THE FALLOUT FROM ENRON: MEDIA FRENZY AND MISGUIDED NOTIONS OF PUBLIC RELATIONS ARE NO REASON TO ABANDON OUR COMMITMENT TO OUR CLIENTS

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The media attention and ensuing debate over Enron's collapse have generated several troubling responses. The author submits that there has been a hasty and unsupported judgment by the general public and prominent people in law and academia that lawyers violated ethical obligations and broke the law with their representation of Enron. Many of the proposed reforms in the wake of the Enron collapse are troubling because they would vitiate the confidentiality clients expect from lawyers. Both the replacement of state rules and regulations regarding lawyer's ethics and the proliferation of multiple sources of rules of professional conduct to scale back client confidentiality are derided as bad ideas. Furthermore, suggestions by the Chairman of the Securities and Exchange Commission that lawyers should reform the manner in which they advocate for corporate clients and reorder the way a lawyer deals with such clients are unwarranted and the product of imprecise thinking.

The author takes particular issue with the suggestions of Professors Koniak and Cramton, presented orally at this symposium, that ethical and legal violations of lawyers abounded in the representation of Enron. The author first argues that Professors Koniak and Cramton have falsely overstated that lawyers have been "found" legally responsible for numerous financial scandals over the past half-century. He then argues that the professors' entire premise is based on the unsupported conclusion that where there is financial fraud, the company's lawyers played some part. The author counters that the performance of individual law firms representing Enron has not revealed to this point any unethical or illegal behavior. Finally, the Enron in-

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vestigation has uncovered no evidence of an epidemic of misconduct among lawyers, as others have suggested.

What is happening here? No sooner does the media hysteria begin over the Enron affair than calls for a change in the lawyers' rules of professional conduct ring throughout the land. It starts with no less an authority than the editorial page of the New York Times which announced on January 28, 2002,

> [a]s scrutiny turns from accountants to lawyers in this scandal, the legal profession should be looking for ways to assure Americans that when fraudulent activities are under way that threaten their livelihoods, their investments and their pensions, lawyers will be on their side, not on the side of the criminals.[1]

This was reinforced by that master of fair play and balanced judgment, William Safire, who opined: "[Vinson & Elkins] replaced their shingle with a doormat—but have you heard a disapproving peep from any bar association?"[2] But these knee-jerk reactions of "let's line up the usual suspects" have been reflected in comments by such pillars of our profession as: Chief Justice Norman Veasey, the Chair of the American Bar Association (ABA) Ethics 2000 Commission;[3] Geoffrey Hazard, the ethics guru of ethics gurus;[4] a group of law professors, including Professor Hazard, who wrote the Chairman of the Securities and Exchange Commission (SEC), Harvey Pitt;[5] Pitt himself;[6] and Professors Susan Koniak and Roger Cramton.[7]

What is the trigger for the response? Were lawyers retained by Enron? For sure. Could the lawyers have been involved in the wrongdoing here? I suppose that is possible. We certainly do not know enough now; surely not enough to make accusations that could withstand Rule 11. And, so far, thank goodness, our jurisprudence, even in the case of big losses—even losses that generate congressional self-righteousness—does not provide that everyone at the scene of the accident is liable (jointly and severally) for all of the damages that occurred.

But our jurisprudence does provide that those who commit fraud are liable for their conduct and if someday, somewhere, somehow after

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1. *Enron and the Lawyers*, N.Y. TIMES, Jan. 28, 2002, at A14.
2. William Safire, "*You Wuz Robbed!*," N.Y. TIMES, Feb. 11, 2002, at A27.
3. *See ABA Delegates Vote to Alter Attorney Ethics Rules*, DEL. L. WKLY., Feb. 13, 2002, at D3.
4. Geoffrey Hazard, Jr., *Points of View*, LEGAL TIMES, Mar. 4, 2002, at 34.
5. Letter from Richard W. Painter et al., Guy Raymond and Mildred Van Voorhis Jones Professor of Law, University of Illinois College of Law, to Harvey Pitt, Chairman, Securities and Exchange Commission 1 (Mar. 7, 2002) (on file with the University of Illinois Law Review).
6. Chairman Harvey Pitt, Remarks at the Winter Bench and Bar Conference of the Federal Bar Council (Feb. 19, 2002), *available at* http://www.sec.gov/news/speech.shtml (last visited Nov. 1, 2002) [hereinafter Pitt Speech].
7. Susan P. Koniak & Roger C. Cramton, *Where Were the Lawyers? Behind the Curtain Wearing Their Magic Caps* (Aug. 19, 2002) (unpublished manuscript, on file with the University of Illinois Law Review).

the headlines have disappeared and the last pompous Congressman has delivered his last excoriating speech to deflect the fallout from his having taken outsized contributions from Arthur Andersen and Enron, a court of law will determine whether, as to the lawyers (and the others), any actionable conduct occurred. But surely the possibility that lawyers broke existing law in connection with their representation of Enron or any Enron-related clients would not be reason to call for a change in the rules of professional conduct.

I. ENRON AND CONFIDENTIALITY

So what is it then that motivates these calls for change? Is it that, if our ABA Model Rules of Professional Conduct (Rules) permitted lawyer disclosure of client fraud, this whole debacle could have been prevented? Cut me a break. First, unlike the ABA, the Texas Disciplinary Rules of Professional Conduct would permit disclosure.[8] Moreover, there has not been a single allegation that the lawyers knew of a client fraud, let alone knew of it early enough that one dollar less would have been lost by any lawyer disclosing anything. Worse than that, what we do know suggests that the one lawyer—Jordan Mintz—who apparently identified problems in the summer of 2001 did not even have the wherewithal to use the remedies the rules clearly required—to go up the ladder to the Chief Executive Officer (CEO), and if that failed, to the Board of Enron—to prevent conduct by Enron employees that was putting the company at risk. Surely the lesson to be drawn from a situation that suggests a lawyer might have violated the Rule 1.13 obligations to take remedial action—a rule which provides the absolutely perfect way for a lawyer to deal with corporate misconduct consistent with the lawyer's duty of confidentiality—is not to water down our rules on confidentiality.

Is the motivation then, that the lawyers could have escaped liability for their conduct in the Enron situation if only they had not been shackled by their oath of secrecy? No lawyer involved in Enron has suggested as much. Nor have we seen any surrogates argue that the lawyers would not be in whatever difficulties they find themselves if they had not been required to maintain silence. Nor, even if that were the assertion, would that argument have any merit. If the lawyers aided and abetted the client fraud, their disclosure would not save them from liability; and if the lawyers were innocently involved, then they have a complete defense to any claims they may face.

If it is not these reasons that motivate the call for the change in the rules, then what is it? For the New York Times and William Safire, it is a

8. Texas Rule 1.05 provides in relevant part, "[a] lawyer may reveal confidential information . . . [w]hen the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05(c)(7) (1990).

totally disingenuous misunderstanding of the special role lawyers and lawyer's rules governing confidentiality play in our system. They would equate the obligations of clients with the obligations of the client's lawyers. And if clients do not do the "right thing"—something that is always going to be judged with the benefit of twenty-twenty hindsight—then their lawyers should be as responsible as the clients. As a result, in the New York Times's view, we really would not need regulators anymore, because each client's lawyer is its own built-in regulator who not only has the obligation to make sure that the client conforms to the law, but also is liable, along with the client, when the client lapses.

The Times's approach also confuses the obligations of lawyers with the obligations of public accountants. True, they are both professionals, True, every public company needs lots of both. But the similarity between the two professions ends there. Auditors have a duty to be independent of the client and to report to the public with respect to whether the company's financials have been audited in accordance with generally accepted auditing standards and are presented in accordance with generally accepted accounting principles.[9] There is no duty of confidentiality here. Indeed, quite the opposite: full and fair disclosure is the watchword of the pointy pencil crowd.

This is hardly true of lawyers. Lawyers are hired as the client decides; the scope of the engagement is determined by the client, not some objective set of accounting standards established by the American Institute of Certified Public Accountants (AICPA); the lawyer's duty is to report to the client, to give advice with respect to the law, to act in the best interests of the client as that goal is determined by the duly elected directors and officers of the organization; the lawyer is required to let the client make the business judgment as to what is to be done, without fear that the lawyer will substitute the lawyer's judgment for that of the client or undermine the client's decision by blowing the whistle on the client whenever the client chooses not to follow the lawyer's advice.

The lawyer also promises confidentiality not because it is a nice frill of the representation, but because lawyers know that the only way they can develop the trust that is so essential to securing the client's willingness to be totally candid with the lawyer, is if the client knows that the client's innermost secrets are protected by the lawyer's pledge of silence. Too many in the academy are quick to assert that this promise of confidentiality is really not necessary; but those practicing lawyers who have looked real clients in the eye know all too well that even with this promise, clients too often tell us what the clients think we want to know; without confidentiality clients will never be as candid as they need to be so that we lawyers can do what we do best—to remonstrate with the client to conform the client's conduct to the law.

9. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statements on Auditing Standards No. 1, § 110 & No.1, § 220 (American Inst. of Certified Pub. Accountants 1972).

As for Chief Justice Veasey and Professor Hazard, I am not sure what motivates their call for a relaxation of Rule 1.6's confidentiality obligation. Surely it is not to increase the potential exposure of lawyers. Yet that would certainly occur if the rules in effect required lawyers to disclose confidences in connection with client fraud. Then every time a fraud occurred, the victims would look around to determine if any lawyers were on the scene. If they were, and they did not blow the whistle on their clients (a likely result given the fact that before the fraud was disclosed, it would have been anything but obvious to the lawyers), the claim would be made that the lawyers should have disclosed to prevent the fraud. And these lawyers, under the regime urged by the professor and the chief, would have no defense that they were barred by principles of confidentiality to maintain silence.

Unfortunately, both Chief Justice Veasey and Professor Hazard are motivated by a different consideration altogether. They worry that the profession is suffering a black eye when the lawyers are at the scene of a great fraud and the lawyers took no steps to prevent it. I, too, worry about the public's view of our profession. I wish lawyers were more popular and could be viewed as always doing the right thing. But in my opinion, that lack of admiration is the price we must pay for being lawyers. We are not in the business to win Miss Congeniality awards. And if we start competing for public approbation, the first casualty will be the ability of the public to get effective representation. Instead of counseling the client in the sanctity of a lawyer-client relationship, the lawyers will become the New York Times's dream of private regulators, not only *not* maintaining confidentiality, but skeptically auditing client conduct and erring on the side of blowing the whistle on the client in even the most marginal cases to protect ourselves from liability for any alleged involvement in client misconduct. Maybe then lawyers' Gallup Poll numbers will soar, but not with the one group that counts: the clients who need our unfettered and confidential advice, advice that is not delivered with the sledgehammer that the client's lawyer will be the one who turns the client in.

Nothing about Enron even suggests that our professional rules, in drawing a balance between client confidentiality and lawyer responsibility to the public, are not crafted precisely right. Let us not now use the hysterical headlines of Enron to tilt that delicate balance against our clients' interests. We should wear the scorn of the New York Times proudly. But we must dedicate ourselves to responding to the Times and anyone else who would compromise lawyers' role in society, by reminding all why our rules on confidentiality, in the end, create a far better society than any they envision by turning lawyers into cops.

II. ENRON AND RULE 1.13

Not satisfied to use Enron to drag out discredited and rejected ideas regarding confidentiality, the academic legal establishment, in the form of a letter to Harvey Pitt, has come up with a proposal to require lawyers to report to a public company's Board of Directors every time they identify a violation of the securities laws.[10] But this idea is no more justified by any of the facts of Enron, nor does the proposal make sense on the merits.

First, the entire premise of the professors' letter is as flawed as the editorials appearing in the New York Times and elsewhere that have convicted the participants in the Enron affair before trial. The professors say they are "concerned" by the role of the "professionals" (obviously including lawyers in that term) in the Enron matter.[11] To what is that a reference? Did any lawyer do anything wrong? There has not been a single allegation to date that suggests that any outside lawyer in Enron acted other than properly. Nor do these professors make any charges. But nonetheless they remain "concerned." I submit that a lot more than a vague expression of concern is required to justify a major change in lawyer obligations. Far too many have painted with far too broad a brush in bemoaning the role of the lawyers in Enron without any support in the present record why this should be the case.

Premised on this "concern," the professors then leap to the conclusion that not enough attention has been given to the role of lawyers in the congressional hearings.[12] As a result, they then leap still further to the assertion that lawyers for corporations should be required by the SEC to inform the Board of Directions of violations of the securities laws.[13]

Am I missing something? Has there been any suggestion that any outside counsel of Enron knew of securities violations and failed to report them to anyone or only reported them to the company officials, rather than the Board? If so, I have missed it. And so have the professors. My search has revealed no facts that outside counsel failed to act under Rule 1.13 in the Enron case.

That rule, which is quite carefully crafted, provides for ample notification for the organizational client. If a lawyer knows that someone at the company is taking action that will harm the company, the lawyer is required to act. The rule does not prescribe exactly what the lawyer must do, but the lawyer must act in an effective way, and if that requires the lawyer to go to the Board of Directors, the rule permits that. But it does not require it because that level of micromanagement of appropri-

10. Painter et al., *supra* note 5.
11. *Id.*
12. *Id.*
13. *Id.*

ate lawyer action has no place in our rules. Sometimes talking to an employee will solve the problem; sometimes talking to the CEO will be enough; and sometimes there is a need to talk to the Board, but hardly in every case. And the idea that if the lawyer chooses wrong, that mistake in judgment could result in the lawyer's being disciplined is repugnant to the purposes for which our rules of professional conduct are designed.

At the time of the savings and loan crisis, the ABA, under the leadership of John J. Curtin, Jr. and Robert H. Mundheim—men of impeccable credentials and experience—reviewed Rule 1.13 and identified the mischief that would be caused if, as Harris Weinstein of the Office of Thrift Supervision (OTS) was then suggesting, lawyers were required to go to the Board. What that Commission concluded then remains true today.[14] There is not the slightest suggestion from the role of the lawyers in the Enron case to conclude that Enron requires revisiting this earlier consideration.

Finally, even if Rule 1.13 is to be revised, the SEC is not the place where that review should take place. The last thing the legal profession needs is for every agency before which lawyers appear to have its own ethics rules. Both the supplanting of state supreme court rules of professional conduct and the proliferation of multiple sources of rules of professional conduct are bad ideas.

In sum, there is nothing that we have learned about Enron to date to suggest any rules need revisiting. The proposed rule is badly flawed in that it interferes needlessly with the lawyer-client relationship. Finally, if any rule change is to be considered, it should occur first at the ABA, then at the various states, but not at the SEC.

III. ENRON AND LAWYERING

SEC Chairman Pitt was the recipient of the professors' proposal regarding going up the corporate ladder, but he was the source of his own mischief when he repeatedly delivered remarks in February 2002, in which he outlined how the very practice of law should change as a result of Enron.[15] Chairman Pitt's recent remarks regarding the proper role of corporate counsel should be a concern to lawyers and clients alike.

After decrying the Enron disaster, Pitt proclaims that lawyers "are professionally obligated, to advocate legitimate views and interests of their clients, with emphasis on the word 'legitimate.'"[16] What could this word mean, a waiting world asks? Pitt's ready answer: "Enron teaches it is inappropriate for corporate lawyers to assist clients in finding ways to

14. *See* ABA WORKING GROUP ON LAWYERS' REPRESENTATION OF REGULATED CLIENTS, LABORERS IN DIFFERENT VINEYARDS? THE BANKING REGULATORS AND THE LEGAL PROFESSION? 197–204 (Discussion Draft, Jan. 1993).

15. *See* Pitt Speech, *supra* note 6.

16. *Id.*

evade legal requirements . . . ."[17] So far that sounds okay. Clients should not evade legal requirements and lawyers should not assist them in that endeavor. But Pitt does not stop there. He writes, "or disserve the public interest."[18] What does that mean? It sounds scary to me. If I am representing a client and the client wants to save money on taxes, am I allowed to help the client if the reduction of my client's tax bill will disserve the public interest? And how do I determine what the public interest is? Call President Bush? My rabbi? Harvey Pitt?

But it gets much worse. Because Pitt goes on to say that I cannot counsel my client to evade legal requirements or disserve the public interest "even if those results can be achieved in a manner arguably within the literal letter of the law."[19] Whoa! No longer do I consult the statutes and casebooks to determine what the letter of the law is. If my client's purpose in having me pursue this activity would be to evade legal requirements (something that is apparently different from the *letter* of the law) or disserve the public interest (however that is determined) then such "arguable" positions should not even be considered, let alone implemented.

Can Pitt be asserting a change in the role of the lawyer that the corporate world can accept? I do not think so. Our clients are entitled to know what the letter of the law is. They are entitled to know where the limits have been drawn. They are entitled to know when the limits are fuzzy. And they are entitled to know and have asserted on their behalf any arguments that can be made in good faith to interpret those limits in their favor. We owe our clients every bit of that. And if we then think that perhaps for other reasons (bad publicity, uncertainty, regulatory risks, lack of public spiritedness), our clients should not go there, we are free to share that advice with them as well.[20] Indeed, every day lawyers advise their clients quite properly on both the letter of the law and the implications of following it. But Pitt's idea that somehow we should be giving our clients less than all the information to which they are entitled has no place in our rules of ethics or practice, even if that practice is before the SEC. If Pitt does not like what happens when clients conform their conduct to the letter of the law, the answer is to change the letter, not to change the professional responsibility foundations of lawyering.

But Pitt's lapse is only half directed at lawyer advocacy. The other half would reorder the way a lawyer deals with an organizational client. Pitt recognizes correctly that corporate lawyers represent the corpora-

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17. *Id.*

18. *Id.*

19. *Id.*

20. Rule 2.1 of the Model Rules of Professional Conduct provides, "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2000).

tion, i.e., the entity itself. He goes astray, however, when he also asserts that lawyers represent the shareholders. By definition, lawyers, in representing a company, do not thereby also represent the shareholders.[21] If they did, the conflicts of interest would abound and the ability of the lawyer to receive clear instructions would be impaired.

Then the Chairman states that when lawyers receive direction from corporate management, the lawyers "must be satisfied that objectives management asks them to pursue truly are intended to, and do, further the interests of the company and its shareholders."[22] Whoa again! What a tall and unusual order. Up until now it has always been my understanding that it was the directors and officers who had the obligation to decide what was in the best interests of the company. That is what they were elected to do. That is what the law requires them to do. And they are accountable to the shareholders if they fail in that endeavor.

And the lawyers? The lawyers are required to implement the business judgment of the directors and officers. If it turns out that the lawyer learns that a constituent of the organization like an employee or officer is taking action that is "likely to result in substantial injury to the organization," then, but only then, is the lawyer supposed to take remedial action, even to the point of going up the corporate ladder to get the matter resolved.[23] But short of that, the client's representative instructs and the lawyer obeys.

Pitt would change all that. Under the Pitt regime, if a lawyer is given a direction, before acting the lawyer would be required to make two determinations: (a) is this action "intended" to further the interests of the company and its shareholders?; and (b) does it further the interests of the company and its shareholders?[24] And presumably the answers to both would have to be in the affirmative for the lawyer to proceed.

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21. As the Annotated Model Rules observes, "Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization. Even though the only way to communicate with a juristic entity is through the people who are its constituent parts, the lawyer owes his or her obligations to the organization itself, not any particular individuals." *See, e.g.*, *id*. R. 1.3 annotations; Carlson v. Frederickson & Bryon, P.A., 475 N.W.2d 882, 890 (Minn. Ct. App. 1991) (noting that representation of business does not automatically amount to representation of business's constituents).

22. *See* Pitt Speech, *supra* note 6.

23. Rule 1.13(b) provides:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others . . . .

MODEL RULES R. 1.13(b).

24. *See* Pitt Speech, *supra* note 6.

What power to put in the hands of lawyers! Each corporation would now have officers *and* a Board of Directors *and* a super ego, super Board known as the company's lawyer. While Pitt places this extraordinary responsibility and potential liability in the hands of the company's lawyer, nowhere does he tell us how the lawyer learns what he needs to know to make these determinations. Nor does he tell us why the lawyer's judgment of what is in the best interest of the company is better than that of the directors or why shareholder democracy gets trumped by lawyer hegemony. Pitt's idea is not only very bad public policy, but it places the lawyer in the crosshairs of disgruntled shareholders when, if the shareholders are disgruntled, it is management which they should either complain about, replace, or sue.

IV. PROFESSORS KONIAK AND CRAMTON'S TAKE ON ENRON: A MODEST REPLY

The New York Times's brazen conviction of lawyers as aiders and abettors of criminals, noted above, looks positively responsible and guarded when compared to the remarks of my friends Cramton and Koniak. In my view, these two have set a new standard for irresponsible scholarship in their diatribe, *Where Were the Lawyers?*,[25] a draft article which was presented orally in *haec verba*, by Koniak at this symposium. Though the authors of this draft have since withdrawn the piece from this symposium issue after this response was prepared, the substance of their charges should not go unrebutted. Indeed, the flaws in their approach to this important topic are so numerous that it is hard to imagine where to begin but, since the criticisms are literally dotted throughout, I approach it from the beginning.

The article is premised on the authors' conclusion that, "[i]n every decade in the last half-century, lawyers and accountants have been *found* legally responsible, along with corporate managers, for a succession of massive corporate frauds."[26] There have been massive frauds for sure. But not one of the situations cited yielded a "finding" as that term is generally understood—a conclusion from a fact finder after a trial.

Rather the authors string together a series of examples that fall far short of "findings." In the collapse of National Student Marketing Corporation, there were charges brought against White & Case.[27] With regard to the Office of Personnel Management (OPM) failure, we are offered a report of a trustee in bankruptcy and an article by Stuart Taylor.[28] In Charles Keating's Lincoln Savings & Loan debacle, we are offered

25. Koniak & Cramton, *supra* note 7.
26. *Id.* at 1 (emphasis added).
27. *Id.* at 1–2 & n.3.
28. *Id.* at 2 n.5.

two settlements, one that was extracted after a widely criticized freezing of the Kaye, Scholer assets, and three law school symposia.[29]

I point this out not to be cute. The three scandals certainly elicited some serious charges in the context of an ever-growing possibility of outsized damage awards. But none of those matters were finally litigated and therefore one would have expected even responsible advocates, let alone "objective" members of the academy, to be careful in characterizing their "evidence" for what is to follow. But in fact such exaggeration and carelessness with the "facts" remain the hallmark of the rest of the paper.

What, for example, is one to make of the statement, "[i]n the most notorious failure, that of Charles Keating's Lincoln Savings & Loan, more than 70 law *firms were hired to do his bidding*."[30] First, as a general proposition, doing a client's bidding is precisely what lawyers are supposed to do. But let us assume that "doing a client's bidding" is something bad—a crime, a violation of the rules, malpractice, whatever. Are the authors telling us that all seventy law firms engaged in this nefarious conduct? Lumping all law firms together into a category worthy of opprobrium and shame is a practice Cramton and Koniak raise to a high art form.

The authors then turn their attention to Enron. We learn that to "pull the wool over the eyes of the investing public . . . a large organization needs the help of lawyers," (as well as other "suitably flexible professionals").[31] There you have it; find a fraud and Koniak and Cramton guarantee you that you will find law-breaking lawyers. And what do *all* of these lawyers do in *every* fraud? Every fraudster in Enron "had a lawyer whispering in his ear;"[32] moreover, "no lawyer stepped in to stop this calamity."[33] The professors' lessons from all this: lawyers should stop their conspiratorial approach in providing "quiet" advice and, more important, it is the lawyers' obligation to prevent all harm.

Indeed the authors go further. Just in case some of you reading this article think the problems that arose in Enron might be cured by some reform of the accounting profession, Koniak and Cramton will quickly disabuse you of such fuzzy thinking by pointing out that "accountants have lawyers too"[34] and unless the regulators "rein in lawyers,"[35] the lawyers will help the accountants "slip loose of whatever reins are put in place"[36] just as they "helped Enron slip loose the reins of corporate and

29. *Id.* at 3 nn.8–9.
30. *Id.* at 2–3 (emphasis added).
31. *Id.* at 5 n.13.
32. *Id.* at 5.
33. *Id.*
34. *Id.*
35. *Id.* at 6.
36. *Id.*

securities law."[37] There you go. The problem is the lawyers, swashbuckling around corporate America providing all clients with magic immunity that permits them to escape whatever regulations one might devise. Those Houdini-like lawyers, in the view of our academic colleagues, can enable their clients to escape any kind of regulatory trap and will do so.

What a worldview! Why do these nice people bother teaching law school at all? In the amoral, anarchic world that they posit, educating future bar admittees must be tantamount to aiding and abetting the creation of a lawless United States. One can almost hear the gunfire in the streets, while one peers into the hallowed halls of Cornell and Boston University Law School to observe the new gunslingers in training. Can such hyperbole possibly pass the litmus test as scholarship?

To prove their point, the authors next turn to Davis Polk's representation of Arthur Andersen. Carefully lining up the dates, they observe that Davis Polk was retained by Andersen on October 9, 2002 and began the firm's work on October 16, seven days "before the major shredding party at Andersen began."[38]

After questioning why Davis Polk did not immediately advise Andersen to clarify the in-house counsel's now famous October 12, 2002 memo regarding Andersen's document retention policy—a charge that one would think requires a smidgen of proof that Davis Polk knew about it—Koniak and Cramton then pass to their main point: "[Davis Polk], on its own initiative, should have taken steps to see to it that Andersen's notes, drafts, work papers, and e-mails on the Enron engagement were preserved and protected from destruction by misguided or criminal actors within Andersen."[39]

What a remarkable observation. Davis Polk, as its first order of business, should have prevented the document destruction, "[e]ven if no one had asked"[40] them about this topic. I am just one lawyer and maybe I have just led a charmed existence, but I have never started a representation of a client—even the representation on highly publicized critical matters—by worrying about the preservation of documents. It would never occur to me that any client would be destroying documents. More important, I would have a lot more to worry about than that particular subject at the outset of a representation.

But Koniak and Cramton do not stop there. They conjure up three possibilities for what Davis Polk did while Andersen was shredding documents. Either they were "encouraging this destruction";[41] they were recklessly ignoring "the very real possibility" documents might be de-

37. *Id.*
38. *Id.* at 15.
39. *Id.* at 15 n.51.
40. *Id.*
41. *Id.* at 13.

stroyed;[42] or they were acting "carelessly" whether files were preserved or not.[43] While I have difficulty analytically distinguishing the second and the third, and admire so much the power of hindsight, I also note with interest the real possibility that Davis Polk was unaware of (and equally appalled by) the document destruction that went on at Andersen.

Koniak and Cramton then admit, graciously enough, that they have no idea what advice Davis Polk gave Andersen and whether it was ignored. What they do know—drum roll, please—is "that during Davis Polk's engagement massive shredding took place at Andersen."[44] If someone restrained Davis Polk, "Davis Polk accepted those restraints or at least was ineffective at getting them changed."[45] The authors continue with hypotheticals:

> If Davis Polk's representation was limited to the point that it could do nothing but sit by in circumstances when it knew or should have known that people within Andersen might be committing crimes (e.g., obstruction of justice) that might be imputed to the accounting firm, we do know that Davis Polk nevertheless stayed on the job.[46]

Finally, "[w]e do know the shredding occurred on Davis Polk's *watch*."[47]

This last statement will certainly send chills through the legal community and prompt apoplexy among those who insure lawyers. With no citations and no shame, Koniak and Cramton invent a new notion of lawyer responsibility not only to clients but perhaps to third parties as well. No longer are lawyers responsible for voluntarily undertaken engagements in which the scope is defined and the assignments clear. From now on, lawyers will be hired to be on watch, guardians of the client's conduct, assuring compliance with law and ready to sound the clarion call when the client should lapse. To me, it conjures up images of lawyers as night security guards, armed with flashlights, inspecting every nook and cranny of their client's business, placing little keys in watch clocks to prove they have made, each night, their appointed rounds.

You might think this Koniak and Cramton idea is a bit excessive. Some might even argue that the Andersen document destruction is an aberration that hardly justifies inventing a new doctrine of lawyer responsibility.

But you would be wrong, because in Koniak and Cramton's view, there is a pandemic of such behavior. They state:

> "Investigations" that are superficial are not just [the problem of one particular firm], any more than failure to discern that clients are actively engaged in obstruction of justice right under a lawyer's nose

42. *Id.*
43. *Id.*
44. *Id.* at 16.
45. *Id.*
46. *Id.* at 17 n.54.
47. *Id.* at 17 (emphasis added).

> is a problem peculiar to Davis Polk. The problems are widespread, not exceptional or unique. It is the way law is practiced in many "elite" and not so elite law firms.[48]

No citations; no other examples. But Koniak and Cramton are academics, informed observers of the legal profession in America, and their dim but certain view of the legal profession in America, in and of itself, is surely enough to warrant the new doctrine that, if it happens on the "lawyers' watch," liability, shame, and perdition should follow.

Davis Polk's transgressions do not end there. The authors next turn to the role Davis Polk played in investigating for Andersen the destruction of documents. "How could Davis Polk conduct an investigation,"[49] they ask, when "that shredding occurred on Davis Polk's watch?"[50]

This "watch" concept certainly has the possibility of creating infinite mischief. Clients have regularly turned to outside counsel to conduct investigations. Not only are lawyers pretty good at such investigations, but the outside law firm's role is likely to keep the end product privileged, an important consideration in generating what can often be dangerous information harmful to the client. And who better to do it than a law firm that already knows the client and has developed a rapport and level of trust? But that does not follow in the authors' view. As they approach the problem, if the conduct took place at a time when the law firm was doing work for the client and therefore "on watch," then that firm is disqualified even if that firm in fact played no role in the matter at issue.

The next object of this searing criticism is Vinson & Elkins whose investigation of Enron "raises the same questions, perhaps in even starker form."[51] Vinson & Elkins is attacked on three counts, the first of which is the fact that part of what Vinson & Elkins was investigating related to the firm's prior work for Enron. Koniak and Cramton call this a conflict which they say could not be waived, at least by the individuals at Enron who were requesting the investigation.

If they are correct, then the charges against Vinson & Elkins change the rules governing lawyer conflicts of interest in a dramatic way. Lawyers regularly are called upon not only to investigate but defend on behalf of client matters in which the lawyers previously did work. Examples at every firm in America abound every day. It is true that at some point, because the investigation is to be represented to the outside world as having been conducted by a totally independent body (as in an independent directors' committee investigation of whether it is in the best interests of a company to pursue a derivative claim),[52] or because the client

48. *Id.* at 29.

49. *Id.* at 19.

50. *Id.* at 17.

51. *Id.* at 19.

52. Lawrence J. Fox, *The Special Litigation Committee Investigation: No Undertaking for the Faint of Heart*, *in* INTERNAL CORPORATE INVESTIGATIONS: CONDUCTING THEM PROTECTING THEM ch. 9 (Brad D. Brian & Barry F. McNeil eds., 1992).

has a potential claim against the law firm, or the client plans to defend a claim by employing an advice-of-counsel defense which will require testimony from the client's lawyer, the law firm cannot undertake this work. But otherwise lawyers review transactions in which they provided advice, investigate matters in which the law firm previously represented the client, and defend their clients in disputes arising from transactions and occurrences in which the same law firm provided contemporaneous advice and counsel. The whole idea that when lawyers do such things they labor under a "conflict" is so novel that one notes with interest that Koniak and Cramton cite to no authority for their radical notion.

The second attack on Vinson & Elkins refers to the scope limitations that were placed on the investigation, to wit, this was a "preliminary investigation" to determine whether the Watkins memo "raised new factual information;"[53] there was to be no detailed analysis of each transaction; the investigation would not involve "the second guessing of the accounting advice and treatment provided"[54] by Arthur Andersen.

In our ethical rules, there is the principle that some scope limitations are too narrow for the lawyer to accept them.[55] In that regard one thinks of a limitation to give advice on a complicated tax matter in one hour, when competent advice is only available after twenty hours of research, or going to trial with no discovery, or an initial public offering with not enough time to conduct due diligence. But short of an inability to comply with legal requirements or be able to provide competent advice, clients are fully entitled to place and lawyers are fully entitled (even required) to accept the engagement the client defines. So even if Enron had simply asked Vinson & Elkins to interview but one employee, that would have been a proper assignment. Determining whether there were any new facts similarly should be a perfectly acceptable directive. And for sure having the lawyers not enter into terrain that was being handled by another professional service provider, particularly when the lawyers lack the background and talent to know whether the accounting treatment was proper, cannot and should not be criticized.

Finally, Koniak and Cramton take Vinson & Elkins to task for providing incompetent advice. They argue that since Vinson & Elkins's underlying role had the effect of compromising any investigation the firm was undertaking, the firm was remiss for taking any money from Enron to conduct the investigation. They also excoriate the firm for failing to

53. Koniak & Cramton, *supra* note 7, at 21.

54. *Id.*

55. An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 5 (2002).

follow leads, all of which, with the benefit of hindsight, look like they might have been promising.[56]

At the present time, as this is being written, it looks like this final criticism is equally without merit. First, the advice contained in the memorandum finds that what had happened was technically legal, but like good lawyers, Vinson & Elkins warned Enron that technically legal might not be sufficient.[57] To suggest that Vinson & Elkins's harsh words constitute a whitewash really requires ignoring the plain meaning of Vinson & Elkins's stern warning. Second, and far more important, there is no suggestion anywhere that somehow, if Vinson & Elkins had gone further with the investigation, second-guessed Arthur Andersen on the accounting issues and issued an even more damaging report than the one that was issued, the Enron saga would have come undone earlier or saved anybody—Enron, Enron's creditors, Enron's employees, Enron's shareholders—from any additional damages. Whatever bad had been done was certainly fully accomplished by the time Vinson & Elkins got the first telephone call regarding the investigation assignment.

But the at best ambiguous nature of Vinson & Elkins's conduct here does not stop Koniak and Cramton from attempting yet one more of their death-defying, triple-back flip leaps of logic. Not content with defaming Vinson & Elkins, they conclude:

> V&E also appears to have accepted limits on its representation that at the time V&E should have suspected were designed to keep wrongdoing under wraps or ongoing. We believe that law firms of stature also routinely do that—another sad fact, but one that does not excuse the behavior. "Investigations" that are superficial are not just a V&E problem, any more than failure to discern that clients are actively engaged in obstruction of justice right under a lawyer's nose is a problem peculiar to Davis Polk. The problems are widespread, not exceptional or unique. It is the way law is practiced in many "elite" and not so elite law firms. . . . All too many pillars of the bar see it as their duty to turn a blind eye to their clients' fraud, which is not the same thing as being fooled, and those lawyers sometimes end up helping the fraud along and forestalling its discovery.[58]

Again, in these two academics' view, the legal landscape is littered with wrongdoers, the problems are everywhere, and lawyers, instead of helping their clients conform their conduct to the law, are blessing whatever the clients choose to do.

What an indictment and one no more worthy of respect than the earlier discussion of how Davis Polk's alleged conduct was also exactly

56. Koniak & Cramton, *supra* note 7, at 27.

57. *See, e.g.*, Ellen Joan Pollock, *Limited Partners: Lawyers for Enron Faulted Its Deals; Didn't Force Issue*, WALL ST. J., May 22, 2002, at A1.

58. Koniak & Cramton, *supra* note 7, at 29–30 (citations omitted).

what you would find everywhere in big firm America! The truth, however, is that, every day in every town and city in America, lawyers are dispensing the best advice they know, doing more to conform corporate America's conduct to law—a monumental task in a world where regulation is so pervasive and so complicated—than any cadre of SEC and other regulatory agencies could ever achieve. Do lawyers lapse? For sure. Do lawyers fail to serve their clients well? From time to time. But there is no evidence of an epidemic of lawyer misconduct, and the Enron matter, as bad as it may turn out, will prove no such thing. Nor should the hysteria of the academics—and the fuzzy thinking of the SEC Chairman—mean that our lawyer ethics rules should change or the lawyer's role should be redefined.