

**MONOPOLIST, ARISTOCRAT, OR
ENTREPRENEUR?: A COMPARATIVE
PERSPECTIVE ON THE FUTURE OF
MULTIDISCIPLINARY PARTNERSHIPS IN
THE UNITED STATES, FRANCE, GERMANY,
AND THE UNITED KINGDOM AFTER THE
DISINTEGRATION OF ANDERSEN LEGAL**

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I. THE IMPORTANCE OF A COMPARATIVE PERSPECTIVE

A. Introduction

For approximately the past four years, a debate has raged in the United States¹ over whether and to what extent a lawyer should be permitted to participate with a nonlawyer in a multidisciplinary partnership (MDP).²

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1. The debate began to take shape in 1997 when a Presidential Global Showcase at the ABA Annual Meeting in San Francisco highlighted multidisciplinary partnerships (MDPs). The ABA Journal published a cover story on MDPs in February 1998. See John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market, Lawyers May Find Themselves Not Only Blindsided by the Assault But Also Limited by Professional Rules*, A.B.A. J., Feb. 1998, at 42. In that same month, the ABA established a Working Group on Accountants and the Legal Profession. The ABA Center on Professional Responsibility made the Working Group's subject matter the focus of its plenary session at the 24th National Conference on Professional Responsibility in May 1998.

In the summer of 1998 the debate entered the public arena when the Paris Bar Association mounted an aggressive campaign to bring MDPs to the organized bar's attention. Cynthia Cotts, *Parisians: Accountants Are Coming*, NAT'L L.J., June 22, 1998, at A6 (quoting one bar official as warning "[T]he U.S. bar had better hurry up and develop a regulatory system to monitor accounting firms—or else the Big [Five] w[ill] swallow up the market for legal services in the United States, as they are doing abroad."); Melody Petersen, *Paris Lawyers Are Seeking Barricades Against the Big 6: Accounting Giants Get Legal Work Abroad*, N.Y. TIMES, June 8, 1998, at D2. See Program Summary, *Multidisciplinary Legal Practice: Opportunities and Challenges for the Future* (June 8, 1998) (on file with the author) (summarizing a program sponsored by the Ordre des Avocats à la Cour de Paris and the Association of the Bar of the City of New York).

2. "MDP" can also stand for multidisciplinary practice. The difference between the two is subtle, but important. "Multidisciplinary practice" refers to "the activities of a professional services

The recent criminal conviction of Arthur Andersen L.L.P. (Andersen), its ensuing collapse, and a rash of high profile accounting scandals have stoked the flames of the debate even higher.

The debate's history begins in 1998 when the President of the American Bar Association (ABA) appointed the Commission on Multidisciplinary Practice (Commission or ABA Commission).³ The intensity of the debate reached a feverish pitch in 1999 and again in 2000 when the Commission proposed significant changes to the Model Rules of Professional Conduct that would have permitted lawyers and nonlawyers to form a partnership whose activities included the delivery of legal services and to share legal fees.⁴ While the ABA House of Delegates rejected both sets of proposals by a wide margin, the debate has continued on the state level.⁵ The majority of states that have considered amending

firm with competencies in more than one discipline or the coordinated activities of professionals in separate" entities. Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 223 (2000) (emphasis omitted). "'Multidisciplinary partnership' refers to the legal relationship among the principals of a professional services firm, serving essentially as a [proxy] for ownership and control." *Id.* (emphasis omitted). Because both U.S. and foreign lawyers repeatedly express the fear that sharing ownership and control with nonlawyers will diminish the independence of a lawyer in providing services to a client, "MDP" as employed in this article refers to a multidisciplinary partnership.

3. The author served as the Reporter for the ABA Commission. For a complete description of the Commission's activities, see <http://www.abanet.org/cpr/multicom.html>. The views expressed in this Article are entirely the author's and should not be attributed to the Commission. The author would like to express her gratitude to the foreign lawyers, bar regulators, and bar association representatives who testified before the Commission and whose remarks helped to shape the views expressed in this article. References to the testimony and/or written comments submitted by these witnesses are cited by the witness's name and the date of the testimony or written submission and a URL. The ABA is a non-governmental entity. This article employs the terms "witness" and "testimony" for the sake of convenience; they do not refer to a formal attestation under oath.

4. ABA COMMISSION, REPORT AND RECOMMENDATION TO THE HOUSE OF DELEGATES (2000), at <http://www.abanet.org/cpr/mdp/finalrep2000.html> (last visited Nov. 3, 2002); ABA COMMISSION, REPORT AND RECOMMENDATION TO THE HOUSE OF DELEGATES (1999), at <http://www.abanet.org/cpr/mdpfinalreport.html> (last visited Nov. 3, 2002).

5. Technically speaking, the 1999 and 2000 Resolutions did not reject the Commission's recommendations on their merits. The 1999 Resolution provided:

RESOLVED, That the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.

The 2000 Resolution disbanded the Commission and adopted eight principles to guide the legal profession in any debate over amending the law governing lawyers to permit MDPs. The Resolution's tenor was clearly hostile. Included among the principles were:

7. The sharing of legal fees with nonlawyers and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.

8. The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership control over entities practicing

their codes of lawyer conduct to permit a lawyer and nonlawyer to practice in an MDP have rejected that proposal.⁶ MDP task forces and commissions in several states have recommended some changes to permit a limited MDP relationship and final action on these proposed changes is pending.⁷ New York has taken the lead by amending the New York Lawyer's Code of Professional Responsibility to permit a lawyer and nonlawyer to enter into an MDP relationship under certain circumstances.⁸

In the debate at both the ABA and state level, the supporters and opponents of MDPs frequently defended their respective positions by referring to the establishment and regulation of MDPs abroad,⁹ particularly in the United Kingdom and several Western European countries.¹⁰ They clashed over the merits and demerits of the Big Five's¹¹ networks of relationships with foreign law firms. U.S. academics, with the notable exceptions of Professors Laurel Terry¹² and Charles Wolfram¹³ and social

law, should not be revised.

Resolution 10F, <http://www.abanet.org/cpr/mdprecom10f/html> (last visited Oct. 22, 2002).

6. <http://www.abanet.org/cpr> (last visited Oct. 22, 2002).

7. *Id.*

8. See also John Caher, *Multidisciplinary Practice Rules Adopted by State: New York Takes Lead on Lawyer-Nonlawyer Partnerships*, N.Y.L.J., July 25, 2001, at 1; John Caher, *Still Debated, MDP Arrives in New York*, N.Y.L.J., Nov. 1, 2001, at 1; Anthony E. Davis, *New Rules on Cooperative Business Arrangements with Non-Lawyers*, N.Y.L.J., Sept. 6, 2001, at 3.

9. The author has previously addressed issues relating to the establishment and regulation of MDPs abroad in (1) the text and endnotes of various Commission papers, of which she was the principal drafter; and (2) her article, Daly, *supra* note 2. Some of the textual analysis and footnotes in this Article borrow directly from those sources.

10. Unless the Article's text indicates to the contrary, "Western Europe" is used as a generic term for Belgium, France, Germany, Italy, Spain, and The Netherlands. The organized bars in those countries have taken a prominent role in framing the ethical and regulatory issues relating to the establishment and regulation of MDPs. Other countries where these issues are also being debated include Canada and Australia. See, e.g., Legal Profession Amendment (National Competition Policy Review Bill), at <http://www.lawsociety.com=au/page.asp?partid=470> (last visited Nov. 3, 2002) (Law Society of New South Wales); Guide to Application to Enter into a Multidiscipline Practice, at http://lsuc.on.ca/services/MDPintro_en.jsp (last visited Nov. 3, 2002) (Law Society of Upper Canada).

11. The "Big Five" is the term commonly used to refer collectively to Arthur Andersen L.L.P. [hereinafter Andersen], Deloitte Touche Tohmatsu L.L.P. [hereinafter Deloitte & Touche], Ernst & Young L.L.P. [hereinafter Ernst & Young], KPMG L.L.P. [hereinafter KPMG], and PricewaterhouseCoopers L.L.P. [hereinafter PwC]. For a fascinating study of the corporate structure of the Big Five firms and their relationship with their foreign law firm affiliates, see Jens Drolshammer, *The Future Legal Structure of International Law Firms—Is the Experience of the Big Five in Structuring, Auditing and Consulting Organizations Relevant?*, 2 EUR. J.L. REFORM 713 (2000).

12. Laurel S. Terry, *MDPs, "Spinning," and Wouters v. NOVA Comment: The Multidisciplinary Practice of Certified Public Accountants and Lawyers*, 52 CASE WEST. L. REV. 867 (2002); Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547 (2000); Laurel S. Terry & Clasing B. Houtman, *Future Role of Merged Law and Accounting Firms: What If . . . ? The Consequences of Court Invalidation of Lawyer-Accountant Multidisciplinary Partnership Bans*, in PRIVATE INVESTMENTS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1998 (1998). See also Laurel S. Terry, *MDPs: Reflections from the U.S. Perspective*, 8 INT'L J. LEGAL

scientists Bryant Garth and Carole Silver,¹⁴ have paid scant attention to MDP developments abroad. This Article examines the most significant of those developments and the lessons do they offer the legal profession in the United States as the MDP debate continues.¹⁵ Part II provides a snapshot of the history of MDPs in France, Germany, and the United Kingdom and the responses of the organized bars at the national and international level. Part III explores how the structure, culture, and ethics of the legal professions in Western Europe contributed to the rapid growth of MDPs. Part IV examines the economic threat that the Big Five's legal networks posed to U.K. and Western European law firms prior to the criminal conviction of Andersen and the consequent disintegration of Andersen Legal, its law firm network.¹⁶ Part V offers some preliminary reflections on how Andersen's demise will shape the future of MDPs in the United States, the United Kingdom, and Western Europe. The Conclusion connects that future to deeply embedded competing models of the legal profession.

PROF. 151 (2001); Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule*, 72 TEMP. L. REV. 869 (1999).

13. Charles W. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 CASE WEST. L. REV. 961 (2002); Charles W. Wolfram, *Multidisciplinary Partnerships in the Law Practice of European and American Lawyers*, in LAWYERS' PRACTICE & IDEALS: A COMPARATIVE VIEW 301 (John J. Barceló III & Roger C. Cramton eds., 1999).

14. Bryant G. Garth & Carole Silver, *The MDP Challenge in the Context of Globalization*, 52 CASE WEST. L. REV. 903 (2002); Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039 (2002); Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093 (2002). See also Richard L. Abel, *Transnational Legal Practice*, 44 CASE W. RES. L. REV. 737 (1994); David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994).

15. To keep the Article's text a manageable length, the author assumes the reader's general familiarity with the MDP debate in the United States. Readers seeking a fuller analysis should consult *Business Law Symposium, Multidisciplinary Practice*, 36 WAKE FOREST L. REV. 1 (2001); Symposium, *The Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083 (2000); Symposium, *Multidisciplinary Practice*, 20 PACE L. REV. 1 (1999).

16. Andersen Legal was an umbrella organization made up of law firms in approximately thirty-six different countries. The law firms were independently owned and operated and did not share fees with one another or Andersen. However, the firms did agree to refer clients to one another on a non-exclusive basis. Carolyn Hong, *Law Firm Leaves Andersen Legal*, N. STRAITS TIMES (Malaysia), Apr. 18, 2002, at 2.

B. Five Models for Configuring an MDP Relationship Between a Lawyer and a Nonlawyer

The organization and day-to-day operations of large businesses and the manner in which legal services are delivered to them have changed dramatically over the course of the last half a century. Of particular importance to the MDP debate is the emergence of global conglomerates selling goods and services around the world, the growing number of mid-sized and small companies engaged in cross-border transactions, and the increased regulation of marketplace activities at the local, regional, national, and international level.¹⁷ These three phenomena have interacted to create a business environment in which a professional educated in a single discipline can rarely resolve a business client's pressing problems. The problems' solution usually requires the knowledge and skills of professionals in multiple disciplines. Little or no disagreement exists between MDP proponents and opponents about clients' increased need for coordinated counseling by professionals in different disciplines. The MDP debate revolves around how to structure the legal relationship between a lawyer and nonlawyer professional.¹⁸ Commentators have addressed this

17. It is a serious mistake, especially in the United States, to examine MDP issues only as they relate to large law firms and their corporate clients. Many small law firms and consumer groups supported amending the rules of professional conduct and the unauthorized practice of law (UPL) statutes to permit lawyers to practice in MDPs. They argued that partnerships with nonlawyer professionals such as social workers, certified financial planners, and engineers would produce economic and efficiency benefits for both lawyers and individual clients. See Daly, *supra* note 2, at 274 nn.242-50 and accompanying text. Because the risks and advantages of the delivery of legal services to individuals by MDPs have not been a major theme in the debate in Western Europe and the United Kingdom, this Article does not address that topic. Some commentators, however, have suggested that permitting fully integrated MDPs would provide "High Street" practitioners in the United Kingdom with a much needed economic boost. Alison Crawley, *Written Remarks: Solicitors, Accountants and Multi-Disciplinary Practice the English Perspective*, ¶ 6.1, at <http://www.abanet.org/cpr/crawley.html> (last visited Oct. 22, 2002). Ms. Crawley is the Head of Professional Ethics of the Law Society of England and Wales. The U.S. equivalent of a "High Street" solicitor is a "Main Street" lawyer.

18. Not all MDP proponents agree that the nonlawyer must be a "professional." Some argue that the market alone should determine if an MDP's clients are willing to purchase services from a nonlawyer, nonprofessional. Others argue that defining "professional" is an impossible exercise.

New York has stepped into the fray. The recent amendments to the Lawyer's Code of Professional Responsibility charge the courts with the responsibility of establishing and maintaining a list of professions with whose members a lawyer may enter into "a cooperative business arrangement." DR 1-107(a)(1), N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.5-c(a)(1) (2002). To gain entry to the list, the profession must be composed of individuals who, with respect to their profession:

- (i) have been awarded a Bachelor's degree or its equivalent from an accredited college or university;
- (ii) are licensed to practice the profession by an agency of the State of New York or the United States government; and

issue by proposing five configurations labeled “models”.¹⁹ But, as discussed more fully below, because of differences in legal cultures and regulatory systems, all five configurations are not equally available in each of the fifty states, the countries of Western Europe, and the United Kingdom.

In the Cooperative Model, a lawyer and one or more nonlawyer professionals work together to solve a client’s problem. The lawyer and nonlawyer are employees or members of separate entities. They singly bill the client for their individual services. The client or the lawyer retains the nonlawyer professional.²⁰

In the United States, a variant on the Cooperative Model has evolved over the past twenty years. It is increasingly common for large law firms to employ nonlawyer professionals on their staffs to assist them in advising clients on litigation and transactional matters. Such nonlawyer professionals include economists, accountants, financial planners, engineers, and lobbyists.

Law firms in Western Europe other than those in Germany have not traditionally employed nonlawyer professionals.²¹ The foreign firms’ practices until very recently have focused primarily on litigation.²² Because of the manner in which litigation is conducted in the civil law system, a lawyer’s role in presenting evidence of a technical or scientific nature is quite limited, considerably lessening the need for a law firm’s employment of nonlawyer professionals. Transactional lawyers in foreign law firms have not pressed to hire nonlawyer professionals because the legal culture in which they were educated and practice considers the giving of advice on non-legal matters to fall outside the scope of a lawyer’s competence.

The Command and Control Model “permits a lawyer to form a

(iii) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession.

DR 1-107(b), N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.5-c(b).

19. The ABA Commission proposed the five models to facilitate discussion. See Commission on Multidisciplinary Practice, *Hypotheticals and Models*, at <http://www.abanet.org/cpr/multicomhypos.html> (last visited Apr. 7, 2002) [hereinafter *Hypotheticals and Models*]. Articles on MDPs frequently use the five models as a basis for discussion and analysis. See, e.g., John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 153-71 (2000).

20. See *Hypotheticals and Models*, *supra* note 19.

21. Germany is an exception to the extent that it has permitted partnership with and employment of a limited category of nonlawyer professionals (e.g., auditors, tax advisors, and patent attorneys). See *infra* notes 137-38 and accompanying text.

22. See *infra* notes 90-96, 222-24 and accompanying text.

partnership with a nonlawyer and to share legal fees subject to certain clearly defined restrictions.²³ Typical restrictions include requiring that the law firm or organization have as its sole or primary purpose the provision of legal services; the nonlawyer's agreement to conform his or her conduct to the rules of professional conduct that govern a lawyer's conduct; the lawyer's agreement to supervise the nonlawyer; and a written acknowledgment of these conditions.²⁴ The District of Columbia is the only jurisdiction in the United States that allows a lawyer to enter into a Command and Control relationship with a nonlawyer.²⁵ While Western European countries, with the exception of Germany, do not permit such relationships,²⁶ nations in other parts of the world do allow them.²⁷

In the Ancillary Business Model, a law firm operates a separate business that provides nonlegal professional services.²⁸ Those services are usually related to the niche practices that the firm has developed. For example, a firm with a significant insurance coverage practice might establish a consulting business to advise companies on how to choose a policy and manage disputes over coverage. Its nonlawyer members might include risk managers, environmental engineers, insurance analysts and public adjusters.²⁹

Ancillary businesses are a familiar phenomenon in the United States.³⁰ Likewise, solicitors may establish them in the United Kingdom.³¹ The existence of ancillary businesses reflects a pro-active, entrepreneurial bar. Ancillary businesses are unknown in Western Europe, reflecting a static, technocratic approach to the practice of law.³² That approach is manifested

23. *Hypotheticals and Models*, *supra* note 19.

24. *Id.*

25. See D.C. RULES OF PROF'L CONDUCT R. 5.4 (2000).

26. See *infra* notes 135-49 and accompanying text.

27. Both New South Wales, Australia and Canada permit a lawyer to enter into a Command and Control Relationship with a nonlawyer. Professional Regulation Task Force Report: Structure of Law Firms at 19-20 (May 1997), at <http://lawsociety.com.au/uploads/filelibrary/102153/8235> (last visited Nov. 4, 2002); Guide to Application to Enter into a Multidiscipline Partnership (June 30, 1999), at http://www.lsuc.on.ca/services/MDPintro_en.jsp (last visited Nov. 4, 2002).

28. See *Hypotheticals and Models*, *supra* note 19.

29. For an announcement of the establishment of precisely such an ancillary business, see *Today's News; Update*, N.Y.L.J., Jan. 11, 2000, at 1 (describing Andersen Kill Insurance Services).

30. See MODEL RULES OF PROF'L CONDUCT R. 5.7 (2000); Daly, *supra* note 2, at 244-47; Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1364-74 (2000); John Gibeaut, *CASH BOUGHS: Since the ABA's Rejection of Multidisciplinary Practices, More Law Firms are Branching Out into Law-Related Businesses*, A.B.A.J., Feb. 2001, at 50; Michael D. Goldhaber, *As ABA Debates, MDPs Are Spreading: NLJ Survey Finds Lots of Firms Already Have Ancillary Businesses*, NAT'L L.J., July 10, 2000, at A1.

31. See *infra* note 160 and accompanying text.

32. In Germany, a lawyer is permitted to be a legal professional and an accounting professional

by the doctrine of incompatible professions. In Western Europe's legal culture, there is a long standing and powerful tradition that rejects the concept of the practice of law as a business activity. Closely allied to that tradition is the view that a lawyer should not engage in business activities regardless of whether they are related or unrelated to the practice of law.³³ For example, the Italian code of conduct denies lawyers the right to "engage in business" or "accept full or part-time employment" in nonlegal businesses.³⁴ For a considerable length of time in Germany, "[m]ost business and commercial activities were found to be incompatible, including those in which the applicant did not hold a 'higher [i.e., nonsubordinate] position.'"³⁵ Animating the doctrine of incompatible professions is the fear that economic dependency on an activity other than the practice of law will eventually erode a lawyer's independence.

In the Contractual or Side-by-Side Model, a law firm and a professional services firm formally agree to work together to provide multidisciplinary services to clients. Both remain independent entities. The law firm is controlled and managed by lawyers; the professional services firm by nonlawyers. Each accepts engagements from clients who do not engage the other.³⁶ The Contractual or Side-by-Side Model is the one most frequently used by the Big Five in Western Europe and the United

simultaneously. *See infra* note 136 and accompanying text.

33. The doctrine's precise substance differs from country to country, but the general prohibition is the same. *See* Richard L. Abel, *Lawyers in the Civil Law World*, in 2 *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD*, 1, 25 (Richard L. Abel & Philip S.C. Lewis eds., 1988) [hereinafter *THE CIVIL LAW WORLD*]; Jean Brucher, *The Legal Professions in Luxembourg*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE* 241, 248 (Alan Tyrrell & Zahd Yaqub eds., 2d ed. 1996) [hereinafter *THE LEGAL PROFESSIONS IN THE NEW EUROPE*]; Remo Danovi, *The Legal Professions in Italy*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra*, at 223, 228-29; Roger G. Goebel, *Lawyers in the European Community: Progress Toward Community-Wide Rights of Practice*, in *RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE* 239, 297 n.173 & 301-02 (Mary C. Daly & Roger J. Goebel eds., 1995) [hereinafter *RIGHTS, LIABILITY, AND ETHICS*]; Takis Kommatas, *The Legal Profession in Greece*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra*, at 177, 185-86; Pierre Sanglade & Hélène Cohen, *The Legal Professions in France*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra*, at 127, 135.

34. MAURO CAPPELLETTI ET AL., *THE ITALIAN LEGAL SYSTEM* 93 (1967); *see* Majda Barazzutti, *Italy*, in *LAW WITHOUT FRONTIERS: A COMPARATIVE OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW* 94, 96 (Edwin Godfrey ed., 1995) [hereinafter *LAW WITHOUT FRONTIERS*]; Ottavio Campanella, *The Italian Legal Profession*, 19 *J. LEGAL PROF.* 59 (1994-95).

35. William B. Fisch, *Varieties of Professional Independence*, in *LAWYERS' PRACTICE & IDEALS*, *supra* note 13, at 363, 368. The federal constitutional court eventually rejected all but two criteria for determining if an activity was incompatible with the practice of law: "insufficient time for active practice of law and clear probability of a conflict of interest between the other activity and the duties of a lawyer." *Id.* (footnote omitted).

36. *See Hypotheticals and Models*, *supra* note 19.

Kingdom.³⁷ The structure of the relationship depends in part on the personnel and geographic size of the contracting law firm.³⁸

Until recently, there was no publicly acknowledged instance of a contractual relationship in the United States between a law firm and a Big Five firm. The ethical prohibition found in most state codes of conduct banning the use of a trade name had the practical effect of discouraging such relationships because it prevented the two entities from advertising their relationship. The prohibition deprived law firms of the opportunity to benefit from “branding” their legal and nonlegal services.³⁹

In 1999, five partners from the Atlanta and Washington, D.C. offices of King & Spalding broke away from the firm, formed a separate law firm in Washington, D.C., and announced the new firm’s affiliation with E&Y.⁴⁰ The Washington D.C. Rules of Professional Conduct do not contain a prohibition on the use of trade names. E&Y reportedly agreed to furnish the firm a significant amount of start up capital and lease it space in a building E&Y owned. In exchange, the law firm agreed to be known as McKee Nelson Ernst & Young.⁴¹ The two firms stated that they were separate entities, but many commentators regarded the affiliation as a major step by the Big Five⁴² toward the eventual establishment of a

37. See, e.g., Neil Cochran, Oral Remarks, at <http://www.abanet.org/cpr/cochran2.html> (last visited Apr. 10, 2002); Neil Cochran, Statement, at <http://www.abanet.org/cpr/cochran1.html> (last visited Apr. 10, 2002); Summary of the Testimony of Gerard Nicolay, at <http://www.abanet.org/cpr/nicholay1198.html> (last visited Apr. 10, 2002). See also *infra* notes 86-188 and accompanying text. See generally John E. Morris, *King Arthur’s March on Europe*, AM. LAW., June 1998, at 49.

38. In one variation, a Big Five firm contracts with a single law firm with only one office. In another, it contracts with a single law firm with several branch offices. And in still another, it contracts with separate, independent law firms, some of which might have only a single office, others of which might have several branch offices. See, e.g., Emily Barker, *More Accounting Firms Eye the U.K. Legal Market*, AM. LAW., Apr. 1996, at 13 (describing the arrangements between Arnheim & Co. and Price Waterhouse and Garrett & Co. and Arthur Andersen).

39. See *infra* notes 102-03 and accompanying text.

40. Press Release, Ernst & Young (Nov. 3, 1999) (on file with author). The Washington, D.C. Rules of Professional Conduct have no bar on the use of trade names.

41. *Id.*

42. While not as controversial as the formation of McKee Nelson Ernst & Young, other steps taken by the Big Five appear to serve the same goal. For example, in 1999 KPMG created a strategic alliance with several members of SALTNet, a network of state and local tax lawyers. See *Deregulation Sparks Significant State Tax Reform*, TRANSFORMATIONS (KPMG Spring 2000), at 8, available at http://www.us.kpmg.com/RutUS_prod/Documents/12/BoardAdvisorsMtg.pdf (last visited Oct. 22, 2002); Arian Campo-Flores, *Dream Tax Team*, AM. LAW., Sept., 1999, at 18; Tom Herman, *KPMG Joins Forces with a Group of State and Local Lawyers*, WALL ST. J., Aug. 4, 1999, at A1; Brenda Sandburg, *MoFo Allies with Accounting Giant*, N.Y.L.J., Aug. 9, 1999, at 2; Ritchenia A. Shepherd, *Why MOFO Teams with KPMG*, NAT’L L.J., Aug. 23, 1999, at A12. In 1997, PwC entered into a strategic alliance with Miller & Chevalier, a prominent tax boutique that had the practical effect of encouraging PwC’s clients to retain the law firm for the clients’ tax-related litigation. See *The Big Six Move in*, INT’L FIN. L. REV., Nov. 1997, at 25.

multidisciplinary partnership that includes legal services.⁴³ In 2001, the firm changed its name to McKee Nelson.⁴⁴ The most likely explanation for the change is its announced intention to open a branch office in New York City.⁴⁵ New York prohibits a law firm from practicing under a trade name.⁴⁶ But it does not prohibit a law firm from entering into a contractual relationship with a professional services firm. It has recently adopted a new rule governing “cooperative business arrangements.”⁴⁷

While the precise terms of the contract between a law firm and a Big Five firm are almost never disclosed publicly, testimony before the Commission by foreign lawyers and regulators and commentary in the popular and legal press suggests that they include (1) the law firm agreeing to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising; (2) the law firm and the professional services firm agreeing to refer clients to each other on a nonexclusive basis; and (3) the law firm agreeing to purchase goods and services from the professional services firm (*e.g.*, staff management, communications technology, office space, and equipment).⁴⁸

In the Fully Integrated Model, the law firm and the professional services firm are not separate entities. There is one professional services firm divided into, for example, accounting, business consulting, and legal units.⁴⁹ Its advertisements emphasize “‘a seamless web’ of services”⁵⁰ and “one-stop shopping,” aiming at potential clients in need of multidisciplinary advice.⁵¹ Businesses with problems that require only the

43. See Jonathan Groner & Siobhan Roth, *Envisioning A Big 5 Law Firm: Ernst & Young Positioning to Offer Full Legal Services*, LEGAL TIMES, Oct. 25, 1999, at 1; Siobhan Roth, *How Ernst & Young Gave Birth to a Law Firm*, RECORDER, Nov. 11, 1999.

44. Press Release, *Growing Fast, McKee Nelson Gives Up Ernst & Young Name*, May 23, 2001, at <http://mckeenelson.com/newsandevents/inthenews/news.cfm?id=1>; Andrew Crooke, *Ernst & Young Re-brands US Law Firm for NY Launch*, LMG: People/firms newsletter, www.legalmediagroup.com (May 22, 2001); Geanne Rosenberg, *E&Y Forges into the Lead with New York-Based Law Group*, NAT'L L.J., Jan. 15, 2001, at B7.

45. See *id.*

46. See N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1200.5-g, 1200.5-c (2002).

47. See *id.* § 1200.5-c (2002). See also *supra* note 8.

48. See *supra* notes 43-44; Morris, *supra* note 37, at 52.

49. See *Hypotheticals and Models*, *supra* note 19.

50. *Id.*

51. The proponents of one-stop shopping typically argue:

The cost savings from which a consumer may benefit include a reduction in the following costs: search, contracting, co-ordination, monitoring, and information costs. . . . There are fixed costs associated with search, verification, and monitoring if the user contracts across several non-integrated suppliers of complementary services. These will be reduced if these services are provided by one integrated firm. The buyer can then either monitor randomly across the services and impute the verified quality to the entire integrated firm and/or rely on substantial brand name capital that would be at risk if the integrated firm were to fail to deliver on its promised quality.

services of a single unit are, of course, free to engage that unit.

The supporters and detractors of the Fully Integrated Model frame their arguments in remarkably similar terms on both sides of the Atlantic Ocean. The supporters contend that the efficiencies and synergies inherent in a single, integrated entity point to this model as the ideal one for delivering multidisciplinary services to clients.⁵² Thus, they urge the repeal of the rules of lawyer conduct and the UPL statutes that prevent lawyers and nonlawyers from forming partnerships and sharing legal fees. The detractors resist these changes, countering that the likelihood of a lawyer's loss of independent professional judgment is too great; the risk of disclosing confidential client information, too substantial; and the danger of conflicts of interest, too jeopardous.⁵³

II. A SNAPSHOT OF MDPs IN FRANCE, GERMANY, AND THE UNITED KINGDOM AND THE RESPONSES OF THE ORGANIZED BARS⁵⁴

In any discussion of MDPs in foreign countries, commentators almost certainly refer to three jurisdictions: France, Germany, and the United Kingdom. France is the country where the Big Five made their greatest gains in establishing the capability to deliver legal services.⁵⁵ Germany has the largest economy in Western Europe, is a leading international center for corporate finance, and has a long history of permitting lawyers to practice with nonlawyers.⁵⁶ The United Kingdom is the home of the "Magic Circle" law firms that have dominated international legal practice

CHARLES RIVER ASSOCIATES, MULTI-DISCIPLINARY PROFESSIONAL PRACTICES: A CONSUMER WELFARE PERSPECTIVE 3-4 (1999) (on file with the author). *See also id.* at 20-27 (reporting the results of a survey of corporate clients that purchased legal services from law firms affiliated with the Big Five). This study contains an extensive economic analysis of the advantages and disadvantages of MDPs. It was prepared under the direction of Professor Michael Trebilcock of the University of Toronto Faculty of Law.

52. *Id.* at 17-18.

53. *Id.* at 22-30.

54. In 1999, the President of the New York State Bar Association appointed a Special Committee to study MDP issues. The Committee conducted an exhaustive review of MDPs outside the United States. Drawing on multiple sources, many of them in French and German, it published up-to-date information not generally available in English. *See* NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS (2000) [hereinafter THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS].

The author commends the Special Committee for its contribution to the MDP debate and acknowledges that much of the information and structure of the analysis in Part II is drawn from The Place of Multidisciplinary Practice in the Law Governing Lawyers.

55. *See infra* notes 86-87, 131-32.

56. *See infra* notes 137-38, 145.

since the end of World War II; both the Office of Fair Trading and the regulatory bodies that govern the conduct of lawyers have extensively reviewed MDP issues; and the resolution of those issues is likely to have a significant impact on the legal profession in other parts of the world, especially Australia, New Zealand, Ireland, and Canada.⁵⁷ In France, Germany, and the United Kingdom, the Big Five have almost exclusively used the Contractual or Side-by-Side Model to structure their relationships with law firms.⁵⁸

The description that follows provides a snapshot of MDP practice in the three countries and discusses those aspects of the history and organization of their legal professions that are most pertinent to the debate in the United States. Two caveats are in order, however. First, the analysis is not exhaustive. It eschews the details in favor of a more general overview.⁵⁹ Second, because it is a snapshot, it does not capture the dynamism of the marketplace for corporate legal services or the multiple forces at play.⁶⁰ U.S. law firms are expanding abroad in response to the relatively flat domestic market for legal services. Their entry into the marketplace generally ratchets up the level of competition. These firms, moreover, are not only selling legal services, but they are also introducing a different conception of the role of lawyers in business transactions. Foreign lawyers who have studied or worked in the United States and subsequently returned home to the jurisdiction of their licensure are also bringing with them a new proactive style of lawyering.⁶¹ In-house lawyers are assuming a new identity.⁶² All of these changes are acting synergistically to reshape the structure and practice of foreign legal professions.

57. See *infra* notes 162-80.

58. If the ethical barriers to the fully integrated model were removed, the Big Five would almost certainly transform those relationships from a contractual one to a corporate one. See Drolshammer, *supra* note 11, at 732 & 767 n.30. For an analysis of the economic weaknesses in the contractual model and the corresponding strength of the fully integrated model, see CHARLES RIVER ASSOCIATES, *supra* note 51, at 7-8.

59. In most instances, the sources identified in the supporting footnotes contain more particularized descriptions.

60. For an insightful analysis of these forces, see Garth & Silver, *supra* note 14; Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, *supra* note 14; Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, *supra* note 14.

61. As a result of this dynamism, French and German lawyers are becoming more instrumentalist and less technocratic in delivery legal services to corporate clients. See *infra* notes 204-39 and accompanying text.

62. See generally Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057 (1997).

A. *The European Union and the Regulation of MDPs*

The regulation of the bar in the member states of the European Union involves a complex interplay between the principles of the Treaty of Rome, as amended,⁶³ and the institutions of the European Union, on the one hand, and the jurisdiction of the member states to regulate the practice of law, on the other.⁶⁴ Generally speaking, the member states are free to regulate the practice of law by statute, administrative pronouncement, or lawyer code of conduct provided that the regulations' substantive content does not violate the Treaty.⁶⁵ The Establishment Directive⁶⁶ specifically acknowledges the member states' jurisdiction over the relationship between a lawyer and an MDP. It provides:

[A] host Member State, insofar as it prohibits lawyers practising under its own relevant professional title from practising the profession of lawyer with a grouping in which some of the persons are not members of the profession, may refuse to allow a lawyer registered under his home-country professional title to practice in its territory in his capacity as a member of his grouping. The grouping is deemed to include persons who are not members of the profession if

- the capital of the grouping is held entirely or partly, or
- the name under which it practises is used, or
- the decision-maker power in that grouping is exercised, *de facto* or *de jure*,

63. Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11.

64. For a comprehensive analysis of this topic, see GEORGE A. BERMAN ET AL., EUROPEAN COMMUNITY LAW 713-43 (2002); Daly, *supra* note 2, at 229-30 & nn.39-43; Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW. 307 (2000); D. Bruce Shine, *The European Union's Lack of Internal Borders in the Practice of Law: A Model for the United States?*, 29 SYRACUSE J. INT'L L. & COM. 207 (2002).

65. The European Court of Justice has invalidated bar regulations on several occasions on precisely this ground. See Daly, *supra* note 2, at 230 n.39 (citing Case 107/83, *Ordre des Avocats au Barreau de Paris v. Klopp*, [1984] E.C.R. 2971, 1 C.M.L.R. 99; Case 33/74, *van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, [1974] E.C.R. 1299, 1 C.M.L.R. 298, Case 2/74, *Reyners v. Belgium*, [1974] E.C.R. 631, 2 C.M.L.R. 305).

66. A directive is a legally binding act that may be issued by the Council of Ministers, the European Parliament (acting jointly with the Council), or the European Commission. For a more complete description of a directive and the function of the three institutions, see BERMAN ET AL., *supra* note 64, at 33-56, 75-76.

—by persons who do not have the status of lawyers within the meaning of article 1(2).⁶⁷

The Establishment Directive does not validate a member state's ban on lawyers affiliating with nonlawyers in an MDP. It simply imposes a rule of equal treatment. If a host country prohibits its own lawyers from being members of an MDP, a lawyer from another member state who is otherwise permitted to offer legal services in the host country may not offer those services through an MDP.

The Directive does not address the underlying question whether a bar association's ban on affiliations between a lawyer and a nonlawyer violates the Treaty of Rome, as amended. Amid a great deal of controversy, the European Court of Justice (ECJ) has recently concluded that such a ban is permissible.⁶⁸ The Court's decision does not compel a bar association to either impose a ban or enforce an existing one. Member States remain free to set their own public policy regarding the ownership and management of MDPs.

Regulation SV 93 adopted by The Netherlands Bar Association (NOVA) allowed Dutch lawyers to enter into a partnership with certain categories of nonlawyers. Partnerships between lawyers, on the one hand, and notaries and tax advisors, on the other, were permitted. Partnerships between lawyers and auditors were prohibited. When bar regulators disapproved two separate, proposed affiliations between a Dutch lawyer and an auditing firm, the lawyers challenged the decisions, essentially arguing that SV 93 constituted a prohibited restraint of trade and violated the provisions of certain EC treaties guaranteeing the lawyers' right of establishment and freedom to provide services.⁶⁹

The trial court rejected those arguments. The lawyers appealed, but the Dutch Supreme Court declined to reach the merits. It referred the appeals to the ECJ. In order to resolve the question of the ban's validity, the Court had to first decide whether NOVA was "an association of undertakings"

67. Council Directive 98/5, art. 11, cl. 5, 1998 O.J. (L 77) 36.

68. J.C.J. Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten. ECJ Judgment, Case C—309/99, 2002 ECJ CELEX LEXIS 186 (Feb. 19, 2002). The opinion is also available at <http://curia.u.int/en/jurisp/index.htm>.

69. For a more complete analysis of the *Wouters* decision and a description of its procedural history, see Terry, *MDPs, "Spinning," and Wouters*, *supra* note 12; Terry & Houtman, *supra* note 12. Also helpful to an understanding of the decision are the remarks of Anthony Huydecoper, the Advocate General to the Supreme Court of The Netherlands. Symposia, 2002 Otto L. Walter Lecture: Multidisciplinary Practice and the European Court of Justice, 21 N.Y.L. SCH. J. INT'L & COMP. L. 175 (2002) (*passim*).

within the meaning of Article 85(1) of Treaty.⁷⁰ The Court concluded that it was such an association because in adopting SV 93 NOVA was acting “as the regulatory body of a profession, the practice of which constitutes an economic activity.”⁷¹ In reaching this conclusion, the Court explicitly rejected two of NOVA’s principle arguments as to why its conduct fell outside the scope of Article 85(1): first, that the provision of legal services did not constitute an economic activity within the article’s meaning; and second, that *even if* the provision of legal service was an economic activity NOVA’s regulation was connected to the exercise of the powers of a public authority.⁷²

The Court then considered whether SV 93’s ban on lawyer-auditor partnerships had an adverse economic effect on competition and might affect trade between Member States.⁷³ It had little difficulty in reaching an affirmative conclusion. The Court’s analysis should have ended at this point. The application of firmly established principles of EC competition law inescapably pointed to a judgment that SV 93’s ban was unlawful. Much to the amazement of European commentators,⁷⁴ however, the ECJ applied a “rule of reason” test, holding

a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite effects restrictive of competition, that are

70. Article 85(1) provides:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of **competition** within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 (b) limit or control production, markets, technical development, or investment;
 (c) share markets or sources of supply;
 (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

71. *Wouters*, ¶ 58.

72. *Id.* ¶ 57.

73. *Id.* ¶¶ 80-96.

74. For a more elaborate discussion of the Court’s “very, very surprising turn,” see Otto L. Walter Lecture, *supra* note 69, at 189-90.

inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.⁷⁵

The Court did not require any showing that the absolute ban on partnerships between lawyers and auditors was the least restrictive means available to preserve the “proper practice of the legal profession.”⁷⁶ It accepted at face value NOVA’s assertions that the ban was necessary to protect “the duty to act for clients in complete independence and in their sole interest . . . the duty to avoid all conflict of interest and the duty to observe strict professional secrecy.”⁷⁷ Finally, it rested its holding in part on a perceived incompatibility between the role of a lawyer and that of an auditor. A lawyer “guarantees that all steps taken in a case are taken in the sole interest of a client.”⁷⁸ In contrast, an auditor “undertake[s] an objective examination and audit of . . . clients’s accounts, so as to be able to impart to interested third parties [the auditor’s] personal opinion concerning the reliability of those accounts.”⁷⁹

The impact of the *Wouters* decision on existing MDPs and the possible establishment of new ones is not clear. It certainly gives a green light to bar regulators in countries, like The Netherlands, that have previously adopted such a ban. They are now free to enforce the prohibition without fearing that they are possibly violating EU competition law. The *Wouters*

75. *Wouters*, ¶ 110.

76. A remand for the purpose of exploring the question of the proportionality of the ban was clearly one option available to the Court. The Advocate General had suggested that the ECJ order a remand for this purpose. That the Court ignored the suggestion is surprising. There is no U.S. counterpart to the Advocate General. The Advocate General is an experienced lawyer who serves as a law clerk to the ECJ. His responsibility is “acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases before the Court of Justice, in order to assist the Court in the performance of [its] task.” Article 222. His opinions are a matter of public record and are highly regarded. For a more complete description of the role of the Advocate General, see BERMAN ET AL., *supra* note 64, at 61-63.

The Court’s decision in *Wouters* departs from the Advocate General’s in two important respects. First, the Advocate General specifically refused to apply a rule of reason to SV 93’s ban. See Opinion of the Advocate General Philippe Leger, Case C-309/99, *Wouters v. NOVA*, (July 10, 2001), available at <http://curia.eu.int/en/juris/index.html>. The Court did, upsetting well-established jurisprudence. See *supra* note 70 and accompanying text. Second, he concluded that a remand was necessary because “the Court was not in possession of sufficient evidence to settle the question itself of the proportionality of the contested Regulation.” *Id.* ¶ 196. A remand would have provided an opportunity for the challengers to show that other, less restrictive alternatives were available. The Court’s decision is silent on the question of taking further evidence, strongly suggesting that any remand is for ministerial or procedural purposes only. See Terry, *supra* note 69, at 891 n.71. Why the Court rejected the Advocate General’s recommendation is not known.

77. *Wouters*, ¶ 100.

78. *Id.* ¶ 102.

79. *Id.* ¶¶ 102 & 104. MDP opponents in the United States and elsewhere repeatedly raised this objection as well.

decision may also encourage MDP opponents in countries without a ban to urge the adoption of one.

Assessing the decision's impact is especially difficult in light of Andersen's demise and the fire-sale of the law firms previously affiliated under the umbrella of Andersen Legal.⁸⁰ Andersen's demise may encourage MDP opponents to use *Wouters* to attack existing relationships between law firms and the Final Four and stop new relationships from forming. Their most likely argument is that the auditing arm of Andersen lost its independence in the Enron affair because it wanted to preserve the lucrative assignments of its consulting arm.⁸¹ They would then charge that an MDP-type relationship between a lawyer and a nonlawyer, especially an auditor, poses an identical threat to the lawyer's exercise of independent professional judgment.⁸²

On the other hand, MDP opponents may conclude that the Enron affair and other prominent accounting scandals in the telecommunications industry have sufficiently exposed the threat to independence that the marketplace will automatically devalue the alleged benefits of one-stop shopping.

Finally, assessing the impact of *Wouters* is difficult because the Law Society of England and Wales is still debating precisely how to amend the Solicitor's Code of Conduct to permit solicitors to form MDP-type relationships with nonsolicitors.⁸³ That decision will significantly influence the MDP debate around the world. *Wouters* may become irrelevant for all practical purposes, if the Law Society fully blesses the Contractual or Side-by-Side Model and/or the Fully Integrated Model. The Law Society's response to *Wouters* was noticeably cool.⁸⁴

80. See *infra* notes 275-85 and accompanying text.

81. Enron paid Andersen \$25 million in auditing fees and \$27 million for consulting fees in 2000. Nanette Byrnes et al., *The Enron Scandal*, BUS. WK., Jan. 28, 2002, at 44. One study of 563 publicly traded companies showed that on the average they paid \$2.69 in consulting fees for every \$1.00 in audit fees. Another study reported that twenty-six of the thirty companies that are components of the Dow Jones Industrial Average paid more in consulting fees than auditing fees to the Big Five firms responsible for auditing those companies' financial statements. See Ken Brown, *Accounting Industry Fights Calls for 'Audit Only' Rules*, WALL ST. J., Mar. 7, 2002, at C1; Laura Pearlman, *Leftovers Anyone?*, AM. LAW., June 2001, at 21; Jonathan Weil & Jeffrey A. Tannenbaum, *Big Companies Pay Audit Firms More for Other Services*, WALL ST. J., Apr. 10, 2001, at C1.

82. E.g., Suzanne Kapner, *Enron's Many Strands: Connections; Enron Fiasco Leads European to Reconsider Ties between Accounting and Legal Practices*, N.Y. TIMES, Feb. 3, 2002, at 28; Nikki Tait & Michael Mann, *A set-back for the one-stop shop: MULTIDISCIPLINARY PARTNERSHIPS: A European court has stirred the 'conflict of interest' debate over links between lawyers and accountants*, FIN. TIMES (London), Feb. 25, 2002, at 14.

83. See *infra* notes 150-88 and accompanying text.

84. In response to the decision, the Law Society issued the statement, "We support the principle of MDPs as part of our commitment to improve access to legal services and choice for consumers."

B. France

As noted earlier, the Paris Bar was instrumental in focusing the attention of the U.S. legal profession on MDPs.⁸⁵ The cries of alarm raised by the Paris Bar are readily understandable. MDPs present more of a threat to traditional law firm practice in that country than they do in Germany, the United Kingdom, or the United States. Until the collapse of Andersen Legal, each of the Big Five had an active legal services practice in France conducted through affiliated law firms.⁸⁶ Those firms grew to be among the largest law firms in that country.⁸⁷

The explanation for the establishment and growth of MDPs in France is multi-faceted. It requires an understanding of the divided structure of the country's legal profession, the geographic limitations on the scope of the bar's regulation, and the government's active involvement in issues relating to the structure of the legal profession and affiliations between members of the legal profession and nonlawyers.

France, like many other Western European countries, has a divided legal profession.⁸⁸ Of particular importance in the MDP debate are the distinct professions of *avocat*, *avoué*, and *notaire*, each of which is governed by separate statutes, codes of conduct, and regulatory bodies.⁸⁹ Appreciating the differences among these and other legal professionals and the limitations imposed on their practices and forms of business organizations is a critical first step in understanding the opportunities that the Big Five aggressively pursued.

For hundreds of years, the *avocat* has been the central figure in the

Tait & Mann, *supra* note 82.

85. *See supra* note 1.

86. The associated law firms are Archibald Andersen (Andersen), H.S.D. [hommes, stratégie, droit] (E&Y), Deloitte & Touche Juridique et Fiscal (Deloitte & Touche), Thomas & Associés and Fiduciare Juridique et Fiscale de France—Fidal (KPMG) [hereinafter Fidal]; and Landwell & Associates (PwC). *See* THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 192 n.12.

87. *See infra* note 131-32 and accompanying text.

88. *See infra* notes 214-26 and accompanying text.

89. A complete description of their activities is beyond the scope of this article. *See generally* Ronald P. Sokol, *Reforming the French Legal Profession*, 26 INT'L LAW. 1025 (1992); Sanglade & Cohen, *supra* note 33, at 127-33. Their functions may be summarized as follows: *avocats* are the legal professionals who represent clients in litigation and advise on dispute resolution; *avoués* are the legal professionals who represent clients in appellate litigation; and *notaires* are legal professionals whose functions relate to the preparation and execution of legal documents such as trusts, wills, and agreements for the sale and purchase of real estate. Sanglade & Cohen, *supra* note 33, at 127-28. *See also* THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 193 n.16.

pantheon of the French legal profession.⁹⁰ *Avocats* generally limited their services to those associated with litigation.⁹¹ Business counseling was left to nonlawyers or other legal professions.⁹² The history of MDPs in France begins in 1970 when the French Parliament enacted legislation that added the title of *conseil juridique* to the list of officially recognized legal professionals.⁹³ The primary function of the *conseil juridique* was to counsel clients on business matters.⁹⁴ Like each of the other legal professions, the *conseil juridique* was separately regulated and had its own code of conduct.⁹⁵ Significantly absent from the regulations and code was a prohibition on affiliating with nonlawyers or sharing legal fees with nonlawyers. The Big Five and their predecessors seized this opportunity and eagerly courted *conseil juridique* to join their staffs.⁹⁶

Over the next twenty years, the *conseil juridique* were successful in establishing their competence to advise on a wide range of business activities. In contrast, very few *avocats* established a remunerative business law practice.⁹⁷ Clients continued to view *avocat* firms as providing primarily litigation services.

In 1990, the French Parliament took a second stab at reforming the legal profession.⁹⁸ The new legislation put *avocat* firms at an even greater disadvantage. It merged the legal professions of *avocats* and *conseil juridique* into the single profession of *avocat* and authorized other professionals to advise clients on legal matters ancillary to their principal activities.⁹⁹ The Big Five and their predecessors used this legislation as a springboard to expand their legal services practices. The legislation, moreover, encouraged other organizations to enter the marketplace, including banks, insurance companies, and unions.¹⁰⁰

What the legislation omitted was probably as harmful as what it affirmatively permitted. The *avoué* remained a separate legal professional. There was no provision permitting partnership between or among *avocats*,

90. Sanglade & Cohen, *supra* note 33, at 128.

91. *Id.*

92. *Id.*

93. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 194-95.

94. *Id.*

95. *Id.* at 195.

96. *Id.* at 195-96.

97. *Id.* at 196.

98. See THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 197.

99. *Id.*

100. *Id.*

avoués, or *notaires*. Lawyers were not given a monopoly over activities such as providing legal advice, drafting legal documents, or even representing clients in litigation.¹⁰¹

The 1990 legislation dealt the *avocat* law firms an additional blow. Among the Big Five's competitive advantages over law firms is "branding." The Big Five can offer a multitude of services under the umbrella of a single name.¹⁰² Each time they competently perform a service for a client the reputational capital of the entire firm as well as the unit providing the service increases. Media campaigns benefit the entire firm not just the service units whose particular skills they extol. Given the large size of the Big Five's media budgets, their ability to reach potential new clients far exceeds that of any law firm.¹⁰³ In France, the advantage's impact was multiplied because of the legal profession's cultural hostility to any and all forms of self-aggrandizement. The *avocats* wholeheartedly disapproved of advertising as unprofessional and supported a regulatory environment that either outlawed it entirely or limited it severely.¹⁰⁴

The French Parliament passed two separate statutes reforming the legal profession on the same day in 1990. Each contained a provision relevant to the type of branding permitted when a law firm was affiliated with a Big Five firm. Article 67 of the first statute appeared on its face to limit to five years the length of time an *avocat* (formerly a *conseil juridique*) could refer to an affiliation with a professional services firm.¹⁰⁵ Article 2 of the second statute allowed an entity to "add, before or after its name or insignia of the association, the group or professional network, be it national or international, of which that entity is a member."¹⁰⁶ Article 2, however, was subject to article 67. The Big Five and French bar associations have been fighting over the interpretation of articles 67 and 2 for the past twelve years.

Only one law firm associated with a Big Five firm,

101. *Id.*

102. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 200.

103. U.S. law firms are far ahead of foreign law firms on the learning curve with respect to advertising. Compared to the Big Five, however, U.S. firms are novices. It is ironic that "[t]o direct high-powered marketing campaigns, [U.S. firms] are bringing aboard experts from the corporate sector, particularly accounting firms." Martha Neil, *Learning How to Ad*, A.B.A. J., Oct. 2001, at 42, 44.

104. *See also infra* notes 230-39 and accompanying text.

105. Art. 67, Law No. 90-1259 of J.O., Jan. 5, 1991 of Dec. 31, 1990. *See* THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 200-01.

106. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 200-01 (citing Art. 2, para. 4, Law No. 90-1258 of Dec. 31, 1990).

PricewaterhouseCoopers Juridique and Fiscal, has ever changed its name.¹⁰⁷ It rechristened itself “Landwell.” That change, however, was neither a victory for the French bar associations nor a benefit for the *avocat* firms. Many of the law firms affiliated with PwC around globe had kept their local name and tagged along some reference to PwC on the lawyers’ business cards and the firms’ letterheads. To better brand its legal services competency and global reach, PwC had *all* its affiliated firms adopt the name “Landwell.”¹⁰⁸

The other Big Five firms did not follow PwC’s lead. *Assuming* that the French bar associations’ interpretation of articles 67 and 2 is correct, Fidal, which is the legal services arm of KPMG, may escape the articles’ reach because the firm’s name does not refer to the affiliation.¹⁰⁹ E&Y and Deloitte & Touche are subject to the jurisdiction of the Bar of Nanterre (Hauts-de-Seine).¹¹⁰ That Bar’s membership has been dominated by *avocats* associated with the law firms affiliated with the Big Five.¹¹¹ It is not surprising therefore to discover that the Bar of Nanterre has displayed no interest whatsoever in forcing those law firms to comply with article 67’s five-year limitation.¹¹² The French law firms affiliated with the large accounting firms consequently continue to publicize the affiliations, benefitting from the derivative branding.

The French bar has attempted to use the rules of ethics as a weapon in its war with the Big Five on at least two occasions, once in 1998 and again in 1999. In 1998, the National Council of the Bars¹¹³ issued a decision that

107. See THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 202-03.

108. Jean Eaglesham, *Pwc Reorganizes Network of Law Firms*, FIN. TIMES (LONDON), Oct. 11, 1999, at 4. Prior to the name change, PwC’s legal network operated in forty-two countries under twenty different names. While the network’s restructuring will not allow the member law firms to circumvent local bar rules against sharing fees or entering into a partnership with a nonlawyer, it will provide them with economic advantages such as sharing costs related to marketing and training. *Id.*

109. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 203.

110. *Id.* See *supra* note 86. Until its disintegration, Archibald, Andersen Legal was also subject to the Bar of Nanterre’s jurisdiction.

111. *Id.*

112. *Id.*

113. The National Council of the Bars is an organization composed of eighty lawyers whose principal functions are to harmonize the rules of professional conduct that have been separately adopted by the one hundred and sixty-three local bar associations, present the profession’s views to the French government, and establish standards in accordance with government directives. Richard Tyler, *War of the Words*, THE LAW., Aug. 4, 1998, at 15; see also Sanglade & Cohen, *supra* note 33, at 131; John M. Grimes, Note, “*Une et Indivisible*”—*The Reform of the Legal Profession in France: The Effect on U.S. Attorneys*, 24 N.Y.U. J. INT’L L. & POL. 1757, 1772 (1992). As this description suggests, the French government plays a much more active role in the organization of the *avocat* profession than either the state or federal governments do in the United States with respect to the legal

ostensibly recognized the right of *avocats* to form a partnership with nonlawyer professionals subject to certain conditions.¹¹⁴ The Big Five accused the National Council of using its rulemaking authority for protectionist purposes. However, they did not reject the decision entirely.¹¹⁵ While the National Bar Counsel's 1998 decision was far from a ringing endorsement of *avocats* practicing in MDPs, its issuance is not hard to understand. First, the prior efforts to limit affiliations between law firms and the Big Five had failed miserably. MDPs were now solidly ensconced on the legal landscape. Second, the Big Five firms had hired a large number of law school graduates as *stagiaires* at a time when the traditional *avocat* firms could not absorb them.¹¹⁶ Without the Big Five's assistance, a political and professional crisis would have ensued.

In 1999, the National Council, in anticipation of the Nallet Report discussed below, adopted a new article 16 to the code of conduct.¹¹⁷ It provided that if a law firm was affiliated with an MDP, all the MDP's members had to conform their conduct to the *avocats*' ethics rules.¹¹⁸ The ostensible purpose for article 16's adoption was to insure the *avocats*' independence and the avoidance of conflicts of interest.¹¹⁹ PwC challenged the National Council's authority. The Paris Court of Appeal subsequently ruled that the National Council lacked the authority to regulate the conduct of MDPs.¹²⁰

The French government also speaks with a loud voice in the MDP debate. In 1999, it asked Henri Nallet, a member of Parliament and a former Minister of Justice, to study the reform of the French legal

profession. Illustrative of this active role is Decree No. 91-1197 of Nov. 27, 1991, J.O., Nov. 28, 1991, P. 15, 502 (dictating the basic structure of the *avocat* profession).

114. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 108-09.

115. Among the recommendations most strenuously objected to were those that would have required MDPs to disclose to the local bar association the legal and financial relationship between the *avocats* and the nonlawyer members of the MDP. Tyler, *supra* note 113; see also THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 208-09.

116. A lawyer in France must undergo a two-year period of supervised training. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 207-08; Sanglade & Cohen, *supra* note 33, at 135.

117. Art. 16, Conseil National des Barreaux, Décision à Caractèrenormatif no. 1999-001 (Mar. 26-27, 1999), at 45-46, cited in THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 204.

118. *Id.*

119. See generally Synopsis of Henri Ader's notes, at <http://www.abanet.org/cpr/ader.html> (last visited Apr. 1, 2002).

120. *French Court Overrules MDP Ban*, LEXISLEGAL, THE LEGAL INSIDER, <http://www.lexislegal.com/ews/storyBin/20010207/Story487.asp>; PwC *Triumphs Against Paris Bar in Landmark MDP Ruling*, THE LAW., Feb. 5, 2001, at 2.

profession and affiliations among members of the different legal professions and between legal and nonlegal professionals.¹²¹ Both the proponents and opponents of MDPs in France can take solace in some of the recommendations in M. Nallet's Report. For example, he would permit *avocats* and nonlegal professionals to enter into a legally cognizable relationship, but deny them the right to share legal fees.¹²² He would create a new regulatory body for policing the ethical conduct of MDPs but have that body principally draw upon the existing codes of conduct and the disciplinary bodies in place.¹²³ He considers the system of conflicts monitoring in existing MDP firms to be adequate and not in need of change, but he would impose restrictions on advertising by MDPs similar to those now placed on *avocats*.¹²⁴

Two sets of recommendations suggest that he, like the French bar associations in general, is worried about the impact of the MDP relationship on a lawyer's independence. First, the Report affirms the "absolute independence" of lawyers and auditors from one another.¹²⁵ It states that each profession within the MDP should control its professional strategy, management, and admission of partners.¹²⁶ It emphasizes that *avocats* in an MDP must remain subject to rule of professional secrecy.¹²⁷ Second, it proposes that the contracts establishing the terms of the relationship between the lawyer and nonlawyer professional be filed with the new and existing regulatory bodies and be available for review by the MDP's clients.¹²⁸ This will presumably enable the reviewers to judge for themselves whether the terms of the relationship threaten the lawyer's independence.¹²⁹

The French Parliament has not acted on the recommendations in the Nallet Report. One reason for its inaction may be that the Report contained

121. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 192, 211-15. Lurking ominously in the backdrop to the Nallet Report is not only the French firms' weaknesses in competing with law firms affiliated with the Big Five but also the significant inroads made by U.S. and U.K. firms into the marketplace for sophisticated legal services. Ben Cook, *A Storm Brewing*, LEGAL BUS., Apr. 2001, at 76.

122. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 212-13.

123. *Id.*

124. *Id.* at 214.

125. *Id.* at 213.

126. *Id.*

127. *Id.* at 214.

128. *Id.* at 213.

129. *Id.* at 213-14. See also Ader, *supra* note 119; Sydney M. Cone, III & François Berbinau, *The Nallet Report and Multidisciplinary Practice*, <http://www.abanet.org/cpr/nallet.html> (last visited Apr. 1, 2002) (summarizing the Nallet Report's recommendations with respect to MDPs).

a number of other controversial recommendations such as allowing passive investments in law firms and amending certain tax laws applicable to lawyers and law firms.¹³⁰ Another reason may be that the Report presented its recommendations as general principles not concrete measures. In France, as in the rest of the world, the devil is in the details.

In short, the current legal and regulatory status of MDPs in France is murky and confused. The Big Five and their affiliated law firms used the disarray to their advantage. By 2001, four of the six largest law firms in France were affiliated with Big Five firms.¹³¹ Two of the affiliated firms ranked first and second in terms of size, and both were significantly larger than the French firm in third place. The two affiliated firms that ranked fourth and sixth were almost the same size as the French firms that immediately precede them in the rankings.¹³²

B. Germany

Until very recently, the principle purpose of a German legal education was to form lawyers who would enter careers associated with the judiciary and the civil service.¹³³ Educators paid little attention to the education of lawyers who would represent corporate clients in litigation or transactional work.¹³⁴ Like the French legal profession, the German legal profession is

130. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 214-15.

131. The six largest law firms in France are: Andersen (378 lawyers), Landwell (360 lawyers), Francis Lefebvre, Bureau (270 lawyers), HSD Ernest & Young (261 lawyers), Gide Loyrette Nouel (235 lawyers), and Deloitte & Touche Juridique & Fiscal (230 lawyers). *France's Largest Firms*, AM. LAW., Nov. 2001, at 91.

132. *Id.*

133. Hilmar Fenge et al., *Legal Education and Training in Europe: Germany*, 2 INT'L J. LEGAL PROF. 95, 103-05 (1995); Jutta Brunnée, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEGAL EDUC. 399, 400 (1992); see generally Juergen R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 VAN. J. TRANSNAT'L L. 301, 309-10 (1993).

134. This deficiency has prompted prominent corporate law firms in Germany to sponsor that country's first private law school. *Leading Firms Back German Private Law Schools*, EUR. LEGAL BUS., Jan./Feb. 2001, at 8. One commentator has noted:

There is little literature available on . . . the teaching of legal business planning and formation . . . These publications do not really address international circumstances, and are more oriented towards two-party contractual relationships and not towards corporate structures. At least on the continent of Europe there is a lack of conceptualization of the planning and structuring of legal transactions. The international dimension of these legal activities, which are core activities in the "international practice of law", is thus unconceptualized either. The "decision"-oriented legal education has not been adequately supplemented by an "action" or "creation"-oriented legal education.

Drolshammer, *supra* note 11, at 721 n.9.

also divided and consists in part of a *Rechtsanwalt*, who performs functions similar to those of a trial or deal lawyer, a *Patentanwalt* who represents clients in connection with procuring and enforcing patents, and a *Notar* who is a public official whose functions include the supervision of the execution of certain documents.¹³⁵ In some instances, an individual may be a member of more than one legal profession. The accounting profession is also divided, and an individual may be a member of more than one accounting-related profession. Complicating these divisions even further is that under certain circumstances an individual may simultaneously be a member of both a legal profession and an accounting-related profession.¹³⁶

MDP relationships in Germany are either fully integrated or contractual. Fully integrated relationships are permitted but only among certain designated categories of legal and accounting-related professionals. Only *Rechtsanwalt* may join a fully integrated MDP, and the nonlawyer members must be auditors, certified bookkeepers, tax advisors, tax agents, or patent lawyers.¹³⁷ Membership is generally limited to natural persons and passive investment is prohibited.¹³⁸

Because fully integrated MDPs have drawn the most vocal protest from the opponents of MDPs both in the United States and abroad, the question of their acceptance in Germany merits further inquiry. The answer is rooted in the German legal culture. To begin with, the statute that establishes the principle of professional secrecy is essentially the same for a *Rechtsanwalt* and the members of the accounting-related professions with whom the *Rechtsanwalt* may join in an MDP. There is an accountant-client privilege, just as there is an attorney-client privilege.¹³⁹ Professional independence is a core value for each professional. Auditors in Germany, moreover, do not have the same obligation of disclosure of client wrongdoing as they do in other countries.¹⁴⁰ The codes of conduct that govern the members of the different professions in an MDP are

135. See Gerhard Manz & Anne MacGregor, *The Legal Professions in Germany*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 33, at 143, 167.

136. See *THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS*, *supra* note 54, at 237; Terry, *supra* note 12, at 1553-56.

137. See *THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS*, *supra* note 54, at 249-51; Terry, *supra* note 12, at 1561-62. The rules of professional conduct permit *Rechtsanwalt* to enter into non-integrated relationships with other professionals such as architects and engineers. *THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS*, *supra* note 54, at 260-61.

138. See *id.* at 253.

139. *Id.* at 257.

140. *Id.*

substantively similar in many respects.¹⁴¹ If the rules are inconsistent and cannot be reconciled, the strictest rule that is in the public interest is applied.¹⁴²

In short, the “ethical gap” between lawyers and accountants that MDP opponents have cited in the United States and other countries is generally missing in Germany. Fully integrated MDPs are therefore seen as acceptable vehicles for the delivery of legal and nonlegal services by professionals in different disciplines. Further contributing to the acceptance of fully integrated MDP firms is their size and the control exercised therein by the *Rechtsanwalt*. Fully integrated MDP firms tend to be small in size. Consequently, law firms do not perceive them as an immense competitive threat the way they would a fully integrated Big Five firm. A very large number of the fully integrated MDP firms are lawyer-controlled, lessening the possibility of any concern that the accounting-related professionals could interfere with a *Rechtsanwalt*'s exercise of independent professional judgment.¹⁴³

In light of the restrictions discussed above on the types of professionals who may be members of a fully integrated MDP,¹⁴⁴ the Big Five have had to enter into a contractual relationship with law firms in Germany in order to participate in the marketplace for the delivery of legal services.¹⁴⁵ Until 1989, partnerships among lawyers in different cities were prohibited.¹⁴⁶ There was no similar restraint on the professionals who worked for the Big

141. *Id.*

142. See testimony of Hans-Jürgen Hellwig, <http://www.abanet.org/cpr/hellwig2.html> (last visited Apr. 1, 2002); written statement of Hans-Jürgen Hellwig, <http://www.abanet.org/cpr/hellwig1.html> (last visited Apr. 1, 2002); testimony of Thomas O. Verhoeven, <http://www.abanet.org/cpr/Verhoeven.html> (last visited Apr. 1, 2002); THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 257-59.

143. Testimony of Hans-Jürgen Hellwig, <http://www.abanet.org/cpr/Hellwig.html> (visited Apr. 1, 2002); written statement of Hans-Jürgen Hellwig, <http://www.abanet.org/cpr/hellwig.html> (visited Apr. 1, 2002); THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 262-64.

144. Other restrictions also come into play. For example, accounting firms are statutorily forbidden to give legal advice. Four of the law firms affiliated with the Big Five were structured as limited liability companies. Lawyers must constitute a majority of the shareholders in a limited liability company. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 266.

145. The affiliated law firms are: Andersen Luther Rechtsanwaltsgesellschaft mbH (Andersen), Menold Herrlinger Rechtsanwälte (E&Y), PwC Veltins Rechtsanwaltsgesellschaft mbH (PwC), WEDIT Deloitte Touche (Deloitte Touche), Raupach & Wollert-Elmendorff Rechtsanwaltsgesellschaft mbH (Deloitte Touche), KPMG Treuhand & Goerdeler GmbH (KPMG). *Id.* at 262 n.291. For a detailed description of their organization and history, see Terry, *supra* note 12, at 1576-87.

146. See *infra* notes 188-90 and accompanying text; see also THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 264-65.

Five, however. Over the course of time, the Big Five established offices across Germany and developed relationships with the leading commercial lawyers in those cities. When the ban on multi-city partnerships between lawyers was struck down, the Big Five moved strategically to encourage the law firms with which they had been working to consolidate.¹⁴⁷ The consolidation gave the merged law firms a broader set of practice groups, facilitated the integration of technology between the newly merged firm and the Big Five firm with which it was affiliated, and generally increased the efficiency of the delivery of legal services by the Big Five and their affiliated law firms.

The Big Five also moved strategically with respect to the recruitment of lawyers. In a pattern that they have followed elsewhere, they made a concerted effort to persuade well respected, leading lawyers to join their affiliated firms.¹⁴⁸ The Big Five's international capabilities were a very attractive selling point, especially for lawyers interested in cross-border transactions and mergers and acquisitions.¹⁴⁹

C. *The United Kingdom*¹⁵⁰

The principle legal professions in the United Kingdom are those of a barrister and a solicitor. While the precise divide between the two has become less clear in recent years,¹⁵¹ for the purposes of this Article the essential distinction is that barristers are trial lawyers and solicitors, transactional lawyers.¹⁵² Bar regulations mandate that barristers may have

147. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 264-65.

148. See *infra* notes 263-64 and accompanying text; Daly, *supra* note 2, at n.47 and accompanying text. See also *Landwell Boosts Corporate Department*, LEGAL BUS., Nov. 2001, at 22; *Mostyn-Williams Ditches Shearman for Landwell*, INT'L FIN. L. REV., Mar. 2001, at 22; *Norton Rose Loses Second Partner to MDP*, INT'L FIN. L. REV., Nov. 2000, at 5; *Thieffry Quits Norton Rose for Andersen Legal*, INT'L FIN. L. REV., Oct. 2000, at 4. A common adage in today's marketplace for legal services is that "clients hire lawyers not law firms." A lawyer who quits a law firm to join an MDP is certainly likely to encourage his or her clients to jump ship too. See *Andersen Legal's Client Win Leaves Nortons Nonplussed*, LEGAL BUS., Dec. 2001/Jan. 2002, at 16.

149. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 265-66.

150. For an excellent general overview of the MDP debate in the United Kingdom and the ethical and regulatory changes required if the proponents of MDPs carry the day, see Elspeth Deards, *MDPs: A Cause for Concern or Celebration*, 8 INT'L J. LEGAL PROF. 125 (2001).

151. Recent reforms have given solicitors rights of audience in all courts. See Access to Justice Act, 1999, C.22, § 36 (Eng.); Higher Courts Qualifications Regulations (2000); Courts and Legal Services Act, 1990, C.41, § 27 (Eng.). See generally OFFICE OF FAIR TRADING, AMENDMENTS TO THE CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES XV (2001).

152. See generally Philip Wareham, *Solicitors in England and Wales*, in THE LEGAL PROFESSIONS IN THE NEW EUROPE, *supra* note 33, at 334; Zand Yaqub, *Barristers in England and Wales*, in THE

only other barristers as partners.¹⁵³ That ethical rule is so ingrained in the U.K. legal culture that it was never seriously challenged during the debate over MDPs.¹⁵⁴

The MDP debate focused on whether and to what extent solicitors should be permitted to enter into a partnership or share legal fees with nonsolicitors.¹⁵⁵ That debate took place in a legal environment in which solicitors did not have monopoly rights¹⁵⁶ and regularly competed with businesses and entities operated by nonlawyers.

[W]hereas solicitors have been restrained in challenging the Bar, lay competitors have been far more aggressive in invading the domain of solicitors. Banks and trust companies, accountants, real estate agents, companies, and trade unions all perform solicitors' work for their customers, employees, and members. The lay public also seems less tolerant of the solicitors' monopoly than they are of the barristers' exclusive right of audience¹⁵⁷

Certain solicitors practice rules, whose content was similar to the lawyer codes of conduct in the United States, also shaped the debate.

LEGAL PROFESSIONS IN THE NEW EUROPE, *supra* note 33, at 319; Richard L. Abel, *England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors*, in *LAWYERS IN SOCIETY: AN OVERVIEW* 39-91 (Richard L. Abel & Philip S. C. Lewis eds., 1995).

153. CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES, Rule 207 (6th ed. 1998).

154. *See generally* testimony of Dan Brennan, at <http://www.abanet.org/cpr/Brennan.html> (last visited Apr. 1, 2002). Mr. Brennan is the General Counsel of the Bar of England and Wales. While the ban has not been "seriously challenged," there have been calls for its repeal. *See e.g.*, DIRECTOR GENERAL OF FAIR TRADING, OFFICE OF FAIR TRADING, *COMPETITION IN PROFESSIONS* (2001). Compare A. Arden, *The Case for Partnership*, *THE LAW.*, Dec. 6, 1999, at 1; A. Arden, *When Partnerships Are the Answer*, *THE LAW.*, Jan. 10, 2000, at 15 with J. Hirst, *Partnerships Offer No Benefits*, *THE LAW.*, Dec. 13, 1999, at 29.

155. The regulation of solicitors in the United Kingdom is split along geographic lines. As their names suggest, the Law Society of England and Wales and the Law Society of Scotland and Northern Ireland govern the conduct of solicitors who practice within those respective territories. References to the MDP debate are to the debate within the Law Society of England and Wales. Because its jurisdiction includes London, it governs almost all of the large U.K. solicitor firms. The British government and press give close attention to its positions on legal issues. The legal professions in the Commonwealth countries also look to it for leadership. The Law Society of Scotland and Northern Ireland is generally opposed to amending the rules of solicitor conduct to permit solicitors to share with fees with nonsolicitors or to form a partnership with them. *THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS*, *supra* note 54, at 216-17.

156. British law distinguishes between "reserved" and "unreserved" work. Litigation, advocacy, conveyancing, and probate work make up the classification of reserved work. Unreserved work is "other legal work which anyone is allowed to do." *LAW SOCIETY OF ENGLAND AND WALES, MULTIDISCIPLINARY PRACTICES-WHY? WHY NOT?*, § 2.1 (1998), at http://www.lawsoc.org.uk/dcs/fourth_tier.asp?section_id=922 (last visited Apr. 1, 2002). Within this framework, "any person or business can, for a fee, give legal advice or prepare a will." *Id.* § 2.2. *See generally* Alison Crawley, *Written Remarks*, <http://www.abanet.org/cpr/crawley.html> (visited Oct. 22, 2002).

157. *LAWYERS IN SOCIETY*, *supra* note 152, at 56.

Practice Rule 7, for example, barred solicitors from sharing legal fees or entering into a partnership with a nonsolicitor.¹⁵⁸ Practice Rule 4 reinforced the bar by specifically stating that except in very limited circumstances a solicitor employed by a nonsolicitor could have as his or her client only the employer.¹⁵⁹ While these rules on their face are straightforward, they are complicated by the fact that a solicitor may enter into an ancillary business-type relationship with a nonsolicitor.¹⁶⁰ A solicitor may organize or join a separate business and serve as a “business advisor.” However, he or she may not use that separate business to provide legal services.¹⁶¹ These principles resemble U.S. rules that govern a lawyer’s conduct in connection with an ancillary business.

The MDP debate in the United Kingdom began in earnest with the Thatcher government’s efforts to introduce greater competition in the market for legal services.¹⁶² In 1986, the Office of Fair Trading issued the Entities Report, suggesting that relaxing the ban on partnerships between solicitors and nonsolicitors was in the public interest.¹⁶³ In 1990, the Parliament passed legislation repealing the statutory prohibitions that barred solicitors from forming a partnership with nonsolicitors.¹⁶⁴ However, the Law Society failed to amend Practice Rules 4 and 7, thus, the ethical bar remained in place. Solicitors continued to practice in one of the four traditional structures: “a partnership or sole practice,” “an unincorporated practice,” “an in-house employee,” or “a multi-national

158. Rule 7 provides:

A solicitor shall not share or agree to share his or her professional fees with any person except:

- (a) a practising solicitor
- (b) a practising lawyer of another jurisdiction
- (ba) a non-registered European lawyer partner with whom partnership is permitted by paragraph (6)(c) of this rule;
- (bb) a body corporate wholly owned and controlled, for the purpose of practising law, by lawyers with sub-paragraph (b) above
- (c) the solicitor’s bona fide employee, which provision shall not permit under the cloak of employment a partnership prohibited by paragraph (6) of this rule; or
- (d) a retired partner or predecessor of the solicitor or the dependents or personal representatives of a deceased partner or predecessor.

SOLICITORS PRACTICE RULES Rule 7 (2002).

159. *Id.* Rule 4.01-.09.

160. *See supra* note 31 and accompanying text.

161. *See* LAW SOCIETY OF ENGLAND AND WALES, *supra* note 156, at §§ 5.2.5, 7.6.2.-3.

162. *See generally* MJ Quinn, Note, *Reform of the Legal Profession in England and Wales*, 12 N.Y.L. SCH. J. INT’L & COMP. L. 237 (1991). For a general overview of the Thatcher government’s proposals, see the 1989 Green Papers.

163. OFFICE OF FAIR TRADING, REPORT ON RESTRICTIONS ON THE KIND OF ORGANIZATION THROUGH WHICH MEMBERS OF THE PROFESSIONS MAY PROVIDE THEIR SERVICES (1986).

164. The Courts and Legal Services Act, 1990, C.41, § 66 (repealing Solicitors Act § 39 (1974)).

practice.”¹⁶⁵

The Law Society triggered the current MDP debate in the United Kingdom in 1998 when it published the consultation paper, *Multi-Disciplinary Practices, Why? . . . Why not?*.¹⁶⁶ The paper extensively discussed the pro’s and con’s of amending the practice rules to permit MDPs. The Law Society subsequently formed a Working Group whose purpose was “[t]o take forward a review of MDPs to ensure that restrictions on the business vehicle/organisation through which solicitors practice, are the minimum necessary in the public interest and do not stand in the way of solicitors’ business development planning.”¹⁶⁷

The Working Group first decided that in conducting the review it would place the burden of proof on the proponents of the status quo.¹⁶⁸ It then formulated seven preliminary conclusions to guide subsequent analyses.¹⁶⁹ Many of those conclusions resembled the principles that guided the ABA Commission in its decision-making analysis.¹⁷⁰

With respect to the merits of the MDP debate, the Working Party proposed two interim practice models that it believed could be implemented immediately and would not require legislative approval. The first was a “Legal Practice Plus” model in which a solicitor firm could

165. LAW SOCIETY OF ENGLAND AND WALES, *supra* note 156, at § 5.1. A multi-national practice is a structure composed of a partnership or recognized body and registered foreign lawyers who share in the practice’s ownership. *Id.*

166. *Id.* In 1987, the Law Society issued a consultation paper on MDPs in which it reported that fifty-four percent of the solicitors who had responded to a Law Society survey thought that the ban on MDPs should be amended to permit solicitors and nonsolicitors to enter into a command and control relationship. Nonetheless, the Law Society objected to the Thatcher government’s efforts to repeal the statutory ban on MDPs. LAW SOCIETY OF ENGLAND AND WALES, *MULTI-DISCIPLINARY PRACTICES: PROPOSALS FOR THE WAY FORWARD, A PRELIMINARY REPORT FOR THE DEBATE* § 3 (1999), at <http://lawsoc.org.uk/stage.asp> (last visited Nov. 3, 2002) [hereinafter *PRELIMINARY REPORT*]. In 1993, it again surveyed its membership. The percentage favoring MDPs dropped to forty-three percent. *Id.* § 4. In 1996, the Council of the Law Society, its governing body, decided to revisit the question of MDPs. *Id.* § 5.

167. *Id.* at § 12.

168. The ABA Commission on Multidisciplinary Practice took the same position in its initial Recommendation and Report. It subsequently modified that position and conducted its inquiry as if each side bore the burden.

169. Among the conclusions were that any decision would have to balance a solicitor’s interest in providing “any legal service through any medium to anyone” with “the necessary safeguards to protect the public interest;” that the core principles to be preserved were “independence, freedom of choice, conflict of interest, confidentiality;” and that “transparency will be important—the client must know what services have been provided and by whom.” *PRELIMINARY REPORT, supra* note 166, § 21.

170. *Compare id. with* ABA COMM. ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (2000), at <http://abanet.org.cpr.mdppfinalrep2000.html> (last visited Apr. 1, 2002); ABA COMM. ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (1999), at <http://abanet.org.cpr/mdpreport.html> (last visited Apr. 1, 2002).

have one or more nonsolicitor partners.¹⁷¹ A *quid pro quo* was extracted, however. Each nonsolicitor partner would have to enter into special contract with the Law Society, and the solicitor(s) in such a firm would have to assume “extra responsibilities.” Furthermore, the nonsolicitor partners could never hold a majority interest in the firm. Although a Legal Practice Plus solicitor firm was limited to supplying “services only of a kind which are normally provided by solicitors practising as solicitors,”¹⁷² the Law Society did not regard that limitation as unduly restrictive because “the scope of solicitors’ services are already broad . . . and are becoming increasingly so.”¹⁷³ The Legal Practice Plus model is a variant on the Command and Control Model discussed earlier.¹⁷⁴

The second was a “Linked Partnership” model in which a solicitor firm “link[s], for example, with an accountancy practice,” and the two linked entities share fees.¹⁷⁵ The Working Party expressed more hesitancy about the feasibility of the Linked Partnership model than the Legal Practice Plus’s. It left unresolved, for example, the question whether the ban on fee sharing should be modified only for “certain specified alliances, or more generally.”¹⁷⁶ It also pointed out that the issues of passive investment and solicitor/auditor conflicts, among others, were left unresolved.¹⁷⁷

The Council of the Law Society substantially adopted the Working Group’s conclusions and recommended that the Legal Practice Plus and Linked Partnerships be considered by the full membership.¹⁷⁸ The Legal Practice Plus recommendation subsequently encountered an unexpected obstacle, however. The Law Society received a legal opinion from its counsel that

[t]he Law Society may not lawfully seek to regulate NSPs under the 1974 Act. Also there are real dangers that a court would conclude that the Law Society cannot lawfully purport to regulate NSPs by contract.

171. LAW SOCIETY OF ENGLAND AND WALES, MULTI-DISCIPLINARY PRACTICE WORKING PARTY—THIRD INTERIM REPORT (2000) (on file with author).

172. *Id.* § 4.19.

173. *Id.* § 4.20.

174. *See supra* notes 23-27 and accompanying text.

175. PRELIMINARY REPORT, *supra* note 166, ¶ 22.2.

176. *Id.*

177. *Id.* ¶ 23.

178. LAW SOCIETY OF ENGLAND AND WALES MDP WORKING GROUP, FOURTH INTERIM REPORT at 2, at http://www.lawsoc.org.uk/des.fourth_tier.asp?section_id+4773 (last visited Nov. 3, 2002).

Because of section 9(1) of the 1985 Act, and section 24(1) of the 1974 Act, an incorporated LLP MDP would be unlawful. Only primary legislation would change this.¹⁷⁹

The legal opinion prompted the Law Society to seek the statutory changes necessary to implement its Legal Practice Plus recommendation and appoint another working party to reevaluate its prior proposals.¹⁸⁰ To date, no further information has been disseminated publicly on the progress that is being made in accomplishing these goals.

In the United Kingdom, as in France, the government has pressed for change. The Office of Fair Trade is a major participant in the MDP debate. Its mission is “[t]o make sure that competition works well in markets for goods and services, so as to make business more efficient, and benefit consumers.”¹⁸¹ The office first roiled the waters with the Entities Report in 1986.¹⁸² That Report played a major role in persuading Parliament to repeal the statutory ban on partnerships between solicitors and nonsolicitors. The Office of Fair Trading monitors closely the Law Society’s policy positions on MDPs and is a strong advocate for reform. It operates on the principle that

[t]he Government considers the range of choice available to users of legal services in England and Wales should not be limited unless there are strong public interest reasons to the contrary, and that restrictions on competition between solicitors should be no greater than is necessarily adequate to safeguard the interests of their clients.¹⁸³

In weighing the public interest, it rejects the proposition that problems of “conflict of interest and professional secrecy [are] insuperable.”¹⁸⁴ Moreover, it views MDPs as strengthening the ability of both accounting and law firms to compete in the global marketplace. “If a major UK law firm and accountancy firm can join together to sell a good product in Poland, why should we put sand in the wheels to prevent them doing so?,”¹⁸⁵ asked the Director of Competition in an important policy

179. *Id.* at Annex A at § 45 (reprinting Joint Opinion, In the Matter of The Law Society and Multi Disciplinary Practice for Solicitors). “NSP” refers to nonsolicitor partner.

180. *Id.* at 6.

181. Margaret Bloom, Opportunities and External Constraints on Legal Business (July 2, 1997) (on file with author). Ms. Bloom was the Director of Competition Policy, Office of Fair Trading.

182. *See supra* note 163 and accompanying text.

183. Bloom, *supra* note 180, at 2.

184. *Id.*

185. *Id.*

statement in 1997.

In March 2001, the Office of Fair Trading issued a major report, *Competition in Professions*, in which it again addressed the drag on competition resulting from the Solicitors Practice Rules 4 and 7.¹⁸⁶ It noted somewhat ominously “I welcome the fact that the Law Society is currently at an advanced stage in considering proposals for liberalisation. I look for progress on this within 12 months.”¹⁸⁷ In the conclusion, it was even more direct: “We will take action after this grace period if necessary, or earlier if there is no evidence of a willingness to make changes.”¹⁸⁸

Given the Office of Fair Trading’s preference for avoiding direct conflict, it is likely to take no precipitous action as long as the Law Society is acting in good faith to obtain the necessary legal authority to implement its Legal Practice Plus recommendation. At the same time, however, it is likely to exert pressure on the Law Society to flesh out its Linked Partnership recommendation.

D. The Response of International Bar Associations to MDPs

In light of the Big Five’s global ambitions with respect to the delivery of legal services, it is not at all surprising that bar associations dedicated to promoting the rule of law across national borders would add their voices to the MDP debate. The position of three such organizations, the Council of the Bars and Law Societies of the European Union (CCBE),¹⁸⁹ the International Bar Association (IBA),¹⁹⁰ and the Union Internationale des

186. OFFICE OF FAIR TRADING, *COMPETITION IN PROFESSIONS* ¶¶ 29-32 (2001).

187. *Id.* at 13.

188. *Id.* ¶ 55.

189. The CCBE is

the officially recognised pan-European professional organisation in the European Community, which includes the national organisations representing the legal profession (bars and law societies) from the Member States of the European Union and the Member States of the European Economic Area, as well as observer delegations from other European countries. The CCBE is established in order to act as a joint body on behalf of the Bars and Law Societies of the States of the EEA in all matters [sic] involving the application of the European law. The objective of the CCBE is to co-ordinate the views, policies and activities of the Bars and Law Societies in the EEA in their common dealing with the European Community, EEA, and EFTA institutions.

1 J. CCBE CENT. & E. EUR. COUNTRIES 2 (2000), at <http://www.ccbe.org/uk/uk.htm> (last visited Apr. 1, 2001); see generally John Toulmin, *A Worldwide Common Code of Professional Ethics?*, in RIGHTS, LIABILITY AND ETHICS, *supra* note 33, at 207, 207 n.1. It has played a leadership role in the creation of European Union law respecting the delivery of legal services across the Member States’ borders. See generally Laurel S. Terry, *An Introduction to the European Community’s Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 (1993).

190. The IBA is “a dual membership organisation, comprising 16,000 individual lawyers and 180 Bar Associations and Law Societies.” International Bar Association, *Introduction to the IBA*, at <http://www.ibanet.org/aboutiba/index.asp> (last visited Nov. 3, 2002). Its goals are: “To promote an

Avocats (UIA)¹⁹¹ merit particular attention. Because of their status and prestige, these organizations (rather than national and local bar associations)¹⁹² are likely to take the lead in future discussions with international regulators who are now turning their attention to the question of whether professional rules against partnership and fee sharing with nonlawyers constitute impermissible trade barriers.¹⁹³

The CCBE's views on MDPs have evolved cautiously over time. It twice adopted a declaration strongly opposing them, once in 1993 and again in 1996.¹⁹⁴ A majority of the Member State delegations endorsed a resolution in 1998 that would have softened the tone of the opposition, but that resolution fell short of the required supermajority vote.¹⁹⁵ Its current position remains solidly anti-MDP: "CCBE consequently advises that there are overriding reasons for not permitting forms of integrated co-operation between lawyers and non-lawyers with relevantly different professional duties and correspondingly different rules of conduct."¹⁹⁶

exchange of information between legal associations worldwide[;] To support the independence of the judiciary and the right of lawyers to practise their profession without interference[;] Support of human rights for lawyers worldwide through its Human Rights Institute." *Id.*

191. The UIA is a dual membership organisation comprised of thousands of individual lawyers and 250 bars and associations. It is "primarily an association of lawyers with an interest in defending the profession and its future in the national and international context." Union Internationale des Avocats, *What Is the UIA?*, at http://www.uianet.org/english/e_what_uia.htm (last visited Apr. 1, 2002). Its core objectives include:

- To promote the basic principles of the legal profession as defender of citizen's [sic] rights.
- To participate in the development of legal knowledge and practice in all fields of law all over the world.
- To contribute towards the establishment of international legal order based on the principles of human rights and justice between nations, through the law, and in the cause of peace.
- To cooperate in an organisation enjoying consultive status with national or international organisations with similar objectives.
- To establish at an international level permanent relations and exchanges between Bars, Law Societies, and their members.
- To defend the interests of members of the legal profession and study the problems arising in the role and practice of the legal profession, particularly on an international level.

Id.

192. The only likely exceptions to this observation are the ABA and the Japan Federation of Lawyers. Those organizations and the CCBE convened a forum on transnational practice in 1998 in anticipation of action by the WTO. See Laurel S. Terry, *An Introduction to the Paris Forum on the Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L L. 1 (1999).

193. See generally Laurel S. Terry, *GATS' Application to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 Vand. J. Transnat'l L. 989 (2001).

194. CCBE, DECLARATION ON MULTIDISCIPLINARY PARTNERSHIPS (adopted unanimously on Nov. 29, 1996) (on file with the author).

195. *Summary of the Testimony of Michel Gout*, President, Council of the Bars and Law Societies of the European Union, at <http://www.abanet.org/cpr/gout1198.html> (last visited Apr. 1, 2002).

196. CCBE, POSITION OF CCBE ON INTEGRATED FORMS OF CO-OPERATION BETWEEN LAWYERS AND PERSONS OUTSIDE THE LEGAL PROFESSION, Adopted in Athens on November 12, 1999, at

To justify its opposition, the CCBE raises objections identical to those raised by the ABA and bar associations in the United Kingdom, France, and Germany: the threat to professional independence, the likelihood of substantial conflicts of interest, and the undermining of the confidentiality of client communications.¹⁹⁷ The problem with the CCBE's position is two-fold: first, it never defines "integrated co-operation." The term is ambiguous. Interpreted narrowly, it might condemn only a fully integrated relationship between a lawyer and a nonlawyer. Interpreted broadly, it might condemn the contractual relationship as well. Second, if "integrated co-operation" condemns both, then the CCBE's position is too little, too late. The contractual relationship is firmly established throughout Western Europe and in other parts of the world as well. The CCBE as much as admits this failure. At the end of the language quoted above it adds: "In those countries where such forms of co-operation are permitted, lawyer independence, client confidentiality and disciplinary supervision of conflicts-of-interests rules must be safeguarded."¹⁹⁸

Despite the seeming clarity of the CCBE's opposition to integrated co-operation (whatever that term means), the organization has left itself some wiggle room. In a report summarizing a Multilateral Meeting on the ethics of lawyers sponsored by the Council of Europe in collaboration with the Czech Bar Association, the CCBE agreed to a number of propositions styled "Conclusions."¹⁹⁹ Included among them were that "[p]artnerships

<http://www.ccbe.org/Documents/En/mdpuk.pdf> (last visited Nov. 3, 2002).

197. *Id.*

198. *Id.* The CCBE Position makes clear its disapproval of those countries that permit integrated co-operation, however:

Where integrated co-operation is permitted, there is also often a body of rules intended to provide for the problems discussed, such as rules on internal partitioning of the relevant organisation (colloquially referred to as the use 'Chinese Walls'). CCBE does not accept that, given circumstances and/or specific professional rules such as these, the likelihood of the actual occurrence of breaches of lawyer independence, of client confidentiality or of the respect for the avoidance of conflicts of interest will be appreciably lessened. The complexities alone that are necessarily attendant upon an organisation as under consideration here, and upon the application of rules of the type indicated, make it unlikely that the relevant problems can truly be adequately met.

Id.

199. CCBE, CONCLUSIONS OF THE MULTILATERAL MEETING ORGANIZED BY THE COUNCIL OF EUROPE IN COLLABORATION WITH THE CZECH BAR ASSOCIATION, 1 J. CCBE-CENTRAL AND EASTERN EUROPEAN COUNTRIES 6, 8 (2000), at www.ccbe.org/uk/uk.htm (last visited Nov. 3, 2002). The Multilateral Meeting took place November third through fifth, 1999 just before the organization adopted the Position of CCBE on Integrated Forms of Co-Operation on November twelfth. While one can argue that the conclusions of the Multilateral Meeting were implicitly rejected on November twelfth, the CCBE Journal article makes no mention of any disagreement. It is likely that the CCBE delegates to the Multilateral Meeting recognized the handwriting on the wall (namely that contractual relationships between lawyers and nonlawyers were firmly established as acceptable vehicles for the

with members of other professions, such as architects, engineers and doctors, could be envisaged, according to the needs of the profession of lawyers” and that “the idea of an additional code of conduct for multidisciplinary partnerships should be explored.”²⁰⁰ In light of the steady growth in Europe of MDPs structured in the form of contractual relationships between lawyers and nonlawyers, the 1999 position is most likely not the CCBE’s last word on MDPs. The Conclusions suggest that CCBE’s position will evolve over time to accommodate changes in the marketplace for legal services.

The position of the IBA and the UIA differs significantly from the CCBE’s. Perhaps in a nod to the reality of the marketplace, both organizations have chosen not to express a view on the merits of the MDP debate. Instead, each has promulgated a set of principles or standards to guide regulators in the event that a jurisdiction decides to permit MDPs. The subject matter of the principles or standards are, of course, the nettlesome core issues of the MDP debate: independence of professional judgment, avoidance of conflicts of interest, and protection of client communications. The IBA principles offer only the most general guidance.²⁰¹ The UIA Standards are more particularized.²⁰² Both sets of

delivery of legal services) and were identifying new directions for the organization to pursue.

200. *Id.*

201. The principles adopted by the IBA that should govern if a jurisdiction chooses to permit MDPs are:

- (a) a requirement to clearly disclose to regulatory and disciplinary authorities and to the public the manner in which integrated co-operation with non lawyers is affected, and the interests represented in the organization concerned;
- (b) a requirement for submission of the entire organization in question, including its nonlawyers, to the regulatory and disciplinary authorities of the legal profession;
- (c) a requirement for giving of clear notice to clients as to the limitations inherent in forms of integrated co-operation and the risk attaching thereto;
- (d) precise requirements on the avoidance of conflicting interests which exclude the possibility of combining auditing services with consulting services or legal representation;
- (e) precise rules on restriction of access to confidential information;
- (f) provisions setting out the minimum degree of ownership and/or voting control which lawyers must hold in MDPs and the maximum degree of ownership and/or voting control which nonlawyers may hold in MDPs.

Resolution on Multi-disciplinary Practices adopted by the Council of the International Bar Association, Sept. 13, 1998.

202. UIA, *Resolution on Multidisciplinary Practices*, at http://uianet.org/english/e_resolution_newdelhi1999.htm (last visited Feb. 9, 2002). The IUA’s Resolution on Multidisciplinary Practices identifies six areas that must be addressed if a jurisdiction is to provide “minimum protections for clients”: “Standard 1: Professional Conduct”; “Standard 2: Independence”; “Standard 3: Informing the Public”; “Standard 4: Advertising”; “Standard 5: Conflicts of Interest”; and “Standard 6: Privilege”. *Id.* For a general description of why the UIA adopted the Resolution, see Delos N. Lutton, Remarks to the American Bar Association <http://www.abanet.org/cpr/lutton.html> (last visited

guidelines clearly lack the specificity and detail associated with lawyer codes of conduct in the United States.²⁰³ Their real significance lies in the IBA's and UIA's implicit recognition that it is possible to protect the core values of the legal profession if lawyers are permitted to work with nonlawyers in an MDP. By not lining up behind the CCBE's hardline opposition to integrated co-operation, the two organizations have affirmatively acknowledged the legitimacy of MDPs as vehicles for the delivery of legal services in the new millennium.

III. HOW THE STRUCTURE, CULTURE, AND ETHICS OF THE LEGAL PROFESSIONS IN WESTERN EUROPE HAVE CONTRIBUTED TO THE RAPID GROWTH OF MDPs

Synergistic interactions among the structure, culture, and ethics of the legal professions in Western Europe have, over time, created a business and regulatory environment that hindered law firms' ability to respond competitively when the Big Five initially exhibited an interest in offering legal services. If the law firms had paid more attention to changes in the marketplace and responded more quickly and imaginatively, the Big Five would have encountered meaningful competition, making their expansion more costly and less certain of success. Structure, culture, and ethics combined to hobble the expansion and evolution of law firms within and across jurisdictions.

In the day-to-day activities of lawyers, the structure, culture, and ethics of a jurisdiction's legal profession are inexorably intertwined. Each is a part of what Professor Merryman so ably described as "legal tradition."²⁰⁴ While separating their strands for analytical purposes can be an insightful exercise, it is also a dangerous one to the extent that it suggests the strands' irrelation or isolation from one another. Subject to this caveat,

Apr. 1, 2002). Mr. Lutton is the U.S. National Vice President of the IUA and a member of its Committee on MDPs.

203. I have explored the importance of understanding this distinction elsewhere. See Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117 (1999).

204. In a now classic definition, Professor Merryman described a "legal tradition" as a set of deeply rooted, historically conditioned attitudes about the nature of the law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.

JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 2 (2d ed. 1985).

four features of the legal professions in Western Europe demand special attention: first, the perception of both clients and lawyers about the role of lawyers in business transactions; second, the divided character of the legal professions that exists in most civil law countries; third, the ethical and legal constraints that until very recently limited the size and geographic expansion of law firms; and fourth, the ethical prohibitions on advertising.

In the United States, lawyers play a central role in structuring business transactions, both large and small. Clients and lawyers alike perceive that lawyers' participation adds value to a deal.²⁰⁵ This perception is not shared in other parts of the world. "It is only in the U.S. that people have assumed that a transaction is necessarily a legal matter—it is a business deal."²⁰⁶ Reinforcing this difference is the fact that the "office lawyer" never shaped the foreign legal professions' self-image as it has in the United States since the Civil War.²⁰⁷ That self-image received an additional boost in the 1970's and the 1980's, when the phenomenon of "celebrity" lawyers emerged in the legal and popular media.²⁰⁸ Business lawyers such as Joe Flom and Robert Joffe became the subject of profiles and gossip.²⁰⁹ In contrast, foreign business lawyers have eschewed publicity for themselves and their firms. The rules of lawyer conduct, such as those governing

205. See, e.g., Ronald J. Gilson & Robert H. Mnookin, *Foreward: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1 (1995); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

206. Wade Lambert, *Lawyers and Clients*, WALL. ST. J., Apr. 17, 1995, at B8 (quoting Charles Kuyk, Partner at Price Waterhouse).

207. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 633-48 (2d ed. 1985).

208. The emergence of a magazine-style legal press with a national subscriber base was instrumental in promoting "super-star" lawyers in the United States. The *American Lawyer* was especially influential. Although no similar stand-alone publications exist in Western Europe, they do in the United Kingdom. They include *Legal Business*, a magazine whose editor is an alumna of the *American Lawyer*. *Legal Business* and the *American Lawyer* have begun to collaborate on projects such as the annual publication of *The Global 50*, an issue of the *American Lawyer* devoted to the globalization of the legal profession. See Aric Press, *In-House at the American Lawyer*, AM. LAW., Nov. 1998, at 9. One indication of the importance of cross-border practice is that within the space of only three years the *Global 50* issue has become the *Global 100* issue. Aric Press, *Lessons from the Global 100*, AM. LAW., Nov. 2001, at 89 [hereinafter *Lessons from the Global 100*].

Legal Business has added a second magazine, *European Legal Business* that is published bi-monthly. That magazine has begun to view the legal profession in Western Europe through the same lens that the *American Lawyer* and *Legal Business* view the U.S. and U.K. legal professions. See, e.g., Nick Reader, *Top Marks*, EUR. LEGAL BUS., Apr. 2001, at 21. This article was the magazine's cover story where it carried the headline, *Germany's Best-Kept Secrets REVEALED: Fees and Partner Profits at Germany's Top 25 Law Firms*. The publication of such an article would have been unimaginable as recently as ten years ago. It flies in the face of the traditional decorum associated with law firms in Western Europe.

209. E.g., John E. Morris, *Joseph Flom (1923 -): Takeover Artist*, AM. LAW., Dec., 1999, at 61; John E. Morris, *Twelve Corporate Lawyers Who Led the Pack in 1998*, AM. LAW., Apr. 1999, at 44; Amy Singer, *The Next Face of Cravath?*, AM. LAW., May 1997, at 45.

advertising discussed below,²¹⁰ have contributed to their reticence.

The perception of the centrality of the lawyer's role in business deals in the United States is also shaped by the purchasing agent function of the general counsel. The general counsel decides whether the deal should be handled internally by the in-house legal department or externally by an outside law firm. Regardless of the decision's resolution, lawyers will be key players on the deal team. Many companies in Western Europe do not have in-house counsel or use nonlawyers to perform the functions of in-house counsel.²¹¹ Management performs the purchasing agent function. If a company's management does see any difference in the value of the advice rendered by lawyers and accountants (and frequently it does not), the deal team may well be lawyerless.²¹² To the extent that the company's chief financial officer (CFO) influences the management's decision, the decision is likely to favor the selection of an accounting firm, because the ties between a CFO and the company's accounting firm are usually quite strong.²¹³

The divided character of the legal professions in Western Europe has also significantly contributed to the creation of legal and business environments in which the roles of lawyers and accountants overlap extensively. In a unitary legal system, such as the one in the United States, a single individual licensed to practice law can litigate a matter in court in the morning, negotiate a business deal in the afternoon, and draft a will in the evening. The structure of the legal professions outside the United States is very different. "While the common law legal professions have produced, at the most, three divisions of judge, advocate, and office lawyer (i.e., barrister and solicitor), the civil code system has produced a

210. See *infra* notes 230-33 and accompanying text.

211. I have explored this topic at length elsewhere. See Daly, *supra* note 62.

212. See Larry Smith, *New Adversaries: Big-6 Accounting Firms Encroach Foreign Legal Turf*, COUNSEL, Mar. 6, 1995, at 5-6. As more U.S. and U.K. companies become global enterprises, exporting organizational and management structures along with products and services, general counsel will assume greater power and prestige in Western Europe. Foreign lawyers who have studied in U.S. law schools and/or worked in U.S. law firms and businesses will facilitate this change when they return to their home countries with a different vision of in-house lawyering. See Daly, *supra* note 62.

213. See Philip Hoult, *Corporate Counsel: Key to MDP Success*, THE LAW., Oct. 13, 1998, at 13 (reporting the statement of a member of a law firm affiliated with PwC that "his firm had several times been instructed via a company's finance director or board without the knowledge of the in-house counsel."); Marcy Burstiner, *The Goliaths*, CAL. BUS. LAW., Nov. 24, 1997, at 13 ("Not only do the accounting firms audit the balance sheets of every large and mid-sized company in the United States, they are also the first place companies turn to when they are recruiting a chief financial officer I think [the chief financial officers] feel bound to the accounting firms to throw them some work"). Several witnesses before the Commission viewed the relationships between CFOs and the Big Five's audit units as threatening the role of the general counsel. In the author's opinion, this concern merits serious attention. See Daly, *supra* note 2, at 283-84.

plethora of types of lawyers—for example, notaries, magistrates, judges, advocates, civil servants, prosecutors—all as discrete categories.”²¹⁴ Accordingly, it is an “ethnocentric misnomer”²¹⁵ mistake to speak of “a lawyer” in most civil law countries, because the functions associated with the practice of law, such as those described above, are divided among different legal professionals.

Legal professionals are educated and/or trained separately.²¹⁶ The members of each group generally identify only with one another. There is little or no cross-over identification with other groups or their members. Each group has its own professional organizations, disciplinary systems, codes of conduct, and formal and informal cultural understandings. Interoccupational mobility between the groups is limited.²¹⁷ As Professor Abel has observed, “the several categories of law graduates—judges and prosecutors, civil servants, corporate employees, advocates, notaries and so on—do not see themselves as a single profession and even lack a common name.”²¹⁸ This structural and professional isolation has a very practical impact on the growth of MDPs in Western Europe. To the extent that any particular group of legal professionals perceives its livelihood threatened by the expansion of professional services entities offering legal services, it generally cannot muster meaningful moral or political support from the other groups. This isolation makes it easier for the proponents of MDPs to accuse a group opposed to those entities’ expansion of turf protection and acting out of self-interest. There is, moreover, no single organization or group that can claim to be speaking as a representative of the *entire* legal profession²¹⁹ in defense of the public interest.²²⁰ While

214. John Flood, *The Cultures of Globalization: Professional Restructuring for the International Market*, in PROFESSIONAL COMPETITION AND PROFESSIONAL POWER: LAWYERS, ACCOUNTANTS AND THE SOCIAL CONSTRUCTION OF MARKETS 139, 146–47 (Yves Dezalay & David Sugarman eds., 1995); see also Olivier d’Ormesson, *French Perspectives on the Duty of Loyalty: Comparisons with the American View*, in RIGHTS, LIABILITY, AND ETHICS, *supra* note 33, at 29, 29 (in France the legal services provided by U.S. lawyers are delivered by eight different professions). See generally Abel, *supra* note 33, at 4 (describing the distinguishing aspects of the legal profession in the civil law world); MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 131 (2d ed. 1994).

215. Abel, *supra* note 33, at 4.

216. For a fuller description, see Daly, *supra* note 2, at 227–29.

217. Abel, *supra* note 33, at 8; Ehrhard Blankenbug & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, in LAWYERS IN SOCIETY: THE CIVIL LAW WORLD, *supra* note 33, at 124, 134.

218. Richard L. Abel, *Revisioning Lawyers*, in LAWYERS IN SOCIETY: AN OVERVIEW 4 (Richard L. Abel & Philip S.C. Lewis eds., 1995).

219. The explanation for their absence is straightforward.

In civil law countries professional associations have tended to play a less crucial role in defining the legal profession for two reasons. First, primary legal education occurred at the university rather than the practical, apprenticeship mechanism typical of the common law nations

“voluntary associations . . . are central to the professional project of private practitioners in the common law world,” they are “irrelevant to the majority of law graduates employed in the public or private sectors in the civil law world [and] differ significantly from the local, official, compulsory associations of civil law private practitioners.”²²¹

The most prominent legal professional in most civil law countries is one with “the right of audience,” whose role and functions closely resemble those of a trial lawyer in the United States or a barrister in the United Kingdom. These legal professionals have historically distanced themselves from counseling clients on business transactions, limiting their practices to court-related representations. As noted earlier, the “office

until the twentieth century. Second, most members of the civilian legal professions have been judges, prosecutors, civil servants, and today in-house corporate counsel; private practitioners were in the minority. For public lawyers the state assumed the task of controlling entry, promoting status, guaranteeing security (civil service), and regulating conduct; lawyers did not have to associate together to accomplish these aims. By contrast, private attorneys have always dominated the common law legal profession.

David S. Clark, *Comparing the Work and Organization of Lawyers Worldwide: The Persistence of Legal Traditions*, in *LAWYERS' PRACTICE AND IDEALS: A COMPARATIVE VIEW*, *supra* note 13, at 9, 134 (citations omitted). An additional reason for their lack of prominence is that “[p]rofessional associations developed late and tended to be local.” Abel, *supra* note 218, at 4.

220. The ABA presents itself as the voice of the entire profession. While the correctness of that description may be open to debate, the fact remains that the ABA is a powerful institution whose views are weighed (even if not always accepted) on important issues affecting the legal profession, the courts, and the civil and criminal systems of justice. One recent incident involving an attempt by the accounting profession to increase its members' professional stature illustrates how the existence of a single institution capable of representing the entire profession in the interest of the public can be critical. Prior to 1998, federal law did not recognize an accountant-client privilege comparable to the attorney-client privilege. See *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). On several occasions, the Big Five unsuccessfully lobbied Congress, seeking the enactment of a statute creating such a privilege. In 1997 and 1998, highly publicized testimony at Congressional hearings portrayed the IRS as an inflexible, arrogant agency that bullied low- and moderate-income taxpayers. Seizing upon that testimony, the Big Five once again lobbied Congress for the creation of an accountant-client privilege, this time phrasing their arguments in terms of consumer protection and equality. They argued that low- and moderate-income taxpayers could not afford to hire lawyers in tax disputes with the IRS, but that they could afford to hire accountants. Fundamental notions of equality demanded that these taxpayers be able to communicate confidentially with their accountants to the same extent as richer taxpayers with their lawyers.

The ABA vigorously opposed the creation of an accountant-client privilege. While it was unable to derail the legislation entirely, it did persuade Congress to cut back significantly on the scope of the privilege sought by the Big Five. See generally *AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COMMITTEE ON CONTINUING LEGAL EDUCATION, THE NEW TAX PRACTITIONER-CLIENT PRIVILEGE THAT PROTECTS TAX ADVICE FROM DISCLOSURE: WHAT CPAS, ENROLLED AGENTS, ENROLLED ACTUARIES, AND LAWYERS NEED TO KNOW* (1998). If the United States, like the countries of Western Europe, had a divided legal profession, there would have been no single organization speaking on behalf of the entire bar. If the ABA's protest had emanated from an organization representing, for example, only trial lawyers, the success of its opposition would have been less likely.

221. Abel, *supra* note 218, at 42.

lawyer” never shaped this profession’s self-image as it did in the United States.²²² In large measure, the difference is attributable to the profession’s desire to maintain a prestigious status in society. That status rested on an identification with the landed aristocracy which, in turn, was accompanied by a disinterest in industrialization and potential clients who were accumulating wealth in the manufacturing sector of the economy.²²³ As the noted sociologist of the legal profession, Bryant Garth, has observed, there was a problem of supply and demand:

One aspect of the supply problem was that lawyers in “the limit the supply” jurisdictions of the civil law world had made a virtue of their *lack* of connection to business, which was thought to compromise their independence. The demand problem was that businesses tended to rely on intermediaries other than lawyers—bankers, family members, political leaders—to resolve their problems and disputes.²²⁴

Further contributing to the impotency of the divided legal profession is the limited reach of UPL statutes. UPL statutes generally protect only the scope of practice of legal professionals who possess the right of audience. A license is generally not needed to offer business counseling that includes advice on the law no matter how extensive that advice may be. Drafting documents intended to alter legal relationships of a business nature is also allowed.²²⁵

222. See *supra* note 207 and accompanying text.

223. Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2040-43 (1990).

224. Bryant Garth, *Comparative Law and the Legal Profession: Notes Toward a Reorientation of Research*, in *LAWYERS’ PRACTICE AND IDEALS: A COMPARATIVE VIEW*, *supra* note 13, at 227, 233. The U.K., France, and Germany are “limit the supply jurisdictions” in Garth’s lexicon, because they are defendant oriented. In contrast, the United States is a demand jurisdiction because the incentive structure of the law is plaintiff oriented. See *id.* at 231. Professor Mattei makes the interesting claim that “[a]s a result of the restraint on advertising, the typical professional agenda of lawyers in England, Germany, and France is focused on limiting supply. In America [where advertising is permitted], to the contrary, the most important activity seems to be stimulating demand.” Ugo Mattei, *The Legal Profession as an Organization: Understanding Changes in the Common and Civil Law*, in *LAWYERS’ PRACTICE AND IDEALS: A COMPARATIVE VIEW*, *supra* note 13, at 151, 179.

225. Of course, the drafter must be careful not to usurp functions reserved to the notary. See generally Luis Algar Calderón, *The Legal Professions in Spain*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE*, *supra* note 33, at 293, 305-06; DANOVİ, *supra* note 33, at 237-38; Sanglade & Cohen, *supra* note 33, at 128. See generally Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT’L & COMP. L. REV. 389 (1996). See also Stewart Baker & Theodore Barassi, *The International Notarial Practitioner*, 24 ABA INT’L L. NEWS, Fall 1995, at 1.

As a consequence of this broad range of service providers (*e.g.*, non-lawyers, legal professionals with the right of audience, notaries, tax advisors, business lawyers, etc.),²²⁶ clients and the public in general are less receptive to the objections raised to MDPs. They simply do not see why advice from a legal professional in business matters should be protected by special monopoly rights. They find it even more difficult to see why a legal professional should be allowed to offer advice in a law firm setting but not in an MDP setting.

Ethical and legal constraints also handcuffed the law firms in Western Europe, severely limiting their ability to compete effectively with MDPs. The requirements of localization, singular admission, residency, and law office were particularly powerful inhibitors. The localization and singular admission requirements restricted a lawyer's admission to one judicial district and to a court of either first instance or appeals, respectively. The residency requirement confined a lawyer's practice to the judicial district of admission, and the law office requirement prevented a lawyer from offering legal services from any office other than one physically located in the judicial district of admission.²²⁷ While judicial intervention has largely invalidated these requirements,²²⁸ they had the practical effect of limiting law firm growth during the critical years in which the Big Five were rapidly expanding their capability to offer legal services. In addition, in some countries, such as Germany, a ban on branch offices and national partnerships complimented these restrictive requirements.²²⁹

The ethical rules banning lawyer advertising also considerably weakened any prospect that law firms could effectively compete with the

226. The Netherlands offers a crisp snapshot of this competitive mix.

Since there is no monopoly for attorneys providing legal advice, some legal services are provided by law graduates and half-trained persons not admitted to the bar. Social advocacy attorneys, for instance, compete with legal aid bureaus (with three hundred salaried law graduates) and trade unions that hire law graduates as labor lawyers. General attorneys compete with insurance companies for legal costs and automobile clubs that hire law graduates for tort advice. Business clients often turn to tax advisors and accountants rather than to attorneys. And old age pensioners might take their legal problems to social workers.

Clark, *supra* note 219, at 34 (citing ERHARD BLANKENBURG & FREEK BRUINSMA, *DUTCH LEGAL CULTURE* 31-34, 36-38 (2d ed. 1994)). For a description of a similar competitive mix in Spain, see *id.* at 112 (citing JULIAN LONBAY ET AL., *TRAINING LAWYERS IN THE EUROPEAN COMMUNITY* 112-13 (1990)).

227. See Andreas G. Junius, *The German System*, in *RIGHTS, LIABILITY, AND ETHICS*, *supra* note 33, at 59, 59-60; Erhard Blankenburg & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, in *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD*, *supra* note 33, at 124, 139.

228. The European Court of Justice and the German Constitutional Court have aggressively invalidated these types of restrictions. See Daly, *supra* note 2, at 230 nn.39-40.

229. Junius, *supra* note 227, at 60.

Big Five.²³⁰ In many countries,²³¹ business cards and dignified entries in a telephone directory were the only form of permitted advertising.²³² The ban reflected a guild mentality and was deeply rooted in bar's insistence that the practice of law was a profession not a trade or business.²³³ The rules enormously impeded the recruitment of new clients and announcements of new competencies. Even if advertising had been permitted, the Big Five would still have possessed other powerful, associated advantages over law firms. To begin with, the operating income available to them for advertising certainly far exceeded that available to law firms, either individually or collectively. It was more than a question of money, however. The Big Five were experienced media purchasers and had a vast reservoir of country-and-industry specific knowledge upon which they could draw to create and place effective advertisements. The law firms in Western Europe had no comparable resources.

230. See Leny E. De Groot-Van Leeuwen, *Polishing the Bar: The Legal Ethics Code and Disciplinary System of the Netherlands, and a Comparison with the United States*, 4 INT'L J. LEGAL PROF. 9, 12 (1997); Ulkrike Schultz, *Legal Ethics in Germany*, 4 INT'L J. LEGAL PROF. 55, 63 (1997); Lauren Dobrowalski, Comment, *Maintaining the Dignity of the Profession: An International Perspective on Legal Advertising and Solicitation*, 12 DICK. J. INT'L L. 367 (1994). See also Stefano Agostini, *Advertising and Solicitation: A Comparative Analysis of Why Italian and American Lawyers Approach Their Profession Differently*, 10 TEMP. INT'L & COMP. L.J. 329, 341 (1996); Carsten Eggers, *Germany*, in LAW WITHOUT FRONTIERS, *supra* note 34, at 81, 85; Louise L. Hill, *Lawyer Publicity in the European Union: Bans Are Removed but Barriers Remain*, 29 GEO. WASH. J. INT'L L. & ECON. 381 (1995); Albert Tanghe, *Publish and Be Damned—Local Bar Publicity Restrictions*, 1 LAW. IN EUR. 3 (1990); *Austria Bar Dispute*, INT'L FIN. L. REV., June 1994, at 3; Robert Lever, *American Attorneys in Paris*, NAT'L L.J., June 22, 1987, at 42; Barbara Galli, *Italian Firms Face Foreign Invasion*, INT'L FIN. L. REV., May 1998, at 33; Sarah Marks, *Finnish Lawyers Face Up to Competition*, INT'L FIN. L. REV., May 1995, at 20, 21; Samantha Wigham, *Foreign Influence Pushes German Lawyers into New Mergers*, INT'L FIN. L. REV., Jan. 1997, at 41, 42-43.

231. While all the countries in Western Europe disapprove of advertising, there are nuances in their disapproval.

The South European (Italy, Greece, Austria) and in some ways the German and Belgium bars are against publicity, the Italians very strongly. The North Europeans (Britons, Scandinavians, Dutch) and tentatively the new bars of Eastern Europe, permit advertising but advise against soliciting and touting. Dignity is their main concern. In between stand Spain, Portugal, and France.

Henri Ader, *Differences and Common Elements in Legal Ethics in France and the United States*, in LAWYER'S PRACTICE & IDEALS, *supra* note 13, at 351, 359.

232. Similar bars were in place across the United States until the Supreme Court extended the protection of the First Amendment to the commercial speech of lawyers and law firms. *E.g.*, *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 472 (1986); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *In re R.M.J.*, 455 U.S. 191, 206-07 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977).

233. Mattei, *supra* note 224, at 167. Mattei has suggested that

The prohibition of advertising is the result of the fiction in the inquisitorial mentality that a judge will find a litigant who is right to be so; it is also founded on the limited negotiability of services of the defense, seen from the perspective of the interests of justice and not of the client.

Id. at 167 n.46.

Finally, there is the fundamental question of what image the law firms would have tried to project if the obstacles of the ethical bar and limited financial resources were overcome. Both in Western Europe and the United States, the Big Five implemented carefully planned and comprehensive strategies designed to shift the public's perception of the accounting firms from "bean counters" to "problem solvers."²³⁴ Thus, they no longer described themselves as accounting firms but rather as professional services firms. They emphasized the wide range of business activities upon which they were competent to advise, the multidisciplinary skills that they could bring to bear on a problem, and their ability to service a client in multiple jurisdictions simultaneously. A creative dynamism infused the image they were projecting. U.S. lawyers have also championed their problem solving skills as well,²³⁵ and U.S. law schools continue to wrestle with how to impart those skills to their students.²³⁶ Instrumentalism is highly valued by both clients and lawyers.²³⁷

The problem-solver image fits uncomfortably with the self-conception of many business lawyers in Western Europe. Their self-conception is more technocratic, less dynamic. They see themselves as performing a "fairly narrow range of functions,"²³⁸ and their role as advising a client on what the law permits it to do or not do. That role leaves little room for

234. One observer has almost perfectly captured the shift.

An American will be startled to see brochures in Andersen's London office lobby with titles such as "Corporate Financial Flagship Deals" and "Leverage Transactions." The description of one \$67 million deal shows just how far Andersen has moved away from bean counting: It boasts that Andersen's role included "managing the buyout process . . . advising management on . . . [its] business plan . . . [and] raising the equity, debt, and mezzanine financing."

Morris, *supra* note 37, at 50.

235. The problem solver image is one the legal and popular press particularly associates with celebrity business lawyers. See *supra* note 209.

236. Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811 (1999); Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994). See also Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W.L. REV. 351 (1998); Roy T. Stuckey, *Education for the Practice of Law: The Times They Are A-Changin'*, 75 NEB. L. REV. 648 (1996). See generally PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT (forthcoming). See also Mary C. Daly, *What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. LEGAL EDUC. 521 (2000).

237. As the noted comparative law scholar, David S. Clark, has observed: "American lawyers demonstrate an entrepreneurial zeal associated with an instrumentalist conception of law as a tool for implementing or resisting social change. They have developed new organizational forms and other innovations as part of an adoptive, expansionist approach to law practice." Clark, *supra* note 219, at 20 n.30 (citing Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 6-7 (Robert L. Nelson et al., eds., 1992)).

238. Abel, *supra* note 33, at 22.

creatively imagining how to use the law instrumentally to further a client's fundamental business goals.²³⁹

IV. THE BIG FIVE'S ECONOMIC THREAT TO TRADITIONAL LAW FIRM PRACTICE IN THE UNITED KINGDOM AND WESTERN EUROPE PRIOR TO ANDERSEN'S COLLAPSE

A. Introduction

Andersen's collapse and the consequent disintegration of Andersen Legal, its foreign law firm network, make it difficult to assess precisely the economic threat that the Final Four's legal networks currently pose. Three observations can be made without qualification, however: first, that the demand for cross-border legal services remains strong and will continue to grow;²⁴⁰ second, that before Andersen's collapse, the legal networks affiliated with the Big Five were on the verge of becoming formidable competitors in certain sectors of the marketplace for cross-border legal services;²⁴¹ and third, that the Final Four will generously support their affiliated law firm networks to advance the long-term goal of enabling the member firms to increase their marketplace share at the expense of traditional law firms.²⁴²

The market for lawyers' services in the global economy is growing by leaps and bounds. The top one hundred global firms grossed \$36 billion in legal fees in 2000.²⁴³ That translated into a twenty-seven percent increase in per equity partner profits.²⁴⁴ It also represented an increase of sixty-one percent in three years for the top fifty law firms from \$15 billion to \$24.5 billion and a sixteen percent increase in revenue per lawyer over two

239. This observation is reflected, for example, in the comment of the international in-house counsel for France Telecom who said in comparing French firms to their "anglo-saxon counterparts" that the French firms "do have a tendency to be less pragmatic and not present in the negotiation process." *Paris Lawyers Reap Rewards as French Learn to Loosen Up*, INT'L FIN. L. REV., Mar. 2001, at 25, 26. A British partner in the Paris branch of a prominent U.K. firm similarly observed, "[t]he French have a tendency to compartmentalize everything so that if it cannot be compartmentalized you can't really do it." *Id.* at 29. The defenders of the traditional conception of the role of a lawyer are not without a rejoinder. In commenting upon the "battle of professional cultures," one Dutch lawyer pitted "[t]he old-fashioned brain surgeon type of lawyer who is quite autonomous, against the plumber type of Anglo-Saxon practice with the emphasis on standard quality and speed of transaction, rather than the intellectual challenge." Richard Tyler, *Time to Follow the U.K. Flow?*, THE LAW., Oct. 13, 1998, at 27.

240. See *infra* notes 243-46 and accompanying text.

241. See *e.g.*, *supra* notes 131-32 and accompanying text.

242. See *infra* notes 247-48 and accompanying text.

243. *Lessons from the Global 100*, *supra* note 208, at 89.

244. *Id.*

years.²⁴⁵ The nature of cross-border legal services is also expanding. While transactional work constitutes the bulk of the practice, multinational litigation, principally in the form of arbitration, is becoming an increasingly important source of revenue.²⁴⁶

In contrast, the market for traditional auditing and accounting services has been shrinking.²⁴⁷ Diminished revenue and profits forced the Big Five and their predecessors to identify new competencies to offer existing and new clients. Recognizing that their most valuable asset was an in-depth knowledge of their clients' businesses and related industries, the Big Five focused their considerable skills on developing consulting practices. Their game plan was to help clients do other things such as, for example, plan their corporate strategies and build and manage their information-technology systems. They decided to add legal services to these other competencies because of its potential to generate significant revenue.²⁴⁸

B. The Competitive Advantages of the Big Five's Legal Networks

The reasons why the Big Five's legal networks posed an economic threat to traditional law firm practice in the United Kingdom and Western Europe are not difficult to grasp. Each network possessed at least twelve competitive advantages because of its affiliation with a Big Five firm: an institutional client base, cross-marketing opportunities, size, leverage, availability of capital, brand name recognition, institutional advertising, sophisticated marketing, cutting edge technology, substantial research and development, and international capabilities.²⁴⁹ While these advantages had

245. *Id.*

246. *Id.*

247. See Daly, *supra* note 2, at 261-62.

248. Jeffrey E. Garten, *Ethics Be Damned, Let's Merge*, BUS. WK., Aug. 30, 1999, at 26 (quoting the Dean of the Yale School of Management).

249. See WARD BOWER, MULTIDISCIPLINARY PARTNERSHIPS IN THE FUTURE IN GLOBAL LAW PRACTICE 155, 158-60 (J. Ross Harper ed. 1997); Gary R. Garrett & Ward Bower, *A Competitive Analysis of the Complex Litigation Services Market: Implications for Larger Law Firms* (1995) (on file with the author). In the same vein, a U.K. partner at Arthur Andersen in response to the question "what are [the Big Five's] particular strengths" answered:

Their size, their financial resources and the human resources that they can devote to a transaction necessarily make them formidable. Their regular contact with the financial management and probably the general management of their clients give visibility as a natural provider of services. Perhaps most significant in the future will be their networks. These are networks of professionals, many of whom have worked together throughout their careers spread through offices in many countries. It is not so much that they can offer a "one stop shop" as they should be able to coordinate their advice so as to provide appropriate answers to questions posed to them.

David Dabysshire, Speech, *How Do You Deal with Accounting Firms as Providers of Legal Services?*, Mar. 7, 1990, at 3, in Seminar on Internationalization of Legal Practice: U.S. and European

the potential to make them the formidable competitors of law firms in the United States, their strength was far greater in Western Europe because of the historically small size of law firms, the ethical prohibitions on advertising, and lawyers' self-conception of their role in advising clients.²⁵⁰

The Big Five's institutional client-base was clearly an advantage that law firms in Western Europe did not share. Because of regulatory requirements and marketplace demands, the Big Five performed audit services for most large and medium size companies. There were, of course, no "Big Five" law firms that could make a similar boast about their client list. The Big Five firms, moreover, had constant contact with the companies' executive decision-makers.²⁵¹ In contrast, a law firm's client contacts are almost certain to be with and through the general counsel's office and episodic rather than constant. The Big Five's in-depth knowledge of the companies and their industries were persuasive reasons to hire the Big Five's consulting groups, including affiliated law firms.²⁵² The traditional ties between CFOs and their auditors encouraged such engagements.²⁵³ Anecdotal evidence suggests that the Big Five were not shy about using their working relationship with CFOs to gain "back door" entry into the legal services market.²⁵⁴

The Big Five not only had a very sizable existing client-base ready to be tapped by their affiliated legal networks, but they also had the marketing and financial wherewithal needed to recruit new clients. The amount of money that the Big Five devoted to advertising was remarkable. Their total advertising budget for 2001 was approximately \$200 million.²⁵⁵

Perspectives and Opportunities Sponsored by Prentice Hall Law & Business in Conjunction With the Institute of Advanced Legal Studies (University of London) (on file with the author). As a practical matter, the Big Five's greatest threat may be their ability to provide cross-subsidies for legal services, leading to predatory pricing and unfair competition with law firms. *Id.* at 3.

Some management consultants believe that these advantages are not insurmountable and have suggested practical steps that law firms can implement to compete more effectively with MDPs that offer law-related services. See Charles M. Maddock, *Me in an MDP? Preparing Your Firm for the Culture Shock*, N.Y.L.J., Mar. 13, 2001, at 5.

250. See *supra* notes 227-39 and accompanying text.

251. Maddock, *supra* note 249.

252. Some commentators believe that the industry-team model used by the Big Five is more appealing to corporate managers than the practice-group model used by law firms. See, e.g., *id.*

253. See *supra* note 213 and accompanying text.

254. See William Hannay, *MDP=TEOTWAWKI . . . or Maybe Not*, INT'L LEGAL NEWS, Apr. 1998, at 23. Summary of the Testimony of M. Elizabeth Wall <http://www.abanet.org/cpr/wall1198.html> (last visited Apr. 1, 2002).

255. Lee Berton, *Big Five Up the Ante*, ACCT. TODAY, Nov. 5, 2001, at 6. Precise dollar figures on lawyer advertising in the United States are difficult to compile. Furthermore, the figures are essentially meaningless unless they also identify the media placement. For example, lawyers spent

Precisely how much of this money was earmarked for the promotion of their affiliated legal networks is difficult to ascertain. The sums reported in connection with their consulting arms suggest, however, that traditional law firms were on the precipice of confronting an unsurmountable competitive disadvantage.²⁵⁶ That disadvantage was not simply a question of money or the Big Five's willingness to spend it. They could contain the costs associated with advertising and judge the merits of proposed media campaigns more efficiently than law firms because each Big Five firm had readily available, in-house expertise. Just as the Big Five counseled their clients on the clients' corporate image, identified new markets for them, and shaped media campaigns to reach the clients' targeted audience, they could perform those functions for the firms' affiliated legal networks. Each Big Five firm, moreover, assiduously sought to create an individual "brand" reputation. Those brands collectively created a Big Five "brand" in the image of the problem-solver.²⁵⁷ This branding directly benefited the members of their affiliated legal networks and placed traditional law firms at a distinct disadvantage.

The ability of the Big Five to raise capital has always been one of their particular strengths. In Western Europe, as in the United States,²⁵⁸ the

approximately \$809 million in 2000 to advertise in the yellow pages. YELLOW PAGES PUBLISHERS ASS'N, YELLOW PAGES: FACTS AND MEDIA GUIDE 2001 (2001) (on file with the author). While the legal profession's total spending significantly surpasses the Big Five's in dollar amounts, advertisements in the yellow pages are hardly comparable to the sophisticated marketing campaigns of the Big Five. Law firms have been notoriously unsuccessful in creating brand names. *See, e.g.,* Jenna Greene, *It's Worked for Soda and Tennis Shoes. But Can the Latest Marketing Fad Aid Law Firms*, LEGAL TIMES, Mar. 1, 1999, at 1; Mark T. Greene, *If I Only Had a Brand—No Matter How Much Money Law Firms Spend on Branding, They Don't Have Brand Names and Won't Be Getting Them Soon*, AM. LAW., Oct. 2001, at 59, available at WL 10/2001 Am. Law. 59. Crystal Nix Hines, *A Legal Eagle (His Ad Claims)*, N.Y. TIMES, Nov. 15, 2001, at C1.

256. Accenture, formerly part of Andersen, spent almost \$45 million in the first quarter of its existence in 2001 to publicize its initial public offering. Berton, *supra* note 255. The total cost of its campaign is estimated to be \$145 million. Mercedes Cardona & Hillary Chura, *Pricewaterhouse Hires DiMassimo*, ADVERTISING AGE, Feb. 19, 2001, at 32. PwC has committed \$20 million to developing a brand and an integrated promotional campaign for its Financial Advisory Services group, if it ultimately decides to spin the group off from PwC. *Id.* In 2000, E&Y sold its consulting business to Cap Gemini. The new firm, Cap Gemini Ernst & Young, allocated \$30 million to a global campaign to foster name recognition. Sarah Ellison & Kevin Delaney, *Cap Gemini Will Use Ads to Boost Profile, Morale*, WALL ST. J., Oct. 30, 2000, at B12.

257. *See supra* note 234-35 and accompanying text.

258. The bar on sharing fees with a nonlawyer has the practical effect of prohibiting passive investment. MODEL RULES OF PROF'L RESPONSIBILITY R. 5.4(a) (2000). The popular legal press has raised the possibility of public ownership of law firms. *See, e.g.,* Susan Beck, *The Case for Going Public: Taking a Law Firm Through an IPO Would Require Enormous Cultural Change. That's a Good Thing*, AM. LAW., July 1999, at 63; Steven Brill, *Psst-Wanna Buy a Hot Stock*, AM. LAW., Nov. 1987, at 3. *See also* Steven Brill, *War of the Law Firm*, BUS. WK., Jan. 26, 1987, at 42. Academic attention to this possibility has only just begun. *See* Edward S. Adams & John H. Matheson, *Law*

ethics rules prohibit passive investment in law firms.²⁵⁹ Many MDP oponents have claimed that the capital resources available to the Big Five enabled the accounting firms to subsidize their affiliated law firms, becoming in effect passive investors. These subsidies allegedly took the form of below-the-market charges for rent, technology, and staffing. It is impossible to verify these claims because the Big Five firms and the members of their legal networks have refused to make the terms of the contracts public.

C. *The Underlying Strategic Plan*

The Big Five's strategy for becoming players in the legal service market consisted of two-related moves. First, they built a network of affiliated law firms on a country-by-country basis. They endeavored to integrate the firms' operations and management with their own to the maximum extent possible, while taking great care not to create a single multi-jurisdictional law firm or a fully integrated MDP. They undertook a meticulous study of the marketplaces in which the affiliated law firms offered services for the purpose of identifying potential clients. Middle-tier companies were their primary targets.²⁶⁰ Judging by the Big Five's reported revenues, they were quite successful in obtaining engagements from them.²⁶¹

Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms, 86 CAL. L. REV. 1 (1998).

259. Legislation is pending in New South Wales, Australia, that will allow law firms to incorporate, share profits with nonlawyers, and raise capital through passive investment. Shares in these law firms will float on the Australian Stock Exchange. See Legal Profession Amendment (National Competition Policy Review Bill), at <http://www.lawsociety.com.au/page.asp?partid=470> (last visited Nov. 3, 2002); Steven Mark, *Harmonization or Homogination? The Globalization of Law and Legal Ethics—An Australian Viewpoint*, 34 VAND. J. TRANS. L. 1173 (2001). *Shaw Should Watch the Society He Keeps*, ABIX, Sept. 3, 1999, 1999 WL 26582433; Andrew Burrell, *Shackles Removed for Law Firms*, AUSTL. FIN. REV., Sept. 3, 1999, at 1, 1999 WL 19338405. Similar legislation has been proposed in France, but the Parliament has not acted. See *infra* notes 121-30.

260. See Geanne Rosenberg, *Lawyers at the Big Five: Attorneys Employed Match Largest Law Firms*, N.Y.L.J., May 23, 2000, at 5. The chief operating officer of Baker & McKenzie has observed: "I'm not saying the days of the big law firm are gone, . . . but when it comes to relying on streams of revenue from middle-market work, 'those days are numbered.'" *Id.*; Arian Campo-Flores, *King Arthur*, AM. LAW., Jan. 2000, at 17 (speculating that only segment of the market Anderson is likely to dominate in the U.K. is "commercial lending and other types of second-tier work."); Sean Farrell, *Who's Afraid of the Big Bad Five?*, AM. LAW., July 2000, at 65 (commenting that the Big Five "may have to accept their limitations and be content to offer solid midlevel corporate, employment, and tax advice internationally—they are in a position to dominate this work globally."); Margaret A. Jacobs, *Accounting Firms Covet Forbidden Fruit*, WALL ST. J., May 31, 2000, at B1 (describing most of the Big Five's European legal clients as "still small and medium-size companies").

261. See, e.g., *infra* notes 272-74 and accompanying text.

Second, they strengthened their own law-related competencies, especially in the area of tax advising. The sheer number of lawyers they hired in recent years is impressive.²⁶² Even more impressive, however, is the quality of some of the hires. An essential part of their recruitment strategy was to persuade prominent tax partners in elite law firms and senior government tax lawyers to join their staffs.²⁶³ At the time of Andersen's collapse, they were also beginning a campaign to hire star-quality lawyers in fields other than tax, such as mergers and acquisitions and business counseling.²⁶⁴

262. While figures for the Big Five's hiring in the United Kingdom and Western European countries are not readily available, anecdotal reports suggest that it is similar to the pattern in the United States.

Ernst & Young now has 800 tax attorneys on its U.S. staff, double the 400 it had several years ago. Price Waterhouse has around 500 tax lawyers in the U.S., up from about 250 three years ago.

Arthur Andersen has 1,000 tax attorneys, 20% more than it had in 1994.

Elizabeth MacDonald, *Lawyers Protest Accounting Firms' Hiring*, WALL ST. J., Aug. 22, 1997, at B8. Price Waterhouse and Coopers & Lybrand merged at a later date, forming PwC.

263. They have implemented this strategy both in the United States and abroad. Compare Bruce Balestier, *Under One Roof: ABA Faces Arrival of Lawyer-Accountant Pairings*, N.Y.L.J., Nov. 19, 1998, at 5 (referring to a "high profile coup" by an accounting firm in hiring a noted tax partner); Tom Herman, *Tax Report: A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., June 18, 1997, at A1 (reporting the departure of a well-known Treasury attorney to an accounting firm); Jeffrey L. Jacobs, *Multidisciplinary Recruiting War . . . The Tax Brain Drain to Accounting Firms Intensifies*, 17 OF COUNSEL 7 (1998) (same); MacDonald, *supra* note 262 (recounting the Big Five's hiring of "legal eagles"); John E. Morris, *The Tax Man Cometh*, AM. LAW., Dec. 1998, at 16 (describing "an exodus" of prominent tax lawyers from law firms to the Big Five) with John E. Morris, *Arthur Adds On*, AM. LAW., Feb. 2000, at 21 (reporting the hiring of a leading partner at Clifford Chance Rogers & Wells); Clare Hepburn, *End of the Line for Cosy Danish Closed Shop*, INT'L FIN. L. REV., July, 1997, at 45, 45 (describing Arthur Andersen's hiring of two Danish lawyers); Samantha Wigham, *Norwegian Firms Await Inevitable Invasion*, INT'L FIN. L. REV., July 1997, at 35, 37 (describing Arthur Andersen's hiring of Norwegian lawyers). They have also implemented this strategy in Canada. See Jim Middlemiss, *Multidisciplinary Partnerships: The Writing on the Wall*, NATIONAL, June-July 1997, at 21-22 (describing the raiding of prominent Canadian law firms by the Big Five); *One Stop Shopping to the Nth Degree . . . Toronto the Latest Tell-Tale Sign of Big-6 Legal Ambitions*, OF COUNSEL, July 7, 1997, at 2-5 (same).

264. See, e.g., *supra* notes 40-45 and accompanying text (describing the ambitions of McKee Nelson); S. F., *Full of Sound and Fury*, AM. LAW., July 2000, at 69 (reporting the hiring of a prominent U.S. lawyer by Klegal, KPMG's legal network, and a prominent U.K. solicitor by Andersen Legal); Campo-Flores, *supra* note 260 (reporting that Andersen Legal has been hiring "high caliber . . . lawyers with big books of business"); *In Brief*, EUR. LEGAL BUS., May/June 2001, at 7 (reporting Andersen Legal's hiring of a prominent German lawyer). As one sharp-witted commentator observed the Big Five have "financial muscle that dwarfs even the largest law firms. When the accountants decide to go shopping for U.S. legal talent, they will come bearing Steinbrenner-sized gifts." *Lessons from the Global 100*, *supra* note 208.

D. Measuring the Success of the Big Five's Strategic Plan

The Big Five were anything but shy about their ambitions. Indeed, many of their public pronouncements seem intended to intimidate law firm competitors as much as to attract new clients. Landwell, PwC's affiliate, for example, publicly proclaimed its goal of being the fifth largest law firm in the world by the year 2004.²⁶⁵ To meet that goal, it would have to employ three thousand lawyers and generate one billion dollars in revenue.²⁶⁶ Landwell's stated mission, moreover, was to be "a top-five global law firm by reputation as well as size."²⁶⁷ Andersen Legal warned that it was aggressively "wooing higher-end work."²⁶⁸

Measuring the success of the Big Five's strategic plan is a complicated undertaking because the only data available comes from articles in the popular and legal press. The way that data is reported is not consistent from month to month or year to year, even within a single publication.²⁶⁹ A few observations can be safely made, however.

Employment figures strongly suggest that the Big Five's legal networks and internal units offering tax and law-related services were competing successfully with traditional law firms for certain categories of work. Before its disintegration, Andersen

had on staff about 2,400 lawyers worldwide in affiliated law firms. This is five times as many lawyers as it had in 1994. In addition, in 1998 Andersen had about 1,000 tax attorneys in the United States, 20% more than in 1994. Price Waterhouse, prior to its merger with Coopers & Lybrand, exhibited similar growth in the number of lawyers working there. In 1998, it had on staff 3,000 lawyers worldwide, about 30% more than in 1995. In the United States, in 1998, Price Waterhouse had about 500 tax lawyers, up from about

265. Rosenberg, *supra* note 260.

266. Jim Kelly & Robert Rice, *PwC Plans to Build \$1B Global Law Firm Network: Five-Year Target To Be Among the World's Largest Legal Practices*, FIN. TIMES (London), Jan. 7, 1997, at 24; Rosenberg, *supra* note 260, at 5. PwC and its predecessors have been particularly vocal. *See, e.g.*, Chris Klein, Gold Rush, *Thin Stakes: U.S. Branches Face Fierce Competition from U.K. Solicitors, Accountants*, NAT'L L.J., Aug. 12, 1996, at A1, A18 (quoting the head of Price Waterhouse's European affiliates: "Right now we're not a threat [to law firms], but the avowed intent is different."); David Rubenstein, *Accounting Firm Legal Practices Expand Rapidly. How the Big Six Firms Are Practicing Law in Europe: Europe First, Then the World?*, CORP. LEGAL TIMES, Nov. 1997, at 1 (reporting that the Chairman of Coopers & Lybrand European Legal Services expected it would be among the largest law firms in the world by the end of the millennium.).

267. Rosenberg, *supra* note 260; S. F., *supra* note 264.

268. *Lessons from the Global 100*, *supra* note 208, at 89; *see also* Jacobs, *supra* note 260.

269. *See infra* note 276.

250 three years before. The number of lawyers working at Ernst & Young outside the United States was similarly large—more than 1,170 lawyer in over 40 countries. Within the U.S., in 1998, about 800 lawyers worked at Ernst & Young, about double the number that had worked there a few years earlier. In Europe, Ernst & Young had on staff about 600 lawyers in 1997. In 1998, Deloitte & Touche had on staff approximately 2,200 lawyers worldwide. KPMG indicated that in 1997 it had 1,125 employees who spend more than 50% of their time providing legal services.²⁷⁰

There is more than a little irony in the fact that Andersen Legal appears to have been the most successful of the Big Five's legal networks. It ranked ninth in a list of the most profitable global law firms in 2000, tying with Sherman & Sterling.²⁷¹ The two firms reported \$590 million in revenue.²⁷² Between 1998 and 1999, Andersen Legal's revenue increased thirty percent.²⁷³ When measured by the number of attorneys it employed, Andersen Legal placed second with 2,880 lawyers. Baker & McKenzie beat it out for first place—but only by 43 lawyers. Andersen Legal took

270. CHARLES RIVER ASSOCIATES, *supra* note 51, at 16 (footnotes omitted). *See also* Rosenberg, *supra* note 260, at 5 (observing "If you add up all the lawyers at the Big Five accounting firms and their affiliates, the total dwarfs the number of attorneys at the five largest law firms in the world."). According to a 1998 *National Law Journal* survey, Arthur Andersen's 1,500 lawyers would have made it the second largest law firm in the world, if MDP barriers were not in place. *See Annual Survey of the Nation's Largest Law Firms*, NAT'L L.J., Nov. 16, 1998, at C5. *See also* Hannay, *supra* note 254, at 1.

271. *Lessons from the Global 100*, *supra* note 208, at 89.

272. *Id.* Interpreting Andersen Legal's revenue is particularly difficult because the measurements of comparison vary from publication to publication and, are even inconsistent with a single publication on occasion. According to one article, the number of Andersen Legal's lawyers/fee-earners in 2001 was 2,880, while Sherman & Sterling's was 887. *Id.* at 123. Andersen Legal's ranking *based on revenue per lawyer* was ninety-nine while Sherman & Sterling's ranking *based on average profits per equity partner* was eleventh. In describing Andersen Legal's financial year that ended August 31, 2000, another publication estimated that "with an average of 418 partners in the network for the last financial year Andersen Legal racks up fees-per-partner of \$1.26 m." *Andersen Legal fee income exceeds \$500m*, EUR. LEGAL BUS., Nov./Dec. 2000, at 9.

It is not clear, moreover, exactly what categories of lawyers/fee earners the statistics capture. In the very first Global 50 issue of the *American Lawyer*, the magazine indicated that the personnel figures for the accounting firms "include all lawyers in affiliated law firms and business lawyers in other divisions, but not lawyers practicing tax law exclusively with the firms' accounting or tax divisions." John E. Morris, *The Global 50*, AM. LAW., Nov. 1998, at 47. No mention is made of the accounting firms in 1999 or 2000 issues. The 2001 issue contains the general statement "[l]awyer numbers . . . reflect only those within a single partnership and do not include affiliations, networks, or those in separate partnerships, even if they operate under a single name. *Methodology: The Global 100*, AM. LAW., Nov. 2001, at 118. Since Andersen Legal does not purport to be a single partnership, the statement's accuracy open to question.

273. Campo-Flores, *supra* note 260. The rate was more than double that of the average Am Law 100 firm. *Id.*

first place and Baker & McKenzie second place, however, when measured by the number of countries in which they maintained offices (36 v. 31).²⁷⁴

V. PRELIMINARY REFLECTIONS ON HOW ANDERSEN'S COLLAPSE WILL AFFECT THE FINAL FOUR'S EFFORTS TO BECOME PLAYERS IN THE MARKET FOR LEGAL SERVICES

When it became clear that Andersen would not survive, the Final Four and second-tier accounting and consulting firms hired Andersen's U.S. partners and staff on a piecemeal basis.²⁷⁵ The firms exercised caution because they feared successor liability under U.S. bankruptcy laws. Andersen's foreign accounting offices generally negotiated with the Final Four independently of one another on a country-by-country basis.²⁷⁶ Successor liability was less of a concern for the Final Four outside the United States because of the structure of Andersen Worldwide SC, the umbrella organization that linked Andersen with its foreign affiliates.²⁷⁷ For reasons that are not clear, the law firm members of the Andersen Legal network were usually not included in the negotiations between the Final Four and Andersen's foreign accounting offices. They had to negotiate on their own.²⁷⁸ Approximately, twenty-one of the thirty-eight law firms went to EY Law Services, fourteen to Deloitte & Touche, and two to KPMG.²⁷⁹ Two of the most prominent members of Andersen Legal decided to revert to their former status as stand-alone law firms with no legal network affiliation.²⁸⁰

MDP opponents should take little solace in Andersen Legal's disintegration. It is futile for them to believe "Enron could become the

274. Using the number of offices as a benchmark shows the enormous disparity between the geographic reach of Andersen Legal, on the one hand, and U.S. and U.K. firms, on the other. White & Case ranked third on the list with twenty-four offices. Freshfields Bruckhaus Deringer, Allen & Overy, and Coudert Brothers tied for fourth place with fifteen offices. Nine firms had between 10 and 14 offices. *Most Lawyers*, AM. LAW., Nov. 2001, at 123.

275. Cassell Bryan-Low, *Ernst & Young, Deloitte, KPMG Look to Hire 200 Partners Each; Pricewaterhouse Focuses on Clients*, WALL ST. J., May 30, 2002, at C1.

276. For a country-by-country list of the new affiliations of Andersen's foreign accounting offices, see Matthew Carr, *Ernst & Young Forecasts 20% Rise in Revenue of Andersen Mergers*, BLOOMBERG NEWS, Apr. 30, 2002.

277. Steve Seidenberg, *Andersen Legal No Longer Exists; Garrigues' Transition*, NAT'L L.J., July 8, 2002, at A17.

278. Sue Reisinger, *Andersen Legal Negotiates Break-Up*, NAT'L L.J., Apr. 8, 2002, at A11; *Fall to Earth: Andersen Legal Took Nearly a Decade to Build, Reaching Lofty Heights. And Then in a Flash, It Was Gone. What Was Holding This Thing Together?*, AM. LAW., June 2002, at 17.

279. *Andersen Aftermath: The Complete Picture*, EUROPEAN LEG. BUS., July/Aug. 2002, at 4.

280. *Garrigues' Transition*, *supra* note 277; Jan Harvey, *No Turning Back for Dundas*, LEG. WK., Sept. 19, 2002, available at 2002 WL 26453767.

Ground Zero for accountancy firms' legal ambitions."²⁸¹ Almost all of the member law firms joined a network affiliated with one of the Final Four. Their decision is a striking display of faith in the future of side-by-side relationships between law firms and accounting firms. The addition of twenty-one firms to EY Law Services is certain to give it a larger client-base, expand its competencies, and strengthen its competitive position in certain markets, such as the "plum jurisdictions" of France, Germany, and Italy.²⁸² While the precise number of lawyers emigrating from Andersen Legal to EY Law Services is not known, their addition is viewed by knowledgeable commentators as creating "a formidable global law group."²⁸³

The nay-sayers insist that clients after the Enron debacle will place a higher value on independent law firms.²⁸⁴ While this claim may have some merit, it overlooks several salient points. First, memories are short. In five or ten years, Enron will be a distant recollection. The Final Four and their affiliated law firm networks can continue to implement the strategic plan previously described during this period. As long as they act cautiously and conform their conduct to the controlling regulatory restraints, their growth will continue. Over the course of time, legislators may well become responsive to lobbying efforts to remove restraints that the Final Four find objectionable. Furthermore, the SEC's current regulation on auditor independence²⁸⁵ does not bar a law firm that is a member of Final Four network from providing legal services to an audit client of the accounting firm with which it is affiliated.²⁸⁶ While the SEC may conceivably take action to bar their provision under the recently enacted Sarbanes-Oxley Act, the agency has not signaled that it regards amending the regulation as a high priority item.

Second, while the Final Four have agreed to spin off their consulting

281. Edward Fennell, *I Told You So, Say Critics*, THE TIMES (London), Jan. 29, 2002, at Law 3, available at 2002 WL 4177341; Geanne Rosenberg, *The Enron Implosion: Scandal Seen as Blow to Outlook for MDP: Andersen Role a Vindication, Foe Says*, NAT'L L.J., Jan. 21, 2002, at A21.

282. *Andersen Aftermath*, supra note 279.

283. Reisinger, supra note 278. Why the new additions would make EY Law Services "a formidable global law group" is not hard to understand. Before its disintegration, Andersen Legal had 2,880 lawyers in 36 countries; EY Law Services boasts of 1,850 lawyers in 60 countries. In contrast, Baker & McKenzie International, the world's largest law firm, has only 2,923 lawyers in 31 countries. *Id.*

284. See, e.g., Corrine Franks, *No Converts to the MDP*, COMM. LAW., Mar. 34, 2002, at 34 (reporting a survey of 75 heads of legal and finance directors at the FTSE 350 companies).

285. 17 C.F.R. § 210.2-01 (2002).

286. See Nathan Koppel, *A Regulator Budges (and Fudges) on MDPs*, AM., Jan. 2001, at 20; Geanne Rosenberg, *SEC's New Rules Will Likely Allow Big Five to Expand Legal Services*, NAT'L L.J., DEC. 4, 2000, at B7.

arms, it is not at all clear that they will jettison their tax and related consulting services. In some respects, the units offering tax and related consulting services are mini-versions of the Fully Integrated Model. It is estimated that these units generate fifty percent of the Final Four's revenue. Among the services the units offer are compensation consulting, litigation support, and financial advising for wealthy clients.²⁸⁷ While these units may not directly compete in the marketplace for legal services, the importance of their role in fostering an acceptance of MDPs should not be overlooked.

Third, the marketplace for multidisciplinary business advice that includes a legal analysis will continue to grow as global enterprises become larger, more companies sell goods and services outside their national borders, capital continues to move at lightening speed from one end of the globe to the other, and local, national, and international authorities expand their regulatory reach. Even if securities regulators are successful in preventing the law firm members of a legal network affiliated with a Final Four firm from providing legal services to the Final Four firm's audit clients, the number of potential clients is still enormous. They range from the non-audit clients of each Final Four firm to the audit clients of the individual non-affiliated Final Four firms.

CONCLUSION

MONOPOLIST, ARISTOCRAT OR ENTREPRENEUR?: A COMPARATIVE PERSPECTIVE ON THE FUTURE OF MDPs

Two observations stand out in any comparative analysis of MDPs. The first is the remarkable similarity of the concerns expressed by the legal professions in the United States, France, Germany, and the United Kingdom in opposition to MDPs. Despite the professions' disparate histories, structures, regulatory schemes, and legal cultures, lawyers and bar associations on both sides of the Atlantic have labeled the same values as core. Both reverently invoke "the interest of the public" in rejecting proposed changes that would allow partnership and fee sharing between lawyers and nonlawyers, especially in the Fully Integrated Model. They rest their opposition on the need to preserve a lawyer's independence, avoid conflicts of interest, and protect confidential client information. They regularly cite the potential for the corruption of the core values, if lawyers and auditors in a single organization are allowed to provide their

287. Cassell Bryan-Low, *Accounting Firms Are Still Consulting*, WALL ST. J., Sept. 23, 2002, at C1.

respective services to the same client. Both question whether there is a client-driven market demand for “one-stop shopping” and “a seamless web” of mixed services. The second is the flip side of the first: the similarity in the arguments in favor of MDPs. MDP proponents cite the steady and increasing growth of the Big Five’s legal networks as proof of market demand. They contend that just as in-house legal departments have developed effective procedures for protecting confidential client information, MDPs will also develop their own. In the proponents’ view, the solution to conflicts of interest problems lies in adequate disclosure to the client and informed consent. In short, there is very little difference in the rhetoric invoked to support the pro’s and con’s of MDPs, even though the supporters may be separated by thousands of miles and disparate legal structures and cultures and rules of ethics.

Deeply embedded ideology more than surface rhetoric makes the MDP debate worth investigating from a comparative perspective. In the United States, lawyers have long displayed a remarkable entrepreneurial spirit. It manifests itself in activities as diverse as the “lottery-style character of American litigation,”²⁸⁸ ancillary businesses,²⁸⁹ and lawyers’ eagerness to join in-house business teams.²⁹⁰ Characterized as “nimble” by the eminent legal historian, Professor Lawrence Friedman,²⁹¹ the U.S. legal profession’s most distinctive attribute may be

the zeal with which [its lawyers] have developed new organizational forms for capturing particular segments of the market for legal services or for capitalizing on the economic opportunities presented by particular legal problems.²⁹²

It is a serious mistake to assume that the rejection of the MDP Recommendations by the ABA House of Delegates in 1999 and 2000 or the rejections by the majority of state bars can derail the entrepreneurial engine that drives the U.S. legal profession. The growth of ancillary businesses is proof positive that lawyers who want to join forces with

288. See, e.g., RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* 108-10 (1996).

289. See *supra* notes 28-35 and accompanying text.

290. See Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization*, *supra* note 62, at 1071-73.

291. See generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 633-48, 687-95 (2d ed. 1985).

292. Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL SYSTEM I* (Robert L. Nelson et al. eds., 1992).

nonlawyers will find ways to do so.²⁹³ The willingness of leading lawyers to leave lucrative partnerships and high level government positions to join the Big Five is further evidence.²⁹⁴ E&Y's affiliation with McKee Nelson is a harbinger of other contractual relationships between U.S. law firms and Big Five firms and U.S. law firms and smaller professional services firms.²⁹⁵ Other developments that have received scant attention in the MDP debate also point to how successful U.S. lawyers have been in capitalizing on economic opportunities. The rush of firms to invest in clients in the late 1990's and the willingness of bar association ethics committees to provide them with a roadmap are two obvious examples.²⁹⁶ A more subtle example is the growth in the number of lawyers who have left law firms to join in-house legal departments prompted by the desire to become involved with business decision-making and planning.²⁹⁷

The ideology of entrepreneurialism is almost entirely missing from the legal culture in France and Germany and is incipient in the U.K.'s. The dominant ideology in France and Germany is best summed up as "the cult of independence." The meaning of independence in France and Germany is very different from its meaning in the United States. In the United States, a lawyer must be independent of outside influences, especially those of other clients or the government. The U.S. lawyer's loyalty runs directly and almost exclusively to the lawyer's client. For better or worse, the U.S. lawyer is the client's hired gun.²⁹⁸ In France and Germany, the lawyer is an aristocrat, independent of the client he or she is representing as well as other clients, the government, and even the lawyer's own partners.²⁹⁹ The ideology of aristocratic independence makes the foreign lawyer much more of a moral actor than the lawyer's U.S. counterpart. Given the absence of the ideology of entrepreneurialism and the presence

293. See *supra* note 30.

294. While these lawyers may have to call themselves "consultants" to avoid UPL restrictions, their professional activities at the Big Five are largely indistinguishable from those they performed during their law firm or government tenure. See *Choosing Wise Men Wisely*, *supra* note 2, at 262-63.

295. See *supra* notes 40-48 and accompanying text.

296. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 00-418 (2000); Assoc. of the Bar of the City of New York, Comm. on Professional and Judicial Ethics, Formal Op. 2000-3 (2000).

297. See Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization*, *supra* note 62, at 1071-73.

298. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 14-85 (1994). *But see*, e.g., William Simon, *The Ideology of Advocacy*, 1978 WISC. L. REV. 29; Richard Wasserman, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975).

299. E.g., Synopsis of Henri Ader's notes, at <http://www.abanet.org/cpr/ader.html> (visited Nov. 3, 2002). M. Ader is the former chair of the Paris Bar Association. Testimony of Ramon Mullerat, at <http://www.abanet.org/cpr/ader.html> (last visited Nov. 3, 2002).

of the ideology of aristocratic independence, the resistance of the legal professions in France and Germany to permitting MDP relationships between lawyers and the Big Five assumes a new dimension. The resistance grows out of a deeply embedded self-image more than the “professional project” envisioned by Professor Abel.³⁰⁰ While it would be foolish to pretend that turf protection is not a monopolistic motive behind some of the opposition to MDPs in France and Germany, it would be equally foolish to ignore the centrality of the ideology of aristocratic independence to the opposition.

The role of the government in the MDP debate is also a distinguishing factor. In the United States, the federal and state governments have stayed on the sidelines except for the SEC. The SEC, however, was only concerned with assuring the independence of the audit function, if MDPs were permitted to offer legal and audit services to the same client.³⁰¹ In contrast, the French and U.K. governments have played a very active role in the MDP debate, placing significant pressure on those jurisdictions’ bar associations to amend the rules of professional conduct to permit MDP-type relationships among lawyers and nonlawyers. They view lawyers as monopolists and the rules against fee sharing and partnerships with nonlawyers as anticompetitive, injuring consumers.

The governments have deliberately crafted their proposed reforms, moreover, with an eye to making the legal professions in France and the United Kingdom more competitive with foreign law firms and non-law firm rivals. The Nallet Report in France acknowledged the disadvantages that French firms were experiencing in competing with large U.S. law firms and U.K. solicitor firms.³⁰² The Office of Fair Trading in the United Kingdom wanted to expand the range of permissible ties between solicitors and nonsolicitors to foster competition in the delivery of legal and law-related services. It reasoned that the expansion would benefit consumers and strengthen the ability of solicitor firms, especially small-size ones, to compete with nonsolicitor firms, such as banks and insurance companies.³⁰³

Finally, the question must be asked, what contribution to the MDP debate, if any, can a comparative perspective offer? The first and most

300. Lawyers in the Civil Law World, *supra* note 33, at 8-9; Lawyers as Monopolists, Aristocrats, and Entrepreneurs, *supra* note 233.

301. See *supra* notes 285-86 and accompanying text.

302. See THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, *supra* note 54, at 211-15.

303. See COMPETITION IN THE PROFESSIONS, *supra* note 186, at 1-12.

obvious answer is that a comparative perspective demonstrates the futility of the bar associations' opposition. The ABA, the CCBE, and their counterparts in France, Germany, and the U.K. were not able to stop the Big Five from offering legal services either under the guise of "consulting" or through the establishment of contractual relationships. The second answer is that the forces for change are located in very different places. The ideology of entrepreneurialism is driving MDP supporters in the United States. In France and the United Kingdom, the government is leading the charge, actively intervening to strengthen the legal profession's competitive position in the marketplace for cross-border legal services and/or to promote competition to benefit individual, domestic consumers. The third answer is that the Contractual or Side-by-Side Model is likely to be the preferred MDP structure for the immediate future outside the United States. It is more appealing to lawyers in France and Germany than the Fully Integrated Model because it is more consistent with the ideology of aristocratic independence. The fourth answer is that the number and size of MDPs in the United States will expand propelled by ideology of entrepreneurialism. Some law firms will partially achieve the benefits of the integrated model through the establishment of ancillary businesses, a relationship between lawyers and nonlawyers that the rules of conduct already permit. Other law firms will opt for the Contractual or Side-by-Side Model with nonlawyers learned in different disciplines. This relationship too can pass muster under the existing rules of professional conduct, if it is properly structured. Lastly, the Final Four are likely to prefer the contractual relationship over other MDP structures both in the United States and abroad because it should enable them to avoid the paralyzing conflicts of interest that would arise in an integrated MDP with offices around the globe.

