUSION

I just returned from a two-and-one-half week trip to China, courtesy of our State Department. I visited seven cities and spoke before seven law schools and eight bar associations. My topic was the independence of lawyers in America. Everywhere I went I was met by law professors, law students, bar leaders, and practicing lawyers who were eager to hear what I had to say. I am not sure the Chinese bar is far enough along in its development to fully comprehend my presentation. Yet, from their attention level and their questions, their interest was

61. *See* MODEL RULES, *supra* note 16, at R. 1.10.
62. *Id.* at R. 5.1.
63. *See* Jones, *supra* note 3.
64. *See id.*
65. *See id.*

clear. Indeed, my sense was that there was a great longing among these Chinese lawyers to emulate us, to bring their profession along to where we are. I was so proud to tell them where we were. How independent we were. How important our role as officers of the court and guardians of our clients' trust was to the success of the rule of law in America.

When you look at the state of affairs in China, you realize how fragile professional independence is. And Enron has taught us that these professional values can disappear overnight. So let us not run aground in response to the clarion call of the new paradigm; let us give one-stop shopping the respectful burial it deserves; let us not gloat over what has happened to the Big Five but learn the lessons that experience provides; and let us continue to be the model for the whole world of an independent profession that maintains and protects its core values.