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

Mary C. Daly
Fordham University School of Law

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MONOPOLIST, ARISTOCRAT, OR ENTERPRENEUR?: 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

MARY C. DALY*

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

* James H. Quinn Professor of Law, Fordham University School of Law; J.D., 1972, Fordham University School of Law; LL.M., 1978, New York University School of Law. Professor Daly is the Director of the Law School’s Graduate Program and Co-Director of its Louis Stein Center for Law and Ethics. The themes explored in this Article are drawn in part from Mark S. Osiel, Lawyers as Monopolists, Aristocrats, and Entrepreneurs, 103 HARV. L. REV. 2009 (1990). Readers who are not familiar with this thoughtful work are urged to read it. The Article does not employ the terms “monopolist,” “aristocrat,” and “entrepreneur” in precisely the same way as Professor Osiel’s, however.

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] will 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 Orde des Avocate 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). 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. While the ABA House of Delegates rejected both sets of proposals by a wide margin, the debate has continued on the state level. 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.


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. 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. 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.

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, particularly in the United Kingdom and several Western European countries. They clashed over the merits and demerits of the Big Five’s networks of relationships with foreign law firms. U.S. academics, with the notable exceptions of Professors Laurel Terry and Charles Wolfram and social law, should not be revised.


7. Id.


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://isuc.on.ca/services/MDPintro_en.jsp (last visited Nov. 3, 2002) (Law Society of Upper Canada).


scientists Bryant Garth and Carole Silver, 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. 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. 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).


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. 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. Commentators have addressed this
issue by proposing five configurations labeled “models”. 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.

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. The foreign firms’ practices until very recently have focused primarily on litigation. 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
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.


\(^{26}\) See infra notes 135-49 and accompanying text.


\(^{28}\) 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).


\(^{31}\) 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.\footnote{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.\footnote{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.’”\footnote{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.\footnote{36} The Contractual or Side-by-Side Model is the one most frequently used by the Big Five in Western Europe and the United


\footnote{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).}

\footnote{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).}

\footnote{36. See Hypotheticals and Models, supra note 19.}
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 Five\(^{42}\) toward the eventual establishment of a


\(^{38}\) 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.


\(^{41}\) 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 SALTNets 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; Ritchenya 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.\textsuperscript{43} In 2001, the firm changed its name to McKee Nelson.\textsuperscript{44} The most likely explanation for the change is its announced intention to open a branch office in New York City.\textsuperscript{45} New York prohibits a law firm from practicing under a trade name.\textsuperscript{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.”\textsuperscript{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).\textsuperscript{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.\textsuperscript{49} Its advertisements emphasize “‘a seamless web’ of services”\textsuperscript{50} and “one-stop shopping,” aiming at potential clients in need of multidisciplinary advice.\textsuperscript{51} Businesses with problems that require only the

\textsuperscript{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, RECODER, Nov. 11, 1999.


\textsuperscript{45} See id.

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

\textsuperscript{47} See id. § 1200.5-c (2002). See also supra note 8.

\textsuperscript{48} See supra notes 43-44; Morris, supra note 37, at 52.

\textsuperscript{49} See Hypotheticals and Models, supra note 19.

\textsuperscript{50} Id.

\textsuperscript{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. 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.

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

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. 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. 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. 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.

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. 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. 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. In-house lawyers are assuming a new identity. All of these changes are acting synergistically to reshape the structure and practice of foreign legal professions.

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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.
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, 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. 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. The Establishment Directive 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,

64. For a comprehensive analysis of this topic, see George A. Bermann 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 L. & Com. 207 (2002).
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 Bermann 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”

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).
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.”\footnote{Wouters, ¶ 58.} 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.\footnote{Id. ¶ 57.}

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.\footnote{Id. ¶¶ 80-96.} 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, 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

\footnote{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{79}

The impact of the \textit{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 \textit{Wouters}

\textsuperscript{75} \textit{Wouters}, ¶ 110.
\textsuperscript{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 \textit{Berman ET AL.}, \textit{supra} note 64, at 61-63.

The Court’s decision in \textit{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, \textit{Wouters v. NOVA}, (July 10, 2001), \textit{available} at http://curia.eu.int/en/jurisp/index.html. The Court did, upsetting well-established jurisprudence. See \textit{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.” \textit{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 \textit{Terry}, \textit{supra} note 69, at 891 n.71. Why the Court rejected the Advocate General’s recommendation is not known.

\textsuperscript{77} \textit{Wouters}, ¶ 100.
\textsuperscript{78} \textit{Id.} ¶ 102.
\textsuperscript{79} \textit{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. 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. 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.

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. 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.

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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.
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. 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. Those firms grew to be among the largest law firms in that country.

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. 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. 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
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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,

\begin{footnotes}
\footnote{101. Id.}
\footnote{102. THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, supra note 54, at 200.}
\footnote{103. U.S. law firms are far head 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.}
\footnote{104. See also infra notes 230-39 and accompanying text.}
\footnote{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).}
\end{footnotes}
PricewaterhouseCoopers Juridique and Fiscal, has ever changed its name. 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 the 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.”

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. E&Y and Deloitte & Touche are subject to the jurisdiction of the Bar of Nanterre (Hauts-de-Seine). That Bar’s membership has been dominated by avocats associated with the law firms affiliated with the Big Five. 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. 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 Bars 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.
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. The Big Five accused the National Council of using its rulemaking authority for protectionist purposes. However, they did not reject the decision entirely. 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. 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. 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. The ostensible purpose for article 16’s adoption was to insure the *avocats*’ independence and the avoidance of conflicts of interest. 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.

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.


118. Id.


profession and affiliations among members of the different legal professions and between legal and nonlegal professionals. 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. 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. 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.

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. It states that each profession within the MDP should control its professional strategy, management, and admission of partners. It emphasizes that avocats in an MDP must remain subject to rule of professional secrecy. 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. This will presumably enable the reviewers to judge for themselves whether the terms of the relationship threaten the lawyer’s independence.

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.


123. Id.

124. Id. at 214.

125. Id. at 213.

126. Id.

127. Id. at 214.

128. Id. at 213.

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. 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. 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.

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. Educators paid little attention to the education of lawyers who would represent corporate clients in litigation or transactional work. Like the French legal profession, the German legal profession is

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 (255 lawyers), and Deloitte & Touche Juridique & Fiscal (230 lawyers). France’s Largest Firms, AM. L. W., Nov. 2001, at 91.
132. Id.
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. If the rules are inconsistent and cannot be reconciled, the strictest rule that is in the public interest is applied.

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 Rechtsandwalt. 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 Rechtsandwalt’s exercise of independent professional judgment.

In light of the restrictions discussed above on the types of professionals who may be members of a fully integrated MDP, 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. Until 1989, partnerships among lawyers in different cities were prohibited. There was no similar restraint on the professionals who worked for the Big

141. Id.
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 Rechtsanwaltschaft mbH (Andersen), Menold Herrlinger Rechtsanwälte (E&Y), PwC Veltins Rechtsanwaltschaft mbH (PwC), WEDIT Deloitte Touche (Deloitte Touche), Raupach & Wollert-Elmendorff Rechtsanwaltschaft 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. 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. The Big Five’s international capabilities were a very attractive selling point, especially for lawyers interested in cross-border transactions and mergers and acquisitions.

C. The United Kingdom

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, for the purposes of this Article the essential distinction is that barristers are trial lawyers and solicitors, transactional lawyers. Bar regulations mandate that barristers may have
only other barristers as partners. That ethical rule is so ingrained in the U.K. legal culture that it was never seriously challenged during the debate over MDPs.

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. That debate took place in a legal environment in which solicitors did not have monopoly rights and regularly competed with businesses and entities operated by nonlawyers.

Whereas 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 audience.

Certain solicitors practice rules, whose content was similar to the lawyer codes of conduct in the United States, also shaped the debate.
Practice Rule 7, for example, barred solicitors from sharing legal fees or entering into a partnership with a nonsolicitor.\(^\text{158}\) 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.\(^\text{159}\) 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.\(^\text{160}\) 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.\(^\text{161}\) 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.\(^\text{162}\) 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.\(^\text{163}\) In 1990, the Parliament passed legislation repealing the statutory prohibitions that barred solicitors from forming a partnership with nonsolicitors.\(^\text{164}\) 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

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\(^{158}\) Rule 7 provides:
A solicitor shall not share or agree to share his or her professional fees with any person except:
(a) a practicing solicitor
(b) a practising lawyer of another jurisdiction
(bs) 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.

\(^{159}\) 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.


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

practice.\textsuperscript{165}

The Law Society triggered the current MDP debate in the United Kingdom in 1998 when it published the consultation paper, \textit{Multi-Disciplinary Practices, Why? . . . Why not?}.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{168} It then formulated seven preliminary conclusions to guide subsequent analyses.\textsuperscript{169} Many of those conclusions resembled the principles that guided the ABA Commission in its decision-making analysis.\textsuperscript{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
have one or more nonsolicitor partners. 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,” 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.” The Legal Practice Plus model is a variant on the Command and Control Model discussed earlier.

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. 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.” It also pointed out that the issues of passive investment and solicitor/auditor conflicts, among others, were left unresolved.

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. 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.

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.
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

[the 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.


184. Id.

185. Id.
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...
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 cooperation 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 consultative 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).


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. 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.”

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.” Included among them were that “[p]artnerships...
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." 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. The UIA Standards are more particularized. Both sets of

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.


guidelines clearly lack the specificity and detail associated with lawyer codes of conduct in the United States. 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.” 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.

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

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 bimonthly. 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.
advertising discussed below, 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. 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. 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.

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. Accordingly, it is an “ethnocentric misnomer” 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. 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. Intercultural mobility between the groups is limited. 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.” 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 profession in defense of the public interest. 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).


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

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


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.”

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.
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.
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.), 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. While judicial intervention has largely invalidated these requirements, 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.

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)).


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. In many countries, business cards and dignified entries in a telephone directory were the only form of permitted advertising. 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. 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.


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 andouting. 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.


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.” 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, and U.S. law schools continue to wrestle with how to impart those skills to their students.

Instrumentalism is highly valued by both clients and lawyers. 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,” 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.”

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


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 and 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.\footnote{239}

\section*{IV. THE BIG FIVE’S ECONOMIC THREAT TO TRADITIONAL LAW FIRM PRACTICE IN THE UNITED KINGDOM AND WESTERN EUROPE PRIOR TO ANDERSEN’S COLLAPSE}

\subsection*{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;\footnote{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;\footnote{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.\footnote{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.\footnote{243} That translated into a twenty-seven percent increase in per equity partner profits.\footnote{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

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\item \footnote{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.” \textit{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, \textit{Time to Follow the U.K. Flow?}, THE LAW., Oct. 13, 1998, at 27.
\item \footnote{240. \textit{See infra} notes 243-46 and accompanying text.
\item \footnote{241. \textit{See e.g., supra} notes 131-32 and accompanying text.
\item \footnote{242. \textit{See infra} notes 247-48 and accompanying text.
\item \footnote{243. \textit{Lessons from the Global 100, supra} note 208, at 89.
\item \footnote{244. \textit{Id.}}}
years. 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.

In contrast, the market for traditional auditing and accounting services has been shrinking. 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.

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. While these advantages had

245. Id.
246. Id.
247. See Daly, supra note 2, at 261-62.
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 Dabyshire, Speech, How Do You Deal with Accounting Firms as Providers of Legal Services?, Mar. 7, 1990, at 5, 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.


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

https://openscholarship.wustl.edu/law_lawreview/vol80/iss2/5
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. 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. 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, the
ethics rules prohibit passive investment in law firms. Many MDP opponents 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. Judging by the Big Five’s reported revenues, they were quite successful in obtaining engagements from them.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{264}

\textsuperscript{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.

Elizabeth MacDonald, Lawyers Protest Accounting Firms’ Hiring, WALL ST. J., Aug. 22, 1997, at B8. 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.

\textsuperscript{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 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). 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. To meet that goal, it would have to employ three thousand lawyers and generate one billion dollars in revenue. Landwell’s stated mission, moreover, was to be “a top-five global law firm by reputation as well as size.” Andersen Legal warned that it was aggressively “wooing higher-end work.”

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.

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 about 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

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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).  

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. 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. 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. 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. Approximately, twenty-one of the thirty-eight law firms went to EY Law Services, fourteen to Deloitte & Touche, and two to KPMG. 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.

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.


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.


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


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).


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. 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

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,” ancillary businesses, and lawyers’ eagerness to join in-house business teams. Characterized as “nimble” by the eminent legal historian, Professor Lawrence Friedman, 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.

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

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.
nonlawyers will find ways to do so. The willingness of leading lawyers to leave lucrative partnerships and high level government positions to join the Big Five is further evidence. 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. 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. 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.

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. 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. 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.


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


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{303}

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

\textsuperscript{300}. Lawyers in the Civil Law World, \textit{supra} note 33, at 8-9; Lawyers as Monopolists, Aristocrats, and Entrepreneurs, \textit{supra} note 233.

\textsuperscript{301}. \textit{See supra} notes 285-86 and accompanying text.

\textsuperscript{302}. \textit{See THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, supra} note 54, at 211-15.

\textsuperscript{303}. \textit{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.
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