

Should the State Bar of Texas Chief Disciplinary Counsel Enter the Enron mess?

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Recent statements by SEC chairman Harvey Pitt that attorneys may be the next target from the Enron mess has business and corporate attorneys very nervous. They should not be if the SEC follows its usual procedure of referring disciplinary matters to the State Bar committees or in Texas, the Chief Disciplinary Counsel for the Texas State Bar. For a variety of reasons the Chief Disciplinary Counsel will probably do nothing unless there is a criminal conviction of a Texas attorney.

The Chief Disciplinary Counsel's duties are listed in The Texas Rules of Disciplinary Procedure, under Rule 5.02 Duties. The most important section in regards to any possible actions taken against Enron's in-house and outside attorneys is TRDP 5.02 (A). That rule allows for an "active investigation [if] deemed necessary by the Chief Disciplinary Counsel independent of the filing of a writing." According to Dawn Miller, Chief Disciplinary Counsel State Bar of Texas, an investigation can be initiated concerning Enron's in-house counsel and outside counsel, if she deems it necessary, regardless of whether there are any complaints filed against them.

I. Why Should Enron's In-House Attorneys Be Investigated?

There exists at least one reason for a Chief Disciplinary Counsel investigation of Enron's in-house corporate counsel, according to Sean Jez, an Attorney with Fleming & Associates, who has filed a lawsuit on behalf of Enron shareholders: there are allegations that at least one former Enron attorney invested and profited from Enron's off-the-books partnerships. Any transaction where an in-house attorney is making over 100% profits on their initial investment with their client is likely a violation of Texas Rules of Professional Conduct (TDRPC) 1.08.

According to TDRPC 1.08(a)(1) and (2), an attorney shall not enter into a business transaction with a client unless, the transaction is "fair and reasonable to the client and are fully disclosed" and the "client is given a reasonable opportunity to seek the advice of independent counsel." Any Enron attorney who participated in Enron's off-the-books partnerships would likely have violated TDRPC 1.08(a)(1), because the interest they gained (possibly doubling, quadrupling, or even more) from their initial investment would have been unreasonable to their client, the Enron shareholders. In addition any lawyer participating in the partnerships could have violated TDRPC 1.08(a)(1) and (2) simply because the only mention of the off-the-books partnerships was hidden in footnotes in Enron's financial statements and the client/shareholders therefore, did not have a "reasonable opportunity to seek the advice of outside counsel."

It is also likely that since Enron's in-house attorney's and outside counsel, Vinson & Elkins, were so close that many of Enron's attorney's would have seen documents

prepared by Vinson & Elkins and would have possibly helped create those documents, meaning they would have violated many of the same TDRPC as Vinson & Elkins.

II. Why Should Vinson & Elkins Be Investigated?

Vinson & Elkins was one of the outside counsels for the Enron Corporation. They played a creative role in the creating and managing as well as consulting on disclosure to the public on many of the off-balance-sheet partnerships currently being investigated by the SEC. According to one executive, employees would approach Vinson & Elkins lawyers and say, "this thing needs to work. How do we make it work?" According to The Powers Report, an internal investigation into Enron's board of Directors, Vinson & Elkins "should have brought a stronger, more objective and more critical voice in the disclosure process." This failure helped to hide over \$1 billion in company losses.

Vinson & Elkins also played a role in creating opinion letters for Enron's partnerships. Opinion letters are needed to prove a lawyer has vouched for the fact that business transactions meet certain standards. One former Enron employee says that the company would not have been able to create the off balance sheet corporations without Vinson & Elkins' opinion letters. The ex-employee also said that Enron "opinion shopped for what it needed."

Vinson & Elkins may have violated the TDRPC 4.01 and 8.04 in their course of dealings with Enron. When questioned, Mark Pinckard, spokesperson for The State Bar of Texas, could neither confirm nor deny that an investigation is under way on Vinson & Elkins.

TDRPC 4.01 (a) and (b) state that in the course of representing a client a lawyer shall not "make a false statement of material fact or law to a third person," or "fail to disclose a material fact to a third person . . . or knowingly assisting a fraud lent act perpetrated by a client." The opinion sheets that Vinson & Elkins signed helped to create investor confidence. If Vinson & Elkins knew when they were signing those that they were based on false information and still let them be released to the public they may have been in violation of TDRPC 4.01 because this could constitute assisting in a fraudulent act perpetrated by the client.

TDRPC 8.04(a)(3) and (4) state that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation," nor "conduct constituting obstruction of justice. If Enron's attorneys knew about the fraudulent financial statements and that the information in the opinion sheets they were signing was untrue, they could have violated TDRPC 8.04(3). Signing fraudulent documents could qualify as engaging in conduct involving misrepresentation. In addition, if they knew documents were being shredded at Enron once the SEC investigation began and did nothing that could qualify for obstructing justice, a violation of TDRPC (a)(4).

III. CONCLUSION

When all the potential TDRPC violations are looked at for Enron's in-house and outside counsel, the question that comes to mind is not why should they be investigated by the Chief Disciplinary Counsel's Office of the State Bar of Texas, but why haven't they yet? State Bar spokesperson Mark Pinckard will neither admit nor deny that they had a file open on any attorney with out their consent to make that information public. As a result is unknown at this time whether there are currently a files open on any of the fact situations above. Most likely, the State Bar is waiting for a possible criminal indictment by the Justice Department against the attorneys involved before deciding whether to start an investigation of their own, and that can take time to come.

Even with SEC chairman Harvey Pitt calling for lawyers to be the next target of the Enron mess. If that happens disciplinary, matters will be sent to the Disciplinary Counsel's Office of the State Bar of Texas. That won't scare Texas attorneys who can simply look around at what the Disciplinary Counsel's Office has already done on their own and see other attorneys breaking the rules, making millions, and yet no action is taken without a criminal conviction. One thing can be learned from the recent Enron Bankruptcy, "the times they are a-changin'" and at least until this point, it does not seem like the State Bar of Texas is keeping up.

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