

**First the Accountants, then the Executives, Next the Lawyers –  
Criminal Exposure from Dealings with Enron**

By Robert Bennett and Joy Anderson<sup>1</sup>

The recent indictment of Mark Belnick, who served as General Counsel for Tyco, by Manhattan District Attorney Robert Morgenthau, shows a dramatic shift from previous investigations into suspect corporate activity. In the past, these investigations have focused primarily on the upper-level corporate officers or management of a variety of corporations, such as Tyco, Enron and World Com, all of which are currently being investigated for various fraudulent activities. In Houston, Arthur Andersen, as the accountants for Enron, also came under scrutiny. Belnick's indictment comes as a shock to many, and may serve as a foreshadowing of future events concerning the legal profession.

Mark Belnick was indicted on six counts of falsifying business records to conceal more than \$14 million of "relocation" loans that were later forgiven by Tyco. (A copy of the indictment can be found at [www.bennettlawfirm.com](http://www.bennettlawfirm.com).) He used these loans to purchase a \$4 million apartment in New York's exclusive Central Park West neighborhood and also a \$10 million vacation home in Utah. Tyco has no office in Utah, other than Belnick's home office. He also received \$19,200 a year from Tyco to pay for this home office. For these criminal charges, he faces up to four years in prison. The SEC has also filed civil

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charges against him, seeking the repayment of the loans, the money he received for his home office, and other financial penalties. In commenting upon the Belnick indictment, Stephen Gillers, a legal ethics professor at New York University's Law School stated: "All corporate officers owe their employers—the company—fiduciary duties. But general counsel have the highest duty because they're supposed to know what the law requires because others will follow their example and because their job is to protect the company from everyone else." Belnick's indictment illustrates that prosecutors are now looking to hold someone other than top-management responsible, namely the general counsel and possibly other attorneys with close ties to the corporation.

In light of this recent development, one must consider what ramifications this will have on other general counsel. It is only logical to assume that the attorneys associated with various aspects of Enron may already be under criminal investigation. Former SEC Commissioner, Joseph Grundfest, also commenting upon the Belnick Indictment, stated: "As in the cases against Enron and World Com, the corporate officers engaged in fraud are frequently doing it on the accounting side where the general counsel lacks visibility into the problem." But what about the attorneys who are worked intimately with those transactions?

At least one attorney for Enron engaged in the fraudulent transactions that occurred on the accounting side. Kristina Mordaunt, general counsel for Enron, invested \$5,800 in Southampton Place, whose purpose was to buy a portion of the interest of an existing limited partner LJM1, which was one of the partnerships created by Andrew Fastow. For

her investment, she was able to recoup a \$1 million in approximately two months. According to the findings in the Powers Report, she was supposed to be responsible for protecting Enron's interests as deals were struck, negotiating for Enron against LJM1. This investment was clearly a conflict of interest. Mordaunt participated in this transaction without approval from the Chairman or CEO, which would have been required prior to her entering into this transaction under the Enron Code of Conduct. (see a copy of the Code at [www.bennettlawfirm.com](http://www.bennettlawfirm.com)) She certified in writing her compliance with the Code at or around that time. Mordaunt did not immediately disclose her initial investment or her profit. She claims that she did not seek consent because she did not believe that LJM1 was doing business with Enron and that partnership was simply buying into a cash flow from a transaction that had been negotiated previously. When she finally did disclose her interest, she was fired and escorted from the building. She now claims that her judgment was wrong and that she didn't consider the issue carefully enough at the time. Subsequently, her home, bank account, and husband's car are the objects of forfeiture. Is an indictment for failure to disclose her investment next?

Arthur Andersen attorneys are also under investigation for their role in Enron. In particular, Nancy Temple's actions are under review. The Andersen jury has already deemed her to be a "corrupt persuader" and explained that her actions were the major basis of their verdict. Will her orders to shred documents and instructions to alter legal memos be enough for an indictment? While there is no indication that Temple was involved in any of the fraudulent transactions, disclosure, reportings, or profits gained from the transactions that went on with Enron, and therefore would most likely not be

investigated in the same manner as Kristina Mordaunt, she may still be indicted if it appears that her orders and editing suggestion could be considered an obstruction of justice.

The attorneys from Vinson and Elkins that worked as outside counsel for Enron are also targets of civil and criminal investigation. There have been allegations and findings in the Powers Report that they were aware of Enron's fraudulent transactions and even helped to structure them. However, unlike the accountants at Andersen who were found guilty for their failure to report the transactions that were occurring at Enron, their loyalties were to Enron, its shareholders, and the applicable law, not to the welfare of the public or an abstract concept of justice. An accountant is subject to different reporting standards than an attorney. There are certain things they must report, whereas an attorney has a duty to zealously represent their client and effectively preserve attorney-client privilege. Thus, it is much more likely that they, if investigated, will be found to have acted within the realm of the appropriate laws.

Even prior to the indictment of Mark Belnick, the general public's concern about the role of legal advisers has dramatically increased. The Sarbones-Oxley Act, which President Bush signed into law in July, contained a provision for the conduct of lawyers requiring them to report evidence of violations of securities laws of breach of fiduciary duties to the company board. The American Bar Association, in response to the heightened concern of the role of lawyers, has also launched a review of corporate governance, which has thus far recommended the toughening up requirements for lawyers to monitor

and report governance failure. These responses to recent events in corporate America clearly suggest that the role of general counsel, and that of the corporate attorney, is changing.

With the indictment of Mark Belnick, it has become clear that attorneys, who serve as general counsel or who are closely connected to corporations, may be scrutinized in the same manner as a corporate officer with respect to the fiduciary duty they owe to the corporation. However, it is important to recognize that Belnick was not indicted for giving flawed legal advice to Tyco; he was indicted for taking “loans” which were not disclosed. Although his indictment raises the question of whether attorneys connected to other problematic companies, like Enron, will be investigated next, it still does not speak to the issue of whether an attorney would be indicted for the legal advice they gave to their client, rather than their own illegal activity within the corporation.

Probably the greatest criminal exposure Enron’s outside counsel may face falls within the realm of the securities advice they provided. This criminal exposure will be addressed in the second part of this article.