

**PRESERVING THE CORE VALUES
OF THE
AMERICAN LEGAL PROFESSION**



**The Place of Multidisciplinary Practice
in the Law Governing Lawyers**



**Report of the New York State Bar Association
Special Committee on the
Law Governing Firm Structure and Operation**

The Special Committee is solely responsible for the contents of this report. Unless and until adopted in whole or in part by the Executive Committee and/or the House of Delegates of the New York State Bar Association, no part of the report should be considered the official position of the Association.

**Albany, New York
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Introduction

The Mission, Process and Report of the Special Committee

In June 1999 the American Bar Association Commission on Multidisciplinary Practice recommended numerous changes to the law governing lawyers, one of which would have permitted lawyers to participate with nonlawyers in the creation of business entities owned or controlled by nonlawyers to engage in multidisciplinary practice.

On June 26, 1999, the New York State Bar Association's House of Delegates adopted a resolution

(1) opposing any changes in existing regulations prohibiting attorneys from practicing law in MDPs in the absence of a sufficient demonstration that such changes are in the best interest of clients and society and do not undermine or dilute the integrity of the delivery of legal services by the legal profession; and

(2) urging further studies of the matter.

1. The Mission of the Committee

Pursuant to the NYSBA House of Delegates resolution, President Thomas O. Rice, on July 28, 1999, created this Special Committee on the Law Governing Firm Structure and Operation, charging it to consider the present law and its effectiveness, whether there is a need for any changes in the law, the evidence in support of such changes, and whether potential advantages from such changes outweigh potential detrimental effects.

On August 10, 1999 the ABA House of Delegates adopted the following resolution by a vote of 304 in favor to 98 opposed:

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.

2. The Committee's Process

At its organizational meeting on September 8, 1999, this committee identified six subject areas for concentrated study and established working groups of committee members to whom initial responsibility for carrying forward each project was assigned. Over the ensuing six months, the Committee examined in depth each of the following subject areas:

- A. the changes since World War II in the American legal profession;
- B. the articulation and enforcement of professional values;
- C. the work of lawyers with other professionals;
- D. nonlawyer involvement in the practice of law;
- E. developments abroad in relation to multidisciplinary practice; and
- F. factors that look toward change in the existing law governing lawyers.

In the first two parts of this three part report, the Committee sets forth the results of its six study projects.

3. The Committee's Report

Part One, comprised of six chapters, provides an appraisal of the American legal profession in the Year 2000, summarizing the product of study projects A, B and C.

Part Two, comprised of four chapters, examines the challenges to maintaining a single public profession of law that arise from the developments chronicled in study projects D, E and F.

Part Three of the Report analyzes, against the background of Parts One and Two, the principal issues raised with respect to the law governing lawyers and law firms in the debate over MDP. Against this analysis the Committee's recommendations are set forth as to:

- (1) what should be changed in the law to clarify the place of multidisciplinary practice while preserving the core values of the American legal profession; and
- (2) what in the public interest should remain unchanged in the law.

PART ONE

APPRAISAL OF THE AMERICAN LEGAL PROFESSION IN THE YEAR 2000

Chapter 1

The Salient Changes in the Demography

1. Explosion in Numbers and in Use of Legal Services
2. Change in the Profession's Gender Make-up
3. Opening the Profession to Minorities

1. Explosion in Numbers and in Use of Legal Services – The phenomenal growth in the number of lawyers since World War II has been accompanied by an unprecedented increase in demand for legal work, both from business clients and on behalf of previously unrepresented individuals.

The growth has affected the manner in which law is practiced, how law firms are structured, and how lawyers organize their work. It has permitted greater specialization in law practice and an increased division of labor among lawyers.

The explosive growth in the number of lawyers began in the law schools. By 1963-64 enrollments matched the post-World War II bulge and there began a yearly increase in the number of law school enrollments that fueled the profession's remarkable expansion between 1965

and 1991.¹ The number of ABA-approved schools grew from 112 in 1948 to 176 in 1991. The following table shows for selected academic years the number of law schools, total J.D. enrollments (first, second and third years) and first admissions to the bar:²

<u>Academic Year</u>	<u>ABA-Approved Law Schools</u>	<u>J.D. Enrollments</u>	<u>First Admissions to the Bar</u>
1965-66	136	56,510	13,109
1970-71	146	78,018	17,922
1975-76	163	111,047	34,930
1980-81	171	119,501	41,997
1985-86	175	118,700	42,450 ³
1991-92	176	129,580	54,577
1997-98	178	125,886	56,184

The great growth in the number of lawyers has been matched by the growth in demand for all kinds of legal services, particularly from the business community. New areas of law and regulation, largely designed by lawyers, have created whole new fields for legal services: the environment, occupational health and safety, nuclear energy, discrimination and individual rights, health and mental health care, biotechnology, computers and the Internet. At the same time, economic activity vastly expanded, new business enterprises multiplied and the number of transactions in every segment of the economy proliferated.

¹ American Bar Foundation, Lawyers Statistical Reports. In one four-year period, 1980 to 1984, the profession grew by 107,000.

² Source: 2000 Edition ABA Approved Law Schools, at 450.

³ Data incomplete for this year.

Significantly, individuals who had never before sought legal assistance began seeking help from lawyers, while the courts pronounced the rights of persons charged with serious crime to have counsel and of classes of people collectively to seek legal redress in the courts.

In sum, while the total number of lawyers increased from 221,605 in 1950 to 857,931 in 1995, the practice of law grew from a service activity estimated at \$4.2 billion-a-year in 1965 to an estimated \$148 billion-a-year in 1999.⁴

2. Change in the Profession's Gender Make-up – Perhaps the most significant change during the last three decades, first among law students and thereafter in the legal profession as a whole, was the growth in the number of women choosing the law as a career vocation. The number of women applicants and students in ABA-approved law schools increased from 4 percent in the mid-1960s to more than 46 percent in the late 1990s:⁵

<u>Academic Year</u>	<u>Women J.D. Enrollments</u>	<u>Percent of Total Enrollments</u>
1965-66	2,374	4.2%
1970-71	6,682	8.6%
1980-81	40,834	34.2%
1991-92	55,110	42.5%
1998-99	57,952	46.1%

⁴ U.S. Industry & Trade Outlook '99 (The McGraw-Hill Companies U.S. Department of Commerce/ International Trade Administration) Table 49-8, at 49-10. The most recent Lawyer Statistical Report of the American Bar Foundation reported the total number of lawyers in 1995 as 857,931.

⁵ Source: 2000 Edition ABA approved Law Schools, at 450.

With this rising tide of women admittees, the percentage of all lawyers who are women has risen sharply in the past two decades as the following table reflects:

<u>Year</u>	<u>Women lawyers as a percentage of total lawyer population⁶</u>
1950-51	2.5%
1960-61	2.6%
1970-71	2.8%
1980-81	8.1%
1990-91	22.0%

Since the rate of growth of the number of women in the profession substantially exceeded that of men, by 1995 women lawyers were, as a group, substantially younger than men, with a median age of 37, contrasted to a median age for men lawyers of 45.

In what segments of the profession has this growing number of women lawyers found employment? A slightly smaller percentage of women lawyers (70.9%) than of men (74.9%) are in private practice. On the other hand, a higher percentage of women than men have legal employment in government, in private associations,⁷ and in legal aid and public defender offices. Women lawyers in 1995, while comprising only 22.6 percent of the lawyers in private practice, were estimated to comprise 32.2 percent of federal government lawyers, 21.1 percent of state and local

⁶ These figures were derived from the American Bar Foundation, 1985, 1988 and 1995 Lawyer Statistical Reports.

⁷ Defined id. at 242: *Private association*. A private association is any nongovernmental organization that does not qualify under private industry. It excludes legal aid, public defender, or educational institutions. Examples of private associations are trade associations, unions, special interest groups, public interest groups, and charitable and religious organizations.

government lawyers, 39.7 percent of private association lawyers and 41.9 percent of the lawyers working in legal aid offices and as public defenders.⁸

The statistics for the Classes of 1997 and 1998 indicate that the legal employment patterns of women and men graduates are now tending to converge, but that in judicial clerkships, government and public interest positions, the percentages of women consistently exceed those of men, while the percentage of men entering law firms exceeds that of women.⁹

Despite the problems women lawyers continue to encounter, their presence and growing role in the profession have placed on the agenda, matters of particular concern to women which previously were ignored and have provoked serious reexamination of the legal workplace. These include matters relating to pregnancy; rape; sexual harassment in the workplace; judicial treatment of domestic violence; sexual relations between attorney and client; sexual stereotyping and other forms of bias and discrimination in both the courts and the other practice settings which are part of a lawyer's professional life.¹⁰

The expressed concerns of women lawyers have also raised consciousness on a broad range of issues pertaining to the established structure of the practice of law: the work/family conflict, the rigidity of the established practice-model, pregnancy and parenting leaves, day-care,

⁸ American Bar Foundation, 1995 Lawyer Statistical Report, at 24.

⁹ See National Association for Law Placement, Class of 1988 Employment Report and Salary Survey (ERSS) (1990) at 118-121, Class of 1989 ERSS (1991) at 68-75, and Class of 1990 ERSS (1991) at 62-70; see also American Bar Association Young Lawyers Division, The State of the Legal Profession 1990, Chapter 14, "The Status of Women in the Profession," at 63-70.

¹⁰ See Judith S. Kaye, Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality, 57 *Fordham L. Rev.* 111 (1988).

flexible work schedules, including working part-time, temporary hiring of lawyers and alternative tracks for career advancement.

Legal scholars debate the issues as to women's "different voice" and the "sameness" and "difference" between women and men. At the center of this discourse lies the practical imperative of how the legal profession will adapt to the gender change. Equal opportunity for women and freedom from gender bias are goals toward which the profession as a whole continues to struggle.

3. Opening the Profession to Minorities -- Another significant change in the legal profession during the decades of the 1970s, '80s and '90s has been its gradual and belated opening to minority lawyers. It was not until 1950 that the first African-American lawyer was knowingly admitted to the American Bar Association.

Legal education was equally exclusionary. Although Howard University Law School in Washington, D.C., received its charter from the Federal Government as early as 1869, it remained the only substantial source of legal education for black Americans in the entire country from 1877 to 1939. In 1939, North Carolina Central University Law School was established and, in 1947, two other predominately black law schools were founded, Texas Southern University Law School in Houston and Southern University Law School in Baton Rouge. As late as 1983, Howard and these three other predominately black law schools had trained the majority of black lawyers in the nation.¹¹

¹¹ See Geraldine Segal, Blacks in the Law, Philadelphia and the Nation, 27 *et seq.* (1983).

Beginning in the middle 1930s black American advocates brought suit to gain admission for African Americans to all-white law schools.¹² Nevertheless, not until the Supreme Court's decision in Brown v. Board of Education¹³ overruling the "separate but equal" doctrine, and the later passage of civil rights legislation in the early 1960s, did the academic legal community begin to give serious attention to the problem of the exclusion of African-Americans and other racial minorities.

It was not until 1964 that the Association of American Law Schools' Committee on Racial Discrimination could state for the first time that no member school reported denying admission to any applicant on grounds of race or color.¹⁴ Notwithstanding this AALS report, there were only 433 African-American students of the more than 50,000 law students enrolled during the 1964-65 academic year in the nation's predominately white law schools.¹⁵

Ultimately, with the coordinated efforts and support of the law schools and the organized bar, the federal Office of Economic Opportunity initiated programs of increased financial aid and remedial study in the late 1960s which soon began to show results. The number of black American law students in accredited law schools rose from 700, or approximately one percent, in

¹² See Pearson v. Murray, 168 Md. 478, 187 A. 590 (1936); Cf. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

¹³ 347 U.S. 483 (1954).

¹⁴ Association of American Law Schools Proceedings, Part One: Reports of Committees, at 159 (1964).

¹⁵ Report of the Philadelphia Bar Association's Special Committee on Pennsylvania Bar Admissions Procedures, Racial Discrimination of Pennsylvania Bar Examinations, 44 Temple L. Q. 141, 182 (1971).

1965; to 4,423, or 4.3%, in 1972; and to 8,149, or 6.3% of JD enrollments in 1991-92. The Black American JD enrollments in 1998-99 totaled 9,271.¹⁶

For racial minorities other than African Americans, there is little historical data. However, since the early 1970s, the office of the ABA Consultant on Legal Education has published a survey of minority group students enrolled in JD programs in approved law schools. In addition to “Black American Enrollment,” the groups included have been “Mexican American,” “Puerto Rican,” “Other Hispanic American,” “American Indian or Alaska Native,” and “Asian or Pacific Islander.” Over that period, the total minority enrollment grew from 5,568 in 1971-72 to 25,266 in 1998-99.

These figures confirm that significant progress has been made since the 1970s in enrolling increased numbers of minority law students, but there remains substantial under-representation of minority groups in the legal profession when compared with total minority populations.

Today, a growing number of minority lawyers are engaged in virtually every field of legal endeavor – in private practice in a variety of specialties; as attorneys in corporations and government offices; as prosecutors and defense attorneys; in the judiciary, as federal, state and local judges; in law schools as teachers, administrators and deans, and as leaders of the organized bar.

¹⁶ Source: 2000 Edition, ABA Approved Law Schools, at 453.

Chapter 2

The Profound Effects of Specialization, Information Technology, Advertising and Law Practice Management

1. The Spread of Specialization
 2. Information Technology in the Law
 3. Advertising and Marketing Legal Services
 4. Managing the Business of Lawyering
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Paralleling in significance the change in the demography of the profession has been the change in how legal services are provided and offered to the public: specialists abound in all segments of practice; the technology of cybernetics has become an integral part of virtually every law office; advertising and marketing of legal services are found in every medium; and the new discipline of law office management increasingly guides the business of lawyering in all practice settings.

1. The Spread of Specialization – Told that the law was “a seamless web,”¹ lawyers traditionally regarded themselves as generalists, prepared to deal with whatever problems prospective clients brought to their offices. However, as the general body of law grew in complexity and the law relating to commerce and industry vastly expanded, an increasing premium was put on specialization to maintain competence and to keep abreast of subject matter.

¹ This characterization of the law is of obscure origins.

The lawyers in larger law firms serving predominantly business clients developed competence in particular areas of regulatory law better to serve their corporate clientele, while the great majority of sole and small-firm practitioners, serving predominantly individual clients, increasingly identified themselves as specializing by legal topic, lawyering skill or type of client.

The growth of specialization presented the legal profession with a dilemma. The profession's ethical rules forbade lawyers to hold themselves out as specialists except in patent, trademark or admiralty law. Yet it became increasingly clear that every lawyer was obliged, as a practical matter, to limit the subjects in which he or she would keep abreast and develop particular competence. Consumer surveys confirmed that the public felt the need to look for lawyers with specific competencies and wanted more information on lawyers' qualifications and the special services that particular lawyers provided.

Yet, self-selection by a lawyer of an announced speciality is no assurance of any special competence in the chosen area of law or type of work. Some choices of specialty are not so much a conscious division of labor as they are an identification of the clientele whom the lawyer seeks to serve.²

Proposals to regulate specialization have generally been opposed by sole and small-firm practitioners who look upon regulation of specialties as just more red tape, increasing the costs of practice, further deprecating the "general practitioner" and erecting another hurdle for the beginning lawyer. Lawyers in larger firms that have essentially been built upon the efficiencies and

² J. P. Heinz & E.O. Laumann, Chicago Lawyers, at 56 (1982), reported that lawyers in their study tended to practice more than one specialty, reflecting the needs of their clients and not any logic of the law.

cost-effectiveness of *de facto* specialization generally see nothing to be gained by having specialization regulated.

On the other hand, proponents of regulation of specialization argue that it provides greater access by the public to appropriate legal services, that it helps identify and improve the quality and competence of legal services, and that it leads to the rendering of appropriate services at a reasonable cost. They argue that the public's lack of knowledge and sophistication about legal services magnifies the harm of inherently or potentially misleading advertising and that regulation of specialization establishes a uniform definition of what is a speciality and who is a specialist. They further urge that the "certifying" of specialists educates the public on the qualifications and competence level they should seek and that enforcement agencies have a standard against which to judge advertisements and a standard of care against which to judge performance.³

The ABA Standing Committee on Specialization has promulgated Model Standards for Specialization in some 24 specialties (in stunning contrast to the 2 or 3 specialties that the profession traditionally sanctioned – patents, trademarks and admiralty).⁴

As of 1998, 12 states sponsored certification plans for specialists in specific practice areas, and the ABA accredited 11 private certification programs. The ABA has accredited the following certifying organizations: the American Board of Professional Liability Attorneys, the American Bankruptcy Board of Certification, the Commercial Law League of America, the National

³ See Report of American Bar Association Standing Committee on Specialization (August 1990).

⁴ See web-site ABA Standing Committee on Specialization at www.abanet.org/specialization.

Elder Law Foundation, the National Association of Estate Planners & Counselors, the Estate Law Specialists Board, Inc., and the National Board of Trial Advocacy.⁵ Today, the national total of certified specialists is less than 3% of the lawyer population, although the number continues to grow modestly each year, but only in a small minority of the states.⁶

While the New York State Bar Association's House of Delegates in the past 20 years had twice defeated proposed specialization certification plans, it recently approved an amendment to DR 2-105 that permits lawyers to identify themselves as specialists provided they have been certified by an organization accredited by the ABA and employ a specified disclaimer. In 1999, the New York Courts approved this amendment of the Disciplinary Rules.⁷

2. Information Technology in the Law – Any appraisal of the legal profession today must take account of the profound effects of the explosion of information technology upon the practice of law. Similarly, any evaluation of the utility of permitting MDPs must factor in the role of cybernetics in the law in 1999 and in the future. In 1978, there were only 5,000 desk-top computers in the United States; by 1982, four years later, there were five million.⁸

Writing in 1983, Michael Crichton predicted a future where there would be “a radical transformation in the professions, in which the exclusivity of information is denied,” but in

⁵ See N.Y.S.B.A. Report on the Future of the Profession (January 11, 1999) at 21-22.

⁶ See ABA Standing Committee on Specialization, Informational Reports to the House of Delegates, February and August 1999.

⁷ 22 NYCRR § 1200.11.

⁸ M. Crichton, Electronic Life, at 3 (1983).

which “the professional person’s therapeutic role continues unchanged.” Explaining his prediction, Crichton asked, “Why do we consult a doctor or a lawyer?” He answered, “Because the professional person possesses specialized knowledge we need,” but since computers can easily store and manipulate formal information, professional knowledge will be “extremely vulnerable to computers.”⁹ He concluded that the future consumers of legal services, then having access to the professional’s fund of information, would “gravitate for further advice toward those professionals who treat [them] as human beings and not merely as problems or sources of income.”¹⁰

Much of what Michael Crichton foresaw has transpired. More and more of the lawyers’ “professional fund of information” is now in the public domain, available on line to those seeking legal counsel. The part of a lawyer’s practice based on exclusive control of formal professional knowledge has been circumscribed and the therapeutic or problem-solving role of the practitioner has grown.

On the other hand, computers are indispensable today to lawyers to command that limitless professional fund of knowledge that permits them to remain expert in their individual fields and to summon such material promptly when needed. Indeed, the legal profession over the last 30 years has been a leader in putting information technology to work for those engaged in providing professional services.

⁹ *Id.* at 139.

¹⁰ *Id.* at 144.

It was less than 30 years ago, in 1971, that the New York State Bar Association entered into an agreement with Mead Data Central, Inc. for the development of computerized legal information retrieval services for lawyers in the State of New York. Mead thereafter vastly expanded its services under the trade names “Lexis” and “Nexis,” and was joined in the mid-1970s by West Publishing’s “Westlaw,” spreading across the country and around the world, and in later years with the aid of the Internet.

Recent technology surveys conducted by the ABA Legal Technology Resource Center document the extension throughout the profession of all manner of technology.¹¹ In 1988, the vast majority of large firms provided computers for lawyers to use when away from the office as well as remote access to computers in firm offices. Approximately 78% of the firms surveyed reported use of computers in depositions and the courtroom; and more than 85% in client meetings. In the courtroom, computers were used for litigation support, presentation of charts, graphs and text, e-mail contact with the firm office, legal research on-line as well as computer animation. All of the law firms surveyed reported the use of word-processing software and virtually all reported use for accounting, time and billing, external e-mail, spreadsheets, databases and the WorldWideWeb.

Since the advent of the computerization of legal materials early in the 1970s, bar associations have played a central role in ensuring that the state of the art in technology is available to lawyers by providing training in its use. The American Bar Association’s Standing Committee on Technology and Information Systems has led this effort for many years and continues today with

¹¹ ABA Legal Technology Resource Center, 1998 Small Law Firm Technology Survey Report; 1998 Large Law Firm Technology Survey Report; 1998 Corporate Law Department Technology Survey.

the support of the Legal Technology Resource Center in Chicago that cooperates with State and local bar organizations throughout the country.

3. Advertising and Marketing Legal Services – During the past three decades the provision of legal services has changed from a client “walk-in” service to a lawyer “seek-out” service; from clients coming to lawyers whom they knew or heard of for help with problems, to lawyers reaching out for clients by publicizing the need for legal services and offering to fill that need. In a sense, it has been a return to how lawyers conducted themselves a century ago.

In the 19th Century, lawyer advertising and solicitation of business were common and generally lawful. Frequently, attorneys wrote letters soliciting legal business from business clients.¹²

When the ABA adopted the Canons of Professional Ethics in 1908, however, Canon 27 banned lawyer advertising and solicitation. Although directory listings and very limited advertising became acceptable over time, the bans generally continued for nearly 70 years until the Supreme Court in Bates¹³ ruled that it was unconstitutional to impose bans on advertising, applying the First Amendment-based doctrine of commercial free speech to lawyers. At the same time, the Court acknowledged that the states had the right to impose certain regulation to protect consumers.

¹² See Lawyer Advertising at the Crossroads, American Bar Association Commission on Advertising (ABA 1995), at 29-32. See also American Bar Association Commission on Advertising White Paper “A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies” (July 1998) (www.abanet.org/legalservices/whitepaper.html), at 2.

¹³ Bates & O’Steen v. State Bar of Arizona, 433 U.S. 350 (1977).

Within six weeks of the Bates decision, the ABA adopted a set of regulations and amended the Model Code of Professional Responsibility. The initial Code provisions precluded television advertising, all targeted mail solicitation and any advertising not done in a dignified manner.¹⁴ None of these limitations continue today in national standards, but the ABA has retained the ban on in-person solicitation that the Supreme Court, the year after Bates, found to be an appropriate constitutional limit on commercial speech, observing in its written opinion¹⁵ that lawyers are trained in the art of persuasion and that clients in need of legal services may be vulnerable to such persuasion.

The ABA replaced the Code of Professional Responsibility in 1983 with the Model Rules of Professional Conduct at a time when the states were still in the process of reformulating their rules to govern lawyer advertising. The result has been that there is to this date substantial diversity among the states in the rules governing lawyer advertising¹⁶ and only a few states have adopted verbatim the Model Rules that govern lawyer advertising and solicitation.¹⁷

In these circumstances, advertising by lawyers grew at first, not only hesitantly but amid a patchwork of state regulation that more often than not, when challenged, failed to pass constitutional muster. Most lawyers chose not to advertise in the first few years after 1977, holding

¹⁴ See Lori B. Andrews, Birth of a Salesman: Lawyer Advertising and Solicitation (1980).

¹⁵ Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978). The companion case of In re Primus, 436 U.S. 412 (1978), allowed solicitation of clients in non-profit settings.

¹⁶ See Appendices D and E to NYSBA Report (June 28, 1996).

¹⁷ *Id.*, White Paper, fn. 12 *supra*, at 3-4.

a residual sense that advertising was unethical.¹⁸ Some lawyers, particularly those who began to advertise later, were waiting for the states to modify their ethical regulations.¹⁹

Thereafter, participation in advertising grew slowly but steadily. By 1981, 10 percent of lawyers had advertised at some point. In 1987, nearly a third of all lawyers had advertised at some point, and a quarter were advertising actively at that time.²⁰

¹⁸ See NYSBA Report on the Future of the Profession (January 11, 1999) at 33-36.

¹⁹ *Id.*, Crossroads, fn.12, *supra*, at 48.

²⁰ *Id.* at 49.

By 1987, 86 percent of the lawyers who had advertised had done so through the Yellow Pages Directory, which were used mainly by solo practitioners and small firms.²¹ The second most-used medium was the newspaper, employed by only 12 percent. Electronic media were used by three percent, while direct mail and billboards were used by only one percent.²²

Since 1987, advertising legal services on television increased steadily, and in 1993 \$125.9 million was spent to air television commercials for legal services, ranking 16th among categories for local spot television advertising. However, the amount spent for advertising on

²¹ *Id.* at 50. The Yellow Pages frequently contain a *Guide of Lawyers Arranged By Practice* that bears the legend: "Lawyers in this guide have chosen to list themselves by Field of Law to which they concentrate their practice. This guide may not include all lawyers." The following Fields of Law are commonly listed:

- | | |
|---|---------------------------------|
| Accidents-Personal Injury/Property Damage | Health Care & Hospital Law |
| Administrative & Governmental Law | Immigration & Naturalization |
| Admiralty & Maritime Law | Insurance Law |
| Adoption Law | International Law |
| Alcoholic Beverages Practice | Labor & Employment Law |
| Appellate Practice | Landlord & Tenant |
| Bankruptcy | Malpractice Law-Legal & Medical |
| Civil Rights Law | Marital & Family Law |
| Civil Service Law | Mediation |
| Consumer Law | Patent Law |
| Copyright Law | Pension & Profit Sharing Law |
| Corporation, Partnership & Business Law | Product Liability |
| Criminal Law | Real Property Law |
| Custody Law | Securities Law |
| Debt Collection | Social Security Law |
| Driving While Intoxicated & Drug Defense | Taxation |
| Elder Law | Trademark Law |
| Entertainment Law | Trial Practice |
| Environmental Law | Vehicle & Traffic Law |
| Estate Litigation | Veterans Benefits |
| Estate Planning & Administration | Wills, Trust & Probate Estates |
| Family Law | Workers' Compensation |
| Franchise Law | Zoning, Planning & Land Use Law |

²² *Id.* at 50.

television was less than a third of that spent by lawyers on Yellow Pages Directory advertising – more than any other profession or business.²³

The expenditures for lawyer advertising appear to vary substantially from venue to venue. One survey of usage of Yellow Pages Directories in six metropolitan areas reported that only 5.8 percent of Boston’s practitioners were in law firms that had a paid Yellow Pages ad, while 36.6 percent of Milwaukee’s practitioners were in such firms.²⁴ Polls of lawyers have shown similar jurisdictional variations: 22 percent of Oregon’s lawyers had advertised in 1983, compared with less than one percent of Birmingham, Alabama’s, and only three percent of Jackson, Mississippi’s.²⁵

Responding to an increasingly competitive marketplace for legal services to businesses, law firms are marketing in a variety of ways, employing solicitation and advertising techniques. Marketing techniques commonly used by corporate firms today, which would not have been permissible prior to the Bates decision, include law firm brochures, client newsletters and other direct mail, client services and presentations, sponsorships of benevolent activities, press releases and even press conferences.²⁶

The ABA has reconstituted its Commission on Advertising as the Commission on Responsibility in Client Development, and it has begun to address the unique aspects of information technology when used for client development. Hundreds of thousands of lawyers have

²³ *Id.* at 50-51.

²⁴ *Id.* at 54.

²⁵ *Id.* at 53-54.

²⁶ *Id.* at 55.

a presence on the Internet today through listings in directories, some with cross-listings of fields of practice.²⁷

The ethical rules that govern client development support the notion that the practice of law is a professional endeavor, serving to separate the legal profession from all other businesses. However, regulating the business-getting activities of lawyers in a way that recognizes the practice of law as a business, as the Supreme Court has directed, argues against the legal profession as a distinctive public service unless such regulation can be shown to be consonant with consumer protection and not limiting of an individual's access to legal services.

4. Managing the Business of Lawyering - During and following the decade of the 1970s, the combined impact of specialization in law practice, developments in information technology, and lawyers' advertising and marketing of their services put a new focus upon the business of lawyering and the increasing institutionalization of the provision of legal services.

Since the first legal aid society was formed in New York City in 1876, the principal means for providing legal assistance to the poor has been through corporate structures, generally with the blessing of the courts. Around the turn of the 20th century, student-run legal clinics and legal aid bureaus that were associated with law schools were organized and permitted by many courts to represent clients before them.²⁸

²⁷ *Id.* White Paper, fn. 12 *supra*, at 25.

²⁸ Harrison Tweed, The Changing Practice of Law (1955).

At the opposite end of the legal services spectrum, beginning in the late 19th century, a small number of large corporations, having found the law so pervasive to their operations, began to hire lawyers to work full time in the management of their businesses and called them “general counsel.” As additional lawyers joined them on the corporate payrolls, they became legal departments for their corporations. Meanwhile, early in the 20th century a revolution in the structure and operation of law firms serving the business community took place in New York City. The system of firm operation adopted by these firms included a requirement that the lawyers work only for the firm. They were paid a salary and were provided training.²⁹

By the time of the great surge in the numbers of lawyers entering the profession in the 1970s, the institutionalization of law practice was in full flower.

Fueling the greater orientation of lawyering to the manner in which business is conducted were several decisions by the U.S. Supreme Court exposing law practice to the rules of commerce. The Court first ordered the elimination of mandatory minimum fee schedules in Goldfarb³⁰ and later lifted the restraints on lawyer advertising in Bates.³¹

Responding to the new focus upon the business of lawyering, the ABA in 1975 established a Section on the Economics of Law Practice to provide information on how to build and maintain a law practice of any size. The Section immediately became the fastest growing section of the Association. The name of the Section was subsequently changed to “Law Practice

²⁹ See *infra*, The “large firm” phenomenon.

³⁰ 421 U.S. 773 (1975).

³¹ 433 U.S. 350 (1977).

Management” and took as its mission to address such matters as “how to grow and maintain a healthy law practice;” “how to use the Internet and other technological advances within a law firm;” “compensation packages to motivate lawyers;” “traditional and alternative billing methods;” and “survival skills for solo and small firm practitioners.”

Taking note of the changes in the profession, late in the 1970s a new legal press began publication with the National Law Journal and Legal Times of Washington first appearing in 1978 and The American Lawyer in 1979. “Heavy Hitters” were touted purportedly for their business-getting, regardless of their prowess at serving the legal needs of clients. Service to clients and the inherently client-centered nature of professional activity became obscured in a preoccupation with the size of law firms, their financial success and the so-called bottom line.

In this environment it was not surprising in 1984 to find the U.S. Department of Commerce adding to its industrial categories Standard Industrial Classification 81, “the legal services industry”.

In 1987, the Department’s annual U.S. Industrial Outlook predicted the long-term prospect for Standard Industrial Classification 81 in this way:

The legal services industry will expand steadily through the 1990s and will be marked by varying methods of delivering legal services. Increased productivity through the growing use of new technology, legal assistants and promotional techniques will continue to affect the legal services industry. The prices charged for the least complicated legal services will remain stable (or possibly fall), while the price of more complex assistance will rise at or above the rate of the general price level. The effect will be an expanded market for legal services, since marginal users of basic legal services will be

more able to afford the advice of a lawyer and users of more complex services have few, if any, alternatives.

The Commerce Department concluded:

Assuming continued growth in the economy, group legal service plans will continue to flourish as employers, labor unions, and other organizations seek to negotiate plans that provide greater benefits. Other types of low-cost legal services firms will also continue to grow as they attract low and middle-income consumers who have not used lawyers in the past. Consequently, the total market will grow, although the traditional law firm will remain the backbone of the legal services industry.

Looking at the legal profession alone and solely from a market and economic perspective, this appraisal of the future in 1987 generally accords with what in fact took place.

However, the very financial success of some segments of the practicing bar stimulated the entrepreneurial urge in other segments of the profession and invited those on the outside who used and paid for professional services to question the costs of legal services, while those who provided other kinds of professional service coveted and sought entry to the legal services market.

Chapter 3

The Differentiation in Practice Settings

1. The Variety of Practice Setting
 2. The Core Sector of Traditional Practitioners
 3. The Development of Legal Service Organizations
 4. The Burgeoning of Entrepreneurial Practice
 5. The Newly Pivotal In-house Counsel
 6. Lawyers for Government
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1. The Variety of Practice Setting – The great variety of practice settings and the highly differentiated work in which lawyers engage present today the greatest challenge to the profession in maintaining the unitary concept of being a lawyer. Historically the lawyer in America was an independent professional who was neither employed by another nor dependent on others to help the lawyer provide legal services. The vast majority of lawyers were solo practitioners, either as a full-time or a part-time occupation. Many supplemented their income and filled out their time in other activities – real estate, banking or political office – but employment of lawyers by private organizations or by public agencies was virtually non-existent until the late 19th century.

In urban centers, some lawyers shared office space or entered into loose partnership, arrangements, but this was not common. A study found that as late as 1872, only 14 law

firms in the entire country had even four lawyers; three had as many as five lawyers; and only one had six.¹ The gradual emergence of the law firm as the common mode of private practice began in the final decades of the 19th century to provide the legal services that were required by those leading the great expansion of industry, commerce and finance.

The makeup of the legal profession at the end of World War II was summarized in a U.S. Department of Commerce Survey of Current Business in this way: three-fourths of the lawyers in the United States were in private law practice and the remaining one-quarter were employed on a salaried basis by industrial firms, banks, labor organizations and other private agencies, and government. The latter quarter was disproportionately concentrated in the larger population centers.²

The 1947 Commerce Department survey estimated that about 74% of those in private practice were solo practitioners and more than 98% either were in solo practice or were in firms of fewer than nine lawyers. Lawyers in firms of nine or more practitioners were less than 2% of those in private practice.³

The major growth in the size of law firms did not come until the 1970s. Since 1970 there has been a steady movement of law firms of all sizes from smaller practice units into larger. Private practice has become a spectrum of different practice units, differentiated not only by

¹ See W.K. Hobson, "Symbol of the New Profession: Emergence of the Large Law Firm 1870-1915," reprinted in The New High Priests: Lawyers in Post-Civil War America, at 5-7 (Gawalt ed., 1984).

² See F. Zemans & V. Rosenblum, Making of A Public Profession, at 65-66 (1981).

³ W. Weinfeld, Income of Lawyers, 1929-48 in U.S. Department of Commerce, Survey of Current Business (August 1949).

size but by kind of client, by the kinds of legal work performed, by specialties, by the number of salaried associates and other support staff, and by the degree that the practice is institutionalized and bureaucratized.

In general, firm size and practice setting have had a direct relationship to the kind of client served, the type of law practiced and the financial rewards of practice. Community-oriented solo and small firm practitioners of the traditional model worked predominately for individuals.⁴ Lawyers in larger firms in urban centers worked predominately for business clients.⁵

The financial rewards of legal work for individuals (except for personal injury claims or class-action suits) have in general been less than the rewards for representing business. Various studies of law practice in the past have shown a direct relationship between the size of a firm and the source of its income: as firm size increased the percentage of fees from business clients rose and the percentage of fees from individuals dropped. The larger the firm, the greater was the concentration of its work for business clients and the larger the average income of a firm's lawyers.⁶

⁴ See D.D. Landon, Country Lawyers—The Impact of Context on Professional Practice, at 9-10 (1990).

⁵ See Zemans & Rosenblum, *supra*, at 65-90. Heinz & Laumann estimated that somewhat more than half (53 percent) of the total effort of Chicago's bar at the time of their study done in the late 1970s was devoted to the corporate client sector. J.P. Heinz & E.O. Laumann, Chicago Lawyers, at 42 (1982).

⁶ See S.R. Hickerson, Structural Change in Nebraska's Legal Profession, 15 Creighton L. Rev. 1, 21 (1981); Weinfeld *supra*; R.H. Sander & E.D. Williams, Why Are There So Many Lawyers? Perspectives on a Turbulent Market, 14 Law & Soc. Inquiry 431, 478 (1989); and R.L. Sandefus & E.O. Laumann, Changing Patterns of Income Stratification in the Chicago Bar (1997), unpublished paper presented at Law & Society Association annual meeting in St. Louis, at 16-17.

During the 1980s and 1990s, the incomes of partners and associates in major firms increased greatly, while the earnings of solo practitioners and lawyers in small firms declined.⁷

The accompanying table tracks the movement in firm size from smaller practice units to larger in the customary manner. It shows at first the drop in the percentage of lawyers who were sole practitioners and then its rise as more women entered the profession, as well as the growth during the 1980s and 1990s in the size of the largest law firms:⁸

	1980		1985		1988		1995	
	Private Practitioners	All Lawyers	Private Practitioners	All Lawyers	Private Practitioners	All Lawyers	Private Practitioners	All Lawyers
	N = 370,111	N = 542,205	N = 460,206	N = 655,191	N = 519,941	N = 723,189	N = 634,475	N = 857,931
Sole Practitioner	48%	33.2%	47%	33%	46.2%	33.2%	46.9%	34.7% 297,702
2 to 10 lawyer firms	32%	21.5%	28.3%	19.9%	25.1%	18.0%	22.4%	16.8% 144,132
11 to 50 lawyer firms	12.6%	8.7%	13.6%	9.6%	14.1%	10.2%	14.1%	10.4% 89,225
51 or more lawyer firms	7.3%	5%	11.2%	7.9%	14.6%	10.5%	16.6%	12.3% 105,526
	Percentage of all lawyers in private practice: 68.3%		Percentage of all lawyers in private practice: 70.2%		Percentage of all lawyers in private practice: 71.9%		Percentage of all lawyers in private practice: 74.0%	

The table reflects the steady movement toward larger and larger law firms in which a greater percentage of lawyers' time is devoted to business clients and less to the representation of individual clients.

⁷ Sandefus & Laumann, *supra id.*

⁸ Sources: B.A. Curran, The Legal Profession in the 1980s: A Profession in Transition, 20 *Law & Society Rev.* 19 (1986); American Bar Foundation 1988 Supplement to the Lawyer Statistical Report; C.N. Carson, The U.S. Legal Profession in 1995 (American Bar Foundation 1999).

At the same time, new forms of organization have been developed for providing legal services to individuals of modest means and new methods for financing such services. A sector of “new providers” of legal services for individual clients and client groups emerged with further differentiation in practice settings. Increasing numbers of solo and small-firm practitioners are participating in these new delivery systems which together have been estimated to provide potential access to legal services for more than 105 million middle-income Americans.⁹ In addition, substantial new provision has been made for services to the poor.

There are, in addition, two other substantial segments of law practice outside the traditional setting of private practice. One is comprised of those providing in-house legal services to corporations and other private organizations, the other is comprised of the lawyers employed by government in all of its functions. The private bar historically provided legal services both to corporate clients and to governments, but since the late 19th century there has been a steady trend toward bringing law work “in-house,” both for corporations and for governmental departments and agencies, and toward employing salaried lawyers to handle their clients’ legal matters instead of retaining individual lawyers and law firms on a fee basis.¹⁰

The Lawyer Statistical Reports of the American Bar Foundation for 1988 and 1995 (based upon the Martindale-Hubbell data-bank) provided the following distribution of lawyer population by generic divisions of practice settings:

⁹ See National Resource Center for Consumers of Legal Services, Legal Plan Letter (1997 Legal Services Plan Census) February 1998, at 1.

¹⁰ See Eve Spangler, Lawyers for Hire, Salaried Professionals at Work (1986).

	(1988 Lawyers)	N = 723,189)	(1995 Lawyers)	N = 857,931)
Private practice	519,941	71.9%	634,475	74.0%
Legal aid/public defender	7,369	1.0%	8,499	1.0%
Private industry and association	70,727	9.8%	76,842	9.0%
Federal/state/local government	57,742	8.0%	65,628	7.6%
Federal/state/local judiciary	19,071	2.6%	21,627	2.5%
Education	7,575	1.0%	8,186	1.0%
Retired/inactive	40,762	5.6%	42,673	5.0%

Possibly, obscured within the category of lawyers working in “Private industry and association” are a growing number of lawyers whose practice status is unclear, who may no longer be serving as in-house counsel to their employers, but who are part of a workforce that provides consulting or advisory services to their employers’ customers. So long as the name of an individual lawyer is listed in the Martindale-Hubbell directory it will be counted in the category (“private industry and association”) regardless of whether or not the individual lawyer holds her- or himself out to third parties to be a lawyer or maintains active membership in the bar of any jurisdiction. The appropriate regulation and application of the law governing lawyers to this segment of lawyers who may or may not be practicing law is a critical issue for the profession to consider in connection with the discussion of multidisciplinary practice.

The next immediate sections of this report detail significant changes within the two hemispheres of private practice earlier identified by empirical scholars,¹¹ as well as the changes in the various settings outside of private practice in which lawyers work today.

¹¹ J.P. Heinz & E.O. Laumann, Chicago Lawyers. The Social Structure of the Bar 319 (1982); cf. J.P. Heinz, E.O. Laumann, R.L. Nelson & E. Michelson, The Changing Character of Lawyer’s Work: Chicago in 1975 and 1995, 32 LAW SOCIETY REVIEW 751 (1998).

2. The Core Sector of Traditional Practitioners – The most numerous segment of the legal profession continues to be the solo and small-firm practitioners for whom the traditional community-based, general practitioner was the prototype. Such lawyers generally served a large number of individual clients for whom they handled a variety of discrete matters.¹² The work of the community-oriented lawyer commonly included real estate transactions, intergenerational transfers of property (wills and trusts), personal injuries, matrimonial and family matters, some corporate and commercial law for small businesses, as well as occasional criminal cases.¹³ They have been traditionally the true general practitioners representing both plaintiffs and defendants, borrowers and lenders, buyers and sellers, public agencies and private parties.

While there has been a long-term decline in the proportion of lawyers in solo and small-firm practice, the latest statistical report confirmed that more than half of the nation's lawyers are in solo-to-ten-lawyer units in private practice.¹⁴ Moreover, following a decline during the 1960s in the total number of sole practitioners (from 131,840 to 124,800), the record growth of the profession during the 1970s, 1980s and 1990s included a significant increase in the number of solo practitioners (from 124,800 to 297,724).¹⁵ Nationwide in 1995, of the lawyers in private practice

¹² See P.D. Landon, Country Lawyers - The Impact of Context on Professional Practice 9-10 (1990).

¹³ See P. Langrock, Beyond the Courthouse - Tales of Lawyers and Lawyering, (Paul S. Eriksson, Publisher) 1999.

¹⁴ Solo practice: 34.7%; small firms 16.8%; combined 51.5%. Clara N. Carson, The Lawyer Statistical Report - The U.S. Legal Profession in 1995, American Bar Foundation (1999).

¹⁵ *Id.* at 25.

46.9% were in solo practice; and more than one out of every three of the approximately 858,000 lawyers in the United States was a solo practitioner.¹⁶

The ABF's survey of the profession in 1995 reported that 439,949 lawyers were engaged in private practice with 10 or fewer colleagues, and were distributed among practice settings as follows:¹⁷

<u>Firm Size</u>	<u>Number of Firms</u>	<u>Number of Practitioners</u>
Solo	297,724	297,724
2 lawyers	17,806	35,926
3 lawyers	8,250	25,480
4 lawyers	4,562	18,970
5 lawyers	2,836	14,887
6-10 lawyers	5,929	<u>46,962</u>
		439,949

This segment accounted for 69 percent of the 634,475 lawyers in private practice, and 51 percent of the national lawyer population of 857,931 in 1995.¹⁸

Solo and small-firm practitioners are found in virtually every practice setting: rural counties, small cities, seaports, river ports, border towns, state capitals, suburban shopping malls, inner-city storefronts and center-city high-rises, with a diversity of clientele and legal problems to match. Many adhere to the modern day version of the general practitioner, deeply involved in their local communities and serving as friendly counselors and advisers to a variety of

¹⁶ *Id.*

¹⁷ *Id.* at 25-26.

¹⁸ *Id.* at 25.

persons and organizations in their locales.¹⁹ However, the opportunities for traditional community-oriented solo and small-firm practitioners have diminished.

The increasing anonymity of urbanization and the enormous sprawl in recent decades of suburbanization mean that legal transactions and services are often with strangers.

Without established relationship to a local community or ethnic circle, some solo and small-firm practitioners seeking to develop new clients have enrolled as members of lawyer panels sponsored by the recently developed prepaid and group legal services plans.

Solo practice today takes many forms. It includes a growing number of those who work at home as well as those who share office space with one or more other lawyers. Solo practitioners include neophyte lawyers who have not yet found the association that they seek with a law firm, as well as veteran lawyers who have established clienteles and networks of linkage within the profession and who prize the independence of practicing alone. For the former, it may be the practice of last resort or the only way that they can accommodate the demands of a professional life with those of one's personal life; for the latter, it can be the fulfillment of a professional life's ambition.²⁰

Small firms of 2 to 10 lawyers have typically been formed by several lawyers, after some initial experience in practice, who have decided to pool their efforts and resources and

¹⁹ D.D. Landon, *supra*, at 96; C. Seron, The Business of Practicing Law - The Work Lives of Solo and Small-Firm Attorneys, Temple University Press (1996).

²⁰ See C. Seron, *id.* at 79-82. Eve Spangler, in Appendix A to her book on salaried lawyers, surveys the scholarly literature on "Solo Practitioners" and summarizes the findings to be compared with her findings regarding the work life of salaried lawyers who are in large law firms, corporate staff counsel, civil service attorneys and legal services advocates. (Eve Spangler, *supra* note 10, Appendix A at 199-212).

have brought with them into the firm different practice skills and areas of concentration which permit the firm to provide a broader range of legal services for a larger clientele. Firms that remain small have no regular recruitment program and no continuing link to law school placement offices, but simply add a lawyer as their practice warrants. Nevertheless, about one of every 3 or 4 law graduates who have entered private practice in the last two years have found employment in a small firm of 2 to 10 lawyers.²¹

Despite the continued vitality of the solo-small firm sector of private practice, the changes in law practice since the 1970s have impacted, perhaps most heavily, upon lawyers in this sector. Carroll Seron, in The Business of Practicing Law - The Work Lives of Solo and Small-Firm Attorneys, provides a penetrating account of the quite different ways in which lawyers in this segment of the profession have responded to the lawyer's imperatives of "getting work," "organizing the work" and "serving clients."²² Attorneys in this setting are not organization men and women. They place an unusually high premium on feeling that they are in control of their workplace. Individually, they can and they do choose how they will conduct their practices.²³

However, many solo and small-firm lawyers no longer feel financially secure based on their professional status and community standing. Confronted by evermore competition, both from within and from outside the profession, they have been forced on an individual basis to

²¹ National Association of Law Placement, Class of 1997 and 1998 Surveys, at 21 and at 28, respectively.

²² C. Seron, Temple University Press (1996).

²³ *Id.* at 12.

draw a personally compatible boundary between the new commercialism and the old professionalism.²⁴

Changing law and new complexities have put an increasing premium on specialization to maintain competence and to keep abreast of subject matter. When asked, the great majority of lawyers now describe themselves as specializing by legal doctrine, lawyering skill or type of client.²⁵ A 1991 survey of the State Bar of California found that three-quarters of the lawyers have spent at least 50 percent of their time in one area of concentration, and more than half the lawyers limited their practice to three or fewer areas of law.²⁶

A 1990 national survey conducted by the ABA Young Lawyers Division reached similar conclusions, finding that 55 percent of the sole practitioners who responded spent 50 percent or more of their time in one substantive area. For solos who spent three-fourths of their time in one area of practice, the most common specialties were real estate, probate and trust, family law, torts and insurance, patent/trademark/copyright, criminal law, and taxation.²⁷ A 1989 study made for the

²⁴ *Id.* at 17-18. The President of the Erie County, New York, Bar Association, Donald Eppers, recently observed: "Most attorneys have a sense that they're working harder to earn less." Buffalo Law Journal, Nov. 22, 1999, at 1.

²⁵ See Economics of Legal Services in Illinois - A 1975 Special Bar Survey, 64 Ill. Bar Jour. 73-102 (1975); Preliminary Report: Results of Survey on Certification of Specialists, 44 Cal. St. Bar Jour. 140, 142-144 (1969).

²⁶ California State Bar Association, Survey Results (September 1991), at 26 and 27.

²⁷ See American Bar Association Young Lawyers Division, The State of the Legal Profession 1990, at 14.

Commission on the Legal Profession and the Economy of New England reported a similar pattern of the most frequently identified specialities by small firms in New England.²⁸

In the age of cybernetics, there have been increasing encroachments by non-lawyers on each of the traditional areas of practice common among solo and small-firm practitioners. The NYSBA's Ostertag Committee reported developments in this way:²⁹

- Nonlawyers now routinely represent clients in housing courts, in real estate tax certiorari cases, and in other administrative agency proceedings in New York, and before the United States Tax Court and various federal agencies including the Internal Revenue Service and the Social Security Administration.
- Nonlawyer employees of title companies routinely provide services, as an adjunct to their traditional function.
- Independent paralegal groups are forming throughout the country for the purposes, among others, of selling legal forms and assisting "clients" in completing them, of handling routine residential real estate closings and of drafting wills.
- Computer programs and self-help books and forms are being marketed, and even touted, as a means by which the public may avoid having to call upon lawyers at all.
- Indeed, an increasing number of potential clients are choosing to represent themselves in important legal matters in an effort to eliminate lawyers and the cost of legal services. This trend is supported by various initiatives such as "do-it-yourself" divorce kits now provided even by [New York] State's own court system and other programs implemented by the courts and private organizations aimed at facilitating *pro se* litigation.

²⁸ T.C. Fischer, Legal Education, Law Practice and the Economy: A New England Study (1990), at 80. The California 1991 Survey, *supra* note 37, at 25, reported that the areas practiced in by the greatest number of individual attorneys were Business Law, Real Estate, Plaintiffs' Personal injury, Domestic Relations, Landlord-Tenant and Bankruptcy.

²⁹ Final Report of the NYSBA Special Committee on the Future of the Profession (January 11, 1999), at pp. 6-7.

Recent press accounts describe the continuing conflict in the Metropolitan New York area over the preparation of residential real estate contracts by real estate agents. Four county bar associations are poised to press claims of the unlicensed practice of law to prevent the practice.³⁰

A principal function of most solo and small-firm practitioners has been to handle the resolution of disputes. Family disputes are a principal source of such work. More than a third of all civil cases in New York State courts are domestic relations cases.³¹ These “one-shot client” cases have bred a specialty bar³² that is now faced with the growing movement to transfer family matters to a less adversarial forum,³³ as well as with “do-it-yourself” divorce kits and paralegal divorce firms.³⁴

The many challenges faced today by the majority of solo and small-firm practitioners who cling to tradition creates in them a sense of being besieged, both from within and without the profession. In the circumstances, it is not surprising that from this most numerous

³⁰ Joe Catalano, “Here Come the New Contracts,” Newsday, Jan. 13, 2000, at C6; Daniel Wise, “Suit Seen Near in Bar’s Dispute With Realtors,” N.Y.L.J., Jan. 10, 2000, at 1; “Agents and Lawyers Battle Over Real Estate Contracts,” The New York Times, Dec. 12, 1999, Sec. 14 at 1, 14.

³¹ J. Atkinson, Assisting Children and the Courts, 83 Judicature No. 1.

³² For an appraisal of the distinctive character of a matrimonial law practice, see Sarat & Felstiner, Law and Strategy in the Divorce Lawyers Office, 20 Law & Soc’y Rev. 93-134 (1986).

³³ In an address to the National Council of Juvenile and Family Court Judges in November 1999, Chief Judge Judith S. Kaye called for a radical departure from “the traditional adversary model” of judging in Family Court matters, suggesting that jurists take a hands-on approach to addressing the health and safety needs of children and that “simply issuing an order and moving on to the next case may not give the greatest assurance that the child’s best interests will be protected.” New York Law Journal, Nov. 16, 1999, at 1.

³⁴ See The New York Times, Oct. 23, 1999, at B2.

segment of the profession rises the insistent call not to sacrifice or compromise the traditional values of the profession to accommodate those who seek to promote multidisciplinary practice.³⁵

However, the challenges from within and without the profession have fostered the development of a significant subgroup of entrepreneurial practitioners among solo and small-firm attorneys.

Professor Seron describes the entrepreneurial subgroup in this way:³⁶

They stake out a commercial niche and create specialized businesses premised on the opportunities of a wider, service-based economy. Building on the ideological tension between commercialism and professionalism, they take the next logical step by incorporating ever more modern business techniques into the delivery of legal services.

The entrepreneurial practitioner proceeds on the premise that clients are more interested in price than quality and that matters involving personal plight are routine, standard and predictable. They seek to organize services for consumers rather than to counsel and advise individual clients. At the same time, the entrepreneurial attorney is service-oriented, but the concern with service emphasizes efficiency and cost rather than process and quality. Borrowing the language and symbols of the consumer movement, they rely on clients looking for cost, speed and

³⁵ See proceedings of NYSBA House of Delegates, June 26, 1999, in Cooperstown, NY and proceedings of ABA House of Delegates, August 9-10, 1999, in Atlanta, GA.

³⁶ Seron, *supra* note 19, at 137.

lawyer-selection based on product-identity through advertising and thereby build large scale standardized practices.³⁷

Meanwhile, modern technology and improved practice management are making small practice units more cost effective than in the past. “Legal boutique” has been added to the lawyers’ lexicon and the referral practice developed by such speciality firms has actively grown alongside the larger law firms.

On the other hand, some see the role of the general practitioner in an age of specialization as evolving into that of the diagnostician who identifies and defines the client’s problem and then refers the client to the appropriate specialist. No doubt such referrals will increase with further specialization and many general advisers will play an important role in seeing that their clients get the legal services appropriate to their needs.

One growing technique for leveraging the practice of small firms is to join in formal and informal networks of firms in different parts of the country engaged in the same lines of practice. Some arrangements provide for no more than mutual referrals of clients who seek representation in another jurisdiction, while others seek some of the advantages of large firms by agreeing to share clients, training facilities, management know-how, practice-development strategies, support services and even experts for litigation.³⁸

³⁷ *See id.* at 105-09. *See also* Daniels & Martin, “It’s Darwinism – Survival of the Fittest: How Markets and Reputations Shape the Way in Which Plaintiffs’ Lawyers Obtain Clients,” 21 Law & Policy 377 (1999).

³⁸ *See* discussion of “Networks and Affiliation Groups” in Galanter & Palay, Tournament of Lawyers 130 (1991).

A salient example of ad hoc networking through the use of modern information technology was the recent cooperative prosecution in New Jersey by some 30 plaintiffs' lawyers around the country of a product liability case relating to diet pills. The Wall Street Journal reported that the absent lawyers every evening received updates of the day's proceedings via electronic mail and, in turn, fired back comments and advice.³⁹

3. The Development of Legal Service Organizations - During the past 40 years traditional private practice serving individuals has been significantly supplemented by new organizations and methods for providing legal services to the poor and to persons of modest means and facilitating the public's access to legal services. These organizations and methods have increased both the demand for and the supply of legal services.

The new organizations and methods include greatly expanded legal services to the poor, including publicly-funded civil legal assistance identified with the emergence of a new field of poverty law, and greatly expanded legal assistance in criminal proceedings furnished by legal aid, public defenders and programs of court-appointed defense counsel; bar-sponsored and privately operated lawyer referral and information services; law clinics or what have been referred to as "advertised" law offices; group legal service plans, free plans, prepaid plans, employee assistance plans and individual enrollment plans; as well as local, state and nationally organized programs of *pro bono* services by lawyer volunteers.

³⁹ Wall Street Journal, October 8, 1999, at B1.

Public access to lawyers and the ready availability of legal services to all who need them have concerned thoughtful members of the profession for more than a century. It is a “basic tenet of the professional responsibility of lawyers . . . that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence.”⁴⁰

The first organized effort to provide legal assistance to the poor was the formation in 1876 in New York City of what became The Legal Aid Society, created by an organization of German-American immigrants. By 1917, thirty-seven cities had a total of forty-one functioning legal aid organizations. Reginald Heber Smith, in his study for the Carnegie Foundation, reported that these organizations handled in one year a total of 117,201 cases. However, Smith found this in no way commensurate with the need and wrote a scathing indictment of the American legal system for its inaccessibility to the poor.⁴¹

Following the model of the New York Legal Aid Society, the early focus of the legal aid organizations was predominantly upon civil legal services. Criminal defendants for many years received scant organized assistance other than from groups of private attorney volunteers.⁴²

The public defender movement, seeking to have government provide counsel to indigent defendants, was initiated in 1893 by Clara Shortridge Foltz, the first woman to be admitted

⁴⁰ Code of Professional Responsibility, EC 1-1.

⁴¹ Reginald H. Smith, Justice and the Poor (1919).

⁴² It was not until the Scottsboro case in 1932 that the right to legal representation in state courts even in capital cases was recognized. Powell v. Alabama, 287 U.S. 45 (1932). See John M. Maguire, The Lance of Justice, 238-245 (1928), for a history of legal aid 1876 to 1926.

to practice in California. There were five public defender offices in 1917 and only 28 by 1949.⁴³ Significant implementation awaited the Supreme Court's grant of the constitutional right to counsel to criminal defendants in federal courts in 1938,⁴⁴ its extension to felony defendants in state courts in 1963⁴⁵ and to all those at risk of imprisonment in 1972.⁴⁶

During the 1920s and 1930s, the twin problems confronted by many members of the public, of knowing when to seek legal assistance and of finding a lawyer competent to assist them, grew with the anonymity of urbanization and the pervasiveness of law in everyday life. It was not until the 1960s, however, that neighborhood law offices were opened with a new mission of providing legal services to the poor, funded first by private foundations as social experiments and later funded by the federal Office of Economic Opportunity as part of the War on Poverty.⁴⁷

Another initiative to make lawyers more accessible to the ordinary citizen was the establishment in 1937 of the first lawyer referral service by the Los Angeles County Bar Association. This marked the beginning of what became in the post-war period a nationwide program of bar-sponsored referral services to inform potential individual consumers of legal services about lawyers in their local communities.

⁴³ See R.L. Abel, American Lawyers (1989), at 131.

⁴⁴ Johnson v. Zerbst, 304 U.S. 458 (1938).

⁴⁵ Gideon v. Wainwright, 372 U.S. 355 (1963).

⁴⁶ Argersinger v. Hamlin, 407 U.S. 25 (1972).

⁴⁷ See E. Johnson Jr., "The Neighborhood Lawyer Experiments and the Goal(s) of Social Reform" in Justice and Reform (1974, new edition 1978), at 21-35.

Legal services of a different character are needed, and frequently not available from the private bar, when individuals find themselves in situations where they share with others substantially the same legal interest against some third person or the government, and they seek as a group to invoke their legal rights. Advocacy to advance and enforce “group legal rights” has been a part of the American scene for many years, but it has been commonly looked upon by the law with suspicion and restraint by rules such as those regulating class actions and standing to sue.

From the early decades of the 20th century, organizations were formed by lawyers and political activists such as those advocating women’s suffrage, the American Civil Liberties Union and the NAACP Legal Defense and Education Fund,⁴⁸ but the development of a special segment of the legal profession, engaged in what came to be called “public interest” law, did not materialize until the activist decade of the 1960s.

The 1960s was a seminal period with respect to legal services for the poor. It was the time that important court decisions and legislative enactments made way for the great expansion in the delivery systems for civil and criminal legal services.

In the following subdivisions of this section, while recognizing the serious problem of unmet legal needs that continues, we look at today’s expanded practice settings for lawyers in non-traditional delivery systems which now provide legal services for the poor, legal services for those of modest means and advocacy for group legal rights in the “public interest.”

⁴⁸ Richard Kluger, Simple Justice, Vantage Press (New York, 1975).

a. Lawyers for the poor

(1) *Civil legal assistance.* By the 1960s, civil legal assistance, financed privately by community chests, bar associations, individual lawyers and special fund-raising campaigns, provided such organized legal assistance to the poor as was available.⁴⁹ The earliest canons of ethics had recognized the professional obligation of individual lawyers to assist the poor,⁵⁰ and in traditional practice settings lawyers in their local communities had always handled many legal matters for which they were not paid. Any organized programs were almost exclusively in large urban areas.

However, in the decade of the 1960s there was increasing public scrutiny of the legal profession and the adequacy of its performance in distributing legal services, including legal services to those unable to afford a lawyer.⁵¹ This was at a time when national policy was focused on the poor who were unable to break the cycle of poverty. It was urged that legal advocacy for the poor should be an integral part of any comprehensive “War on Poverty.”⁵²

⁴⁹ See E. Johnson, *supra* note 47, at 5-10: A Brief History of the Legal Aid Movement; see also, R.L. Abel, Law Without Politics: Legal Aid Under Advanced Capitalism, 32 UCLA L.Rev. 474, 502 (1985).

⁵⁰ See, for example, The Alabama Code of Ethics of 1887 setting forth a code of duties for attorneys and concluding with the duty to be a friend to the defenseless and the oppressed.

⁵¹ See M.L. Schwartz Changing Patterns of Legal Services in *Law in a Changing Society*, 109-124 (Geoffrey Hazard, ed. (1968)).

⁵² See E. Johnson, *supra* note 47, at 39-70: Birth of the Federal Program.

Thus in 1965, the Office of Legal Services was established within the federal Office of Economic Opportunity and the federal funding of local legal services programs began.⁵³ It marked the beginning of the emergence of poverty advocacy and of the development of what is today known as poverty law, greatly supplementing and broadening the mission of legal assistance for the poor as previously provided by traditional, privately financed legal aid.

During the years 1965 to 1973, the federal Legal Services Program, with the strong support of the organized bar, created a presence of lawyers in poor urban neighborhoods and began the representation of organized groups of the poor. By 1973, the program comprised 250 community-based agencies staffed by more than 2,600 full-time lawyers manning 900 separate law offices. Program lawyers by 1973 had served over five million low-income clients and had argued a hundred appeals in the United States Supreme Court.⁵⁴

Following the establishment of the Legal Services Corporation (“LSC”) in 1975, with the organized bar again playing a leading role, federal funding for civil legal services rose rapidly to its peak in 1981 with a budget of \$321 million, which supported programs employing some 6,000 staff lawyers.⁵⁵ The following year, the budget was cut by 25% and throughout the

⁵³ *Id.*, at 7-102: Development of Local Legal Services Organizations.

⁵⁴ *Id.*, at xxix. *See also* A.W. Houseman, A Short Review of Past Poverty Law Advocacy, *Clearinghouse Rev.* 1514 (April 1990).

⁵⁵ R.L. Abel, American Lawyers, Tables 5 and 6, at 254-255.

1980s the challenge for proponents of publicly-supported legal services, including the American Bar Association, was to maintain at least the 1982 level of funding.⁵⁶

The National Legal Aid and Defender Association's 1998/99 Directory lists a total of 2,506 main and branch offices in the United States and Territories which today provide civil legal assistance to persons unable to retain private counsel. This listing includes programs funded wholly or in part by the Legal Services Corporation as well as those funded by other sources.⁵⁷ The offices range in size from offices with one or two staff attorneys to offices of a hundred or more attorneys, paralegals and investigators. The Legal Services Corporation reported that programs for civil legal services to the poor that it supported during 1997 employed 3,494 full-time staff attorneys and 1,439 paralegals working in local legal aid and legal services offices as well as in the Corporation's state supported and regional training centers and its computer assisted legal research programs.⁵⁸

In recent years, the work of staff attorneys in legal services offices has been supplemented by the work of more than 100,000 private attorneys, working with staff attorneys and accepting referrals on a pro bono or reduced fee basis.

⁵⁶ A striking example of what happened following the 1982 budget cut was the closing in 1983 of the Southeast Legal Aid Center in Compton, California, requiring the State Bar to take responsibility for some 36,000 case files abandoned by the Legal Aid Center. R.L. Abel, *supra* note 43, at 133.

⁵⁷ See National Legal Aid and Defender Association 1998/99 Directory, 17-123 (1998).

⁵⁸ Legal Services Corporation, 1997 at a Glance.

(2) *Criminal defense*. Thirty years elapsed between the Scottsboro case in 1932 and the sounding of Gideon's Trumpet in 1963.⁵⁹ During that period, modest advances were made in providing representation for indigent defendants, but it was only in the wake of Gideon and the passage of the Criminal Justice Act of 1964, with its provision for the compensation of defense counsel, that legal assistance for persons accused of crime became a publicly-acknowledged responsibility.

Thereafter, the traditional role of ad hoc court-assigned defense counsel greatly diminished and most jurisdictions created government-supported public defender offices staffed by salaried employees to satisfy the new constitutional requirements. In 1967, state governments spent \$17 million, and the federal government \$3 million, to provide legal representation for indigents charged with felonies.⁶⁰ By 1977, the combined total reached \$403 million,⁶¹ and by 1988, expenditures for criminal defense services reached \$1.4 billion.⁶²

Public defender programs grew from 28 in 1949 to 163 in 1973, by which time state-subsidized counsel under programs for indigent defendants were representing 65% of all felony defendants (leading one commentator, with a measure of hyperbole, to characterize private defense

⁵⁹ Anthony Lewis, Gideon's Trumpet (1964).

⁶⁰ R.L. Abel, *supra* note 43, at 131, citing D.J. Scari, "The Financial Impacts of the Right to Counsel for Criminal Defense of the Poor," Law & Society annual meeting, San Francisco (May 1979).

⁶¹ *Id.*

⁶² 1988 is the latest year for which there is data of this kind available from the National Criminal Justice Reference Service, U.S. Department of Justice, Bureau of Justice Statistics (July 1990 Bulletin).

counsel as a “dying breed”).⁶³ The 1998/99 Directory of Legal Aid and Defender Offices in the United States and Territories now lists a total of 1,566 main and branch offices providing criminal representation to persons unable to retain private counsel operated by public defender programs and by legal services programs which contain a public defender component.⁶⁴ The largest publicly-supported program is the Criminal Defense Division of the New York City Legal Aid Society with an average complement of 451 supervising and staff attorneys who handled 194,000 cases in the 1998-99 fiscal year.⁶⁵ In addition, special programs in a number of urban centers, both publicly and privately funded, now provide lawyers for juveniles in both criminal and family court proceedings, as well as for prisoners and other institutionalized persons.⁶⁶

Although state-subsidized public defenders predominate in the representation of felony defendants today, private practitioners in every jurisdiction continue to play a significant role in representing defendants on both a retainer and publicly-subsidized basis.⁶⁷ Substantial

⁶³ National Legal Aid and Defender Association, The Other Face of Justice at 83 (1973); P.B. Wise, The Endangered Species: America’s Private Criminal Lawyers (1973).

⁶⁴ National Legal Aid and Defender Association, 1998/99 Directory (1998), at 127-189.

⁶⁵ Information provided by Susan Hendricks, Deputy Attorney in Charge, Criminal Defense Division, New York City Legal Aid Society. Indicative of the fiscal constraints placed on the Legal Aid Society in recent years: in 1992, with a substantially larger average complement of 675 attorneys, the Criminal Defense Division handled 170,000 cases, 24,000 fewer than the Division handled in the 1999 fiscal year with 224 fewer attorneys.

⁶⁶ *See* NLADA, 1998/99 Directory of Legal Services Offices.

⁶⁷ *See* National Directory of Criminal Lawyers (B. Tarlow ed. 3rd Ed. 1991): a directory of lawyers who the editor represents have been evaluated for demonstrated ability and commitment to conscientious representation.

representation continues to be on a pro bono basis, both court-appointed and volunteer (including post-conviction death-penalty representation).

Today the criminal justice system is confronted with record numbers of prosecutions. Providers of indigent defense services have in some jurisdictions been overwhelmed by the ravages of the drug epidemic and the federal “war on drugs.” The National Center for State Courts in 1991 reported that 70-90% of defendants charged with drug and drug-related offenses were indigent and required appointed counsel. Many public defender offices are today overburdened and underpaid, with high turnover, and unprepared to handle their massive caseloads.⁶⁸

b. Services for persons of moderate means

Following World War II it became increasingly apparent that supply and demand in the legal services marketplace as traditionally structured operated no more effectively to provide equal access to legal assistance for persons of moderate means than for the poor.

In 1951, the ABA Standing Committee on Lawyer Referral Services prophetically reported that:

the requirements of the public for legal services at moderate fees are greatly in excess of its requirements for free legal aid.⁶⁹

⁶⁸ See “Unclogging Gideon’s trumpet,” National Law Journal, January 10, 2000 at A1, relating to lawsuits challenging the lack of financial support for criminal defense of the poor and the resulting erosion of the Sixth Amendment right to counsel.

⁶⁹ American Bar Association Reports, Standing Committee on Lawyer Referral Services.

Experience in later years confirmed the magnitude of this potential demand after the Supreme Court had lifted the ban on advertising⁷⁰ and had struck down minimum fee schedules,⁷¹ and legal services came to be more or less freely marketed to middle income persons.

As the consumer movement gained momentum during the late 1950s, the need of middle-income consumers for improved access to legal representation received increasing attention. Some consumer groups, primarily those associated with organized labor, concluded that a way should be found to surmount the obstacles faced by the rank and file in accessing the justice system.

Some approaches were initiated by individual lawyers and were entrepreneurial in nature; others were sponsored by the organized bar and conceived as a means for fulfilling the bar's responsibilities to the public; while still others, inspired by experience in delivering legal services to the poor, were developed in furtherance of public policy objectives and adapted to the needs of particular groups of consumers.

Basically, each of the mechanisms was aimed at the same three things:

- helping people to know when to seek legal assistance;
- letting them know that lawyers were available; and
- making legal services affordable for persons of moderate income.⁷²

⁷⁰ Bates & O'Steen v. State Bar of Arizona, 433 U.S. 350 (1977).

⁷¹ Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

⁷² See B.F. Christensen, Lawyers for People of Moderate Means, Some Problems of Availability of Legal Services (1970) at 1-39; see also Report of the Staff to the Federal Trade Commission, Improving Consumer (continued...)

(1) *Advertised legal services and clinics.* The approach of enterprising individual lawyers, taking their cue from the medical profession, was to organize “legal clinics.” A “legal clinic” has been defined as “a law firm that offers legal assistance at below-market rates for relatively routine types of...legal services [to individuals rather than to business] and that uses advertising, fixed-amount fees and standardized operating procedures and forms to increase volume and reduce costs.”⁷³

Lawyers who organized their practice on the clinic model, following the Supreme Court’s decision in the Bates case, sought to reduce the cost of providing legal services by reducing the amount of lawyer time involved in rendering individualized legal assistance.⁷⁴ This required high volume to justify setting up standard procedures. Standardization was more readily accomplished in highly specialized offices such as those for conveyancing, personal bankruptcies or workers’ compensation. It also required intensive use of paraprofessionals, under a lawyer’s direction, as interviewers, investigators and technical assistants. It called for word processors and computer software to generate standard forms and checklists, and to maintain practice controls and accounts, so that fees could be lower than those charged by traditional law firms.

⁷² (...continued)
Access to Legal Services (1984).

⁷³ G. Singsen, Report on the Survey of Legal Clinics and Advertising Law Firms, ABA Special Committee on Delivery of Legal Services (August 1990), at 1.

⁷⁴ See L. Brickman, Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism, 71 Colum.L.Rev. 1153 (1971).

A 1970 national survey of legal clinics indicated some difficulty in identifying true clinics, which by then had become a diverse group, not generally high-volume or streamlined in operations, but all advertising, at least in the Yellow Pages, and providing routine legal services for set fees.⁷⁵ In 1980, it was estimated that there were between 475 and 583 private clinics across the country, mainly in metropolitan areas, run predominately by solo practitioners.⁷⁶

While it appears that the name “clinic” may be disappearing as connoting “poor people only” to many prospective clients, large numbers of firms are in fact using a “clinic” approach. A 1988 study reported that there were at least 15,000 to 16,000 lawyers nationally in law offices that had adopted the techniques of the clinic, advertised civil legal services for individuals on a basis other than contingent fees, and addressed their marketing primarily to middle income consumers.⁷⁷

(2) *Franchised legal services.* The experience of both Hyatt Legal Services and the Law Offices of Jacoby & Meyers may suggest limits upon the effectiveness of national organizations operating local law offices that use the “clinic” approach. Both Jacoby & Meyers and Hyatt grew into interstate chains of small law offices supported by heavy television advertising. They generally avoided head-to-head competition with each other by locating their

⁷⁵ Carol Richards, Legal Clinics: Merely Advertising Law Firms? (ABA Special Committee on the delivery of Legal Services, November 1981), at 86.

⁷⁶ *Id.* at 6-7.

⁷⁷ Singsen, *supra* note 73, at 131-33.

offices primarily in different media markets.⁷⁸ However, the subsequent history of both organizations illustrates the difficulty in maintaining such a multistate chain.

Hyatt Legal Services was established in 1977. It popularized the concept of providing inexpensive, flat-fee legal services. In the mid-1980s it had almost 200 offices nationwide. Since then, Joel Hyatt who was the co-founder, sold off the offices to lawyers employed in the individual offices and the company charter was canceled in September 1999.⁷⁹ Meanwhile, Hyatt had established Hyatt Legal Plans that offered legal services at a flat-rate to consumers through their employers as part of benefits plans. In 1997, Hyatt and his partners sold Hyatt Legal Plans to MetLife. He is now a professor of entrepreneurship at Stanford University Graduate School of Business.⁸⁰

As of November, 1999, Jacoby & Meyers had 17 remaining offices in various metropolitan areas of New York, New Jersey, Pennsylvania, California and Arizona. Gail J. Koff, a New York lawyer, is the remaining founding partner and sole owner of the firm.⁸¹ In November, 1999, this firm launched Instant Interview, an interactive legal web site designed to sign up clients who log on and answer a page of questions to see if they have a case worth pursuing. In the same

⁷⁸ Seron, *supra* note 19, at 126-27.

⁷⁹ So advised by the Ohio Secretary of State's office, 2-3-00.

⁸⁰ PR Newswire: Wednesday December 8, 1999.

⁸¹ Mover, Jacoby & Myers' Gail Koff keeps changing the face of legal profession, Long Island Newsday, April 10, 2000, at C8-C9.

month, the firm announced that it would encourage all of its attorneys to use Cybersettle.com, an online claim resolution system.⁸²

No multi-state chains of law offices comparable to Hyatt Legal Services or Jacoby & Meyers have since emerged. However, various small firms around the country have established local chains and, while frequently not describing themselves as legal clinics, have targeted their practices toward persons of moderate means.⁸³

From the perspective of the individual lawyers engaged in these new methods of delivering legal service, there are marked differences between working in a local chain of storefront offices and in a local unit of an interstate firm, such as Jacoby & Meyers. In the small, entrepreneurial setting of the locally advertised, clinic-like operation, many of the aspects of traditional solo and small-firm practice survive, but are altered by the advertising which frequently draws a different clientele of single-matter drop-ins for whom the lawyer performs a standardized service at a fixed-fee with little opportunity for developing a client base.

As for the attorney working in a large multistate chain, the lawyer must adapt to working in a large organization that emphasizes managing the work of its lawyers and their fitting into the management scheme focused on the efficient, productive and cost-effective delivery of service. Within an otherwise structured context, Professor Seron found in her study that staff attorneys were expected to give special attention to self-promotion and the development of social

⁸² PR Newswire: Tuesday November 16, 1999.

⁸³ Singsen, *supra* note 73, at 132-33.

skills among attorneys and staff alike. Moreover, quality service was equated with how consumers rated their treatment by an attorney on criteria deemed important by consumers: tidiness, returning telephone calls and politeness. However, the managers and the individual attorneys agreed that each attorney retained control over his or her own cases and clients, and that the relationships were private and personal between attorney and client without interference from management.⁸⁴

Professor Seron found a consensus as to what is required to be a successful attorney in a franchised legal service firm: One must be able to carry a high-volume practice of individual-client cases – wills, bankruptcies, divorces – while acting in an entrepreneurial fashion, bringing in new business, complying with a managed reporting system, working very long hours and building on the advertising provided by headquarters.⁸⁵

(3) *Lawyer referral and information services.* Bar-sponsored lawyer referral services are operated by state and local bar associations providing coverage for virtually every county in the United States; however, the services they provide vary considerably. In a basic system, a caller is simply given the name of the next lawyer on a rotating list who handles the kind of matter involved; an appointment is made, and the caller can then go to the lawyer's office and receive a half-hour consultation at a fixed fee of \$20 or \$25.

⁸⁴ Seron, *supra* note 19, at 68-73. Compare the picture provided by Jerry Van Hoy, who describes the pressure from management to mislead clients. Franchise Law Firms and the Transformation of Personal Legal Services (1997).

⁸⁵ *Id.* at 129-30.

However, among the more than 300 lawyer referral programs nationwide, a great variety of additional services are offered.⁸⁶ Many programs are directed by staff attorneys with in-house staff available to furnish basic legal advice as well as suggestions as to where prospective clients may obtain help. Some programs conduct consumer education regarding lawyers and the law, and publish “legal check-up” materials and lists of community resources. A small number charge no fee for initial consultation.

Many referral services operate in conjunction with legal aid offices or have “no-fee” pro bono panels of lawyers. Bilingual staffs are common and a few accept credit cards for legal service.

To help ensure the competency of members of referral panels, a number of the services have screening procedures for would-be panelists or have CLE requirements or peer review as a condition of continued membership on panels. In some jurisdictions panels of specialists are available, for which qualifying education and experience are a prerequisite to membership.

It has been estimated that five to six million requests are handled each year by lawyer referral services nationwide.

Membership on a referral panel is seldom, if ever, the principal source of a lawyer’s practice, but tens of thousands of solo and small-firm practitioners are today members of

⁸⁶ The information on lawyer referral services is drawn from the Reference Handbook published in 1988 by the ABA Lawyer Referral and Information Service Committee and from Lawyer Referral and Information Services, A Profile at the Turn of the Century published by the Committee in 1999.

bar-sponsored panels, which provide a useful channel of introduction to prospective clients, while helping members of the public locate lawyers who can serve their needs.

Recently, privately sponsored lawyer referral services have sprung up. These are operated and funded primarily by groups of law firms specializing in handling personal injury and professional and product liability claims on a contingent fee basis. These services are frequently more visible than bar-sponsored services because of the television and other advertising that they employ.⁸⁷

(4) *Prepaid and group legal service plans.* If legal clinics can be seen as arising from the entrepreneurial efforts of individual lawyers, and lawyer referral services as the bar's program for increasing public access to legal services, then prepaid and group legal service plans may be looked upon, at least initially, as a consumer group-response to the problem of legal assistance for persons of moderate means.

Following a series of Supreme Court decisions between 1963 and 1971 holding that private associations may advise members on legal claims, and recognizing the right of people to associate to obtain legal assistance, legal service plans of a variety of types proliferated.⁸⁸ Some of these arrangements were very simple: an agreement between a group of consumers and a law firm

⁸⁷ DontNeedALawyer.com at its website offers referrals to "lawyers, paralegals, accountants and other professionals, in your areas, standing by, ready to assist you with a free initial consultation of 30 minutes by telephone." In New York, a recent amendment to the Code of Professional Responsibility (*see* DR 2-103(D)(3)) will permit lawyers to operate private for-profit referral services provided court rules are implemented to govern them.

⁸⁸ *See NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971).

under which members of the group could receive certain free advice and receive fee discounts on routine legal services. Information about the arrangement would be provided by the group to its members. The endorsement of the firm by the group's leadership seemed to provide a ready answer to the common question: "Where can I find a good lawyer?"

This type of legal service arrangement exists today between literally thousands of groups of consumers and individual lawyers and law firms. The largest and most elaborate of these plans is the Union Privilege Legal Services Plan sponsored by the AFL-CIO. Theoretically, some 17 million union members are eligible to receive free and discounted service under this plan from a nationwide panel of attorneys selected by the plan's administrators. The panel members are primarily drawn from among solo practitioners and 23 three-lawyer firms. AARP now has a variation on this plan. Members of AARP can obtain limited access services through lawyers identified in the Yellow Pages as AARP participating attorneys.

Such "group discount" plans address consumer concerns as to the availability and price of legal services, by extending the existing framework for financing and delivering legal services. The group member is still on his or her own to determine whether a legal problem is present and is substantial enough to warrant getting a lawyer and coming up with the money to pay the fee.

In the early 1970s consumer groups and the organized bar, with the cooperation of the insurance industry, jointly developed the prepaid legal service plan. In one sense, a prepaid

legal service plan is simply a way of financing the cost of legal services. In Europe, legal expense insurance, as it is called, has been performing this financing function for over 80 years.

One of the most popular prepaid legal service plan systems is a direct derivative of the “group discount” plan of the kind sponsored by consumers groups such as the AFL-CIO, the AARP and the National Education Association. Under such an access plan, the basic service is unlimited legal advice and consultation by telephone during normal business hours. Under the pure access plan, benefits are limited to this service only. In addition, service may include brief in-office consultations, the preparation and review of simple legal documents, such as wills, and short letters to be written or phone calls to be made to adverse parties. If more complex legal work is necessary, the plan member is referred to an attorney who has agreed in advance to furnish such service at a discount. The fees for these additional services are paid by the group member.

This type of prepaid legal service plan has been marketed directly to millions of American households by major credit card issuers at a cost of between \$7 and \$12 per month. Recently, the publicly-held Prepaid Legal Services, Inc., has offered a more comprehensive coverage package, through its sales network to individuals for about \$25 per month; it claims to have some 600,000 subscribers.

The established comprehensive form of prepaid legal service is typically arranged in connection with employment. Either a labor union has negotiated a legal service benefit plan for all employees as an employer-paid fringe benefit, or an employer offers such a benefit to employees on a voluntary basis as part of a flexible benefits plan.

Comprehensive prepaid legal service plans are commonly designed to cover 80-90% of the average person's legal needs in a given year. Benefits of the plan may include direct telephone access to services, as under an access plan, but, in addition, coverage for both in-office and court work in most areas of the law. Such plans cover the types of problems most often brought by individuals to lawyers: wills and estates, consumer problems, landlord-tenant, real estate transactions, domestic relations, bankruptcy, representation before administrative agencies, civil disputes, and certain limited types of criminal matters.

Hyatt Legal Plans, Inc. ("HLP"), now a subsidiary of the Metropolitan Life Insurance Company, serves more than 50 corporate and union sponsors with a variety of benefit packages. Plan participants call the HLP service center toll-free, it directs the callers to the nearest legal service providers. To support these plans, HLP maintains a network of private law firms.

The largest employer-funded prepaid legal service plan in the country is the UAW Legal Service Plan, which covers all hourly workers of Ford, Chrysler and GM and provides access to a comprehensive list of legal services to over 2 million people, counting employees and family members.⁸⁹ The New York City Municipal Employees Legal Services plan, covering some 130,000 public employees of the city, is based on a pilot project funded in the 1970s by the Ford Foundation for District Council 37 of the American Federation of State, County & Municipal Employees

⁸⁹ The Executive Director of the ABA's American Prepaid Legal Services Institute states that it is difficult to determine which plans today are the largest, since the private commercial plans (other than Prepaid Legal Services, Inc.) consider that data proprietary.

(AFSCME) to learn how social workers and lawyers might work together, in a multidisciplinary setting, in the delivery of legal services.⁹⁰

Many plans have developed today into full-fledged legal service delivery systems with computerized referral systems, complaint mechanisms, quality control protocols, nationwide attorney networks, client information newsletters and cost-conscious administrative controls. Administration of plans by insurance companies and other service organizations has added the element of mass marketing designed to get consumers to enroll.

The type of arrangements entered into with lawyers under these plans has also evolved. Today, there are plans where staff attorneys service all members; others have a network of law firms under contract; while still others have a loose panel of general practitioners who have agreed with the plan's administrator to accept cases under the plan. The network supporting some plans number as many as 12,000 lawyers, predominately solo and small-firm practitioners. Solo practitioners continue to serve as exclusive plan attorneys for small groups, as well as participating in many of the other arrangements.

From the perspective of solo and small-firm practitioners, the spread of legal service plans has presented new business opportunities for lawyers, most typically as legal service providers for plan members.⁹¹

⁹⁰ Letter of Curtis R. Berger to Robert MacCrate, December 10, 1991.

⁹¹ See also Who's Who in Prepaid Legal Services, published by the American Prepaid Legal Services Institute (1999).

In 1989, an American Bar Foundation study indicated that 18% of U.S. households, representing some 43 million people, reported at least one person as a member of a prepaid or group legal service plan.⁹² The National Resource Center for Consumers of Legal Services in February, 1998, estimated that there were 105 million people eligible to use at least one legal service plan (including the armed services' legal assistance plans), or 39% of the population.⁹³

Since legal service plans involve elements of insurance, marketing and employee benefits, their emergence has brought new forms of regulation into the legal-service-delivery equation. Initially, provisions of state codes of professional responsibility severely limited the extent to which lawyers could participate in prepaid legal service plans. The decade of the 1970s saw serious debates between the bar and sponsors of legal service plans regarding ethical rules prohibiting plans which limited the choice of lawyers that could be used by plan members. During the 1980s ethical restraints were eliminated and most states during the 1980s revised their professional codes to accord with the optional provisions in this respect of the ABA Model Rule of Professional Conduct.⁹⁴

The insurance codes of many states were amended to allow insurance companies and other commercial firms to market, underwrite and administer legal insurance plans. Both the

⁹² NewsBriefs, "Bar Foundation Study Yields Prepaid-Lawyer Use Data," American Prepaid Legal Services Institute, Chicago (June, 1989).

⁹³ National Resource Center for Consumers of Legal Services, Legal Plan Letter (February 1998) at 1; Alec M. Schwartz, executive director of the APLSI, greatly assisted the Committee in the development of the material on legal service plans.

⁹⁴ Pursuant to the July 1999 amendments, closed panel prepaid legal service plans are now permitted in New York under DR 2-103(D)(4).

Taft-Hartley Act and the Employee Retirement Income Security Act of 1974 (ERISA) were modified to contain provisions recognizing legal services as a legitimate employee benefit. Finally, the Internal Revenue Code was amended in 1976 to exempt the value of employer payments to legal service plans from employee taxable income, but this exemption expired in 1992 and attempts to have it reenacted have been unsuccessful.

There is evidence that all of these mechanisms, together with the spread of lawyer advertising and increased public awareness of the need for and availability of legal services, have significantly stimulated the use of legal services. The American Bar Foundation survey in 1989 found that the percentage of adults who have ever used legal services increased from 64% to 72% between 1974 and 1989. The proportion of adults having used legal services within three years of the 1989 survey was 39%, up from 27% during the same period prior to the 1974 survey. While the use of legal services increased for all income groups, it grew at the highest rate among the moderate income segment of the population.⁹⁵

c. Advocates for group legal rights

Private lawyers are frequently retained by groups of individual citizens who have a similar legal interest. Taxpayers, members of a profession, residents of a community, consumers of a particular product or service, members of a labor organization and stockholders of a corporation

⁹⁵ Barbara A. Curran, 1989 Survey of the Public's Use of Legal Services, in American Bar Association Consortium on Legal Services and the Public, Two National Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and the Public Generally (September 1989), at 57.

routinely employ private counsel to press their group legal rights.⁹⁶ For the disadvantaged members of the community, their access to redress has been more problematic, but following the Supreme Court's decision in NAACP Legal Defense Fund, Inc. v. Button⁹⁷ in 1963, litigation to vindicate group legal rights became a favored avenue by which "public interest" advocates sought to redress what were perceived to be social and economic injustices.

While the public interest bar established its separate identity and enjoyed its broadest support during the 10 years, 1965-1975, it remains today an active and significant segment of the practicing profession working in three interrelated practice settings. The first setting is the so-called public interest law firm, a private entity funded by individuals, frequently by foundations, and sometimes by attorneys' fees awarded in litigation. In 1988, there were reported to be 200 such firms employing 1000 lawyers and financed to the extent of \$130 million a year.⁹⁸

Some public interest law firms are identified by the client group they represent: children, the disabled, industrial workers, women, the elderly, gays and lesbians, minorities or the poverty stricken.⁹⁹ Other firms are known by the causes they advocate: the environment, natural resources, civil liberties, human rights or issues pertaining to the communication media. Still other firms take the names of organizations which support them: Pacific Legal Foundation, National Legal

⁹⁶ ABA Consortium on Legal Services and the Public, Legal Services for the Average Citizen (Discussion papers 1977, reprinted 1978).

⁹⁷ 371 U.S. 415.

⁹⁸ N. Aron, Non Traditional Models for Legal Services Delivery, presented at the ABA Conference on Access to Justice in the 1990s (May 1989).

⁹⁹ See the listings of legal services programs in the NLADA 1998/99 Directory, at 17-123.

Center for the Public Interest, Mountain States Legal Foundation, Washington Legal Foundation or Moral Majority Legal Defense Fund. Public interest firms which comply with IRS regulations enjoy tax exempt status and today span the ideological spectrum from liberal to conservative.¹⁰⁰

The work of the public interest law firms is significantly augmented by a large number of private public-interest lawyers and law firms who devote a substantial segment of their practices to representing community groups, environmentalists and civil rights plaintiffs.

A further practice setting for public interest lawyers is in government. The agencies in which they work are frequently the product of prior successes by public interest advocates and have been established to serve disadvantaged groups.

The late Justice Thurgood Marshall summarized the contribution of public interest law in these words:

Public interest law seeks to fill some of the gaps in our legal system. Today's public interest lawyers have built upon the earlier successes of civil rights, civil liberties, and legal aid lawyers, but have moved into new areas. Before courts, administrative agencies and legislatures, they provide representation for a broad range of relatively powerless minorities...

They also represent neglected interests that are widely shared by most of us as consumers, as workers, and as individuals in need of privacy and a healthy environment. These lawyers have, I believe, made an important contribution. They do not (nor should they) always prevail, but they have won many important victories for their clients. More fundamentally,

¹⁰⁰ See "Fighting the good fight" "Breachhead for conservatism," National Law Journal, December 27, 1999 – January 3, 2000, at A10-A11, relating to the exoneration of death-penalty defendants and the Center for Individual Rights' furthering of libertarian and conservative causes.

perhaps, they have made our legal process work better. They have broadened the flow of information to decision makers. They have made it possible for administrators, legislators, and judges to assess the impact of their decisions in terms of all affected interests. And, by helping open doors to our legal system, they have moved us a little closer to the ideal of equal justice for all.¹⁰¹

4. The Burgeoning of Entrepreneurial Practice – We turn from the segments of practice predominantly involved with the representation of individuals to the segments in which the representation of business predominates. Empirical studies indicate that business law predominates in firms of 11 lawyers or more. For purposes of analysis, based on the 1988 and 1995 American Bar Foundation surveys of the profession, we have arrayed by size of firm the following four segments, divided between “medium” and “large”:

	Number of Firms		Number of Lawyers	
	<u>1988</u>	<u>1995</u>	<u>1988</u>	<u>1995</u>
Medium:				
11-20 lawyers	2,583	2,822	36,859	43,256
21-50 lawyers	1,201	1,397	36,563	45,954
Large:				
51-100 lawyers	381	381	26,273	28,823
101 or more lawyers	<u>258</u>	<u>321</u>	<u>49,639</u>	<u>76,493</u>
	4,423	4,921	149,334	194,526
	firms	firms	lawyers	lawyers

¹⁰¹ Justice Thurgood Marshall, “Financing Public Interest Law: The Role of the Organized Bar.” Address to the Award of Merit Luncheon of the Bar Activities Section of the American Bar Association (August 10, 1975). (Quoted by N. Aron, Liberty & Justice for All (1988), at 2.)

It is important to a balanced and inclusive view of the private practice of law that this entire array of medium and large law firms be considered, and not only the very largest firms on which the legal press as well as scholars and pundits tend to focus their attention. When considering these four segments of law firms it would be seriously mistaken to look upon them either as “monolithic”¹⁰² or as sharing all the characteristics of the very largest firms.

a. Middle-sized firms

In 1995, more than 89,000 lawyers worked in one of the approximately 4,200 medium-sized law firms (11 to 50 lawyers). Collectively, they represented a cross-section of law firm practice in all its diversity of substantive areas of practice, of clients and of firm organization and structure. They provided legal representation both for individuals and for businesses; some had a mixed practice, others stressed legal problems of individuals, and still others focused almost entirely on business law issues.

Medium-sized firms are large enough for some to offer what they describe as a “full line” of legal services, while other firms limit their practice to one or several specialties. Professor T.C. Fischer, reflecting on the current problems faced by medium-sized firms, observed that the “cycle of growth and development feeds on itself,” which gives these firms a choice either to grow larger “to compete with larger firms (and accept the tremendous overhead consequences), or...focus their practice on limited clients and legal fields, remaining competitive, although small.”¹⁰³

¹⁰² See F. Zemans & V. Rosenblum, Making of a Public Profession, at 66 (1981).

¹⁰³ T.C. Fischer, *supra* note 28, at 79.

Many medium-sized firms, following the design of the small specialty boutiques, have directed their practices and developed their expertise to serve clients in one of the burgeoning areas such as the entertainment industry, media communications or the publishing industry. Also common among middle-sized firms is specialization in aviation accidents, product liability, toxic torts, taxation or corporate behavior; while others have specialized in the rapidly developing field of intellectual property (which today embraces long-recognized specialties of patent, copyright and trademark law), of health and hospital law, of waste disposal and of environmental law.

In one sense, the middle-sized firm stands at the center of the profession today. Many have resisted the institutionalization of practice and the bureaucratic model. While now acknowledging the importance of effective law office management, they have continued to lend emphasis to the idea that law is first a profession, and only secondarily a business. As a consequence, lawyers from this segment of practice have frequently been the backbone of activities within the organized bar, stressing “professionalism” and providing leadership for professional organizations. In some ways, the medium-sized law firm appears to have mitigated the effects upon the profession as a whole of the transformation of the large law firm, to which we next turn.¹⁰⁴

b. The “large firm” phenomenon

The more than 105,000 lawyers in the 700 largest law firms¹⁰⁵ are the most prominent sector of the profession today. It is clear that the emergence of what came to be referred

¹⁰⁴ See J.S. Studley, “Building on the Assets of Mid-size Firms,” *Manhattan Lawyer* (November 1991), at 45.

¹⁰⁵ See chart, *supra* at 66.

to as the “Wall Street law firms” has profoundly affected both the structure and the operations of many law firms of both large and of lesser size. In addition, it has had a significant effect upon the profession generally, as well as upon recruitment and placement policies at many law schools, if not upon curricula.¹⁰⁶ One recent study concluded that large firms have been the “critical catalysts” of recent changes in the legal profession.¹⁰⁷

The largest law firms of today are the professional progeny of “the Wall Street lawyer,” who rose to prominence in the early years of this century as servant and adviser to big business and architect of its financial structure. Legal historian Lawrence Friedman writes:

There is no question that the rise of the Wall Street lawyer was the most important event in the life of the profession during the [the 1890s to 1930s] period.¹⁰⁸

Friedman and others have recounted the revolution in the structure and operation of large law firms led by Paul D. Cravath, which began in New York City early in this century. He instituted a system of firm operation that was adopted by other firms serving the business community. It included hiring outstanding graduates straight out of law school, with hopes of a partnership after an extended probationary period. They were required to work only for the firm, were paid a salary and were provided training and a graduated increase in responsibility. The system included outplacement of lawyers who were not promoted to partner and the concept that only the firm had clients and not the individual lawyers.

¹⁰⁶ See R.L. Nelson, Partners with Power: Social Transformation of the Large Law Firm (1988), at 1.

¹⁰⁷ Sander & Williams, *supra* note 6, at 478.

¹⁰⁸ L.W. Friedman, A History of American Law (1985), at 636.

After 50 years of steady but gradual growth by law firms adopting the Wall Street model of hired associates,¹⁰⁹ the Census Bureau reported in 1947 that there were 77 law firms having 50 or more employees, still concentrated, however, in New York, Chicago and Washington, D.C.¹¹⁰

By 1950 these larger firms had well-established law practices providing the high-quality and sophisticated legal services sought by major corporations and other large institutions. Their relations with their clients were stable and commonly reenforced by retainer agreements under which they provided continuing counsel, while standing ready to handle any special matters for their clients that might arise. The consumer and civil rights movements were heating up, and with spirited enforcement of the antitrust laws as well as a high level of business scrutiny by the federal regulatory agencies that had been established during the 1930s, the corporate law firms were in heavy demand by their clients.

Moreover, it was a period of heightened general economic activity. Legal work and prosperity went hand in hand and the large law firms steadily grew during the decade of the 1950s. Galanter & Palay refer to “Circa 1960” as “The Golden Age of the Big Law Firm.”¹¹¹

A salient feature of law practice – large or small – in this period was keeping to one’s self not only a client’s confidences, but also firm information as to finances, billing, income,

¹⁰⁹ W.K. Hobson, *supra* note 1, at 141 *et seq.*, Chapter 5 “Rise of Large Law Firms.”

¹¹⁰ Cited by Sander & Williams, *supra* note 6, at 436; the Census figures did not distinguish between salaried lawyers and other salaried employees.

¹¹¹ Galanter & Palay, *supra* note 38, at 20-36.

relations with clients or firm operations. Moreover, maintaining a low profile was enjoined by Canon 27 of the 1908 Canons of Professional Ethics which condemned as “unprofessional” various forms of advertising and solicitation and concluded:

Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer’s positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling and are intolerable.

The most obvious feature of the transformation of large firms in the 1970s and 1980s was the exponential growth in the size of firms, to which the structure and mode of operation of the larger firms was highly conducive. Galanter & Palay presented a compelling demonstration of the inevitability of such exponential growth so long as law firms were structured around a system that maintained a leveraged ratio of associates to partners combined with a fixed policy of “up-or-out/promotion-to-partner.”¹¹²

Many large firms during the 1970s, seeking to retain old clients and to acquire new, began to scatter branch offices and to open foreign offices. Specialization became more intense and additional specialties were added so as to offer a “full product line” of services.¹¹³

¹¹² Galanter & Palay, *supra* note 38, at 77-110.

¹¹³ The National Association for Law Placement’s Directory of Legal Employers indicates that nearly all firms with more than 100 lawyers list over a half-dozen specialties covering most major areas of corporate law (even though many are best known for a single specialty). Cited in Sander & Williams, *supra* note 6, at 436, fn. 14.

At the same time, the firms found their relations with their business clients less enduring.¹¹⁴ Corporate clients had substantially increased the size of their law departments during the 1950s and began to draw more and more of their legal work in-house. During the 1970s and 1980s many discontinued comprehensive retainer agreements and shifted to having their in-house general counsels, as sophisticated shoppers for legal service, arrange *ad hoc* engagements of outside law firms. For large hotly-contested one-of-a-kind transactions, in-house general counsel shopped for law firms that had assembled specialty groups. Outside counsel were also engaged for major litigation, but more routine litigation and support for litigation were frequently kept in-house.

Some changes in relations between law firms and their business clients have been industry-specific, as in the case of insurance defense counsel. Ever since courts accepted the principle of insurance companies retaining defense counsel for their insureds, it has been common for stable relationships to exist between insurance companies and the law firms they retain as defense attorneys. But with the changing profile of the insurance industry, the traditional relationships are no longer secure as companies draw more work in-house, experiment with cost-cutting devices such as “reverse” contingency agreements, and even acquire entire law firms to handle their defense work.¹¹⁵ Recently, the Indiana Supreme Court ruled to allow insurers to use their own salaried attorneys to represent policyholders, but held that it was misleading to name its “captive law firm”

¹¹⁴ It has been suggested that 25% of the corporations going public change law firms in the process. R.L. Abel, *supra* note 43, at 184.

¹¹⁵ See G. Taylor, Party's Over in Insurance, National Law Journal, September 23, 1991.

Berlon & Timmel. Subsequently, the name was changed to “Law Offices of the Cincinnati Insurance Companies.”¹¹⁶

As a consequence of the profound changes in their practices, a new and open competitiveness among large law firms emerged. Operations became more profit-oriented. More and more firms resorted to lateral hiring and many to mergers to broaden their lines of legal expertise or to gain new clients. Some turned even to diversifying outside of the law into what they described as ancillary businesses.¹¹⁷

The intense competition by an increased number of large firms for top law school graduates to fill what seemed to be an ever-increasing need for more top-flight associates led not only to dramatic increases in associate compensation, but also to expanded recruiting programs to a broader roster of schools. In addition, there was a significant expansion in the hiring of law students for summer employment at generous levels of compensation.

In due course, to increase the leveraging ratio of associates to partners, many firms lowered their rate of promotion-to-partner, while others introduced multi-tiered staffs of senior lawyers, specialists, a second tier of associates, as well as an increased number of non-lawyer professionals.

A fresh focus was placed on business-like management. Professional managers to run the business side of law offices became commonplace and the Association of Legal

¹¹⁶ “Insurers score another victory,” National Law Journal, November 29, 1999, at B1, B4; see also Chapter 12, Section 3.

¹¹⁷ J.W. Jones, The Challenge of Change: The Practice of Law in the Year 2000, 41 Vand. L. Rev. 683 (1988).

Administrators came to boast more than 5000 members.¹¹⁸ Some firms hired marketing directors, a position unknown in 1980, but by 1985 a National Association of Law Firm Marketing Administrators had also been established.¹¹⁹ A whole service industry has now grown up to work with law firms: search firms for associates, partners and law-firm mergers; attorney out-placement consultants; law-firm management consultants; special computer support centers; lawyer-software systems providers; and public relations specialists for law firms.

Fanning the fires of competition and aggressively promoting this new service industry for law firms, has been the new legal press which began publishing in the late 1970s in the wake of the Supreme Court's decision in the Bates case striking down the ban on lawyer advertising. The ethical restraints dropped one by one and the once opaque practices and internal affairs of large law firms gradually became public information, helping to complete the change in dominant law firm culture from that of a restrained professional organization to that of a competitive entrepreneurial enterprise with a growth strategy.

The National Law Journal, soon joined by its publishing competitors, lent media support for the growth strategy by focusing attention upon the comparative size of law firms and annually compiling successively longer lists of the nation's largest law firms with a catalog of their branch offices and revenues. When The American Lawyer began publication in the late 1970s, it

¹¹⁸ See B. Johnson, Administration Grows Up, Nat. L. Jour. (April 28, 1986) at 17.

¹¹⁹ S. Schmidt, Firm Development Mobilized by a "New Breed" of Resource, Nat. L. Jour. (August 25, 1986) at 15.

shifted the focus from counting lawyers and offices to the economics of law and the business of lawyering.

At the same time, law remains a very decentralized industry, with substantially less concentration than in accounting; or in engineering, architecture and surveying; or in advertising; or in management consulting and public relations; although one of great inequality in the economic rewards.¹²⁰

For at least 50 years, the law has been viewed as the most unequal of all the professions in the incomes of its members.¹²¹ For a period during three decades, 1941 to 1969, incomes within the lawyer population gradually became more equal, but in the 1970s that trend reversed and the inequality of income became increasingly severe.¹²² The rapid increase in partner and associate income in the largest firms was not shared in by most firms of lesser size and it appears that after 1972, there was in fact a decline in real income among medium-sized and small firms.¹²³ Moreover, in the economic downturn in the early 1980s, the income of sole practitioners fell a stunning 46%.¹²⁴

¹²⁰ Galanter & Palay, *supra* note 38, at 123 (Table 7).

¹²¹ A government study of eight major professions in the 1940s found that lawyers had the most unequal distribution of income. U.S. Dept. of Commerce, Survey of Current Business (May 1944): in 1941, the most affluent 5% of lawyers accounted for 28% of all lawyer income.

¹²² Sander & Williams, *supra* note 6, at 446-451 (Table 10).

¹²³ *Id.* at 466-467 (Table 14).

¹²⁴ *Id.* at 450-451. It is appropriate to note that the less systematic and more limited surveys done by independent consulting firms and published in the legal press failed to report the general decline in income, but focused instead only on the general prosperity of "the most elite end of the lawyer spectrum."

The continuing lawyer boom during the 1970s and 1980s was not, however, confined to the very large firms. The relative size of the “corporate customer” base grew at a steady rate and around 1980 for the first time it passed the “individual consumer” sector as the dominant purchaser of lawyers’ services.¹²⁵ From 1967 to 1982, “personal” legal services rendered by lawyers grew at only a 4.7% rate (after adjusting for inflation) while “business” legal services grew at a real rate of 8%.¹²⁶ Overall demand for legal services grew more rapidly in the business sector than in the consumer sector, and most rapidly with respect to large corporations.¹²⁷

For law firms with receipts of \$1,000,000 or more (which would include a substantial majority of the 5,000 odd firms we have identified as medium or large firms), over 70% of firm receipts have come from business and less than 25% from individuals (which proportions appear to have remained quite stable over time).¹²⁸

c. The ripple effects

The extent to which law firms of lesser size, engaged primarily in a “corporate” practice, have shared in the phenomenal success of the largest firms, may well have turned on how the firms perceived themselves and how closely they held to the elitist model of the traditional “Wall Street” firm. Sander & Williams suggest:

¹²⁵ *Id.* at 441 (Table 5).

¹²⁶ *Id.* at 440-441.

¹²⁷ *Id.* at 475.

¹²⁸ *Id.* at 441. Included in receipts from individual clients are the contingent fees paid plaintiffs’ lawyers in personal injury and product liability cases. There are firms of every size, including many medium-sized firms, which specialize in handling these cases on a contingent fee basis.

The elite firms *are* elite because, in their view, they provide a special type of legal service....[T]he common specialty shared by all elite firms is complex law...the most difficult and esoteric legal issues.¹²⁹

They go on to contrast this practice of “complex law,” concerned as it is with determining the relevant issues and engaging in exhaustive research to advance their business clients’ interests, with what they perceive as the non-elitist practice which, for the most part, involves the application of standard legal doctrine to common problems of individual clients.¹³⁰

Dean Robert McKay wrote in 1990 of the “the triggering influence of the major firms” which had “defined the task, fixed the rules, and determined the conditions of labor, including compensation and billable hours.” Perhaps speaking prophetically, Dean McKay went on to observe that it might be “too much to say that the whole apparatus, from legal education through every form of practice, depends on the large firm’s somewhat uneasy structure,” but that “at least we can say that collapse or serious damage to that imposing structure would have implications for every element of the legal profession,” and that the “ripple effect on the way down would be no less dramatic than the impact occasioned by the abrupt rise of great aggregations of lawyers within the new megafirms.”¹³¹

For law firms of all sizes which have a predominately business practice, the 1990-92 downturn in the economy made apparent how closely linked corporate law practice has become to the general level of economic activity. The new ad hoc relationships between

¹²⁹ *Id.* at 475.

¹³⁰ *Id.* at 475-476.

¹³¹ R.B. McKay, The Rise of the Justice Industry and the Decline of Legal Ethics, 68 Wash. Univ. L. Quarterly 829 (1990), at 846.

corporations with their own in-house law departments, and outside law firms, as well as the special staffing by law firms to serve particular corporate legal needs, makes business law firms particularly vulnerable not only to general corporate cost-cutting programs, but also to the loss of the kinds of law business, such as mergers and acquisitions, for which special staffs have been assembled.¹³²

In the early 1990s, with the demand for complex corporate legal work falling for the first time since the lawyer boom began in the 1970s, many firms had to face the reality that in their entrepreneurial ardor, they may have over-expanded. As a result, many law firms followed the lead of their corporate clients and adopted a strategy of “downsizing.” This was accomplished not only by reducing and deferring the hiring of new associates, but also by the forced separation of associates and even partners.

What sustained the modest overall growth rate among the large firms during 1990-91 was a continuing increase in the number of branch offices of the firms. This phenomenon has continued as the economy recovered during the 1990s. The 1999 list of the 250 largest firms¹³³ shows offices of these firms in over 260 cities in all states except Maine, Oklahoma, South Dakota

¹³² E.J. Pollock, Big Firms Learn That They, Too, Are A Cyclical Business, Wall Street Journal (August 15, 1991), at 1.

¹³³ The National Law Journal's annual listing of the nation's largest law firms, December 13, 1999.

and Vermont. These 250 firms are reported to have more than a thousand lawyers in each of the following 16 cities:

New York City, NY	14,691 lawyers
Washington, DC	10,372 lawyers
Chicago, IL	5,344 lawyers
Los Angeles, CA	4,133 lawyers
Philadelphia, PA	2,850 lawyers
Boston, MA	2,728 lawyers
Dallas, TX	2,712 lawyers
Atlanta, GA	2,574 lawyers
Houston, TX	2,207 lawyers
San Francisco, CA	1,963 lawyers
Palo Alto, CA	1,689 lawyers
Cleveland, OH	1,249 lawyers
Minneapolis, MN	1,104 lawyers
Kansas City, MO	1,090 lawyers
Miami, FL	1,075 lawyers
St. Louis, MO	1,011 lawyers

d. The future of the “large firm”

The professional work of lawyers in large law firms engaged in transactional work for business clients has moved from continuing work on a broad range of issues based upon ongoing relationships with clients to engagement on specific transactions or issues, often involving some competitive selection process in the lawyers’ retention.

This has driven such lawyers further toward focusing on specialties and sub-specialties. The client, with increased in-house legal staff, retains lawyers for specific matters and wants one who is expert in that specialty, frequently giving that priority over existing relationships. This trend is exacerbated by the increasing complexity of many specialties – for

example, bank regulation – which make it difficult for a lawyer to be truly expert without concentrating in the particular specialty.

The competitive selection process puts increased emphasis on “practice development,” requiring lawyers to work on what can only be called marketing themselves and law firms. Reputation can go a long way in attracting clients, but it is not enough to get most transactional assignments.

The faster pace of business has had an important effect on the work and life of lawyers working on transactional assignments. Working around the clock is, regrettably, quite common. In the past, the typical public offering of securities languished for at least 20 days at the SEC, providing time to advance the related work. Now, in many cases, securities offerings under various newly permissible methods, are done, start to finish, in a few days.

PCs, fax, the Internet, e-mail, cell phones and the like have greatly contributed to the speed of business. They have made many things easier to accomplish, but have robbed lawyers of much of the time they would otherwise have had for contemplation or life. Research can be done and vast quantities of data can be retrieved at the desk, at home or on the road. Much of the more routine, or commodity type, preparation of documents can be accomplished much more easily and quickly through forms and precedents easily stored and accessed through PCs.

A great deal of transactional work today has transnational elements, reflecting the globalization of business and finance during the past 25 years. The experience of the lawyer is

enriched as the result of the exposure to other legal systems and practice patterns and the additional complexity introduced, but at a price.

Many transactions have become significantly more complex. In financings, examples would be the use of derivatives and the securitization of many types of receivables. In M&A transactions, particularly hostile deals, there is the integration into the effort of corporate communications/PR, the great development of corporate governance issues and the much deeper understanding of the intricacies and imaginative use of corporate law. In financial services, the legal issues involved in the increasing integration of banking, securities, investment management and insurance business are an important focus of many lawyers servicing business clients. Other areas that have grown significantly are environmental law and executive compensation/employee benefits law.

In this present environment, there appears to be a growing body of opinion that the outer limits of law-firm size may have been reached and that the law will not follow the accounting profession into the formation of a few giant firms that dominate the profession. Rather, it is thought to be more likely in the highly differentiated legal profession, that large business-law practice will increasingly diversify and experiment in firm organization and that lack of concentration will continue to be a principal feature of the profession.¹³⁴

¹³⁴ See Galanter & Palay, *supra* note 38, Table 7, at 123; see also S. Brill, The Law Business in the Year 2000, *American Lawyer* (Management Report, June 1989); D. Bradlow, The Changing Legal Environment, The 1980s and Beyond, *ABA Journal* (December 1988), at 72.

The professional ideal of a unitary profession, with its core body of knowledge, skills and values, common educational requirements and shared professional standards has, to a significant degree, survived the profession's profound transformation in the 1970s, 1980s and 1990s. It has survived despite the enormous pressures within and without the profession to capitulate completely to commercialization and to divide into a series of economic sub-markets in which separate groups of lawyers sell highly specialized legal services to different consumer groups.

It now appears, however, that the continuous-growth strategy of the large firms with their "up-or-out/promotion-to-partner" system will continue to give way to more bureaucratized, closely-controlled forms of law firm management that conform growth to actual increases in demand, but which recognize the effective limits of rationalization and standardization in the conduct of a corporate law practice with its inherent complexity and the inevitably personalized nature of the professional services involved.

Large firms are designing diverse firm-missions aimed at different clienteles, focusing on new specialties and coming to look less and less alike, thus beginning to display the same range of diversity in their practice as has been common for firms of lesser size all along. Galanter & Palay observe:

The big-firm form carried an inadvertent commitment to exponential growth, but that growth was sufficiently slow to be compatible for a long period with "professional" forms of governance. So law practice never suffered the separation of ownership from control; control of work by others was, in aspiration at least, only temporary. Compared to other business services, law remained relatively unconcentrated, decentralized, unbureaucratic, and worker-managed. As the

big firm becomes a less congenial vehicle, lawyers enjoy new opportunities to use their institution-shaping skills to reorganize the formats of professional work to make it produce the services and protections desired by society while making it fulfilling for those who do the work.¹³⁵

5. The Newly Pivotal In-house Counsel – In the early years of the 20th century, lawyers were employed by corporations as house counsel primarily in response to the increasing pervasiveness of governmental regulations that required frequent consultation with lawyers by corporate management, who sought legal advice from someone knowledgeable about the company's business and more aware than an outsider of the objectives of the enterprise. The in-house lawyer's role came to be seen in many companies as keeping the corporation free of legal trouble rather than getting the client out of trouble.¹³⁶ However, it was not until the New Deal legislation of the 1930s and World War II regulations that the continuing need for legal advice in virtually every area of business became so pervasive that almost all large companies created a law department.

The general movement to reduce the amount of legal work done by law firms and to bring more corporate legal work in-house began during the 1950s.¹³⁷ As corporate legal departments developed, their paramount concern increasingly became the cost-effective use of legal services. Allocating appropriate tasks internally to in-house counsel requires an analysis of the

¹³⁵ Galanter & Palay, *supra* note 38, at 138.

¹³⁶ See J. D. Donnell, The Corporate Counsel - A Role Study (1970), at 27-28.

¹³⁷ B. Lyne, The Pressure Is On, Nat. Law Jour. (Corporate Counsel Supplement, Sept. 9, 1991), at 51. See also 2. Johnstone & D. Hopson, Lawyers and Their Work, Chapter 6: Corporate Law Departments (1967).

cost-effectiveness of the alternatives. By the 1970s, this had become a major function of in-house counsel.

A 1991 survey of the general counsels of 350 major companies reported “intense pressure from management to reduce [legal] costs” and more than a quarter of the general counsels said that their own compensation was linked to controlling legal costs.¹³⁸ General counsels used outside firms in fields such as international legal matters¹³⁹ for European Community work, mergers and acquisitions, intellectual property, environmental work, real estate, bankruptcy and antitrust matters.¹⁴⁰

Indicative of the pivotal role now played by inhouse counsel of large corporations is their recent use of a technique taken from government contracting: issuing “requests for proposals” (RFPs) to law firms, asking them to specify in detail and at what cost how they would meet a company’s legal needs. Compared with a traditional “beauty contest” in which competing firms give hour or two-hour presentations, an RFP calls for a detailed written proposal, often followed by an in-person presentation.¹⁴¹

The enlarged role of corporate counsel has led Professor Geoffrey Hazard to opine that “the role of corporate counsel is among the most complex and difficult of those functions

¹³⁸ Lyne, *Id.* at 51.

¹³⁹ See W. S. Lipsman, American Corporate Counsel as In-House Advisers Overseas, ACCA Docket (Spring 1991), at 18.

¹⁴⁰ Lyne, *Id.* at 52.

¹⁴¹ Laurel-Ann Dooley, Law Firms Cope With Request for Proposals, National Law Journal, November 22, 1999, B1.

performed by lawyers [It] entails intrinsic ambiguities that must be worked through in the course of a day's work with far greater frequency than in most other practice settings. . . . Who is the client? How does a corporate lawyer deal with the duty to get 'all' the facts? What are the responsibilities among lawyers having different hierarchical positions within a law department?"¹⁴²

One consequence of the oversight of the work of law firms by in-house counsel has been to place a new focus upon how law firms manage their practice and the cost effectiveness of their work. A new PricewaterhouseCoopers L.L.P. survey of 1998 corporate law department spending forecasts an intensified conflict over money between law firms and corporate law departments. General counsel spent 6.4% more on hiring outside legal help in 1998 than in the previous year, at a time when in-house legal work cost a median of \$166 per hour compared with the \$250 per hour it cost to give work to the company's main outside firms. The study suggests that law firms associates who want to go in-house will find it harder to jump ship because of fewer jobs in corporate law departments. The PricewaterhouseCoopers partner who oversaw the survey of 251 law departments envisions a year in which firms' billable hours will take a beating as general counsel will seek to cut costs.¹⁴³

6. Lawyers for Government – The public role of the legal profession in the United States is reflected in the variety of relationships in which lawyers function: for government, in government, and with the support of government.

¹⁴² G.C. Hazard, Ethical Dilemmas of Corporate Counsel, 46 Emory L. Journal 1011-12 (1997).

¹⁴³ Business Watch, National Law Journal, January 31, 2000, at 134.

a. Private lawyers working for government

Traditionally, governments hired lawyers in private practice to represent the public interests involved. Gradually, more and more lawyers were employed as in-house counsel by government. Today the legal work of the larger governmental units has been brought “in-house” to be performed by full-time salaried employees, but there remains a substantial amount of the public’s legal work done by part-time and fee-charging private attorneys serving municipalities, school districts and special taxing districts.

According to the 1997 Census of Governments, there were 87,504 governments in the United States. In addition to the national and 50 state governments, the Census enumerated the following units of local government:¹⁴⁴

3,043	county governments (county, boroughs and parishes);
19,372	municipalities — providing general local government through municipal corporations (cities, villages and towns);
16,629	town governments (governmental divisions of states and counties);
13,726	school districts;
34,683	special taxing districts.

There are approximately 39,000 local government units with police powers in the United States. Of these, some 37,000 have populations of less than 10,000.¹⁴⁵ In these smaller units of government, it is customary to hire private attorneys on a part-time or a fee-work basis, just as it is for special taxing districts for schools, fire protection, water, libraries, sewers, waste disposal and other public services.

¹⁴⁴ U.S. Census Bureau, 1997 Census of Governments, vol. 1, at v.

¹⁴⁵ The Municipal Year Book 1997, at 114-152.

b. Lawyers employed in local, state and federal government (both elected and appointed to offices)

Salaried lawyers employed by local governments fill a variety of legal roles. Law enforcement and criminal justice are the quintessential functions of local government, generally led by a district attorney principally responsible for criminal prosecutions. In the early 1990s, the National District Attorneys Association estimated that there were 2,800 elected or appointed district attorneys and that there were between 20,000 and 22,000 district attorneys and assistant district attorneys in the United States.¹⁴⁶ Also part of the local criminal justice system are salaried attorneys serving in probation, parole and corrections.

On the civil side of local government, lawyers are employed in offices of county and city attorneys; by departments of education, city school boards and universities; in real property and land use regulation; defending against tort liability; for municipal highway and other construction projects; in welfare, health and hospital agencies; in bond financing and tax collection agencies as well as in civil rights and antidiscrimination enforcement.

The number of lawyers employed by local governments to handle this array of civil legal work in more than 5,000 governmental units has been estimated to be at least 50,000.¹⁴⁷

At the state level, the office of Attorney General is the center of legal activity and ordinarily a dominant employer of lawyers. However, the role of the Attorney General's offices in

¹⁴⁶ 1991 Report of the National Association of District Attorneys.

¹⁴⁷ This estimate is based on information provided by the National Institute of Municipal Law Offices (NIMLO), the *Municipal Yearbook* and the National Association of Counties (NACO).

the legal work of the departments and agencies of state government varies from state to state, making it difficult to develop an accurate count of the number of lawyers employed in the executive branches of state governments. The legislative branches are also a substantial employer of lawyers on both a part-time and a full-time basis, but again the number is not readily ascertained.¹⁴⁸

The 1995 Lawyer Statistical Report published by the American Bar Foundation counted 38,823 lawyers employed in state and local governments who were not part of the judicial branch.¹⁴⁹

At the federal level, lawyers have played a central role since the founding of the Republic in designing and administering the national government. As the role of the federal government grew, so did the number of lawyers employed by federal departments and agencies. Dean Erwin Griswold pointed out that the Federal Register in 1937, the first full year of its publication, filled 3,450 pages. In 1990 the total was 53,618 pages.¹⁵⁰

Subject to its inherent limitations in the count of government lawyers, the 1995 Lawyer Statistical Report counted 26,803 lawyers in federal departments and agencies who were not part of the federal judicial branch. Taken together, the local, state and federal governments employ

¹⁴⁸ The NYSBA staff estimates that between 12 and 15 percent of the 120,000 New York lawyers are government employees: 14,400 to 18,000. Letter from John A. Williamson, Jr., Associate Executive Director, February 23, 2000.

¹⁴⁹ Many lawyers employed by state and local units of government seem to find no purpose in providing listing information to the Martindale-Hubbell Directory, the basis of the Lawyer Statistical Report, suggesting that the figure is significantly less than the actual number of lawyers employed by state and local governments.

¹⁵⁰ E.N. Griswold, OuldFields, New Corne (1991), at 119.

7.65% of the lawyers in America counted in the 1995 Lawyers Statistical Report, just shy of the 8.3% employed in private industry.¹⁵¹

c. Lawyers in publicly supported programs

We have noted above in the section on “Lawyers for the poor,” the growth in federal funding since 1965 for local legal services programs, administered since 1975 by the Legal Services Corporation. Similarly noted, was the growth in support by state and local governments for criminal defense services provided by public defenders, legal aid offices and court-appointed defense counsel. While the annual cost to the public for these legal services to indigents exceeds one billion dollars, the 1995 Lawyer Statistical Report counted a modest 8,499 lawyers working as legal aid and public defender attorneys.¹⁵²

Within New York State, the pool of private lawyers willing to take indigents’ cases is reported to be seriously shrinking, which is attributed to the failure to change the rates paid since 1986 to court-appointed lawyers, New York is said to pay the second lowest rates in the nation, ahead only of Maryland.¹⁵³

¹⁵¹ 1995 Lawyer Statistical Report at 7.

¹⁵² *Id.*

¹⁵³ “Public defender ranks shrinking”, Poughkeepsie Journal, March 24, 2000, at 6A.

Chapter 4

Cooperative Arrangements With Other Professionals

1. Ad Hoc Cooperation Between Lawyers and Nonlawyer Professionals
2. Nonlegal Businesses of Law Firms and Dual Practitioners
3. Ancillary Businesses Conducted as Law Firm Subsidiaries
4. Ancillary Businesses in Which Autonomous Nonlawyers Have a Financial Interest
 - Ventures with Investment Advisers
 - Ventures with Accountants
5. Law Firms in Which Nonlawyers Have a Financial Interest.

It is well known that, in most cases in compliance with existing ethics rules, lawyers today regularly work with non-lawyers to provide integrated professional services to clients. We have found, however, that the evidence of such arrangements is largely anecdotal. No survey, scientifically conducted or otherwise, purports to cover all aspects of this question, or to address comprehensively even one of the various formats that exist for cooperation between lawyers and other professionals.

Lawyers engaged in cooperative activities with non-lawyer professionals do not always tout the arrangements in promotional materials,¹ and little is reported in the legal press as to

¹ We base this conclusion in large part on an examination of all of the Internet home pages of the 100 largest law firms in the United States and on a sampling of the 150 next largest firms (as ranked in the most recent (continued...))

the business and financial relationship between the lawyers and the nonlegal firms with which they have an affiliation. What evidence of a public nature does exist focuses chiefly on a relative handful of highly publicized business alliances between lawyers and nonlawyers.

1. Ad Hoc Cooperation Between Lawyers and Nonlawyer Professionals – It is generally understood that lawyers and non-lawyers cooperate informally on a routine basis in providing professional services to their respective clients. When needs arise, lawyers are quite capable of working effectively with other professionals, and frequently recommend that particular accountants, financial advisors, investment bankers, engineers, brokers, social workers, and others, be engaged by their clients. Whether made at the behest of the client or *sua sponte*, these referrals and working relationships are part of everyday professional life. They vary from ad hoc relationships, formed solely for the benefit and based on the needs of a particular client or group of clients, to ongoing cooperative working arrangements for various clients over a lengthy period of time.

2. Nonlegal Businesses of Law Firms and Dual Practitioners – Common among law firms are affiliations with providers of nonlegal services that could be considered ancillary to the practice of law. The closest of these affiliations occur in the context of law firms that actually employ other professionals to assist in providing certain services to firm clients. For example, patent lawyers routinely hire scientists and nonlawyer patent agents to work with them on client projects. Antitrust lawyers frequently employ economists to assist them in dealing with the economic issues

¹ (...continued)
NATIONAL LAW JOURNAL “250” survey).

and working with expert witnesses and other outside consultants. Many law firms have professional lobbyists on staff to assist them in governmental relations. Practitioners in the real estate tax certiorari or condemnation fields often employ appraisers who assist them in advocacy as to the values for specific properties. Elder law attorneys often employ social workers who serve their clients in conjunction with the legal services provided. Law schools recognize the interdisciplinary aspect of certain practice areas by offering joint degrees, for example, in law and social work.

Indeed, it is not uncommon for lawyers to be dually licensed professionals. Lawyer-accountants in 1964 formed their own association, the American Association of Attorney-Certified Public Accountants, which has as one of its purposes the protection of the rights of its members to practice both professions as they see fit.² In addition to lawyer-accountants, lawyers often practice, or are qualified to practice, a wide variety of other professions and callings, including real estate brokerage, insurance brokerage, financial planning, medicine, nursing, social work, and so on.³ The organized bar has only recently accepted dual practice by attorneys. For many years, the ABA took the position that the lawyer might use the non-legal occupation as a feeder to generate business for a legal practice, thereby circumventing the ban on third-party solicitation of clients.⁴ Advertising of dual professions was expressly prohibited under DR 2-102(E) of the ABA Model Code of

² See Brief of Amicus Curiae American Association of Attorney-Certified Public Accountants, Inc. in Support of Petitioner, *Ibanez v. State of Florida*, No. 93-639, at 14 (Feb. 28, 1994); Nassau County Ethics Op. 86-37.

³ See generally ABA/BNA Lawyers' Manual on Professional Conduct 81:2009, 81:3012-13 (1999) (collecting authorities); Jorge L. Carro & Lisa A. Martinez, *Ohio's Ethical Prohibition Against the Use of Dual Degrees in Letterheads: A Time for Change?*, 18 U. Dayton L. Rev. 63 (1992); New York State Ethics Ops. 711 (1999) and 687 (1997); New York County Ethics Op. 685 (1991); Nassau County Ethics Ops. 92-12 and 92-18; Los Angeles County Ethics Opinion 477 (1994).

⁴ See, e.g., ABA Informal Ethics Op. 1422 (1978); Alabama Ethics Op. 86-101; Ohio Informal Ethics Op. 88-2; Philadelphia Ethics Op. 87-22.

Professional Responsibility until 1980.⁵ New York was among those states that had originally declined to follow the restrictive ABA policy,⁶ which was abandoned in the course of adoption of the Model Rules of Professional Conduct and is now generally rejected by the legal profession.⁷

One recent and widely publicized example of a law firm operating a nonlegal business through its employees is that of Womble Carlyle Sandridge & Rice, of Winston-Salem, North Carolina, which created a Client Plus Technology Department consisting of 22 technology consultants who are employees of the firm, rather than of a subsidiary or other separate entity. The department helps clients manage multi-district mass tort litigation, and assists creditors and collection agencies cut the cost of recovering on bankruptcy claims.⁸

3. Ancillary Businesses Conducted as Law Firm Subsidiaries – In addition to instances in which nonlawyer professionals are employed by law firms (or in which individual lawyers are dual professionals) there are those instances in which law firms have created separate wholly owned entities through which to conduct ancillary businesses.⁹ A 1992 study by the *National Law Journal* reported that the nation's 250 largest firms at that time conducted over 50 ancillary businesses in such diverse areas as real estate development, management consulting, financial

⁵ See Chapter 12, Section 1.

⁶ See N.Y. County Ethics Op. 388 (1949); Note, *Attorneys Who Are Also Certified Public Accountants May Properly Practice Both Professions in the Same Office*. 63 Harv. L. Rev. 1457, 1458 (1950).

⁷ See ABA Informal Ethics Op. 83-1497 n.2; Massachusetts Ethics Op. 82-2; Michigan Ethics Op. CI-795 (1983); Texas Ethics Op. 406 (1983). See generally discussion in Chapter 12, Section 1.

⁸ See generally Darryl Van Duch & Edward Kensik, "Entrepreneurial Firms May Face Ethical Barriers," New Jersey Law Journal, Sep. 14, 1998, at 25.

⁹ See Thom Weidlich, "Law Firms Struggle to Define — and Describe — the Entity," National Law Journal, Dec. 21, 1992, at 32.

institution consulting, federal and state⁷ governmental affairs consulting, title insurance, management information services, public issues law and management, international trade consulting, employee benefits consulting, human resources consulting, financial planning, educational consulting, intellectual property consulting, environmental consulting, private judging and general business consulting.¹⁰

In 1986, the “Stanley Report” of the ABA Commission on Professionalism¹¹ bemoaned “what it perceived to be an increasing participation by lawyers in business activities.”¹² It found that law firms operated businesses that provided services ancillary to the practice of law, such as real estate development and investment banking, but that other lawyers engaged in businesses that had little or nothing to do with the practice of law.¹³

Today, there is anecdotal evidence that law firms throughout the country continue to own and operate ancillary business subsidiaries within the existing legal and ethical framework governing lawyers. Here are a few examples:

- The San Francisco-based Littler Mendelsohn firm, which concentrates its practice in management-side labor relations, established Employment Law Training, Inc. The

¹⁰ “Ancillary Businesses of the Nation’s 250 Largest Law Firms,” National Law Journal, Dec. 21, 1992, at 31. *See also* Thom Weidlich, “Ancillary Businesses Prospering Quietly,” National Law Journal, Dec. 21, 1992, at 1.

¹¹ American Bar Association, “...In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism,” 112 F.R.D. 243 (1986) (the “Stanley Report”).

¹² *Id.* Stanley Report, at 280-81.

¹³ *Id.* at 281.

subsidiary trains clients on how to minimize employment discrimination within their ranks.¹⁴

- Washington's Howrey & Simon has three subsidiaries: "Capital Environmental," which has 10 scientists and other specialists who provide risk analysis and assessments of environmental cleanup costs; "Capital Accounting," which has 15 accountants and assists litigants represented by the firm in measuring their damage exposure; and "Capital Economics," which has more than 30 economists and accountants who perform market analyses for mergers and acquisitions.¹⁵
- Detroit's Dickinson, Wright firm took 10 computer technicians it had recruited for its own internal purposes and created Technology Consulting Partners. The new entity helps businesses such as Chrysler Financial, Dollar Rent-a-Car and Thrifty Rent-a-Car manage their operations more efficiently.¹⁶
- Holland & Knight Consulting Inc., a wholly owned subsidiary of Holland & Knight LLP, includes a private investigation group, international translation operations, forensic accounting, real estate consulting, environmental consulting, corporate compliance program, maritime compliance programs and other services.¹⁷
- Richmond, Virginia based McGuire, Woods, Battle & Boothe formed a corporate consulting subsidiary to provide public lobbying, public relations and business relocation advice.¹⁸
- New York's Anderson Kill & Olick, which has an extensive practice in insurance coverage disputes, recently announced that it is forming an insurance coverage consulting business (Anderson Kill Insurance Services) to advise companies on subjects such as choosing appropriate policies and securing maximum recoveries in policy disputes without litigation. The subsidiary will employ insurance analysts,

¹⁴ See generally Darryl Van Duch & Edward Kensik, "Entrepreneurial Firms May Face Ethical Barriers," New Jersey Law Journal, Sep. 14, 1998, at 25 (discussing Littler Mendelsohn, Howrey & Simon and Dickinson Wright).

¹⁵ Id.

¹⁶ Id.

¹⁷ "Bundling Legal Services with Others Gets Mixed Reviews," The Business Journal, Feb. 25, 2000, at 26; see also www.hklaw.com/whoweare/ancillary/index.shtml.

¹⁸ T. R. Goldman & Dierdre Shesgreen, "Lobby Talk: McGuire, Woods Ventures Out," Legal Times, Jan. 19, 1998, at 4.

public adjusters, environmental engineers, risk managers and insurance “archaeologists,” among others.¹⁹

- The Mineola, New York firm of Ruskin, Moscou, Evans & Fatischek recently created Island Star Capital, an investment banking firm, to advise Long Island companies in mergers and acquisitions, to help them raise capital and to lend management expertise to early stage companies.²⁰

Thus, lawyers have long recognized that there are circumstances in which it is advantageous to them and to their clients to provide integrated professional services on certain matters, and have taken steps over the past several years to create entities, within or under the control of their firms, to provide such services.²¹

4. Ancillary Businesses in Which Autonomous Nonlawyers Have a Financial Interest – In contradistinction to ancillary businesses owned and controlled by lawyers or law firms are the relative handful of affiliations between lawyers and other professionals in which the non-lawyer professional is not an employee of the law firm or of a subsidiary of the law firm, and has an ownership or other direct financial interest in the nonlegal business venture.²² Public attention

¹⁹ See New York Law Journal, Jan. 11, 2000, at 1, col. 1.

²⁰ See Newsday, Feb. 21, 2000.

²¹ They have done so notwithstanding the fact that the American Bar Association has sent an ambiguous message to the bar by reversing its position at least twice on the question of lawyers operating ancillary businesses. See generally William B. Dunn, “Legal Ethics and Ancillary Business,” 74 Michigan Bar Journal 154 (Feb. 1995). See discussion in Chapter 12, Section 1.

²² The District of Columbia has permitted nonlawyer partners in law firms for several years. District of Columbia Rules of Professional Conduct, Rule 5.4(b) (“[a] lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if . . . the partnership or organization has as its sole purpose providing legal services to clients . . .”). See generally Randall Samborn, “Non-Lawyers as Firm Partners: D.C. Court Expected to Approve Long-Awaited Ethics Rule Change,” National Law Journal, Mar. 5, 1990, at 1.

was first called to these entities in 1997, and the few that have been created since then have attracted considerable media attention.

a. Ventures with investment advisers

On October 4, 1999, the Boston law firm of Bingham Dana LLP announced that it had established a joint venture with Legg Mason, Inc., a publicly traded firm that provides investment advisory, securities brokerage, investment banking and other financial services to clients worldwide, for the purpose of providing investment management and trust administration services for Bingham Dana's clients. Called Bingham Legg Advisers LLC, the new entity is owned 50-50 by Bingham Dana and Legg Mason, and continues the operations previously performed by Bingham Dana's Fiduciary Services Group. The former Director of the Fiduciary Services Group is now president of the LLC, and the account administrators and staff of the Fiduciary Services Group continued in their same roles in the new entity. In effect, Bingham Dana "spun off its Fiduciary Services Group into a new entity in which Legg Mason purchased a 50% interest for an undisclosed sum.

While it is not uncommon for law firms to offer their clients limited money-management services, this has been common in Boston where old-line families have often turned to law firms rather than banks to manage estates and trusts. The new venture was thus in line with past practice and apparently made business sense to both parties. On the one hand, it enhanced Bingham Dana's ability to provide trust administration and portfolio management services to its

clients as well as providing an unspecified influx of capital. On the other hand, it provided Legg Mason with greater access to high net worth families in Boston.²³

While the joint venture between Bingham Dana and Legg Mason marked the first such combination, it was not the first entity affiliated with a law firm to become a registered investment advisor. In 1998, the Boston law firm of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo formed a wholly owned subsidiary called Mintz Levin Financial Advisors, and hired a nationally known financial planner to provide investment advice and services to its clients.²⁴

b. Ventures with accountants

In 1997, the Washington, D.C. law firm of Miller & Chevalier announced a “strategic alliance” with the accounting firm then known as Price Waterhouse. Described as a “loose” affiliation, the alliance presented both firms with a non-exclusive source of business referrals and the ability to market themselves nationwide as being able to provide “seamless service” to their clients.²⁵ Similar alliances were formed during 1999 between KPMG, the 25-lawyer Chicago firm of Horwood Marcus & Berk Chtd. and the San Francisco-based 700-lawyer firm of Morrison &

²³ Steven Wilmsen, “Law Firm Partners With Broker,” *Boston Globe*, Oct. 5, 1999, at C6; “Legg Mason and Bingham Dana Form Joint Venture,” Legg Mason press release, Oct. 4, 1999 (on file).

²⁴ The Mintz Levin firm was one of the first to create subsidiaries to provide nonlegal services to clients. ML Global LLC, formed in 1996, advised clients on airport and seaport ventures, real estate issues and international business strategies. ML Strategies Inc., created in 1992, assisted clients on management issues in health care organization and compliance, public relations, government affairs and strategic planning. (These two wholly owned subsidiaries were merged in January 1999.) E. Douglas Banks, “Tocco Heads Up New Mintz, Levin Consulting Affiliate,” *Boston Business Journal*, Jan. 1, 1999, at 9.

²⁵ The Miller & Chevalier alliance prompted the first significant press coverage in the United States of the MDP issue and the activities of the “Big Six” accounting firms in other parts of the world. “Big Six Mobilize Legal Forces,” *International Tax Review*, April 1997, at 1; “Price Waterhouse Forms Alliance with US Law Firm,” *International Accounting Bulletin*, Feb. 27, 1997, at 4; Phillippa Cannon, “The Big Six Move In,” *International Financial Law Review*, Nov. 1997, at 25.

Foerster.²⁶ While the terms of the alliances are not public, the public announcement refers to an agreement by the participants to use their best efforts to refer clients to one another. To ensure that each participant is able to exercise independent professional judgment in choosing the best service provider for a particular client, the referral arrangement is said to be non-exclusive. The client is not required to engage the services of the recommended firm, and there may be circumstances (such as conflicts of interest) that preclude the recommended firm from accepting the matter. The law firms are reported to have also agreed to serve as counsel to KPMG in certain state and local taxation matters. No fees are shared, nor are referral fees to be paid.

5. Law Firms in Which Nonlawyers Have a Financial Interest.

In November 1999, an accounting firm and lawyers from an established law firm took a step beyond any prior joint venture between lawyers and nonlawyers and formed a new law firm called McKee Nelson Ernst & Young LLP in Washington, D.C.²⁷ William McKee and William

²⁶ Meera Somasundaram, "Local Law Firm Branches Out in Big 5 Link: Growing Services Under KPMG Deal," *Crain's Chicago Business*, Aug. 16, 1999, at 22; Marthan Neil, "As Firm Here Forges Alliance With CPAs," *Chicago Daily Law Bulletin*, Aug. 9, 1999, at 1; Sara Hazlewood, "Coalition Blurs Lines Between Law Firms, Accountants," *The Business Journal*, Aug. 13, 1999, at 6; Laura Impellizzeri, "S.F. Law's New Order," *San Francisco Business Times*, Aug. 20, 1999, at 1. The national firm of Holland & Knight LLP was originally announced as a participant in this venture but ultimately did not join. "KPMG Links Tax Practice to Morrison & Foerster," *International Tax Review*, Sept. 1999, at 5. Holland & Knight is no stranger to ancillary services, maintaining an Ancillary Professional Services Department (known as Holland & Knight Professionals) to provide technology services, translation services, government relations assistance, corporate relocation incentive assistance, employee benefits analysis, environmental services, corporate integrity services, and strategic planning advice, among other things, to clients of the law firm. Information derived from Holland & Knight LLP web site, URL www.hklaw.com/howeare/ancillary/index.shtml.

²⁷ See, e.g., Tom Herman, "Ernst & Young Will Finance Launch of Law Firm in Special Arrangement," *Wall Street Journal*, Nov. 3, 1999, at B10; Siobhan Roth, "Inside the Ernst & Young Deal," *The Recorder*, Nov. 10, 1999. Use of the Ernst & Young trade name as part of the firm name may or may not be permissible in the District of Columbia, depending upon whether it is viewed as deceptive or misleading to the public. District of Columbia Rules of Professional Conduct, Rules 5.4(b), 7.5(a); see District of Columbia Ethics Opinion 244 (1993) (permitting name of non-lawyer partner to be included in a law firm name assuming compliance with Rule 5.4(b)). McKee Nelson Ernst & Young is listed as part of Ernst & Young International in Ernst & Young (continued...)

Nelson both withdrew from the King & Spalding firm to create the new entity. According to press reports, Ernst & Young is providing “start-up” financing of an unspecified amount to the new firm but otherwise has “no financial interest” in the firm and “will not be involved” in its day-to-day management. Although the law firm will rent space from Ernst & Young, the offices of the firms will be physically separate, and the law firm’s files are said to be inaccessible to employees of the accounting firm.

* * *

The foregoing examples illustrate the extent to which lawyers, purportedly operating under existing legal and ethical strictures in their respective jurisdictions, particularly in the past several years, have affiliated in varying degrees with non-lawyer professionals in providing services to their clients.

²⁷ (...continued)
2000 Worldwide Corporate Tax Guide, at page 696.

Chapter 5

The Organization, Education and Maintenance of a Single American Legal Profession

In contrast to the divided bar in other common law countries and the diffuse character of lawyering in various civil law countries, the American legal profession over the last 200 years has evolved as a single profession, set apart and unified by its organization, education and common body of learning, as well as by acquired skills and adopted values associated with the profession. Law and medicine have been distinguished in this manner from other professions in the United States, including that of accountancy, which has never achieved an identity but has been splintered and spread into diffuse components.¹

Even in the early years of the nineteenth century, American lawyers had more in common than members of similar professions abroad. Although the traditions of the English legal professions deeply influenced this country, the distinction between barristers and solicitors never took root here. Neither did we follow the civil law systems, which tend to recognize advocates, notaries, judges and sometimes others as distinct professions. The main obstacle to unity, aside from the disorganization of lawyers in most states, was the existence of separate legal systems in each state, each with its own bar admission arrangements. Yet even this was counteracted to some extent by a shared common law heritage, by the mobility of lawyers along with other Americans, and by the increasing, unifying role of federal laws and federal courts.

¹ See Joint Public Hearing New York State Assembly on Proposed Amendments to the State Accountancy Statute, November 16, 1999.

In the 1870s a single identity for the American legal profession began to be framed in the organization of bar associations, first in a few major cities,² then in a few states,³ and in 1878 nationally with the establishment of the American Bar Association.⁴ At its organizational meeting, the ABA established a Standing Committee on Legal Education and charged it with developing a program which visualized a unitary legal profession with common admissions and educational requirements for the entire country.

Meanwhile, Christopher Columbus Langdell had left the practice of law in New York City and had become dean of the Harvard Law School, which at the time, along with a few other law schools, was striving to move into the mainstream of American university education and out of what

² New York in 1870, Cincinnati in 1872, Cleveland in 1873, St. Louis and Chicago in 1874, Memphis and Nashville in 1875, and Boston in 1876.

³ Dates of the initial organization of state bars:

1873	New Hampshire
1874	Iowa
	District of Columbia
1875	Connecticut
1876	New York
1877	Illinois
1878	Alabama
	Nebraska
	New Jersey
	Vermont
	Wisconsin
1880	Missouri
	Ohio

⁴ Some 75 lawyers from 21 states and the District of Columbia came together for the organizational meeting of the ABA in the upstate New York resort of Saratoga, in response to a call of the Connecticut Bar Association based on a resolution adopted a year earlier by the American Social Science Association that had commended the future of the legal profession to the emerging law schools of the country. See Goetsch, Essays on Simeon E. Baldwin, 24-30, cited by R.B. Stevens, Law School: Legal Education in America from the 1850s to the 1980s (1983) at 34; G. Carson, A Good Day at Saratoga (1978).

had been their subordinate educational role. The 1870s was the time that the university in America was beginning to flourish, the intellectual community was infatuated with the “new sciences” that were driving industrial development. Technical training became the badge of contemporary achievement. It was in such circumstances that Dean Langdell introduced the “case method” and began the promotion of legal education as the study of a “science,” with the “case method” providing the laboratory in which legal doctrines and principles could be explored and developed out of the opinions of appellate courts.⁵

While many schools continued the earlier methods of instruction, the Langdellian reorganization of legal education into an academic discipline acceptable to the university community assured law schools that adopted the Langdell model of a place in the modern university, at the same time that it presented the profession with an educational program for lawyers that could raise both the status and the standards of the bar.

The ABA upon its founding thus became a strong ally of the law schools in their efforts to establish their niche in American university education. In 1881 the ABA initiated what became a century-long campaign, passing a resolution recommending attendance at law school for three years and that all states give credit toward required-apprenticeships for time spent in law school. With bar leaders advocating that a type of academic law school was needed to control entry into the bar, a national alliance developed between the newly organized bar and the burgeoning law schools.⁶

⁵ See R.B. Stevens, Law School: Legal Education in America from the 1850s to the 1980s (1983), at 51 to 72.

⁶ *Id.* at 92-93.

Toward the end of the 19th century, the ABA called for the establishment of an organization of “reputable” law schools and in 1900 the Association of American Law Schools was founded with 32 charter-member schools. Membership was open to schools rather than individuals, and schools were required to meet certain minimum standards.⁷ For the next 14 years, AALS met regularly with the ABA until World War I, when the ABA heedlessly scheduled its annual meeting to conflict with the academic term.⁸

However, the separation of AALS meetings from those of the ABA beginning in 1915 breathed new vigor into the AALS. By 1920, its leadership, convinced that the schools could do little by themselves to raise requirements for admission to the bar, urged law faculties of the member-schools to work actively with the ABA in a standards-raising effort. With the active participation of a large body of law professors at the 1920 meeting of the ABA Section of Legal Education and Admissions to the Bar, a special committee on legal education was established chaired by the lawyer-statesman Elihu Root. The Root Committee reported in 1921 that “only in law school could an adequate legal education be obtained;” that two years of college should be required before admission to law school; and that the ABA should invest a council on legal education with

⁷ W.A. Seavey, The Association of American Law Schools in Retrospect, 3 *Journal of Legal Education* 153 (1950) at 157-58: the requirements for Association membership: (1) accept students for admission only who had a high school or equivalent education; (2) require 10 hours-a-week of instruction for at least two years; (3) only graduate students after an examination; and(4) provide students with access to a law library having reports of the state in which located and of the U.S. Supreme Court.

⁸ *Id.* at 160.

power to accredit law schools. The report was accepted by the Section, and Root and Chief Justice Taft piloted it to approval by the 1921 ABA convention.⁹

The Root Report was not without its critics, who argued that the standards-raising initiative was exclusionary and designed to drive out the intellectually less fashionable schools.¹⁰ Moreover, the notion of a unitary profession with a single standard of qualification was contrary to the position that Alfred Z. Reed, who conducted a series of studies of legal education and the legal profession sponsored by the Carnegie Foundation, espoused. Reed argued for a differentiated bar and for different types of law schools for lawyers of differing skills and qualifications to serve different purposes and different elements in society.¹¹

A salient accomplishment of the ABA during the early years of the 20th century, born of its relationship with the law schools, was to wrest legal education from the local control of the practicing profession and to place it increasingly in the law schools. When state-wide admissions standards were first prescribed by newly-established boards of law examiners in the late 19th century, it was common to require at least one year of law school preceded by two years in either a

⁹ See R.B. Stevens, *supra* at 115 and Seavey, *supra* at 161-62; cf. A.Z. Reed, Training for the Public Profession of Law (1921).

¹⁰ One aroused critic declared:
“I protest in the name of 111,000,000 people against so reactionary, so narrow, so unfair a position as says: ‘It matters not what your competency in every particular; if you did not acquire it in one of about a half dozen great endowed universities, then, not *prima facie*, but conclusively, you are unfit to represent your fellow citizens or to advise them upon their legal rights.’” 4 *American Law School Review* 682 (1921), cited by R.B. Stevens, *supra* note 5, at 125 (fn. 18).

¹¹ R.B. Stevens, *supra* note 5, at 114.

law office or a law school,¹² but the growing sentiment among legal educators, supported by the organized bar, led to the call for requiring that the entire three years be spent in law school, which ultimately became the rule.

Today, all but seven states require all applicants for bar admission to have graduated from a three-year law school program (or its part-time equivalent). California, Vermont, Virginia and Washington do permit law office study (for the few who wish it) to be a substitute for law school graduation, and Maine, New York, and Wyoming permit a combination of law school and law office study as a substitute for law school graduation.¹³

For the profession to create for itself an identity, it had not only to claim as its own a special body of learning and skills – for which the legal profession looked increasingly to the law schools – but it had also to embrace a core body of values which it could assert set members of the profession apart and justified their claim to an exclusive right to engage in the profession’s activities.¹⁴ In the next section of this report we will address the way in which that body of values formally embraced by the American legal profession has been articulated and enforced.

The result has been that to this time the American legal profession has succeeded to maintain its overall identity and in some respects to have come together as possibly a more unified profession than in the past. In 1880 only 552 of the more than 64,000 lawyers in America were

¹² If the applicant for admission were a college graduate, it was common to require a year less of “law” training. See, for example, the first New York State Admissions Standards prescribed in 1895. J. Newton Fiero, Albany Law School Semi-Centennial Remarks (1901).

¹³ See ABA Comprehensive Guide to Bar Admissions Requirements, 1999 at 10-12; in Alaska, a clerkship program is provided for by statute, but has not been implanted by the University of Alaska in recent years.

¹⁴ R. MacCrate “The Lost Lawyer” Regained: The Abiding Values of the Legal Profession, 100 Dickinson L. Rev. 587 (1996).

members of the ABA. In 1929 only 18% of the lawyers were ABA members. Today the ABA has approximately 405,000 members, which represents more than 40 percent of the lawyers in the country. Moreover, according to the ABA Redbook for 1999-2000, 28 independent organizations linked to the law and the justice system are formally affiliated with the ABA and have a representative who sits in the ABA House of Delegates. In addition, the vast majority of non-ABA members belong to State and local bar associations (with lawyers in at least 35 states required to belong in order to practice).

The bar of America is today a more organized and unified profession than at any time in its history, despite its great size and diversity in practice settings. Its aspired-for identity is now declared in the opening sentence of the Preamble to the Model Rules of Professional conduct:

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

The Preface to the Restatement of the Law Governing Lawyers opens with similar words that acknowledge the multiple sources of lawyer regulation:

Lawyers are regulated by moral, professional, and legal constraints in discharging their several responsibilities as representatives of clients, officers of the legal system, and public citizens having special responsibilities for the quality of justice.

The profession has successfully created for itself a loosely defined but distinct identity in learning, skills and values with which most lawyers can identify. Indispensable to that creation have been the organization of the bar and the development of formal legal education as the common gateway to the profession, as well as the universal control by the judiciary over entry providing a strongly unifying effect despite the ever-increasing diversity and extraordinary growth of the

profession. Maintaining such a unified profession has become a central feature and core value of the American legal profession.

Chapter 6

The Articulation and Enforcement of Professional Values

1. The Bar and the Courts
 2. The Multiple Channels of Professionalization
 - Rule-making
 - Academic instruction
 - Admission requirements and continuing legal education
 - Professional discipline
 - Litigation
 - Fostering professional culture
-

Two features distinguish the regulation and professionalization of the American bar from those of most other professions. First, lawyers shape their values and rules through unusually open and intense debate that extends beyond the organized bar. In particular, the profession has a special relationship with the courts, so that it is regulated - more actively than other professions - by persons who are both insiders and outsiders. Second, professional values are shaped and brought to bear through many forms of inculcation and enforcement. Both of these features have become more prominent during recent decades, as part of the increasing emphasis on the law and ethics of lawyering.

1. The Bar and the Courts – If debate leads to the triumph of right, the standards of American lawyers should be unusually enlightened. Its principles are not imposed from outside or worked out in private, but emerge from vigorous debate. Lawyers tend to be argumentative; and lawyers in the United States work and are trained in a tradition that sees lawyers, not as upholders of a fixed law that others have laid down, but as helping to remodel the law in the light of felt

necessities and public policy. The bar has tended to be relatively accessible to those not born into the elite, and in recent decades has increased in its racial, religious, ethnic and sexual diversity.¹ Its members work in many practice settings – large corporate firms, specialty boutiques, solo and small firm practice, government work, corporate law departments, public interest practice, academe – and are attuned to the concerns of many different clienteles.² Bar associations are no longer the preserve of elite white males.³ The American Bar Association contains sections and other groupings that freely express their viewpoints, and there are many other lawyers’ associations organized on the basis of geography, field of practice, or belief.

Debate about lawyers’ behavior and ideals extends beyond the practicing bar: state supreme courts in the United States claim the primary, and in some states the exclusive, power to regulate the legal profession.⁴ They promulgate rules, hear disciplinary proceedings, impose litigation sanctions, shape the law of privilege, malpractice and other matters, and in many states establish standards for bar admission and appoint enforcement personnel. The judges who exercise these powers have almost all practiced or taught law. They are members of the profession, respected as such by practicing lawyers, but members with a relatively objective viewpoint.

¹ See *supra*, Chapter 1 “The Salient Changes in the Demography.”

² *Supra*, Chapter 3 “The Differentiation in Practice Settings;” *see also*, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development-An Educational Continuum 29-102 (1992).

³ Michael I. Powell, *From Patrician to Professional Elite: The Transformation of the New York City Bar Association* (1988); John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar*, 234-41 (1982); Richard L. Abel, *American Lawyers* 45, 90, 100, 290 (1989).

⁴ Charles Wolfram, *Modern Legal Ethics* § 2.2 (1986).

This is a very unusual pattern of professional regulation. Nonlegal professions are either (if unrecognized by the state) self-regulating or (if recognized) subject to significant control by courts and legislatures in which members of the profession play small roles. In either case, their rules do not arise from the debate and interplay characterizing the American bar. In civil law nations, judges form a profession of their own and do not predominate in regulating lawyers.⁵ Even in England, where judges are chosen from among practitioners and at one time participated actively in the bar's regulation through the Inns of Court,⁶ their involvement has tended to decrease.

Although some might anticipate that former lawyers would not regulate lawyers very vigorously, courts have shaped and remade the law governing lawyers with considerable vigor. During recent decades, for example, courts legitimized group legal services, price competition, and lawyer advertising, against the opposition of much of the organized bar,⁷ recognized the rights of certain nonclients to sue lawyers for malpractice,⁸ modified the bar's proposed rule concerning

⁵ See, e.g., John Leubsdorf, *Man In His Original Dignity: Legal Ethics in France* (2000); Kenneth F. Ledford, *From General Estate to Special Interest: German Lawyers 1878-1933* (1996).

⁶ On barristers, see, e.g., J.H. Baker, *Judicial Review of the Judges as Visitors to the Inns of Court*, 1992 Public L. 411. Solicitors, although subject to court discipline, have now owed much of their regulation to judges, who of course were never solicitors themselves. Brian Abel-Smith & Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750-1965* (1967).

⁷ United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

⁸ Jay Feinman, *Economic Negligence*, ch. 9 (1994).

disclosure of proposed client wrongdoing,⁹ and (this time following ABA recommendations) instituted full-time disciplinary counsel to invigorate the disciplinary system.¹⁰

Judges have been relatively vigorous regulators because they know and care about the profession's needs and values, while at the same time enjoying a viewpoint partly outside it. Members of other professions, by contrast, have tended to be regulated either by their own organizations or by uninvolved outsiders who are likely to accept those organizations' diagnoses and proposals.

The central role of state supreme courts in regulating lawyers fosters dialogue and experimentation, but also creates problems in an age of multi-state and multinational transactions. The bar and its regulators have only begun to address the rights of lawyers to perform some acts in states where they are not admitted,¹¹ and the disciplinary standards and mechanisms applicable to

⁹ Thomas D. Morgan & Ronald D. Rotunda, 1999 Selected Standards on Professional Responsibility 133-42 (1999).

¹⁰ Commission on Evaluation of Disciplinary Enforcement, Law Regulation for a New Century 89-129 (1992).

¹¹ Compare Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Calif. 1998)(New York firm's initiation of California arbitration unauthorized practice) with Calif. Code of Civ. Pro. § 1282.4 (responding to Birbrower by authorizing similar behavior); see also Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir.), cert. den., 385 U.S. 987 (1966)(considering interstate federal law); Restatement of the Law Governing Lawyers § 3.

such lawyers.¹² Although there have been a few efforts to enforce national standards for lawyers,¹³ overall the tradition of state regulation continues.¹⁴

Like judges, others who help frame and enforce lawyers' standards often stand both within the profession and outside private practice. That is the case with law teachers and with many government officials, for example, the Antitrust Division lawyers who intervened in the group legal services and lawyer advertising debates.¹⁵ When legislatures legislate about lawyers, which in most states is infrequent,¹⁶ some of the many lawyer-legislators¹⁷ usually take the lead. Of course, non-lawyers also express their views about lawyers' rules and ideals, but often with the aid of lawyers of their own.¹⁸

¹² *E.g.*, Attorney Grievance Comm'n v. Hopp, 623 A.2d 193 (Md. 1993)(disciplining Maryland lawyer for California misconduct); Paramount Corp. v. QVC Network, 637 A.2d 34 (Del. 1994) (discussing Delaware discipline for Delaware misconduct by Texas lawyer); *see* ABA Model Rules of Professional Conduct, rule 8.5; Symposium, Ethics and the Multijurisdictional Practice of Law, 36 S. Tex. L. Rev. 657 (1995).

¹³ *E.g.*, In re American Airlines, Inc., 972 F.2d 605 (5th Cir. 1992) (ethical common law governs disqualification of lawyers in federal court action); In the Matter of John H. Gutfreund, Securities Exchange Act of 1934, Release No. 34-31554 (SEC 1992)(discussing duties of brokerage firm lawyer under federal law).

¹⁴ *E.g.*, Virginia Supreme Court v. Friedman, 487 U.S. 59 (1988) (striking down residence requirement for admission, but accepting that state may impose other requirements); 28 U.S.C. § 530B (federal government lawyers subject to state ethical standards).

¹⁵ Charles Wolfram, note 4 *supra*, at 40-41, 912-913.

¹⁶ For perhaps the most extensive set of statutes, *see* Calif. Business & Professions Code §§ 6067-6228. England and France, where circumstances are different, have recently passed far more comprehensive legislation. Courts and Legal Services Act 1990 (c. 41) (Eng.); Access to Justice Act 1999 (c. 22) (Eng.); Law no. 71-1130 of Dec. 31, 1971, amended by Law no. 90-1259 of Dec. 31, 1990 (France).

¹⁷ Charles Wolfram, note 4 *supra*, at 756-57, 751-53.

¹⁸ *E.g.*, Marc Galanter, Predators and Parasites: Lawyer-Bashing and Civil Justice, 28 Ga. L. Rev. 663, 667-68 (1994) (discussing HALT-Americans for Legal Reform, an "antilawyer" organization); Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law, 26 Hofstra L. Rev. 567 (1998) (discussing lobbying and the Restatement of the Law Governing Lawyers).

Because of the vigor with which the bar debates its values, and the active involvement of lawyers of varying viewpoints and views, one could expect lawyer standards to multiply and evolve. That is just what has happened in recent decades.

2. The Multiple Channels of Professionalization – Professional standards, emerging from a debate of many voices, are transmitted and enforced in many ways, which in turn interact with each other.¹⁹ Only an outline of this process can be given here.

a. Rule-making

The revision of standards for lawyering has accelerated in recent years. During the nineteenth century, a number of American lawyers tried to state the rules of their profession,²⁰ but the promulgation of standards for national acceptance occurred only after the American Bar Association was founded in 1878. The ABA's Canons of Professional Ethics of 1908 held the field for sixty years. Its successor, the Model Code of Professional Responsibility (1969) was followed after only fourteen years by the Model Rules of Professional Conduct (1983), and the ABA's Ethics 2000 project is now considering extensive changes to the Model Rules.

From revision to revision, these sets of rules have increasingly emphasized legal enforceability and de-emphasized moral exhortation.²¹ The Canons spoke of what a lawyer "should" or "has the right" to do; the Model Code contained both enforceable Disciplinary Rules and

¹⁹ See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799 (1992).

²⁰ David Hoffman, *Professional Department*, in *A Course of Legal Study* 324-34 (1817); George Sharswood, *An Essay on Professional Ethics* (1854); see M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition"*, 47 Kan. L. Rev. 793 (1999).

²¹ Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 Yale L.J. 1239 (1991).

aspirational Ethical Considerations; and the Model Rules are virtually all drafted as binding legal commands. The state Supreme Courts, moreover, by adopting versions of either the Model Rules or the Model Code as rules of court, have made them enforceable through disciplinary proceedings. And although comments to the Model Code and Model Rules disclaim any enforcement of their provisions through civil suits, courts hearing such suits have drawn on them to chart the duties lawyers owe their clients.²²

The content and scope of professional rules have also evolved from version to version. The Canons' emphasis on preventing lawyer advertising and price competition has gradually yielded to the facilitation of access to legal services.²³ Where the Canons stressed the lawyer as litigator, the Model Code and Model Rules have devoted more attention to the roles of lawyers as counselors, negotiators, arbitrators, lobbyists, and government officials.²⁴ Where the Canons gave only grudging recognition to law firms, the Model Rules begin to grapple with the problems they pose.²⁵

The process of formulating professional rules has become increasingly open to conflicting views and interests. The Canons, and to a great extent the Model Code, emerged full-grown from a small drafting committee; the Model Rules, by contrast, went through several publicized drafts, leading to public commentary and lobbying, to counterproposals, to changes in the

²² John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 *Rutgers L. Rev.* 101 (1995).

²³ See Richard L. Abel, note 3 *supra*, at 112-41(1989).

²⁴ See Model Rules 1.11, 1.12, 2.1, 2.2, 2.3, 3.8, 3.9.

²⁵ Canons 33; Model Rules 5.1-4.

drafts, and ultimately to revisions by the ABA House of Delegates.²⁶ Meanwhile, as already noted, state supreme courts have become increasingly willing to modify ABA rules before promulgating them, sometimes providing for public comment or committee reports to guide them.²⁷ The states, indeed, sometimes moved ahead of the ABA in dealing with such matters as discrimination and sexual harassment by lawyers,²⁸ activities of lawyers from abroad,²⁹ and discipline of law firms.³⁰

b. Academic instruction

Law school has been a central institution for the inculcation of lawyers' skills and values.³¹ With insignificant exceptions, all American lawyers share the three-year law school experience as their initiation into the profession.³² Even in the nineteenth century, this initiation might include not just training in legal knowledge and skills but also lectures on professional

²⁶ Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 *L. & Social Inquiry* 1 (1999); Geoffrey C. Hazard, Jr., note 21 *supra*; Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 *L. & Social Inquiry* 677 (1989); Proposed American Lawyer's Code of Conduct (rev. draft 1982).

²⁷ *E.g.*, *The Florida Bar Re: Amendments to Rules Regulating the Florida Bar*, 624 *So. 2d* 720 (Fl. 1993); Steven C. Krane, *Proposed Amendments to the Code of Professional Responsibility: A Continuing Process of Change*, 69 *N.Y. St. B.J.*, May/June 1997, at 42; *Massachusetts is Latest State to Adopt ABA Model Rules*, 13 *ABA/BNA Lawyers' Manual on Professional Conduct* 181 (1997).

²⁸ *E.g.*, *N.Y. Code of Prof. Responsibility*, DR 1-102(A)(6), 5-111; *Colo. Rules of Prof. Conduct*, rule 1.2.

²⁹ 22 *N.Y.C.R.R.* §§ 521.1-.8 (permitting foreign lawyers to register as legal consultants).

³⁰ *N.Y. Code of Prof. Responsibility*, DR 1-104; *N.J. Rules Prof. Conduct*, rule 5.1(a).

³¹ *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum* 111-14 (1992).

³² Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983).

behavior, with formal legal ethics courses appearing in the early twentieth century.³³ No doubt, teachers incorporated instruction in how lawyers should behave into other courses, especially after the Council on Legal Education for Professional Responsibility fostered the institution of clinical legal education starting in 1968.³⁴

Since 1974, American law schools have been required, as a condition for ABA accreditation, to educate students in professional responsibility.³⁵ Although some schools rely on the “pervasive method,” in which all teachers are expected to include professional responsibility in their courses, most schools require students to take a two or three credit course in the subject.³⁶ With the recent help of the Keck Foundation, law teachers have developed a variety of ways to teach and enrich the course.³⁷ The content of the course also varies, at least in emphasis: some teaching materials stress the Model Rules or the broader law of lawyering, while others pursue more philosophical, moral or religious approaches.³⁸

³³ Michael J. Kelly, *Legal Ethics and Legal Education* 7-21 (1980); LeRoy L. Lamborn, *Legal Ethics and Professional Responsibility* (1973); authorities cited note 15, *supra*.

³⁴ *Clinical Education for the Law Student* (1973).

³⁵ ABA Standards for the Approval of Law Schools, standard 304(a)(iv) (as amended August 1974).

³⁶ *See* Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (2d ed. 1998).

³⁷ Symposium, *Teaching Legal Ethics*, 58 *Law & Contemp. Probs.*, Nos. 3 & 4 (1995); *see* Report of the Professionalism Committee, *Teaching and Learning Professionalism* (1996); *Teaching and Learning Professionalism: Symposium Proceedings* (1997).

³⁸ Compare Geoffrey C. Hazard, Jr., Susan Koniak & Roger Cramton, *The Law and Ethics of Lawyering* (3d ed. 1999); John F. Sutton, Jr. & John S. Dzienkowski, *Cases and Materials on the Professional Responsibilities of Lawyers* (1989) *with* Thomas L. Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics* (1985); Daniel R. Coquillette, *Lawyers and Fundamental Moral Responsibility* (1995).

In addition to presenting students with problems and rules they will face when they enter practice, requiring instruction in professional responsibility has also given rise to a group of academics with a scholarly interest in the subject, and hence to a burgeoning literature. Some of this literature is directed to practicing lawyers, some to students, some to rule-makers and reformers, and some to other scholars. Much of it, arising from a perspective more or less removed from practice, takes a more critical and reformist view of existing law and behavior than did traditional writing – or rather, takes several more critical and reformist views, for the criticism and reform proposals come from different directions.³⁹ The professorate has thus helped rule-makers to rethink the rules, and indeed some of the leading recent rule-makers have themselves been professors. This strong academic involvement distinguishes the United States from other countries such as England and France, in which there has been little university teaching of professional responsibility.⁴⁰

c. Admission requirements and continuing legal education

To be admitted to the bar, an applicant must not only graduate from law school but also be appraised for “good moral character” and pass the jurisdiction’s bar examination.⁴¹ The examination, of course, is meant to ensure that lawyers possess legal knowledge and the ability to apply it. The great majority of jurisdictions now also include in their examinations the Multistate

³⁹ See John Leubsdorf, *Three Models of Professional Reform*, 67 *Cornell L. Rev.* 1021 (1982).

⁴⁰ Andrew W. Boon & Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* 152-72 (1999); Jean-Claude Masclet, et al., *Legal Education and Training in Europe: France*, 2 *Int’l J. Leg. Prof.* 7 (1995).

⁴¹ Charles Wolfram, note 4 *supra*, at 198-202, 858-64.

Professional Responsibility Examination (MPRE) or a comparable test on local rules.⁴² The MPRE began in 1980 as an examination on the ABA's Model Code and Model Rules, but is now expanding to include other aspects of the law of lawyering.⁴³ The bar admission and membership renewal process provides an opportunity for regulators to gather information about lawyers, to ensure that regulators and others can ascertain their whereabouts, and to collect fees that fund the regulatory system.

In addition to seeking to ensure that those who enter the profession will know its rules, lawyers and judges have taken measures to train new practitioners through transition education⁴⁴ and to refresh experienced practitioners' familiarity with professional standards as they evolve. Organized continuing legal education supplements the professional reading that diligent lawyers have always undertaken. Nationwide organizations such as ALI-ABA and the Practicing Law Institute as well as organizations in individual states have long offered courses in a variety of legal subjects, including professional responsibility.⁴⁵ Since Minnesota required lawyers to take such

⁴² ABA/BNA Lawyers' Manual on Professional Conduct 21:601-02; Comprehensive Guide to Bar Admission Requirements 20 (1999).

⁴³ Robert M. Jarvis, An Anecdotal History of the Bar Exam, 9 Georgetown K. Legal Ethics 359, 384-85 (1996); Leslie C. Levin, The MPRE Reconsidered, 86 Ky. L.J. 395, 409-11 (1997).

⁴⁴ Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development-An Educational Continuum 273-304 (1992).

⁴⁵ Paul A. Wolkin, ALI-ABA...XL! (1988); CLE and the Lawyer's Responsibilities in an Evolving Profession (1998).

courses in 1975,⁴⁶ other states have followed suit, and in about eighteen states professional responsibility is a required subject.⁴⁷

d. Professional discipline

In the last two decades, the proportion of American lawyers disciplined each year has increased from about one tenth of one percent to more than six times that rate in 1995. In that year, disciplinary authorities investigated about 10 complaints for each one on which sanctions were imposed.⁴⁸ Traditionally, the usual grounds for discipline have been gross misconduct such as committing a crime or taking a client's money, but discipline is now imposed for other offenses as well.⁴⁹

The increase in the percentage of lawyers disciplined seems to reflect an increase in enforcement efforts rather than one in lawyer misconduct. Until the early 1970s, enforcement efforts were usually perfunctory, although no more so than those of other professions.⁵⁰ In 1970, the ABA's Clark committee, named for retired Justice Tom Clark who served as its chair, vigorously criticized the disciplinary system and proposed reforms, most of which have been adopted by state supreme

⁴⁶ Sheran & Harmon, *Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges as a Condition for the Maintaining of Professional Licensing*, 44 *Fordham L. Rev.* 1081 (1976).

⁴⁷ 22 N.Y.C.R.R. pt. 1500 (1999); ABA/BNA *Lawyers' Manual on Professional Conduct* 21:3004-13.

⁴⁸ Charles W. Wolfram, note 4 *supra*, at 80; American Bar Association, *Survey on Lawyer Discipline Systems*, 1995, at 5, 12 (1997).

⁴⁹ *E.g.*, *In re Forrest*, 730 A.2d 340 (N.J. 1999)(failure to disclose client's death); *In re Yarborough*, 1999 S.C. Lexis 94 (S.C. 1999)(sexual overtures to client); note 50, *infra*.

⁵⁰ Richard Abel, note 3 *supra*, at 143-50 (asserting little subsequent improvement); Mark & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 *U. Ill. L. Forum* 193; Hedvah L. Shuchman, *Self-Regulation in the Professions: Accounting, Law, Medicine* 41-50, 139-60, 229-34 (1981).

courts.⁵¹ Most states now have full time disciplinary staffs ranging from three to 297 persons, significant disciplinary budgets, and reasonably prompt procedures.⁵² The ABA has adopted model rules for disciplinary procedures and sanctions, and its McKay Report proposes further improvements.⁵³

In addition to promoting compliance by deterrence and by removing some offenders from the profession, the disciplinary system also helps educate the bar about what the rules require. The names and offenses of offenders are usually made public when discipline is imposed – which is not the case in some professions – and often even earlier, when officials have found probable cause to proceed.⁵⁴ Often, a full opinion of an appellate court announces the discipline and explains its grounds. When a decision is unexpected or involves a prominent lawyer, it receives publicity in professional publications.⁵⁵ Indeed, a number of disciplinary proceedings have led to important

⁵¹ ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations (1970).

⁵² American Bar Association, Survey on Lawyer Discipline Systems, 1995 (1997).

⁵³ ABA Model Rules for Lawyer Disciplinary Enforcement (1989); ABA Standards for Imposing Lawyer Sanctions (1986); Report of the Commission on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century (1992).

⁵⁴ *Id* at 33-34, 117-20.

⁵⁵ *E.g.*, In re Himmel, 533 N.E.2d 790 (Ill. 1988) (discipline for failing to report another lawyer's misconduct); In re Fordham, 668 N.E.2d 816 (Mass. 1996), *cert. den.*, 519 U.S. 1149 (1997) (discipline of hourly fee lawyer for devoting too many hours to criminal defense); Lisa G. Lerman, Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers, 12 Georgetown J. Legal Ethics 205 (1999) (billing fraud by large firm lawyers).

precedents on the rights and duties of lawyers.⁵⁶ A supreme court's disciplinary practice, such as invariable disbarment for lawyers who knowingly use client funds, also becomes widely known.⁵⁷

The organized bar helps to expound and publicize the requirements of disciplinary rules by publishing ethics opinions applying the rules to specific situations. The ABA, state bar associations, and some county and city bar associations have ethics committees whose members, most of them practicing lawyers, issue hundreds of opinions every year.⁵⁸ A lawyer facing a problem can often seek such an opinion for his or her guidance. In a few states, the state Supreme Court appoints an ethics committee or hears appeals from some of its rulings, giving committee opinions quasi-official status.

e. **Litigation**

Like disciplinary proceedings, litigation has provided many opportunities for courts to expound and enforce professional norms. The knowledge and concern that judges bring to the legal profession has made their involvement more intense than it has been for any other profession. The bar, for its part, recognizes the authority of the courts and is accustomed to studying their opinions. And of course the participation of lawyers in court proceedings has multiplied the occasions for judicial involvement, as well as the incentives for lawyers to heed judicial

⁵⁶ *E.g.*, *In re Primus*, 436 U.S. 412 (1978) (lawyer's First Amendment right to solicit for unpaid public interest case); *In re Ryder*, 263 F. Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967) (lawyer may not place criminal suspect's gun and stolen property in safe deposit box).

⁵⁷ *E.g.*, Kevin H. Michels, *New Jersey Attorney Ethics* 934-44 (1998).

⁵⁸ *E.g.*, ABA/BNA *Lawyers' Manual on Professional Conduct, Ethics Opinions 1991-1995*; Charles Wolfram, note 4 *supra*, at 65-67; Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 U.C.L.A. L. Rev. 67 (1981).

pronouncements. Ordinary civil litigation, as well as a scattering of law reform⁵⁹ and criminal proceedings,⁶⁰ thus contributes powerfully to regulate the legal profession.

Claims of legal malpractice, if less publicized than the medical malpractice boom, have in past decades become frequent enough to distress the bar, but also to influence its behavior.⁶¹ Clients' malpractice suits almost always include claims that lawyers have failed in competence or diligence, and thus help to ensure that lawyers will provide quality services. They often also allege breach of professional norms such as those forbidding conflicts of interest.⁶² Violating other professional standards may subject a lawyer to other remedies, such as rescission of a lawyer-client business transaction that the lawyer cannot prove to be fair,⁶³ or in some jurisdictions enhanced remedies under consumer protection statutes.⁶⁴ In dealing with these various claims, courts often hear expert testimony on professional standards and rely on those standards in shaping their rulings.⁶⁵ The lessons for lawyers that client suits inculcate are disseminated through the professional media,

⁵⁹ E.g., Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (striking down minimum fee scales under Sherman Act); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976)(holding violative of First Amendment rule limiting lawyers' comments on pending cases).

⁶⁰ Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *Fordham L. Rev.* 327 (1998).

⁶¹ Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 *Vand. L. Rev.* 1657 (1994); ABA Standing Committee on Lawyers' Professional Liability, *Characteristics of Legal Malpractice* (1989).

⁶² E.g., Re v. Kornstein Veisz & Wexler, 958 F. Supp. 907 (S.D.N.Y. 1997) (conflict of interest; liability for breach of fiduciary duty); 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 15.18 (4th ed. 1996).

⁶³ *Id.* at §§ 14.21-23.

⁶⁴ E.g., Doucette v. Kwiat, 467 N.E.2d 1374 (Mass. 1984) (liability for overcharging); Lucas v. Nesbitt, 653 S.W.2d 883 (Tex. Civ. App. 1983)(liability for misrepresentation and failure to file proper pleading).

⁶⁵ *Restatement of the Law Governing Lawyers* § 52; John Leubsdorf, note 22 *supra*.

for example through “preventive malpractice” publications explaining how lawyers can best avoid liability.⁶⁶

Fee disputes between lawyers and clients likewise help to propagate and enforce professional requirements. The law governing these disputes not only forbids unreasonably high fees but also incorporates various ancillary rules arising out of the lawyer’s obligations as a fiduciary.⁶⁷ For example, a lawyer who seriously breaches duties owed to a client may forfeit the right to compensation.⁶⁸ Other law allows clients to sue for the refund of fees already paid, imposes burdens of justification on lawyers, and entitles clients in some states to require their lawyers to arbitrate fee disputes.⁶⁹

Nonclients as well as clients can sue lawyers in certain circumstances, in the process helping to develop and enforce the limits on lawyer adversarial behavior. The privity doctrine, which formerly forbade nonclient suits for negligence,⁷⁰ has yielded to recognitions that suits should sometimes be allowed, for example, when a lawyer’s negligent opinion letter misleads its nonclient

⁶⁶ E.g., A.B.A. Standing Committee on Lawyers’ Professional Liability, *The Lawyer’s Desk Guide to Legal Malpractice* (1992).

⁶⁷ Restatement of the Law Governing Lawyers §§ 34-43. *But see* Stephen Gillers, *Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers*, 10 *Georgetown J. Legal Ethics* 581 (1997).

⁶⁸ Restatement of the Law Governing Lawyers § 37.

⁶⁹ *Id.* § 42; Alan S. Rau, Resolving Disputes Over Attorneys’ Fees: The Role of ADR, 46 *S.M.U.L. Rev.* 2005 (1993).

⁷⁰ E.g., National Savings Bank v. Ward, 100 U.S. 195 (1879).

recipient.⁷¹ Nonclients can sometimes invoke other causes of action as well.⁷² When courts determine that lawyers are liable to nonclients, they necessarily decide where a lawyer's duty to advance a client's interests is limited by the legitimate concerns of others. These conflicts are frequently difficult and controversial, so that they attract much professional attention. For example, the Kaye, Scholer litigation, in which a bank regulatory agency charged a large New York firm with concealment and misrepresentation and proceeded to freeze its assets, led to much debate on the duties of lawyers dealing with agencies in situations not involving litigation.⁷³

Even when lawyers are not parties to litigation, court decisions frequently expound and enforce professional values. We owe to such decisions much of the law on such matters as conflicts of interest,⁷⁴ direct communications with represented parties,⁷⁵ and, of course, the attorney client privilege.⁷⁶ The courts' power to sanction parties and their lawyers for litigation misconduct⁷⁷ likewise helps shape lawyers' behavior.

⁷¹ Restatement of the Law Governing Lawyers § 51.

⁷² *E.g.*, Heintz v. Jenkins, 514 U.S. 291 (1995) (Fair Debt Collection Practices Act); Rubin v. Schottenstein, Zox & Dunn, 143 F.3d 263 (6th Cir. 1998) (securities acts liability for misrepresentation); Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 343 N.E.2d 278 (N.Y. 1975) (abuse of process).

⁷³ Symposium, In the Matter of Kaye, Scholer, Fierman, Hays & Handler, 66 S. Cal. L. Rev. 985 (1993); The Attorney-Client Relationship After Kaye, Scholer (P.L.I. 1992).

⁷⁴ *E.g.*, T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953) (lawyer may not sue former client in matter substantially related to matters in which lawyer represented client).

⁷⁵ *E.g.*, Niesig v. Team I, 558 N.E.2d 1030 (1990) (application of rule to employees of corporate client).

⁷⁶ *E.g.*, Upjohn Co. v. United States, 449 U.S. 383 (1991) (communications by employees of corporate client):

⁷⁷ *E.g.*, 28 U.S.C. § 1927; Fed. R. Civ. P. 11, 37.

Recent years have brought efforts to understand and systematize these and other means of professional regulation.⁷⁸ The American Law Institute, after many drafts and meetings, is now on the verge of publishing its Restatement of the Law Governing Lawyers, which attempts to organize, clarify, improve and disseminate bodies of law covering a variety of subjects and remedies.⁷⁹ The Restatement in turn seems likely to influence the Ethics 2000 Commission's reconsideration of the ABA Model Rules,⁸⁰ providing another example of the interplay between the bar and the courts in remodeling professional values.

f. Fostering professional culture

Lawyers' own customs, expectations and ideals influence their behavior. A profession whose models are lawyers such as Abraham Lincoln, Louis Dembitz Brandeis and Thurgood Marshall will differ from one that looks back only to Howe and Hummel.⁸¹ Although lawyers often transmit professional culture informally or by example, the process has not gone wholly unrecorded.

Apprenticeship traditionally introduced lawyers to the skills and values of their profession.⁸² The spread of formal legal education did not remove the need for further training,

⁷⁸ See David B. Wilkins, note 19 *supra*.

⁷⁹ Restatement of the Law Governing Lawyers (Proposed Final Drafts No. 1 (1996) and 2 (1998); Tentative Draft No. 8 (1997); ALI Completes Restatement on Lawyers, Gives Final Approval to All Sections, 14 ABA/BNA Lawyers' Manual on Professional Conduct 211 (1998).

⁸⁰ See the Commission's proposals at <http://www.abanet.org/cpr/e2k/drafrules.html>.

⁸¹ Richard H. Rovere, *Howe & Hummel* (1947) (describing turn-of-the-century New York firm known for blackmail and other misbehavior).

⁸² Robert Stevens, note 32 *supra*.

which many firms continued to provide.⁸³ Some bars have also introduced counseling programs through which lawyers can seek advice outside their firms.⁸⁴ In many firms, ethics partners or an ethics committee provide a similar resource, as well as a forum for resolving disputes about the conduct of firm lawyers.⁸⁵ Malpractice insurers' risk prevention departments and other risk reduction consultants have helped lawyers develop office procedures to assure competent and ethical service.⁸⁶

The bar engages in a variety of voluntary activities promoting professional culture and values. Firms and bar associations, for example, have promoted pro bono representation.⁸⁷ Many bar associations disseminate publications to the bar and public, advocate improvements in the law, arrange colloquia and continuing education activities, offer fee arbitration services, and support a variety of specialized committee work.⁸⁸ Most states have integrated bars, to which all lawyers must belong and pay dues, and which pursue both these activities and others already mentioned, such

⁸³ See 2 Robert T. Swaine, *The Cravath Firm and Its Predecessors 1819-1948*, at 1-8, 124-32 (1948); Theodore Voorhees, *On Training Associates* (1989).

⁸⁴ E.g., Mass. Rules of Prof. Conduct, rule 1.6(c) (providing for confidentiality for lawyer assistance programs); Linda McDonald, *Legal Education and the Practicing Bar: A Partnership of Reality*, in *MacCrate Report-Building the Educational Continuum* (1993) (New Mexico mentor system).

⁸⁵ Report of the Professionalism Committee, *Teaching and Learning Professionalism* 29, 33 (1996); Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. Colo. L. Rev. 329 (1995).

⁸⁶ E.g., Robert O'Malley, *Preventing Legal Malpractice in Large Law Firms*, 20 U. Tol. L. Rev. 325 (1989); John A. Edginton, *Managing Lawyers' Risks at the Millennium*, 73 Tul. L. Rev. 1987 (1999).

⁸⁷ E.g., *The Law Firm and the Public Good* (R.A. Katzmann ed. 1995).

⁸⁸ E.g., Michael J. Powell, note 3 *supra*; Terence C. Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* 145-283 (1987); see generally the N.Y. State Bar Journal.

as drafting, interpreting and helping enforce professional rules.⁸⁹ In other states, the state supreme court collects fees from lawyers to fund the disciplinary system and other core functions, while bar associations conduct other activities, a model which has become more attractive since constitutional and political challenges have somewhat inhibited integrated bars.⁹⁰

The law of lawyering has begun to encourage law firms to foster proper professional practices. The Model Rules require lawyers, on pain of discipline, to institute measures and assert their authority to ensure that lawyers and non-lawyers in the firm conform to the requirements of the rules.⁹¹ A few states have authorized discipline of firms as well as of individual lawyers.⁹² A firm's vicarious liability for the malpractice of its lawyers encourages preventive measures, at least in firms organized as traditional partnerships, in which all partners are personally liable.⁹³ Courts have begun to provide remedies for whistle-blowing lawyers against their employers.⁹⁴

⁸⁹ Lathrop v. Donohue, 367 U.S. 820 (1961) (upholding compulsory membership); Terry Radtke, *The Last Stage In Reprofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934-1956*, 81 Marq. L. Rev. 1001 (1998); Ted Schneyer, *The Incoherence of the Unified Bar Concept*, 1983 Am. Bar. Found. Res. J. 1.

⁹⁰ Keller v. State Bar of California, 496 U.S. 1 (1990) (entitling dissenters to refund of part of integrated bar dues used for certain political activities); *In the Matter of the State Bar of Wisconsin*, 485 N.W.2d 225 (Wis. 1992) (discussing options for organizing bar activities); David Luban, *The Disengagement of the Legal Profession: Keller v. State Bar of California*, 1990 Sup. Ct. Rev. 163; Mike McKee, *And Then There Were None*, *The Recorder*, May 11, 1999, at 1 (describing struggle to restrict California State Bar).

⁹¹ ABA Model Rules of Professional Conduct, rules 5.1, 5.3.

⁹² Authorities cited note 30 *supra*; Ted Schneyer, *Professional Discipline for Law Firms*, 77 Cornell L. Rev. 1 (1999).

⁹³ Restatement of the Law Governing Lawyers § 58.

⁹⁴ Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992) (law firm associate); General Dynamics v. Superior Court, 876 P.2d 487 (Cal. 1994)(in-house counsel). *But see* Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998).

Pressure of clients and competitors, although not likely to promote all professional values,⁹⁵ constitutes a powerful impetus for lawyers to provide competent and economical services. Even relatively unsophisticated clients tend to do better if they take an active role in their cases.⁹⁶ The law has moved away from the model in which virtually all decisions were left to the lawyer, albeit without renouncing the lawyer's power and duty to act ethically regardless of client wishes,⁹⁷ and many clients have become more assertive. The Supreme Court has likewise fostered competition among lawyers by forbidding price fixing⁹⁸ and legitimating advertising.⁹⁹ These decisions have, in turn, vastly increased the amount of information about lawyers, law firms and legal services that circulates through the professional and general press, so that both clients and lawyers are better informed than ever before about lawyer behavior and misbehavior. The promulgation and enforcement of professional norms thus takes place in conditions of increasing openness and participation.

⁹⁵ See Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (1997) (describing pressure to mislead clients).

⁹⁶ Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (1974).

⁹⁷ Restatement of the Law Governing Lawyers §§ 21-23.

⁹⁸ Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (forbidding minimum price scale); see National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978) (invalidating professional rule against price bidding).

⁹⁹ E.g., Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (price advertising); Shapiro v. Kentucky Bar Assoc., 486 U.S. 466 (1988) (targeted mail); Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990) (credentials advertising).

PART TWO

THE CHALLENGES TO MAINTAINING A SINGLE PUBLIC PROFESSION OF LAW

Chapter 7

Marketing Legal Services as Part of a Multidisciplinary Practice

1. The Metamorphosis in the Accounting Profession
2. The “Big Five” Phenomenon
3. The Regulation Today of the Discipline of Accountancy
4. Lawyer Recruitment and Employment by Accounting/Professional Services Firms

The Committee’s study project of nonlawyer involvement in the practice of law (see Introduction to this report) examined the historical relation between the professions of law and accountancy and the recent movement among the largest accounting firms to expand the professional services they provide and to market legal services as part of what they refer to as a “multidisciplinary practice” under the banner of “one-stop shopping.” In this chapter, we review the major restructuring of the largest accounting firms through the 1980s and ‘90s, the effects of that restructuring upon the regulation of the accounting profession today, and the recruitment of lawyers by these organizations managed and controlled by nonlawyers.

1. The Metamorphosis in the Accounting Profession

- a. **Pre-1950s**

Although the art of bookkeeping is of ancient origin, the accounting profession is relatively young. In the United States, the profession dates back to the 1880s. The rise of this

profession is associated with the industrial revolution, that prompted entrepreneurs to raise investment capital from banks and other investors. The providers of funding, especially those from abroad, demanded reliable financial reports, and as a result some English accountants established themselves here.¹

The accounting profession evolved in two distinct forms. First came voluntary associations, then state licensure. New York provided leadership in both forms; other states followed suit quickly. The first voluntary professional accounting society in the United States was the Institute of Accountants and Bookkeepers, established in New York in 1882. The first multistate voluntary association was the Federation of Societies of Public Accountants, established in 1902. The American Institute of Accountants (predecessor of today's American Institute of Certified Public Accountants) was formed in 1916.

As regards state licensing of accountants, New York adopted the first statute in 1896. The first model state accountancy law was proposed in 1916. By 1921, all states had enacted statutes for licensing accountants. The title "Certified Public Accountant" ("CPA") was reserved to individuals who had demonstrated their competence and received state licenses to use that title. Other individuals were allowed to describe themselves as "accountants" or "bookkeepers" and to perform many of the same functions as CPAs.

In the early years, the accounting profession adopted standards of etiquette similar to those of the legal profession, including prohibitions against advertising and solicitation. These

¹ See generally Gary John Previts & Barbara Dubis Merino, *A History of Accounting in America* (John Wiley & Sons, Inc., 1979), John L. Carey, *The Rise of the Accounting Profession: From Technician to Professional 1896-1936* (1969).

standards were promulgated, either in the codes of ethics of voluntary associations, or in the licensing statutes, or both.² As noted below, the prohibitions against advertising and solicitation were invalidated by a series of Supreme Court decisions, starting in 1977.

Until the 1929 stock market crash and its aftermath, accounting and auditing were generally perceived to be a single subject. After the crash and the adoption of the federal securities laws, auditing standards received separate emphasis. Public opinion and the Securities Exchange Commission induced the profession to start establishing uniform standards for financial statements and to require auditors to be independent from those they audited.

In addition to providing accounting and auditing services, accountants also offered tax services following the enactment of the first federal income tax in 1913. The preparation of tax returns requires accounting skills, insofar as a tax return is a specialized type of financial statement, in which the accounting principles of the tax law supersede those of financial accounting.

Accountants gradually expanded their services to include tax planning as well as tax return preparation. Case law in the late 1940s and early 1950s allowed accountants to provide tax advice, but only if it was in conjunction with the preparation of tax returns.³ In view of accountants' need for tax knowledge in preparing returns, giving tax advice, and auditing tax liabilities, the

² See Carey, *supra*; Alistair M. Preston, et al., Changes in the Code of Ethics of the U.S. Accounting Profession, 1917 and 1988: The Continual Quest for Legitimation, 20 Accounting, Organization, and Society 507 (1995).

³ See, e.g., *In re Bercu*, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948), *aff'd*, 299 N.Y.728, 87 N.E.2d 451 (1949); *Gardner v. Conway*, 234 Minn. 468, 48 N.W.2d 788 (1951); *Agran v. Shapiro*, 127 Cal. App. 2d 807, 273 P.2d 619 (Super. Ct. 1954). The continued vitality of these cases is questionable in view of the Agency Practice Act, 5 U.S.C. §500(c), which allows CPAs to practice before the Internal Revenue Service.

training of auditors and the CPA examination have for a long time included significant coverage of federal taxation.

In 1955, Harvard Law School Dean Erwin Griswold referred to the emergence, by then, of “accounting factories” which had “law departments” giving tax advice to clients.⁴ He pointed out that these “accounting factories” were of a much larger scale than even the largest law firms. Controversy existed, at that time, as to the permissible scope of tax practice by accountants. The ABA had already been in contact with the American Institute of Certified Public Accountants (“AICPA”), but the two organizations had not resolved the matter. (Later, antitrust regulators discouraged the two organizations from making any market-sharing arrangements.)

In addition to accounting, auditing and tax services, accountants developed other types of services. Perhaps the earliest arose naturally from the audit function, which requires the auditor to evaluate the client’s system of internal controls in order to determine the scope of the audit. If the evaluation reveals weaknesses in the system, the auditor brings the situation to the attention of management — in effect, the audit role leads to a role as systems advisor. Further, the auditor’s insights into the client’s business practices, as revealed during the audit, give the auditor an opportunity to compare these practices with those of other enterprises in a similar line of business. Thus the audit role leads to a role as business advisor. And, having developed expertise and a reputation as business advisor for audit clients, an accountant may offer business advisory services to other clients beyond those who are audit clients. As noted later in this chapter, the expansion of

⁴ Erwin N. Griswold, *A Further Look: Lawyers and Accountants*, 41 ABAJ 1113 (Dec. 1955).

business advisory services provided by accounting firms has been a major development in recent years.

b. 1950s and later

The tendencies which were apparent to Dean Griswold in 1955 went through rapid development in the decades following. The major accounting firms consolidated further (most recently into the “Big Five”) becoming large multinational bureaucratic enterprises.⁵

Auditing revenues increased, but revenues from other types of services increased even more quickly, with the result that audit revenues constituted a decreasing percentage of total revenues. Further, malpractice liability and price cutting in response to competition reduced the net income from auditing, while management consulting and other professional services generated increasing net income as well as gross revenues.⁶ The big firms continue to offer auditing services, even though these services constitute a less lucrative segment of their practice. Auditing maintains the firms’ prestige and gives them access to information and personnel, so that they can offer the more lucrative types of “consulting” services to their audit clients (as allowed by the existing standards of conduct), as well as to others.

Meanwhile, pressure from malpractice suits and critics within and outside the profession led to increasingly intricate standards promulgated by the Financial Accounting Standards

⁵ See Ahmed Belkaoui, *The Coming Crisis in Accounting* (1989).

⁶ See generally Colin Boyd, *The Transformation of the Accounting Profession: The History Behind the Big 5 Accounting Firms Diversifying into Law*, A Report Prepared for the Canadian Bar Association International Practice of Law Committee on Multi-Disciplinary Practices and the Legal Profession, May 13, 1999, <http://www.commerce.usask.ca/faculty/boyd/mpacc801/FinalCBARepor.htm>. See also Michael Trebilcock, Lilla Csorgo, Charles River Associates, *Multidisciplinary Practices: A Consumer Welfare Perspective*, submitted to ABA Commission on Multidisciplinary Practice August 4, 1999, <http://www.abanet.org/cpr/canada.html>.

Board (created in 1973 to be independent of AICPA, which had previously promulgated all standards). AICPA still adopts audit standards, adopts the Code of Professional Conduct, issues ethics opinions, cooperates with state societies of CPAs in a joint trial board to decide ethics complaints against members, and makes other pronouncements. The AICPA also initiated a peer review program to help improve the performance of its members.⁷

Decisions of the Supreme Court applied the commercial speech doctrine to strike down the prohibitions against advertising.⁸ The Court also struck down the prohibition against solicitation by CPAs, at least in a business setting.⁹ The Court, however, has allowed continued enforcement of the rule against solicitation by lawyers, at least in an ambulance chasing setting. Thus CPAs are allowed to engage in “cold call” solicitation of clients, while lawyers are not.¹⁰

2. The “Big Five” Phenomenon

The past decade has seen unprecedented growth by the largest accounting firms as the “Big Eight” accounting firms became the “Big Five” professional services firms. During 1997 and 1998, the Big Five’s average revenue growth was 26.18%, ranging from a low of 20.9% increase

⁷ Wallace E. Olson, *The Accounting Profession, Years of Trial: 1969-1980* (1982); Subcommittee on Reporting, Accounting and Management of the Senate Committee on Government Operations, *The Accounting Establishment: A Staff Study* (1976); Abraham J. Briloff, *More Debits than Credits: The Burnt Investor’s Guide to Financial Statements* (1976).

⁸ *Bates v. Arizona State Bar*, 433 U.S. 350 (1977) invalidated the rule against advertising by lawyers; the holding is clearly applicable to advertising by CPAs as well. See also *Ibanez v. Florida Department of Business Regulation*, 512 U.S. 136 (1994), confirming the right of an individual licensed as a lawyer, a CPA and a certified financial planner to list all credentials in the telephone yellow pages.

⁹ *Edenfield v. Fane*, 507 U.S. 761 (1993).

¹⁰ *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978); *Falanga v. Georgia State Bar*, 150 F.3d 1333 (11th Cir. 1998), cert. denied, 119 S. Ct. 1496 (1999).

to a high of 30.6%.¹¹ Commenting upon this phenomenal growth and transformation of the firms and upon their “voracious appetite,” the Dean of the Yale School of Management observed:

“During this decade, the Big Eight have become just five: PricewaterhouseCoopers, KPMG Peat Marwick, Arthur Andersen, Ernst & Young, and Deloitte Touche Tohmatsu. All are obsessed with leveraging their accounting relationships to help clients do other things — plan their corporate strategies, build and manage their information-technology systems, and now, solve clients’ legal problems.”¹²

a. Who are the “Big Five”?

The five multinational organizations, collectively dubbed the “Big Five,” are comprised of multiple units. Each of the firms is profiled in the following summaries:

(1) Andersen Worldwide Société Cooperative of Meyrin, Switzerland, serves as the umbrella administrative organization that coordinates the activities of Arthur Andersen and of Andersen Consulting, as well as the recently organized Andersen Legal C.V., a Dutch limited partnership, which has co-operating firm agreements with a network of law firms.¹³ Andersen Worldwide was reported in 1999 to have had 1,164 owner-partners, all of whom were CPAs.¹⁴ It, like the other “Big Five” firms, organized in the 1990s as a limited liability partnership (LLP). Its Managing Partner is headquartered in Chicago, Illinois.

¹¹ Bowman’s Accounting Report, Vol. 13, No. 8, August, 1999 p. 4.

¹² Jeffrey E. Garten in “Ethics be Damned, Let’s Merge” at page 26 of Business Week for August 30, 1999.

¹³ Jens Drolshammer, The Future Legal Structure of International Law Firms, Special Edition European Journal of Law Reform (2000), at 15-16.

¹⁴ Public Accounting Report, October 31, 1999, based on the records of the Nebraska Board of Public Accountancy as of May 1, 1999.

There is currently pending an arbitration before the International Chamber of Commerce in which the constituent business units of Andersen Consulting seek to separate themselves from Andersen Worldwide and to obtain \$400 million in damages from Andersen Worldwide and the business units of Arthur Andersen.¹⁵ Andersen Worldwide is reported to have had \$16.3 billion in sales in 1999 and to have had 135,000 employees¹⁶ and offices in 78 countries and “correspondent relationships” with other firms in 46 other countries.¹⁷

(2) Deloitte Touche Tohmatsu International (“DTT”) is an association under Swiss law with domicile in Zurich and has recently organized Deloitte Touche Consulting Group as a separate association under Swiss law with domicile in Basle.¹⁸ Deloitte Consulting and Deloitte LLP are headquartered in Wilton, Connecticut, where the Chief Executive Officer is located. DDT is the result of the merger in 1989 of Deloitte, Haskins & Sells and Touche Ross & Co., with which Tohmatsu, a Japanese firm, had been affiliated. DTT was reported in 1999 to have had 1,299 owner-partners, 34% of whom were non CPAs¹⁹ and to have had 82,000 employees in 130 countries.²⁰

¹⁵ See Andersen Consulting Business Unit Member Firms v. Andersen Worldwide, 98 Civ. 1030 (U.S. SDNY 1998).

¹⁶ Andersen Worldwide, Hoover's Online, The Business Network, April 5, 2000.

¹⁷ *Id.*

¹⁸ *Id.*, Drolshammer, fn. 13, *supra*, at 16.

¹⁹ *Id.*, fn. 14, *supra*.

²⁰ Who's News, Wall Street Journal, February 25, 2000, at 9.

DTT was reported in April 2000 to have had \$10.6 billion of sales in 1999 and to have a staff of 90,000 employees.²¹

(3) Ernst & Young is a federation created through the merger of Ernst & Ernst into Ernst & Whinney with Arthur Young & Co., whose structure and organization are regulated by a basic memorandum of association in an English company limited by guarantee. Ernst & Young is currently reviewing the structure to move one step further towards the goal of “one firm worldwide” with a commitment by member companies to global branding.²² Ernst & Young’s Chief Executive Officer and Chairman is headquartered on Seventh Avenue in New York City. In 1999, it had 1,375 owner-partners, all of whom were CPAs.²³ Ernst & Young had estimated worldwide sales of \$12.51 billion in 1999 and a staff of 97,800 employees.²⁴

A potential merger of Ernst & Young with KPMG International collapsed in February 1998, reportedly because of regulatory obstacles and cultural differences between the two firms. In December 1999, Ernst & Young announced that it was in talks to sell its management consulting business to Cap Gemini Group SA, a Paris computer-consulting company in a deal that could surpass \$4.8 billion.²⁵

Ernst & Young International’s legal network operates as a combination of independent law firms and legal service practices that are an integrated part of the local

²¹ Deloitte Touche Tohmatsu, Hoover’s Online, The Business Network, April 5, 2000.

²² *Id.* Drolshammer, fn. 13, *supra*, 17-18.

²³ *Id.* Public Accounting Report fn. 14, *supra*.

²⁴ Ernst & Young International, Hoover’s Online, The Business Network, April 5, 2000.

²⁵ Ernst & Young May Sell Unit to Cap Gemini, Wall Street Journal, December 7, 1999, at A3.

national EY firms. The lawyers are linked through a multilateral Cooperation Agreement, which rules various topics of common interest to its members.²⁶

(4) KPMG International is an association under Swiss law with its registered office in Zurich.²⁷ It stands at the head of the business which resulted from the merger of Peat Marwick Mitchell & Co. and certain European firms.

KPMG LLP is headquartered in New York City where its Chief Executive Officer and Chairman is based. The U.S. firm is made up of three operating businesses: a consulting practice, an assurance (auditing) practice, and, what the firm refers to as a tax practice. The organization announced in November 1999 that its global business would soon adopt the same structure,²⁸ and is in the process of creating KLegal International Association, a Swiss Verein, for its legal services. The Association will be governed by the General Meeting, the Board of Directors, the Chairman and the Chief Executive Officer. The rights and duties of the members are laid down in the statutes of the Association and in the membership agreements between the Association and its members.²⁹

KPMG had 1,323 owner-partners in 1999, 24% of whom were CPAs. The owners of 16% of the equity were not CPAs.³⁰ In 1996, KPMG Peat Marwick had worldwide sales

²⁶ *Id.* Drolshammer, fn. 11, *supra*, at 18.

²⁷ *Id.* Drolshammer, fn. 13, *supra* at 16-17.

²⁸ John T. Lanning: One-Stop-Shopping For Global Tax Advice, The Metropolitan Corporate Counsel, November 1999, at 32.

²⁹ *Id.* Drolshammer, fn. 13, *supra* at 17.

³⁰ *Id.* Public Accounting Report, fn. 14, *supra*.

of \$7.45 billion³¹ that by 1999 had grown to \$12.2 billion for the merged organization; KPMG is reported to have had some 800 offices in more than 150 nations in 1999, and to have had 102,000 employees,³² 700 of whom were attorneys in the United States, said to be in a variety of positions and a variety of different practices.³³

KPMG has announced that it is selling 20% of its consulting business to networking equipment maker, Cisco Systems, prior to taking its consulting arm public.³⁴

(5) PricewaterhouseCoopers LLP (PwC) was formed in 1998 from the merger of Price Waterhouse and Coopers & Lybrand. Its headquarters are in New York City. In 1999, PwC had 1,821 owner-partners, 32% of whom were not CPAs and had no equity interest in the firm.³⁵ In 1999, it had revenues of \$15.3 billion, realized through the efforts of 155,000 employees operating at more than 850 offices in 150 countries.³⁶

The firm has announced that to lower administrative costs it is cutting 1,000 jobs and that it is also dividing its consulting and auditing operations.³⁷ Also in 1999, PwC announced a new structure for its global network of associated legal firms, which it has named "Landwell" with individual firms becoming members of a Genossenschaft, a Swiss

³¹ U.S. Industry and Trade Outlook 1998: Professional Business Services, Table 49-1, at 49-3.

³² KPMG International, Hoover's Online, The Business Network, April 5, 2000.

³³ *Id.* Lanning, fn. 28, *supra*, at 4.

³⁴ *Id.* KPMG International, fn. 32, *supra*.

³⁵ *Id.* Public Accounting Report, fn. 14, *supra*.

³⁶ PricewaterhouseCoopers, Hoover's Online, The Business Network, April 5, 2000.

³⁷ PwC reorganizes global network of legal firms, Jean Eaglesham, Legal Correspondent, London Financial Times, London edition, October 11, 1999, at 4 (National News).

limited liability vehicle; PwC's legal network was said to employ 1,600 lawyers and to operate under 20 names across the different countries.³⁸

b. **“Business Conglomerates” or “Multidisciplinary Practices”?**

The largest accounting firms, as we have noted, have developed types of services other than accounting, audit and tax, and greatly expanded their business advisory services; with the result that the Big Five steadily escaped from the influence of the accounting profession in general, while maintaining substantial influence over the profession itself.³⁹

In these circumstances, Professor Colin Boyd points out⁴⁰ that the phrase “multidisciplinary practices” can be misleading when applied to what the Big Five have become and the activities in which they are currently engaged. These erstwhile public accounting firms are now giant business conglomerates that manage and market multiple product lines, employ tens of thousands of employees in scores of countries, and each realizes annual sales in the billions of dollars.

In contrast, the phrase represented by the letters MDP suggests professionals from different professions, working closely together, each guided by his or her own acknowledged and enforceable codes of conduct, delivering their services, and not the virtually unregulated services provided by the Big Five.⁴¹ Nor do these firms resemble the cooperative arrangements between

³⁸ *Id.*

³⁹ See Subcommittee, A Staff Study, fn. 7, *supra*.

⁴⁰ *Id.* Colin Boyd, fn. 6, *supra*, at 29.

⁴¹ *Id.*; a Professor Boyd, in a similar vein, suggests that the phrase “one-stop shopping” erroneously implies passive selling, in contrast to the active marketing by the Big Five that lies behind the rapid rise in their sales
(continued...)

different professionals of the kinds described in Chapter 4 earlier in this report. A further divergence from the notion of a unified multidisciplinary practice has been the difficulty encountered by the Big Five in controlling impermissible investments by their professional staffs in audit clients of their firms.⁴²

These difficulties encountered by the Big Five have contributed to a growing movement to separate the audit assurance parts of the firms from the business advisory services, aggravated by the tensions within the firm created by the differing profitability of the various segments. As noted above, at least three of the Big Five are now engaged in bringing about such a separation. Market analyses accentuate the separateness of the different business activities of the Big Five:⁴³ (SIC8721) “accounting, auditing, and bookkeeping”;⁴⁴ (SIC874) “management consulting and public relations,”⁴⁵ as an entirely separate market; and (SIC81) “legal services,”⁴⁶ as a third separate market.

⁴¹ (...continued)
during the 1990s. *Id.* Boyd, fn. 6, *supra*, at 29-30. For a detailed comparison between lawyer rules and those applicable to accountants performing attest and nonattest functions, see Harold Levinson, *Regulation of Multidisciplinary Practice*, ch. 2 (forthcoming).

⁴² See Rules That Only an Accountant Could Fail to Understand, *New York Times*, January 8, 2000, at C1; Accounting firms admit compliance faults, *Financial Times*, January 24, 2000, at 2; Report by SEC Says Pricewaterhouse Violated Rules on Conflicts of Interest, January 7, 2000, at A3.

⁴³ See U.S. Industry and Trades Outlook 1988: Professional Business Services, at 49-1.

⁴⁴ *Id.* at 49.3 and Tables 49-2 and 49-3.

⁴⁵ *Id.* at 49.4 and Tables 49-4 and 49-5.

⁴⁶ *Id.* at 49.5 and Tables 49-7 and 49-8.

3. The Regulation Today of the Discipline of Accountancy

a. **The Uniform Accounting Act**

The Uniform Accountancy Act (“UAA”) and the accompanying UAA rules are co-sponsored by the American Institute of Certified Public Accountants (“AICPA”) and the National Association of State Boards of Accountancy (“NASBA”). These two organizations are quite different. AICPA is a voluntary association of CPAs (with over 300,000 members), comparable to the ABA.⁴⁷ NASBA is a much smaller organization, composed of members of the state boards of accountancy, many of whom are practicing CPAs. Although AICPA and NASBA have co-sponsored the UAA, the two organizations have sometimes revealed different regulatory perspectives. Nevertheless, the UAA reflects the agenda of both AICPA and NASBA.⁴⁸

More than half the states have enacted the 3d edition or an earlier version of the Act. AICPA and NASBA identify the following as key provisions of the current version:⁴⁹

(1) Substantial equivalency

This concept facilitates the mobility of CPAs across state lines if the state of licensure and the state where the CPA wishes to practice use licensing criteria which are substantially equivalent. State boards may request NASBA to determine questions of substantial equivalency. A

⁴⁷ For an analysis, including the AICPA rules, see Harold Levinson, fn. 41, *supra*.

⁴⁸ The current edition of the UAA is the 3d edition (1997), as revised November 1999 <http://www.aicpa.org/states/uaaentry.htm>.

⁴⁹ See generally Background on the AICPA/NASBA Uniform Accountancy Act-Third Edition-Revised (UAA) What Does It Mean? <http://www.aicpa.org/states/uaa/briefs/newuaa.htm>.

CPA is subject to the disciplinary authority of the state where the CPA practices, as well as the state of licensure. UAA §§6(c)(2), 23.

(2) CPA=CPA

Everyone who holds a CPA license is subject to regulation and discipline by a state board, regardless of what that person does for a living and regardless of whether that person uses the CPA title. UAA §10. As noted below, however, the regulations regarding the attest function (auditing, as well as certain related functions) are much more stringent than those regarding other functions. Therefore, a CPA who does not offer the attest function is regulated by a relatively loose set of standards, set forth in the state's version of the UAA.⁵⁰

A CPA who chooses to be a member of a voluntary organization, such as the AICPA or a state society of CPAs, is also subject to the organization's code of ethics. The committee has found little information on the operation of the disciplinary systems of the AICPA and state boards in recent years. Older reports indicate that they do little.⁵¹

(3) Reservation of the attest function to CPA firms

The attest function may be performed only by CPA firms, which must comply with a special set of regulations. UAA §§7(a), 14(a). Functions other than the attest function can be

⁵⁰ But see special regulation of the compilation function, *infra*.

⁵¹ Hedvah L. Shuchman, *Self-Regulation in the Professions: Accounting, Law, Medicine* (1981); Briloff, fn. 7, *supra*, at 350-60.

performed by anyone, including but not limited to CPA firms, individual CPAs, CPAs in firms that do not qualify as CPA firms, or firms in which there are no CPAs.⁵²

(4) Special regulation of compilation function

The function of compiling financial statements without the expression of an opinion, as provided in the AICPA's Statements on Standards for Accounting and Review Services ("SSARS"), is not within the definition of the attest function. The compilation function, however, is also reserved to CPAs, and is governed by a special set of requirements, similar in some respects to those governing the attest function.⁵³

Notably, the UAA does not regulate the ownership of firms that perform compilations. These services may therefore be provided by CPAs who work for firms owned by non-CPAs, including passive investors.

(5) CPAs working in nonCPA firms

Firms which do not offer the attest function need not be licensed by the state, and need not be owned by CPAs, so long as they do not call themselves CPA firms. Any individual CPA working in such a firm must hold a license and is subject to regulation and discipline; see *supra*, "CPA=CPA." CPAs in nonCPA firms may perform compilation services; see discussion above.

⁵² But see special regulation of the compilation function, *infra*.

⁵³ In summary: A CPA who prepares and issues compilations while working for a nonCPA firm must sign the compilation report as an individual. UAA §14(1); a CPA and a firm that prepare and issue compilations must undergo peer review every three years. UAA §§6(j), 7(h); a CPA who supervises and signs compilation reports must meet special competency requirements as defined in professional standards. UAA §7(h), 14(1); a CPA and a firm that prepare and issue compilation reports may not accept commissions or contingent fees for products or services they provide for compilation clients. UAA §14(n)(o).

(6) Regulation of CPA Firms

A CPA firm must be licensed by the state. UAA §§7(a), 14(a). It must undergo peer review every three years, UAA §7(h), and must make sure that the CPAs who supervise and sign attest engagements meet an appropriate level of competency, to be spelled out in professional standards. UAA §§7(c)(3), (4).

A simple majority of the ownership of a CPA firm, as regards financial interests and voting rights, must be held by CPAs. UAA §7(c)(1). (Previously, all owners had to be CPAs, as is still the case in New York.) All nonCPA owners must be active individual participants in the firm or its affiliated entities. UAA §7(c)(2).⁵⁴ The firm name may not include the name of a non-CPA if “CPAs” is included in the firm name. UAA Rule 14-1-1.

(7) Licensure and education requirements

UAA §5(c) and UAA Rule 5-2 add more higher education credits to the educational requirement for CPA candidates. The additional requirement becomes effective five years after a state adopts the UAA.

Among other requirements for obtaining a CPA license, a candidate must complete one year of experience. The UAA allows a candidate to satisfy this experience requirement by providing some type of professional services or advice involving the use of accounting, attest, management advisory, financial advisory, tax or consulting skills, so long as the experience is verified by a CPA. UAA §5(i), UAA Rule 6-2. (The previous requirement was one year, but limited to accounting experience.) Of course, CPAs still have to pass an examination. UAA §5(d).

⁵⁴ On the concept of “affiliated entities,” see discussion of alternative practice structures, infra.

(8) Continuing professional education

The basic requirement is 120 hours during a three-year period. UAA Rule 6.

(9) Commissions and contingent fees

CPAs or CPA firms may not accept commissions or contingent fees for products or services provided to clients for whom they perform attest or compilation services. UAA §14(n)(o). CPAs may accept commissions that are disclosed to clients, except when the CPAs perform attest or compilation services for the client whose business with a third party generated the commission. CPAs may accept contingent fees for services, except for attest or compilation services, and except for preparing an original tax return.

Contingent fees for amended tax returns or refund claims are permitted, provided the CPA anticipates the claim will be reviewed by a taxing authority . UAA §14(m), (n).

(10) Tort Reform

Although not highlighted by AICPA/NASBA in their most recent background paper, other noteworthy provisions of the UAA include provisions on tort reform, each tending to minimize the exposure of accountants to civil liability.

UAA §20 adopts a strict rule of privity. Only persons in a direct contractual relationship, or a relationship so close as to approach contractual privity, may sue an accountant for negligence. The comments to this section note its derivation from the New York cases of *Ultramares Corp. v. Touche*, 255 N.Y. 170 (1931) and *Credit Alliance v. Arthur Andersen & Co.*, 65 N.Y.2d 536 (1985).

UAA §21 establishes a statute of limitations for contract and negligence suits against accountants. The basic period is one year from when the act was or should have been discovered, but in no event more than three years after completion of the service, or three years after initial issuance of the accountant's report.

UAA §22 provides for proportionate liability in all claims against accountants for money damages (including common law and statutory claims), except that fraud actions continue to be governed by generally applicable rules. Under the proportionate liability system, the trier of fact determines the percentage of each defendant's responsibility for the plaintiff's damage. In making this determination, the trier of fact shall consider both the nature of each person's conduct and the nature and extent of the causal relationship between that conduct and the plaintiff's damage. Each defendant is liable for the appropriate percentage, as thus determined, of the plaintiff's total damage. An accountant shall not be jointly liable for any judgment entered against any other defendant. This version of proportionate liability is similar but not identical to the Private Securities Litigation Reform Act of 1995.

b. Independence Standards Board

In recent years, the SEC and others have expressed concern about the independence of accounting firms from the businesses they audit, especially when they also provide advisory or other services to those businesses. The Independence Standards Board ("ISB") is an advisory organization which developed as a result of discussions between the AICPA, other representatives of the accounting profession, and the SEC. Its mission is to conduct a timely, thorough and open study of issues involving auditor independence and to encourage broad public participation in the

process of establishing and improving independence standards. In addition, the ISB staff answers questions and provides interpretations to accounting firms in the SEC Practice Section of the AICPA.⁵⁵

The Board recently invited public comment on two discussion memoranda (“DM”). While these DM do not reflect the Board’s policy, they provide important factual information, together with insights into the agenda of the leaders of the accounting profession who serve with outsiders on the Board.

c. Discussion Memorandum on Firm Structure and Organization

DM 99-2, *Evolving Forms of Firm Structure and Organization* (October 1999) raises questions about the impact on auditor independence of various innovative forms of firm structure and organization. The DM identifies several forms of firm structure which currently exist, or are evolving.

- (1) Traditional partnership, often with separate auditing, tax, and consulting divisions

The DM mentions but does not extensively discuss traditional partnerships, since these are not “evolving forms.” The DM therefore does not explore the risks to independence which may result from the combination, in a single firm, of audit and non-audit functions, especially when the firm provides audit and non-audit services to the same client.

⁵⁵ U.S. General Accounting Office, *The Accounting Profession — Major Issues* (1996); Gary John Previts, *The Scope of CPA Services: A Study in the Development of the Concept of Independence and the Profession’s Role in Society* (1985); Paul R. Brown, et al., *Administrative and Judicial Approaches to Auditor Independence*, 30 *Seton Hall L. Rev.* 443 (2000).

The DM does note, however, the expanded range of services offered by large accounting firms since the mid-1900s. Appendix A to the DM provides an extensive list of services offered by accounting firms at the present time. The list includes, among numerous other items, “Estate planning including preparation of wills, trusts, etc.” and “Corporate and commercial legal services to national and international companies worldwide.” The DM does not mention the extent to which some of these services are reserved to lawyers, or the rules under which lawyers are not allowed to share fees or partner with nonlawyers regarding these services.

- (2) Corporate purchase of the non-audit business of one or more traditional firms

The DM portrays a typical “alternative practice arrangement” as follows:

- (1) A company, which may be publicly owned, buys the non-audit portion of a CPA practice from the firm’s partners for cash, stock, or a combination of both. The price may be based in part on the future earnings of the acquired business.
- (2) The company may have subsidiaries such as a bank, insurance company, broker-dealer, and professional services. The professional services subsidiary will offer the non-audit services of the acquired CPA firm.
- (3) Partners and employees of the acquired CPA firm become employees of the company (or its subsidiary) and provide clients with non-audit services.
- (4) The audit function of the CPA practice remains intact, and continues to be owned by some or all of its original partners, who are now also employees of the company in providing non-audit services.

- (5) The audit firm provides its services by leasing employees from the company — or the audit firm retains its own employees and leases them to the company to perform non-audit services.
- (6) The audit firm pays fees to the company for the use of office space and equipment and for administrative services and advertising.
- (7) The company may engage in transactions of this type with numerous audit firms, which may retain their separate identities as sister firms, or may merge into a single audit firm.
- (8) As a result of the above transactions, the management of the company directly supervises the owners of the audit firm, in their work as employees of the company in non-audit work. The DM notes that some people believe that this employment, together with other aspects of the relationship, may in effect allow the company to control the audit firm in its performance of audits.

It is noteworthy that the type of alternative practice structure described above was portrayed, without disapproval, in AICPA Ethics Interpretation 101-14 (February 1999). The only issue was whether certain individuals involved in the transaction should be regarded as the AICPA member's "firm," for purposes of applying the standards on auditor independence. The Interpretation concluded that direct supervisors of the non-audit activities of a CPA, or substantial investors in the company, should be regarded as members of the CPA's "firm." Therefore, the CPA

would be disqualified from auditing a client in which such supervisors or investors had a significant interest.

(3) Roll-up transactions

The roll-up transaction is a variation of the above alternative practice structure. In a roll-up, a number of firms are assembled under a holding company that is sold to the public in an initial public offering.

(4) Public ownership of interest in non-audit practice of traditional firm

A traditional public accounting firm may place all or part of its non-audit business in a subsidiary, some of which is sold to the public or to private investors.

(5) Association

The DM uses the term “associations” to describe networks of independently owned firms which are linked for certain purposes, such as shared training and marketing, or to fill gaps in expertise or geographical presence.

Member firms are financially independent and practice under their own names, but they may note their membership in an association on their letterhead, web sites or other marketing material. They do not share profits with one another, but they may receive “correspondent fees” for referral or for participating in engagements. These fees are arranged directly by the firms, not by the association. Member firms pay fees to the association.

(6) Affiliations

The DM uses the term “affiliations” to denote networks of firms under common management, or participating in some type of profit or expense sharing. According to the DM, all

of the larger firms have affiliates around the world that practice under the umbrella organization's name. The degree of independence of member firms varies, but generally they use the manuals, technology and training of the umbrella organization. The DM notes further that the SEC staff requires foreign affiliates to be independent with respect to the U.S. firm's audit clients.

d. Discussion Memorandum on Legal Services

Discussion Memorandum 99-4, Legal Services (December 1999) poses the question, "Under what circumstances, if any, can an audit firm or its affiliates provide legal services for SEC audit clients without impairing independence?" The DM immediately defines "legal services" as "those services that can only be provided by someone licensed to practice law."

It is not clear whether the DM attaches the same meaning to the term "provide" in the question and in the definition. If the meanings are the same, the question has little practical significance as regards current practice in the United States, since an audit firm is not "someone licensed to practice law" (unless all of its members happen to be lawyers as well as CPAs), and therefore an audit firm cannot provide legal services. The question has greater significance in international practice, since an audit firm or its affiliates may qualify in certain foreign countries as "someone authorized to practice law."⁵⁶

Another possible interpretation is that the term "provided," as used in the definition, actually means "performed." According to this interpretation, the DM discusses legal services *performed* by lawyers but *provided* by an audit firm under some kind of sponsorship arrangement, such as employment, partnership, or affiliation. This interpretation invites speculation about

⁵⁶ See Chapter 9, *infra*.

potential future changes in American law, which may allow nonlawyers to sponsor the performance, by lawyers, of legal services. Of course, the ISB function is limited to safeguarding audits independence, and does not include passing on who may practice law.

The DM discusses the impact on auditor independence of legal services “provided” by audit firms in two distinct settings, corresponding approximately to the above two interpretations of the term “provided” in the definition.

The first setting involves an audit firm that offers legal services to foreign clients, including foreign units of SEC clients. A footnote to the DM notes that such services are rendered in a variety of forms, depending on the law of the foreign country. In some countries, the U.S. audit firm enters into affiliation arrangements with independent law firms. In others, legal services may be offered by the accounting firm itself, or by a separate law firm in partnership with the accounting firm. The DM also reports its understanding that, since around 1993, some U.S. audit firms have provided legal services to foreign subsidiaries of SEC audit clients, and to foreign audit clients, based on the following principles:

- (1) The subject matter is not material to the financial statements;
- (2) The relevant country permits the service;
- (3) The firm does not act as general counsel or management of the subsidiary; and
- (4) The matter and the legal relationship are not likely to be highly visible.

The second setting is based on speculation that the current rules in the United States, prohibiting partnerships and fee sharing between lawyers and non-lawyers, may be relaxed in

accordance with the June 1999 recommendation of the ABA Commission on Multidisciplinary Practice.

The DM sets forth five alternative views regarding the issue of auditor independence in either of the above two settings. These alternatives are, in summary:

- (1) Legal services not permitted at all — this reflects the position of the SEC, that “the attorney-client relationship is inconsistent with the independence required of accountants in reporting to investors.”⁵⁷
- (2) Legal services not permitted if they involve a high degree of advocacy.
- (3) Legal services not permitted if they relate to matters with a material financial impact on the client.
- (4) Legal services not permitted unless appropriate safeguards are established, such as changing the organization of the firm, establishing “firewalls” (although the DM observes that these are currently not allowed under Generally Accepted Auditing Standards), obtaining client waivers, and other safeguards.
- (5) Legal services permitted, provided the auditor does not become a de facto employee or officer of the client, perform other management functions, or audit its own work.

⁵⁷ The DM sets forth the above SEC position in an excerpt from a Letter from Harvey J. Goldschmid, Chief Counsel, SEC. Lynn E. Turner, Chief Accountant, SEC. and Richard H. Walker, Director of Enforcement, SEC to Philip S. Anderson, Esq., President, ABA, July 12, 1999, quoting from Matter of Charles E. Falk, Exch. Act Rel. No. 41426, AAE Rel. No. 1136 (SEC, May 19, 1999).

e. SEC Practice

The SEC has broad regulatory authority over the auditors for publicly held companies. The SEC has authority to establish accounting principles, and participates in an advisory role in deliberations of the Financial Accounting Standards Board (FASB). Once the FASB has adopted a standard, the SEC generally defers to it.

Rule 102(e) of the SEC rules of practice empowers the SEC to impose sanctions on professionals, including CPAs, for unethical conduct. In addition, the SEC has power to seek federal court injunctions against auditors as well as their clients.

The SEC designated 1999 as the “year of the accountant” and devoted special attention to alleged irregularities in the audits of public companies. Once an SEC proceeding is pending, state boards of accountancy generally await its outcome before bringing their own disciplinary proceedings based on the same allegations. Thus the SEC takes the lead in enforcement actions against auditors. Private litigation has played an especially important role in enforcing compliance with auditing standards, although the Private Securities Litigation Reform Act of 1995 has made it more difficult for plaintiffs to maintain suits against auditors. An auditor’s improper conduct in the audit of an SEC client may also violate the standards of voluntary organizations, such as the AICPA (especially its SEC Practice Section), or a state society of CPAs. The published reports of discipline by the joint processes of AICPA and the state societies, however, reveal few proceedings arising from alleged violations of professional standards during SEC audits.⁵⁸

⁵⁸ See fn. 55, *supra*, Paul R. Brown, et al.

The SEC prohibits the same firm from acting as auditor and legal counsel for the same client, but its position with respect to the provision of legal services to foreign subsidiaries of SEC audit clients and foreign SEC audit clients is unclear.⁵⁹

f. Tax Practice

The Agency Practice Act, 5 U.S.C. §500(c), authorizes CPAs to “practice” before the Internal Revenue Service (“IRS”). Practitioners are governed by the IRS Rules of Practice, generally known as Circular 230, and can be debarred or suspended from IRS practice for violating the rules. CPAs who engage in tax practice are subject to discipline by state boards of accountancy if they violate state statutes during federal tax practice. They are also governed by the AICPA Statement on Standards of Tax Practice, and are subject to sanctions by the AICPA and the state society of CPAs.

Tax work includes such a wide range of functions that some individuals are authorized to engage in some but not others.

Tax returns. Circular 230 declares that anyone can prepare a tax return for another. This statement may be subject to the Agran case,⁶⁰ which held that some returns are so complex that only a lawyer is allowed to prepare them. This case, however, may no longer be good law.

Advocacy before the IRS. The Agency Practice Act, *supra*, expressly authorizes CPAs to engage in “practice before the IRS,” which apparently means advocacy for a specific client within the administrative levels of IRS. The Act, however, says nothing about the type of firm with

⁵⁹ See Chapter 9, Germany, *infra*.

⁶⁰ *Supra*, fn. 3.

which a CPA may or may not be associated, except to prohibit association with certain individuals who are disqualified from IRS practice. In the absence of federal specifications, the type of firm is apparently left to the states. Arguably, this means that a state would not run afoul of federal law if it disciplined a lawyer for violating a disciplinary rule regarding fee sharing or partnership with nonlawyers, even if the violation took place during federally authorized tax practice.

Practice before Tax Court. Tax Court Rule 200 admits any attorney, and any other person who passes the court's exam. Many CPAs have passed the exam.

Practice before other courts. Tax practice before other courts is limited to lawyers.

4. Lawyer Recruitment and Employment By Accounting/Professional Services Firms

The Bowman Reports (according to the Executive Director of the Florida Institute of CPAs, June 3, 1999) placed the staff of the Big Five in the United States in 1998 at 174,939, of whom 10,464 were partners and 125,383 were "other" professionals. We had hoped at the outset of this project to determine just how many of the "other" professionals are lawyers who remain in good standing in the Bar or Bars to which they have been admitted and to learn the nature of their duties on behalf of their employers. This has not been possible.

a. **Four of the Big Five turn a deaf ear to this committee**

The report of the ABA Commission on so-called "multidisciplinary partners" contained only limited information regarding the recruitment and employment of lawyers by the Big Five. Thus, at the beginning of this Committee's work, the chair of the Committee sent a personal letter in September 1999 to the chief executive of each of the Big Five firms. The letter requested assistance in assembling data relative to the number of lawyers (both partners and employees) in

each firm, how the number of lawyers had changed during the years 1995 to 1999, and whether the lawyers were or were not admitted to practice in a U.S. jurisdiction.⁶¹

No written acknowledgment of the letters was received from any of the Big Five firms. A single voicemail message was left by one employee, who left only her first name. She stated that she was calling from Kathryn Oberly's office at Ernst & Young regarding the study being done by the New York State Bar Association. She further stated: "it is information that we don't keep track of we don't have any idea of who is admitted to practice in a U.S. jurisdiction or not admitted to practice in a U.S. jurisdiction." She added that the only people for which such information could definitely be provided, were in the general counsel's office, who are "just a small group of people." The voicemail caller went on to acknowledge: "We probably have lots of people that have a J.D., but they're not practicing law because they are working as a consultant or something like that."⁶²

Having received no response with respect to bar admissions from four of the five firms and a generally unresponsive voicemail message from the fifth, we concluded that to get such information we must turn elsewhere than to employers who seemed to have no interest in whether their employees were or were not in good standing at the Bar.

⁶¹ Letters dated September 30, 1999 from Robert MacCrate to: James Wadia, Arthur Andersen; James E. Copeland, Deloitte & Touche; Philip A. Laskaway, Ernst & Young; Stephan G. Butler, KPMG; and James J. Schiro, PricewaterhouseCoopers, LLP.

⁶² Voicemail recording at 212-768-6747, October 27, 1999. On the other hand, various representatives of the Big Five firms cooperated in the preparation of Chapter 9, and references to this effect are found in that chapter.

b. Competitive lawyer recruiting

In November 1999, the Vice-Chairman of KPMG for Tax Services was more forthcoming in addressing the subject of recruiting lawyers than the firms had been in response to the Committee's request for assistance.⁶³ He stated that KPMG employed about 700 attorneys in the United States in a variety of different positions.⁶⁴ He further stated that to support the firm's 25 percent revenue growth rate in its U.S. Tax Practice, KPMG planned to double the number of the tax lawyers the firm would hire in the current year. As to recruiting sources, the KPMG Vice-Chairman said that the hiring would be both directly out of law schools and from other sources, all the way from associates through the partner level.⁶⁵ Vice-Chairman Lanning went on to say that KPMG hires "more and more people with master's degrees in taxation."⁶⁶ He explained: "As to lawyers, we certainly like people who have experience as practicing tax attorneys or have LLMS in taxation."

This fact explains the mistaken report published in *Legal Times* in 1997, that twenty percent of the graduates of NYU Law School had joined accounting firms.⁶⁷ That figure was for graduates of the NYU's LLM program in taxation—of which the accounting firms are particularly

⁶³ *Id.* Lanning, fn. 28, *supra*, at 42, 47.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See *Legal Times*, February 3, 1997.

supportive—and not for the JD graduating class from the law school.⁶⁸ While the percentage of NYU law graduates finding positions in business and industry of any kind is around four percent, a greater percentage of graduates of some other law schools find their first positions in business or industry.⁶⁹ In recent years, the total number of JD graduates from some 175 approved law schools who joined accounting firms were less than three percent of the graduates.⁷⁰

Looking to the future, the KPMG Vice Chairman predicted: “you will also see us focusing more on people with a good background of general legal skills.”⁷¹ In the course of his published interview, Vice Chairman Lanning of KPMG landed the firm’s strength in the state and local tax areas in this way: “We have approximately 700 full-time state and local tax professionals, serving thousands of clients. We probably have one hundred tax professionals in New York alone. We have fifty or sixty tax partners across the country who focus full-time on state and local tax issues. Many of them are attorneys. From a client’s perspective, this creates an enormous state and local experience base that they can tap into.”⁷² He contrasted this with the fact that “Even the largest law firms frequently have only one or two tax attorneys who deal with state and local tax issues.”⁷³

⁶⁸ Interview with Irene Dorschak, April 3, 2000.

⁶⁹ Lawyer Statistical Report for 1995.

⁷⁰ The National Association for Law Placement (“NALP”), in its surveys of graduates of the law school classes of 1997 and 1998, divided graduates taking positions in accounting firms into two categories: “accounting legal” (for which a law degree is required) and “accounting - other” (for which a law degree is not required). The surveys indicate that approximately 1,000 JD graduates nationwide found jobs with accounting firms split between the two categories.

⁷¹ *Id.* Lanning, fn. 28, *supra*.

⁷² *Id.* at 32.

⁷³ *Id.* at 32.

On the subject of whether to use an accounting firm or a law firm for tax advice, the

KPMG Vice Chairman stated:

“The critical question is where the top talent can be found. If you go back five, six, seven years, most of the top tax attorneys in the U.S. were in law firms. Today, many top tax lawyers are moving into big five public accounting firms. What many companies are saying is that when it come to areas of tax, tax planning and dealing with tax issues, we are not as concerned about whether we go to a law firm or a big five accounting firm. We want to go where the best people are. This is above all a race for the top talent.”⁷⁴

The Big Five firms have expended significant effort to recruit lawyers to provide tax services in the only legally-sanctioned area of overlap between law and accountancy. As the Journal of Accountancy notes, “although CPA firms are among the largest employers of attorneys in the United States, lawyers working in the U.S.-based firm can offer clients only consulting and tax advice.”⁷⁵

c. Lawyers employed by the Big Five

The Big Five’s cadre of lawyers in the United States in 1998 was reported to be: Andersen Worldwide, approximately 1,000 lawyers; Deloitte & Touche, 910 lawyers; Ernst & Young, 1,800 lawyers; KPMG, 775 lawyers; and PricewaterhouseCoopers, 1,500 lawyers.⁷⁶

⁷⁴ *Id.* at 32 and 47.

⁷⁵ Journal of Accountancy, September 1999, at 15. (The Journal is published by the American Institute of Certified Public Accountants, Inc.)

⁷⁶ “Taking a Look Inside the Big 5” by Anna Snider, New York Law Journal, September 7, 1999; “Rivals Call Law Firms to Account” by David Seigal The Washington Post, November 12, 1998, at F-1; Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective, Michael Trebilcock and Lilla Csorgo, Charles River Associates, Toronto, Ontario. 1999.

During 1999, there was aggressive recruiting of experienced lawyers by all the Big Five. A sampling: Ernst & Young-Charles Kingston from Wilkie Farr & Gallagher, New York, for international mergers and acquisitions; Prentiss Willson, former managing partner of Morrison & Foerster, San Francisco; Glen Kohl, tax group chair at Wilson Goodrich & Rosati, San Francisco; KPMG-David Brockway from Dewey Ballentine, Washington, D.C., as partner in charge of national tax practice.⁷⁷ King & Spalding, the Atlanta-based law firm, was the source of the lawyers to create Ernst & Young's created and "branded" law firm in Washington, D.C.⁷⁸

Generalizations regarding "multidisciplinary partnerships" drawn from experience in tax practices can be misleading. There is substantial overlap between the areas of competence of the tax lawyer and the tax accountant. The competition for top talent in the field between law firms and accounting firms is unabating. After all, accounting firms are the creators of the financial statements that are the basis for tax returns. Accountants provide the accounting rules on which financial statements are based.

The 1997, 1998 and 1999 editions of the Lawyers Diary and Manual carried a listing for Deloitte & Touche LLP as a law firm in the Bar Directory for New York State: "(212) 436-2000 Deloitte & Touche, LLP — 2 World Financial Center, New York, New York 10281." The listing does not appear in the 2000 edition.

⁷⁷ Bowmans, Accounting Report, Vol. 13, No. 11, November 1999, at 8.

⁷⁸ *Id.*

Similarly, KPMG was listed in the 1999 edition of the Lawyers Diary and Manual as follows: “(212) 909-5000 KPMG Peat Marwick, LLP — 757 3rd Av. NY 10017.” Its listing does not appear in the 2000 edition of the Bar Directory for New York State.

In the 1994 edition of the Martindale Hubbell Law Directory, a firm biography appeared for ATAG Ernst & Young AG in Bern, Switzerland. It carried the following:

FIRM PROFILE: The Swiss Law practice of ATAG Ernst & Young AG gives advice in all business related legal and tax matters, both on a national and international basis. It is connected with other Law practices of Ernst & Young in Europe in Belgium, France, Germany, Hungary, Italy, The Netherlands, Portugal and Spain.

In response to protests of the Swiss bar authorities, the entry did not appear thereafter.⁷⁹

Pursuing its policy of “global branding” and its legal network to the United States, Ernst & Young attached its name to a new law firm in Washington, D.C., established as McKee Nelson Ernst & Young. The new firm’s outside counsel announced that McKee Nelson Ernst & Young and Ernst & Young had signed multiple agreements that covered:

Use of the Ernst & Young trademark. The start-up loan. A sublease from Ernst & Young for the law firm’s offices, first the temporary quarters and later permanent space within the Big Five firm’s building. General building and administrative services, such as reception, janitorial, and physical amenities, for which the firm will pay Ernst & Young market rates and to keep a wall between the lawyers and Ernst & Young,

⁷⁹ Letter dated March 7, 2000 of Louis F. Duffy to Robert MacCrate.

the law firm's client files would be separate from, and off limits to, the accounting firm.⁸⁰

⁸⁰ "Inside the Ernst & Young Deal," Siobhan Roth, The Recorder/Cal Law, November 10, 1999 on NETWORK.com.

Chapter 8

The Globalization of American Law Practice

1. The Modest Beginnings
 2. The Expansion Abroad of U.S. Law Firms
 3. Professional Regulation
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1. The Modest Beginnings

In Colonial America, law was imported, chiefly from England. In the early years of the Republic those who had trained in the law abroad were prominent practitioners. Coke and Blackstone were established texts for American lawyers.¹

It was not until the late 19th century that this imbalance of trade in law began gradually to change, undoubtedly influenced in part by the attention that had been given abroad to American political institutions grounded in written constitutions and declarations of individual rights authored principally by American lawyers. However, the direct stimulus for exporting American law came from the economic and industrial development in the nation and the resulting growth in foreign trade and international finance that brought a small circle of lawyers, principally from New York City, into transnational transactions, marking the modest beginnings of the globalization of American law and practice.

As New York City became a world financial center, Dutch, English, French and German bankers, all sought legal representation in their financing of American railroads and

¹ See P.M. Hamlin, Legal Education in Colonial New York, (NYU 1939), Appendix VII.

subsequently, when things turned sour, in receiverships and reorganizations for the troubled lines.² The growth of foreign trade with new trading partners using various shipping lines to carry the trade brought an increasing number of American lawyers into the transactions involving foreign countries. Wars and military actions in Latin America and Europe, canal building in the mideast and in Panama, all with political and economic fallout, further enlarged the circle of American lawyers engaged in transnational matters. Both in the private sphere of corporate America's foreign business and the public sphere of negotiating international treaties - even the planning for the League of Nations - American lawyers were significant participants.

2. The Expansion Abroad of U.S. Law Firms

While a few American law firms since the 1930s have had offices in Europe, South and Central America and East Asia, political events of recent years have had profound repercussions in international commerce and finance, creating new capital markets, channels of trade and wholesale privatization, all of which have brought new law and regulation and the need for expert legal counsel equipped to advise both government and private enterprise regarding an emerging new international legal regime.

The European Union has brought European lawyers into a new legal arena along with a growing number of American law firms. Eastern Europe's turn toward market economies, organization of stock markets and broad-scale privatization of national enterprises have created a demand for multinational legal assistance from experienced U.S. lawyers. Meanwhile, Japan has slowly accepted the presence of American law firms, and from Hong Kong southward and westward:

² A.H. Dean, William Nelson Cromwell (1854-1948), NY (1957) at 59-69.

Malaysia, Australia, across a changing India and even in Africa, economic and financial linkages have been forged in which American corporate lawyers are finding public and private clients eager for their knowledgeable services. Multinational practice has become a favorite avenue of expansion for corporate law firms.

The most pronounced growth among middle-sized and large law firms during the 1990s was expansion outside the United States. Foreign offices of the 250 largest firms (identified by the National Law Journal) are now located in 72 cities in more than 50 foreign countries and are reported to employ more than 4,900 U.S. and foreign lawyers.³ These 250 firms are reported to have more than 100 U.S. and foreign lawyers in each of the following 12 foreign cities:

London, England	1,087 lawyers
Paris, France	489 lawyers
Hong Kong, China	378 lawyers
Brussels, Belgium	270 lawyers
Sydney, Australia	204 lawyers
Frankfurt, Germany	192 lawyers
Warsaw, Poland	184 lawyers
Moscow, Russia	144 lawyers
Amsterdam, Netherlands	139 lawyers
Singapore	105 lawyers
Mexico City, Mexico	103 lawyers
Tokyo, Japan	101 lawyers

A soon-to-be-published empirical study of the international activities of U.S. lawyers adopts the foreign office as a proxy for internationalization and globalization of the U.S. market in legal services. It chronicles the foreign office expansion of 72 of the largest and most international

³ Nat. L. Jour. (December 13, 1999) at C5-C20.

U.S. firms, documenting how U.S. law firms over the last 25 years moved into foreign legal markets in increasing numbers.⁴

Accompanying this movement into foreign countries has been a delocalization of law practice within the United States. The study notes: “New York has become a gateway for the overseas activities of non-NY law firms and it serves as an anchor for their international identities.”⁵ At the same time, U.S. firms are staffing their foreign offices with local hires and even groups of lawyers from foreign firms. The demand for staff has led to an increase in the LL.M programs in American law schools to help fill that demand.⁶

A recent empirical study of International Commercial Arbitration, sponsored by the American Bar Foundation, traced the internalization of legal practice as seen through international commercial arbitration and the growth of the U.S. presence in that field. The study documented how legal developments within the United States are affecting international arbitration. The authors concluded:

From the perspective of the United States , the international and the national legal markets are growing very close. In one obvious respect, the U.S. business world is connected closely to other countries around the world. Less obviously, the legal

⁴ Carole Silver, Globalization and the U.S. Market in Legal Services—Shifting Identities (forthcoming publication in *Georgetown Journal of International Business*).

⁵ *id.* at 48.

⁶ *id.* at 58-59.

practices and approaches of big U.S. law firms are providing an almost general legal language for transnational business transactions.⁷

3. Professional Regulation

Lawyers practicing in host countries other than their home countries are as a general matter subject to regulation in both countries. Practically speaking, home-country regulation may be somewhat attenuated, but disciplinary action by home-country authorities of a lawyer practicing abroad is not unknown. Host-country regulation, on the other hand, tends to be the more immediate context in which such a lawyer practices.

Most major centers of international legal practice have rules governing the activities of foreign lawyers established in those jurisdictions.⁸ Some form of local registration is usually required. A special status for the foreign lawyer may have been created as, for example, in Brussels. The applicable rules range from relatively restrictive in France and Japan to relatively permissive in Hong Kong, London and New York. Some jurisdictions such as China (other than Hong Kong) limit the number of foreign law offices that may be opened. Others such as France may require that the foreign lawyer pass a local bar examination administered in the local language. Most jurisdictions permit associations between foreign and local lawyers, although Japan continues to be rather restrictive in this respect.

⁷ Y. Dezalay and B.G. Gartle, Dealing in Virtue, International Commercial Arbitration and the Construction of a Transnational Legal Order, (Univ. of Chicago 1996), at 179.

⁸ These rules in North America, Europe, East Asia and Australia are set forth and discussed in Cone, International Trade in Legal Services (Little, Brown 1996).

The European Union has adopted Directives relevant to the right of lawyers from one EU member-state to practice in other EU member states—the most important of which is the Establishment Directive currently being put into effect by the several EU member states. Lawyers who are not citizens of EU member states are not entitled to the benefits of the Establishment Directive, however.

In the United States, a number of states (following the lead of New York in 1974) have adopted rules for the licensing of “legal consultants” (based on the French concept of *conseil juridique*).⁹ The legal-consultant rules of the various U.S. states vary significantly from state to state, and very few have followed all major aspects of the ABA’s Model Rule for the Licensing of Legal Consultants (1993) (which is based on New York’s rules).¹⁰ Generally, a legal consultant is a lawyer qualified to practice in a foreign jurisdiction who, without taking a U.S. bar examination, is authorized by a host U.S. state to conduct an advisory but not a courtroom legal practice in the host U.S. state.

All members of the World Trade Organization are bound by the General Agreement on Trade in Services, which covers legal services (among many other fields). The extent of GATS coverage of legal services is largely dependent, country-by-country, on the specific commitments that a given country made with respect to legal services during the Uruguay Round of Multilateral Trade

⁹ See the text at Chapter 9, note 21 below. These U.S. states have continued to license foreign lawyers as legal consultants, although France has ceased to license foreign lawyers as *conseils juridiques*.

¹⁰ The New York legal-consultant rules are Part 521 of the Rules of the N.Y. Court of Appeals.

Negotiations (or, possibly, which that country unilaterally liberalized thereafter).¹¹ Thus, to determine the regulatory status of a foreign lawyer in a given country, it is necessary to consult not only the relevant rules of that country but also its scheduled legal-service commitments under the GATS. At the present time (March 2000), as a practical matter, these GATS commitments by the three countries that are parties to the North American Free Trade Agreement subsume the operative NAFTA provisions on legal services.

Both GATS and NAFTA provide for on-going liberalizing negotiations on professional services, but (according to lawyers in the office of the United States Trade Representative as of March 1, 2000) GATS negotiations for the liberalization of legal services are not expected to take place, and NAFTA negotiations for such liberalization are not expected to take effect, in the near future.¹² Thus, for the time being in the United States, the provision of legal services by lawyers including, foreign lawyers in the several states, is subject to the rules of those states governing legal services. The relevant rules are those for admission to the Bar and, in U.S. states which have them, rules for being licensed as legal consultants.

¹¹ These specific commitments are annexed to the GATS, country-by-country.

¹² Under Annex 1210.5, Section B of the NAFTA, Canadian, Mexican and U.S. professional bodies of lawyers have proposed a model rule for adoption by local regulatory authorities in each country, entitled "Foreign Legal Consultants and Related Aspects of the Cross-Border Delivery of Legal Services." This model rule is just that, and it may be adopted, modified, rejected or ignored by local regulatory authorities.

Chapter 9

A Survey of MDP in Selected Jurisdictions Abroad

1. Europe
2. France
3. United Kingdom
4. The Netherlands
5. Germany
6. Other European Jurisdictions--Austria, Belgium, Italy, Spain, Sweden, Switzerland
7. Ontario, Canada
8. New South Wales, Australia
9. Conclusions Regarding the Survey

Some advocates of MDP in the United States, in support of their advocacy, point to the existence of MDP abroad.¹ In addition, some commentators have mentioned that positions taken in the United States will influence positions taken abroad on MDP.² These two factors—domestic U.S. advocacy based on, and domestic U.S. influence on, MDP abroad—provide the backdrop for this survey of MDP in selected jurisdictions outside the United States, and are referred to again in the Conclusion at the end of the survey.

The objective in conducting the survey has been to obtain information. Although the survey itself is not intended to favor or disfavor MDP either generally or in some particular

¹ See generally, American Bar Association Commission on Multidisciplinary Practice (hereinafter, "ABA Commission on MDP"), Report to the House of Delegates, Aug. 1999, at C7-C9.

² See, e.g., Ader, Synopsis of notes on the question of the multidisciplinary partnership in France today, at 4, Paris, Aug. 4, 1999.

form, it necessarily will reflect views expressed concerning MDP, and these views are rarely neutral. To the extent feasible, the survey has been designed to present a balanced picture, but it seems unlikely that every reader will conclude that perfect balance has been achieved.

The survey begins in and focuses principally on Europe, because of Europe's relative economic importance, because of its variety of on-going experiences with MDP, and because a discussion of Europe can add perspective to other jurisdictions. Another reason for focusing on Europe is that firms now known and sometimes referred to herein as the Big Five (Arthur Andersen, Deloitte Touche Tohmatsu, Ernst & Young, KPMG, PricewaterhouseCoopers) and their predecessors have themselves initially focused on certain European jurisdictions in their quest for MDP.

More particularly, after covering the European Bar Council (CCBE) and the European Commission to provide a Europe-wide perspective to the extent one seems to be available, the survey will turn to France. This country has been chosen as the first in the survey because the Big Five themselves seem to have chosen it as a field of experiment in their attempt to include legal practice in their MDPs.³ After France, the survey will turn to the United Kingdom. Although rules on MDP in the U.K. are very much in a state of evolution, the London legal market is undeniably the largest in Europe. The survey will then cover The Netherlands, because it has given rise to litigation over MDP which is now pending before the European Court of Justice. Germany will be covered next and, because it is the largest national economy in Europe and its professional rules are relatively unknown in the United States, it will be covered in some detail.

³ See "The Paris Laboratory," *Commercial Lawyer*, Feb. 1996, at 16.

After Europe as such and the four countries of France, United Kingdom, Netherlands, Germany, the survey will touch briefly on six other European countries (Austria, Belgium, Italy, Spain, Sweden, Switzerland), as well as Ontario and New South Wales. Following the survey, an attempt will be made to set out the conclusions that it seems to support.

1. Europe

a. The European Bar Council (CCBE)

National delegations from the 18 European countries of the European Economic Area represent the legal professions of those countries in a common bar association called the Council of the Bars and Law Societies of the European Community, often referred to by the acronym of CCBE.⁴ For several years it has been considering MDP and taking positions thereon.⁵ On November 13, 1999, in a plenary session in Athens, the 18 delegations unanimously adopted a “Position of CCBE on integrated forms of co-operation between lawyers and persons outside the legal profession” (hereinafter the “CCBE Position on MDP”). The CCBE Position on MDP begins by mentioning competing interests: on the one hand, freedom of initiative, free competition, and social needs and preferences; on the other, the lawyer’s professional independence and duty of loyalty to clients, and the legal profession’s rules on conflicts of interest.⁶ The CCBE Position on MDP then states:

The duty to maintain their independence, to avoid conflicts of interests and to respect client confidentiality are particularly endangered when lawyers exercise their profession in an organisation which, factually or legally, allows non-lawyers a relevant degree of control over the affairs of the organisation. Interests conflicting with the stated duties of lawyers, arising from the concerns of the non-lawyers involved, may then directly influence the organisation’s aims and policies. . . . [T]he interests involved may, viewed by themselves, be legitimate and salutary, rendering their potential influence particularly insidious.

⁴ The 18 are the 15 member states of the European Union—Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom—plus Iceland, Liechtenstein, Norway. CCBE is the acronym for Commission Consultative des Barreaux Européens, the former French name of the Council.

⁵ See, e.g., the CCBE Declaration on Multidisciplinary Partnerships adopted in Brussels on Nov. 29, 1996.

⁶ By way of footnote, the CCBE Position on MDP stated that it was not addressing the subject of in-house counsel, because in-house lawyers have a position that “is distinct from that of lawyers serving the public to such an extent, that the two cannot be considered within the same context.”

The CCBE Position on MDP next restates “the legitimate interest in the free pursuit of economic activity,” and then adds the following:

[I]t has been advanced that there is a relevant demand on the part of users of professional services, for the forms of service made possible by integrated professional organisations, and that this demand may not justifiably be denied. CCBE observes, however, that there is no actual evidence of the existence of any public consensus as to the desirability or the legitimacy of the forms of integrated co-operation examined here; whilst it is a matter of overriding public interest, that the negative aspects . . . be effectively dealt with.

In the context of “jurisdictions [where] forms of integrated co-operation between lawyers and non-lawyers are permitted,” the CCBE Position on MDP addresses “rules on internal partitioning of the relevant organization (colloquially referred to as the use of ‘Chinese Walls’).” According to the Position, “CCBE does not accept that . . . the relevant problems can truly be adequately met . . . [by] the application of rules of the type indicated”. The CCBE Position on MDP then concludes as follows:

The legal profession is a crucial and indispensable element in the administration of justice and in the protection available to citizens under the law. . . . CCBE consequently advises that there are overriding reasons for not permitting forms of integrated co-operation between lawyers and non-lawyers with relevantly different professional duties and correspondingly different rules of conduct. In those countries where such forms of co-operation are nevertheless permitted, lawyer independence, client confidentiality and disciplinary supervision of conflicts-of-interests rules must be safeguarded.

It would seem fair to characterize the CCBE Position on MDP as strongly cautionary. It has been reported as presaging intervention by the CCBE on behalf of the Dutch Bar in the litigation on MDP now before the European Court of Justice (discussed below under The Netherlands).⁷

⁷ This possibility was referred to, e.g., in the course of the litigation in The Netherlands (discussed below), and in the article in the Law Society Gazette referred to in the next footnote.

On the other hand the CCBE Position on MDP should be considered in light of these three considerations:

- The CCBE neither licenses nor disciplines lawyers. These functions are carried out by national authorities who will have the final word on matters relating to MDP. (In this respect, the CCBE is roughly analogous to the American Bar Association.)
- As expressly recognized in the CCBE Position on MDP (and as will be seen below), various forms of MDP are already permitted in certain European countries.
- Although the United Kingdom delegation to the CCBE (like the 17 other national delegations) voted in favor of the CCBE Position on MDP, the Law Society of England and Wales “reserved its position on the resolution.” The U.K. vote for the CCBE Position on MDP was made possible by the other U.K. professional organizations (bars and law societies).⁸ Thus, the position of the English Law Society must be considered separately (see below under United Kingdom).

b. The European Commission

At the level of the staff of the Commission of the European Union, work on MDP has apparently not progressed beyond a section of a 1992 document entitled “Consultation Paper on Joint Cross-Border Practice of Regulated Professions.”⁹ The Consultation Paper calls a mixed practice involving more than one profession “problematic,” but nonetheless “is inclined to support it [such a mixed practice].” The paper observes that “mixed practices do seem to meet the needs of business. Small firms in particular are often pleased to find a range of services under the same roof.”

The paper next mentions problems that have been raised concerning mixed practices:

[In the case of combinations] within the same category of professions [and] especially in the case of broader combinations, the problem of incompatibility

⁸ See the Gazette of The Law Society, Nov. 17, 1999, at 1.

⁹ The paper was prepared by Directorate General III of the Commission (no. 9, 7/9, Sept. 21, 1992). The relevant section is “6. Mixed Practices” (at 22-24).

between professions will arise. The justification for prohibiting certain combinations is the need to protect the independence of the practitioner, in the interests of the consumer.

Finally, the paper next examines problems arising from differences in the rules as among the member states of the European Union. On the basis of this examination, the paper concludes, “it should not be expected that rules authorizing mixed practices will be easy to apply.” As mentioned, this 1992 staff-level paper seems to be the most recent study of MDP that has been conducted within the European Commission.

2. France

a. Introduction

The topic of *pluridisciplinarité*¹⁰ (multidisciplinary practice) has been much debated in France, largely because of the prominent position of the Big Five within the legal market in that country. The French Government has been involved in the debate, and at its request Henri Nallet, a former Minister of Justice and a member of the French Parliament, prepared and, in July 1999, submitted a report entitled Les réseaux pluridisciplinaires et les professions du droit (multidisciplinary networks and the legal professions) (hereinafter the "Nallet Report"), which focuses in large part on the Big Five in France.¹¹

Even though the Big Five have established a strong presence in several European countries, they seem to have used the French legal market as a field of experiment in their attempt to include the practice of law in their multidisciplinary networks ("MDPs"). In France (as in certain other countries) the Big Five have included within their MDPs legal practices that remain nominally independent. The Big Five thus practice law in France through "associated law firms,"¹² each of which is affiliated with one of the Big Five pursuant to

¹⁰ In France, *multidisciplinarité* refers to the practice by a firm of several disciplines; *interprofessionalité* refers to organized relationships between several professionals practicing in different disciplines; and *pluridisciplinarité* refers to multidisciplinary practice in general.

¹¹ Collection des rapports officiels. La Documentation Française, ISBN 2-11-004360-1, Paris, 1999. It is summarized below at the end of this section on France. The legal profession in France is fragmented, which is why the French and the Nallet Report use "professions" in the plural.

¹² These associated French law firms are Archibald Andersen; H.S.D.[hommes, stratégie, droit]-Ernst & Young; Deloitte & Touche Juridique et Fiscal; [Deloitte & Touche] Thomas & Associés; Fiduciaire Juridique et Fiscale de France-Fidal [KPMG] (hereinafter "Fidal"); Landwell & Associés (previously Coopers & Lybrand CLC Juridique et Fiscal and Price Waterhouse Juridique et Fiscal). For the term "associated law firms," see, e.g., "Accountants and lawyers," *The Economist*, March 6, 1999, at 68.

arrangements creating the association. During the 1990s, these Big Five legal practices in France grew to the point that they were among the seven largest law firms in that country.¹³

How did it happen and why did it happen in France? The answer lies in the historical background of the French legal professions and the related process whereby, it has been suggested, France in the 1990s became a "paradise" for the Big Five.¹⁴ Of particular importance in this connection were the mitigated results of the 1970 reform of the French legal professions—an attempt by the French authorities to transform a group of legal professions into a larger and more homogenized profession—which offered an important opportunity to the Big Eight (as they then were) to practice law in France.¹⁵

Unlike the United States, where lawyers have essentially formed a single profession with geographical divisions, France has had for centuries (in addition to its geographical divisions) several distinct legal professions.¹⁶ Among them, the *avocat* resembles the U.S. attorney with a less extensive mission and reduced prerogatives. The *avocats* are organized in regional Bars (*barreaux*) of different size (the largest being in Paris) and follow the rules set by the Bar's *règlement intérieur*, the equivalent of a code of professional responsibility. The other traditional legal professions are also organized in and regulated by professional bodies.

¹³ Contribution Intersyndicale à la mission parlementaire de Monsieur Henri Nallet: Guichet unique du droit, interprofessionnalité règlementée: deux impératifs pour les clients et les justiciables (March 1999) (hereinafter "*Contribution Intersyndicale*"), at 29. See also the Nallet Report, at 30.

¹⁴ The Nallet Report, at 29-31, discusses the Big Five under the heading, "Les réseaux et le marché du droit: la France, un paradis pour les réseaux [MDPs and the legal market: France, a paradise for MDPs]?"

¹⁵ See generally, *Contribution Intersyndicale*, and Laurent Chambaz, Rapport à l'Assemblée Plénière du Conseil National des Barreaux. L'affiliation de cabinets d'avocats à des réseaux intégrés, non-exclusivement juridiques, August 1997 (hereinafter "Chambaz"), for discussions of the origin and the development of MDPs in France.

¹⁶ The *avocats* are officers of the court acting as attorneys and counselors; the *avoués* are officers before the courts of appeal; the *huissiers de justice* perform various functions including serving legal papers (like process servers), levying execution of court decisions, collecting minor debts; the *notaires* have jurisdiction over real estate transactions, wills, and various documentary matters.

In addition, statutes designed to facilitate the access of individuals to certain types of courts have generated non-lawyer practitioners in areas of the law covering labor disputes, commercial litigation, social security litigation, and administrative litigation. Before certain courts, individuals may be represented by non-lawyers of their choice who have been formally authorized to do so. Labor unions thus have entire legal departments with members specialized in the representation of employees before the French labor courts, many or all of whom are non-lawyers. Moreover, accountants and auditors also benefit from provisions of the 1970 and 1990 reforms, allowing them to provide their clients with legal advice so long as the advice follows naturally from their basic professional activities. In sum, neither the French *avocats* nor the traditional French legal professions taken as a whole enjoy a monopoly of the practice of law.

Not only do *avocats* belong to but one piece of a fragmented legal profession, but also it was not until the 1960s that *avocats* were permitted to form partnerships having more than five partners.¹⁷ Historically, therefore, *avocats* were almost exclusively focused on the traditional litigation-related aspects of legal practice (the *judiciaire*), and tended not to focus on advice and assistance involving tax, corporate, commercial, and general business law (the *juridique*).¹⁸ Prior to 1971, this vacuum was filled in part by a new, unofficial profession whose members were known as *conseils juridiques et fiduciaires* (legal and tax consultants).¹⁹

¹⁷ A decree of November 30, 1956 authorized associations between *avocats*, but the Paris Bar's Code of Professional Responsibility in 1961 limited to five the number of associated *avocats* in each structure. This limitation was finally abandoned later in the 1960s.

¹⁸ By 1971, only a few French firms had an international reputation (e.g., Gide Loyrette Nouel, Jeantet, Francis Lefebvre).

¹⁹ See Zimmerman in *Contribution Intersyndicale*, at 18-19. The vacuum was also filled in part by foreign law firms established in France, as well as by French legal and tax consultants with law degrees who were not members of a French Bar but were giving advice or preparing documents in matters related to business, commercial, corporate, and tax law.

Although the main legislative goal of the 1970 reform was to enlarge the domain of the *avocats* and to create a stronger legal profession, and although two secondary professions (*avoués près les tribunaux, agréés au commerce*) were integrated into the profession of *avocat*, the 1970 reform failed to integrate the legal and tax consultants into the profession of *avocat*. On the contrary, the new law created and thus legally recognized the profession of *conseil juridique* (legal consultant). Thenceforth, the *conseils juridiques* benefited from a protected title.²⁰ They were not *avocats* and were not allowed to represent their clients before the principal French courts. Rather, they dedicated their practices mostly to business law matters and developed their legal counseling activities, in many cases quite successfully. Under the law, they were professionally organized,²¹ enrolled on a list established by the *Procureur de la République* (State Attorney), and subject to requirements similar to those required of *avocats*.

It has been argued that the 1970 reform did not strengthen the French legal profession but rather divided and weakened it to the disadvantage of both the *avocats* and the *conseils juridiques*; that the *avocat* retained the image of a litigator lacking competence in matters involving business and tax law, while the *conseil juridique* remained a purely French innovation not well recognized internationally and lacking the prestige that accompanies a long tradition and rigorous professional rules.²²

Whether or not the 1970 reform strengthened the French legal profession, it did a great deal to strengthen two other categories of legal practitioner in France. One group that benefited consisted of foreign lawyers who were allowed to practice in France as *conseils*

²⁰ The title is recognized by Law 71-1130 of December 31, 1971.

²¹ Several associations of *conseils juridiques* including the *Association Nationale des Conseils Juridiques (ANCJ)* were unified under regional commissions headed by a National Commission of *Conseils Juridiques*.

²² *Contribution Intersyndicale*, at 19-20.

juridiques.²³ The other group benefiting from the 1970 reform was the Big Eight (as they then were). They started adding legal practice to their activities in France by employing or affiliating with *conseils juridiques*, who enjoyed complete autonomy from the French Bar. The areas of business and tax law being pursued by the *conseils juridiques* were those of interest to the Big Eight which, through the *conseils juridiques*, could develop their legal practices free of supervision by the Bar. At the time the Bar apparently did not react to the practice of law in France by the Big Eight, although (as will be seen) there was a premonition of potential conflict.

Following the 1970 reform, it became clear that further reform was necessary to try once again to strengthen the French legal profession and to adapt it to the challenges of the business-law market. Overall, the *avocats* had not managed to develop their activities in this market, and by the end of the 1980s only ten firms of *avocats* comprised at least 60 *avocats* per firm.²⁴ The Paris Bar Association commissioned an inquiry into the situation by a member of its governing body. The resulting report²⁵ included (among other proposals) the recommendation that the *conseils juridiques* and *avocats* should merge into a single legal profession, subject to a formal undertaking by the *conseils juridiques* that they would not be part of an accounting firm: "As to the issue of the accountants, the situation must not be left as is, especially considering that several of the accounting firms' principals would automatically become *avocats* upon completion of the merger of both professions."²⁶

²³ See Cone, International Trade in Legal Services (Little, Brown 1996), §9.4.

²⁴ *Contribution Intersyndicale*, at 29.

²⁵ Rapport à Monsieur le Bâtonnier Philippe Lafarge de Monsieur Daniel Soulez Larivière, membre du Conseil de l'Ordre, sur la réforme des professions juridiques et judiciaires (June 1988) (hereinafter "Soulez Larivière").

²⁶ *Id.*, at 21 (where the report also criticized the Big Eight for using their financial strength to buy up firms of *conseils juridiques* in Paris and throughout France, and for allegedly boasting that they would buy up the *avocats* "building by building and room by room").

The report and the proposals led to a second legislative reform in 1990. In supporting this second reform, the *avocats* requested a unified profession that would have a monopoly over the right to give legal advice, to draft legal documents, and to represent clients in court. They achieved only partial satisfaction. The French Parliament merged the professions of *conseil juridique* and *avocat* into a single profession which became known as the profession of *avocat*, but the *avocats* were not granted a monopoly over legal advice, drafting legal documents, or even representation before the courts. The *périmètre du droit* (area of professional activity reserved to *avocats*) was limited from its origin by the right granted to other professionals to give advice in areas regarded by them as ancillary to their principal activities. Banks, insurance companies, unions, and accountants took advantage of this right to handle legal matters that the *avocats* considered as part of their natural domain.

Furthermore, the French Parliament did not allow the *avocats* to form partnerships with the other legal professions (the *notaires* and the *huissiers*), nor did it merge the *avoués* or the *avocats au conseils* into the new profession of *avocat*, nor did it allow these three professions to form partnerships with each other.²⁷ The legal profession thus remained divided despite the 1990 reform.

While the text of the 1990 reform was still being debated by the French Parliament, debates occurred within the National Association of *Conseils Juridiques* (the *ANCJ*)²⁸ regarding the issue of MDP. The proponents of MDP among the *conseils juridiques* wanted to have the *ANCJ* support a text that would officially authorize MDP in France, but a majority of the *ANCJ* membership was opposed to this text and its objective. Realizing that they

²⁷ See *Contribution Intersyndicale*, at 24.

²⁸ *Association Nationale des Conseils Juridiques (ANCJ)*.

were in a minority, the supporters of MDP left the *ANCJ* and created their own professional association, which they called *Juri-Avenir*.²⁹

In an open letter to its members,³⁰ the *ANCJ* opposed the Big Five and the creation of *Juri-Avenir*. It stated that the sole purpose of *Juri-Avenir* was to "support the right of law firms to be affiliated with accounting firms," and added that "the quasi-totality of the *conseils juridiques* oppose this right [because] it would be incompatible and inconsistent with the principle of separation between accounting activities and the legal profession as understood and supported by the *ANCJ*." Symbolic of this dispute was the issue of "branding" (the use of Big Five names by their affiliated law firms) that was to give rise to much discussion within the French Parliament and, following the 1990 reform, within the new profession of *avocat*.³¹

By virtue of the 1990 reform, all persons who were *conseils juridiques* on December 31, 1991 became *avocats* on January 1, 1992. This occurred automatically, by operation of law. Therefore, as had been foreseen in 1988,³² all *conseils juridiques* (all partners and associates) working in the legal practices of the Big Six (as they then were) became *avocats* and members of the Bar (members of the respective Bars having jurisdiction over the geographical areas where they were practicing).

²⁹ The legal name of *Juri-Avenir* is *Association pour l'exercice en groupe de la nouvelle profession juridique et judiciaire*. Although not exclusively composed of the Big Five, *Juri-Avenir* is viewed as having been sponsored by them to promote MDP in France.

³⁰ Letter dated Sept. 1990. The letter claimed broad support from the professions of *avocat* and *conseil juridique*.

³¹ See note 42, *infra*, and accompanying text for a discussion of Article 67, paragraph 3.

³² See Soulez Larivière, §II-3 D a).

b. The Big Five in France

Subsequent to January 1, 1992, the legal practices of the Big Five in France have expanded at a substantial rate in terms of both revenues and numbers of legal professionals (*avocats*).³³ The analysis found in the *Contribution Intersyndicale*³⁴ suggests that the development of these legal practices, while subject to variations, has generally resulted in (1) low net income in terms of revenues, (2) substantial indebtedness, and (3) low net results per partner. Fidal (the legal practice of KPMG), which is the largest law firm in France, can be examined for information bearing on this analysis.

(1) Fidal, in September 1998, employed 1,099 *avocats*, reported gross annual revenues of 1,124,688,000 French francs (“FF”), and a net annual income (after tax) of 11,296,000 FF.³⁵ The gross/net ratio thus shows a rather low profitability of 1% of revenues, or about one-tenth of the reported profitability of Clifford Chance in France.³⁶

(2) At the same time, Fidal had total indebtedness of 422,177,000 FF and an operating result of 28,509,000 FF in 1998.³⁷ Thus, the debt was 37.53% of gross revenues.

³³ See the Nallet Report, at 30, and *Contribution Intersyndicale*, at 29. In 1997, the average annual increase in revenues for the legal practices of the Big Six (before the merger of Price Waterhouse and Coopers & Lybrand) was 21%. Nallet Report at 31.

³⁴ See *Contribution Intersyndicale*, at 31-32.

³⁵ Fidal, *Rapport de gestion du directoire*, Accounting year ending Sept. 30, 1998 (hereinafter “Fidal 1998”).

³⁶ The profitability of Clifford Chance, France, was 9.66% in 1997. *Contribution Intersyndicale*, at 31.

³⁷ Fidal 1998.

Since the debt was 14.8 times the amount of the operating result, were this relationship to remain unchanged it would take Fidal over 14 years to reimburse its debt.³⁸

(3) In 1997, Fidal had 308 partners and an operating result of 35,470,000 FF after all expenses. The operating result per partner thus amounted to 115,162 FF, as against 2,709,229.83 FF for Clifford Chance.³⁹ If Fidal partners received remuneration significantly in excess of their salaries,⁴⁰ the excess was presumably provided by non-Fidal sources in KPMG.⁴¹ In this event, Fidal partners may have benefited from financial support from the rest of the MDP, which may have been subsidizing Fidal's market share of legal practice.

Another issue that involves legal practice by the Big Five in France relates to “branding,” that is, to the usage by a law firm affiliated with one of the Big Five of a name that includes or reflects the name of the Big Five entity itself. The 1990 reform contained two relevant statutory provisions whereby the Big Five (as they now are) officially entered the French legal profession. They are Article 67 of Law No. 90-1259 of December 31, 1990 (“Article 67”), and Article 2, paragraph 4 of Law No. 90-1258 of the same date (“Article 2”).

³⁸ See *Contribution Intersyndicale*, at 32. Fidal had almost the same debt/gross revenues ratio in 1997 (37.94%), which was the lowest among the Big Five legal practices. In comparison, the same ratio for Clifford Chance in France was 2.17% in 1997. *Id.*

³⁹ *Id.*

⁴⁰ Partners' remuneration in the Big Five law firms is not published. The amount, if any, of remuneration contributed by the non-legal practices, and any differences in remuneration between the regular French partners of a Big Five law practice and those partners who are also members of international entities grouping various practices (like Andersen Worldwide in Switzerland) are likewise not published. Gérard Nicolay of Landwell & Associés (PricewaterhouseCoopers) says that the law firm's partners receive 70% of their income after a one-year delay and invest in the law firm a total of 40% of their income in order to finance its development.

⁴¹ In 1998, Fidal had a total of 1,960 employees, and total operating expenses in respect of salaries of 604,030,000 FF. Fidal 1998. If it had paid its associates and other non-partner employees at the lowest market rates (180,000 FF a year for a first-year associate was the base salary recommended by the relevant syndicate in Paris; the legal minimum wage in France in 1998 was approximately 90,000 FF a year), Fidal would have paid its partners on average a yearly salary of less than 1.2 million FF (approximately \$200,000). These figures assume full-year employment. They may understate non-partner remuneration and overstate partner remuneration.

The latter provides that an entity may add, before or after its name, the name or insignia of the association, the group or the professional network, be it national or international, of which that entity is a member, without prejudice to (i.e., subject to) the provisions of Article 67. Article 67 contains two relevant provisions, paragraphs 2 and 3. Paragraph 2 provides that "the companies or groups which existed [before January 1, 1992] may keep their names, even if the name is not constituted by the names of current or former partners." Paragraph 3 then provides that "if [at the time of the reform] these companies or groups of *conseils juridiques* were affiliated with a national or international network that included professions other than the legal professions, they could still mention their belonging to such a network during a period of five years [starting on January 1, 1992]."⁴²

There are two main interpretations of this provision. One reflects the position of the French National Bar Council and critics of the Big Five, while the other has been developed by the Big Five and to a certain extent by the Bar of Nanterre (Hauts-de-Seine). According to several syndicates of *avocats* and former *conseils juridiques*, the debates which took place in the French Parliament over the issue of the accounting firms' relationships with some firms of *conseils juridiques* show that Parliament had misgivings concerning those relationships. These syndicates consider that Article 67, paragraph 3 clearly represents a limitation on the provisions of Article 67, paragraph 2, as well as on Article 2, with respect to a legal practice affiliated with an MDP. They assert that to permit such a legal practice to continue using the same name (entirely or in part) as one of the Big Five would be completely inconsistent with the prohibition

⁴² Chambaz, at 12-15, gives the following legislative history. Different versions of the text appeared during the parliamentary debates. There were several attempts by supporters of the Big Five to amend the wording of the text. The text ultimately adopted was in fact taken from an amendment submitted by a supporter of the Big Five, which were thus successful in imposing their views to a certain extent. Their wording not only gave them a five-year period of status quo, but also generated a debate on its interpretation on which the Big Five have been relying to prolong enforcement of the provision beyond the period of five years.

in Article 67, paragraph 3 and with the intent of the French Parliament.⁴³ This interpretation finds support in an answer given by a parliamentary leader in the debate in the French National Assembly on December 10, 1990:

What is the situation today? Some firms [groups of *conseils juridiques*] may refer in their partnership name to the multidisciplinary practice they are part of, which includes that to which we are opposed, the accounting professions. The Government in Article 67, paragraph 3 has given a five-year period for these firms to comply with the law. . . . Within the coming years law firms [*sociétés d'exercice libéral* or *associations*] within the new structure set by the law must respect our laws. We have accepted multidisciplinary networks but only to the extent that it is between legal professions [*judiciaire* and *juridique*].⁴⁴

Later, based on this strict interpretation and on a resolution taken by the National Bar Council,⁴⁵ the Paris Bar insisted that PricewaterhouseCoopers Juridique et Fiscal change its name. At various times beginning in 1996, several Bars including the Paris Bar had requested that the legal practices of the Big Five respect the provisions of Article 67, paragraph 3 and modify their respective names.⁴⁶ PricewaterhouseCoopers Juridique et Fiscal, created by the merger of Price Waterhouse and Coopers & Lybrand,⁴⁷ after being questioned by the Paris Bar on the issue of the name of its legal practice, finally announced its decision in October 1999 to

⁴³ See *Contribution Intersyndicale*, at 25-26. Chambaz, at 11-13, quotes Dominique Saint-Pierre, in his report of June 1989, for the proposition that legal practices within MDPs would not be permitted to use the names of the MDPs; and quotes Michel Pezet, the Reporter of the Law Committee of the French National Assembly, as having stated that the purpose of Article 67 was to guarantee the independence of the *avocat* within an MDP. The syndicates referred to are the *Association Française des Avocats Conseils d'Entreprises*, *Confédération Nationale des Avocats*, *Fédération Nationale des Unions des Jeunes Avocats*, *Union des Jeunes Avocats de Paris*.

⁴⁴ For this statement by Michel Pezet (preceding note) see Chambaz, at 13, *Contribution Intersyndicale*, at 25.

⁴⁵ On Nov. 16, 1996 the National Bar Council issued the following statement: "Any firm affiliated with a national or international MDP that is not exclusively among legal practitioners must, from January 1, 1997 on: -stop making any reference whatsoever to such MDP, -modify its name so it no longer reproduces or includes in part or in whole the name of such MDP."

⁴⁶ A decision by the Paris Bar Council dated May 7, 1996 indirectly required that the Big Five's legal practices change their names but at the same time indicate their Big Five affiliations. This decision was a source of confusion that enabled the Big Five to maintain the status quo.

⁴⁷ The decision to merge was reportedly taken at the global level by the accounting and counseling practices and imposed on the legal practices, which had to adapt to the situation created by a *fait accompli*.

change it to “Landwell & Associés”⁴⁸—which might be regarded as an acknowledgment by one of the Big Five of the correctness of the strict interpretation of Article 67, paragraph 3.

This decision by PricewaterhouseCoopers was not copied by other Big Five accounting firms in France. Fidal, which is affiliated with KPMG, may not feel as much concerned as Deloitte & Touche, Archibald Andersen, or Ernst & Young, because, unlike these three firms, its name is distinct from that of its affiliated MDP.⁴⁹ As for the remaining three of the Big Five, their legal practices in France are under the jurisdiction of the Bar of Nanterre (Hauts-de-Seine), where they and Fidal represent almost 70% of its individual members, and where members of Big Five legal practices are on the Bar’s governing body (*Conseil de l’Ordre*). The Bar of Nanterre has not taken action to prohibit a law firm affiliated with an MDP from using the name of the MDP.

Generally speaking, the Big Five consider that paragraph 2 of Article 67 allows their legal practices to retain the respective names of the MDPs with which they are affiliated, and paragraph 3 should not be read as an exception to that principle. The text of Article 67 as enacted was the result of an amendment presented by Jean-Pierre Philibert, who was in 1990 a member of both the National Assembly and of Fidal. Although the National Assembly rejected several of the amendments he presented because they openly would have allowed the Big Five legal practices to retain their names, he also drafted the final version of Article 67. The Big Five

⁴⁸ The decision was made for all legal practices of PricewaterhouseCoopers in Europe and, according to Gérard Nicolay, this rather short name was picked to sound Anglo-Saxon though allowing at the same time each country’s legal practice in the network to “customize” it easily. Accordingly it was Frenchified by adding the “& Associés” in France. For all practical purposes, the law firm PriceWaterhouse Juridique et Fiscal became Landwell & Partners and the law firm Coopers & Lybrand CLC Juridique et Fiscal became Landwell & Associés. Both are expected to become Landwell & Associés in the year 2000.

⁴⁹ On the other hand, as regards Fidal, it should be noted that, in his report to the French Senate on Oct. 31, 1990, the *Rapporteur de la Commission des Lois du Sénat*, Luc Dejoie, gave a broad interpretation of the prohibition found in Article 67, paragraph 3: “This restriction means that past the five-year period, not only may the name of

have consistently argued that paragraph 2 of Article 67 allows their legal practices to retain their names even when "not constituted by the names of current or former partners," and that the limitation in paragraph 3 applies only to references to the MDP but not to the name of a legal practice itself. In sum, the Big Five never interpreted Article 67, paragraph 3 as an obligation for their legal practices to dissolve any link they had with other Big Five activities (accounting, counseling, and auditing).⁵⁰

In March 1999, the French National Bar Council adopted a decision on MDPs (*réseaux*) which requires lawyers in an MDP to use a firm name distinct from the name of the MDP. The decision limits permissible MDPs to those comprising only members of regulated liberal professions; declares auditing and certifying the accounts of a client to be incompatible with the activities of an MDP in which lawyers are members; lays down stringent rules on transparency, setting out information about the structure and operation of each MDP comprising lawyers that must be disclosed to the National Bar Council; requires the MDP to comply with the rules of the legal profession on conflicts of interest; and forbids the MDP to compromise the independence of the lawyer. Reportedly, in April 2000, Fidal commenced litigation in an effort to set aside this decision by the National Bar Council.⁵¹

A July 1996 document⁵² describes a common strategy of development by the Big Eight (as they then were). This 1996 plan of action was signed by representatives of each of the

the firm no longer refer to the network to which it was affiliated, but also the name of the firm will have to be changed even if it did not mention the name of the network to which it was affiliated".

⁵⁰ See Chambaz, at 15-16.

⁵¹ The relevant portion of the decision is found in Art. 16, *Conseil National des Barreaux, Décision à caractère normatif* no. 1999-001 (March 26-27, 1999), at 45-46.

⁵² Juri-Avenir. Répondre aux attentes du marché: un plan d'action qualité pour l'audit en Europe (hereinafter "1996 plan of action"). This document is found in Chambaz as Annex 12.

eight firms, and its purpose was to address the issue of the "expectation gap" that these firms considered to exist between the mission of accountants and auditors, and their actual performance as it was perceived by clients. Although much of this accountant-oriented document does not refer to legal practice, the document throughout presents the development of multidisciplinary forms of practice as a necessity in order to improve the service of the accountants and auditors and to reduce the "expectation gap." It comments at several places on the role of lawyers as part of an MDP. These comments are concerned with the non-accounting services which the Big Five deem it necessary to provide in addition to, and as a complement to, the classical accounting and audit functions.

The 1996 plan of action seems to be based on one key principle with regard to non-accounting activities, including legal services, within a Big Eight (now Big Five) MDP. Under this principle, the main activities of the MDP are to remain accounting and auditing, and it is to make them more effective that the services of specialists from other areas must be added. Thus, lawyers were regarded as accessories to accountants. The 1996 plan of action made it clear that the MDPs were to be controlled by accountants and auditors, and only by them—that a given MDP must be majority-controlled, through voting rights and the composition of management, by persons qualified to practice the accounting profession.⁵³ In this connection it might be mentioned that, within the Big Five in France, the legal practices are far from being the activity that is most productive of revenues.⁵⁴

Non-lawyer control of the MDPs has prompted *avocats* outside the Big Five to claim that *avocats* surrender their professional independence when entering the Big Five.

⁵³ 1996 plan of action, at 12.

⁵⁴ Recent data indicate that the legal practices of the Big Five in France generate 15% to 28% of total MDP revenues. See the Nallet Report, at 24.

Recruitment of *avocats* by the Big Five involves obtaining the views of non-legal professionals. Once inside a Big Five MDP, the *avocat* may be expected to provide the MDP's auditors with information that an independent *avocat* would consider privileged. Portions of the 1996 plan of action suggest that the *avocats* within the Big Five will be expected to observe the standards of the auditors in supplying the latter with information relating to clients.⁵⁵ The risk for the *avocats* under the 1996 plan of action is that, being considered as any other service providers and as accessories to the auditors and accountants in an MDP, they will lose their specificity and hence the professional basis in France for attorney-client privilege and for the confidentiality of communications between *avocats* in the representation of their clients.⁵⁶

The transformation of the Big Five *conseils juridiques* into *avocats* could imply that their legal practices are now being monitored as a result of their passing under the jurisdiction of the Bar. The Big Five are still criticized, however, for lack of transparency regarding the type of structural or contractual arrangements that exist among the members of an MDP, especially between *avocats*, on the one hand, and non-legal professions such as auditors and accountants, on the other. The Big Five claim that such agreements are confidential and do not fall under the jurisdiction of the National Bar Council; that they are only provided to a local Bar upon official request, provided that they remain confidential. Four of the Big Five⁵⁷ assert that the Bar having jurisdiction over them is fully informed of all existing agreements regarding the structure of their MDPs. They are under the jurisdiction of the Bar of Nanterre (Hauts-de-Seine), which geographically encompasses La Défense, a large business center bordering Paris.

⁵⁵ 1996 plan of action, at 7, 43.

⁵⁶ In this connection, see "Controverse sur l'entendue de l'exercice professionnel des avocats," *Le Monde*, Sept. 29, 1999, at 10.

⁵⁷ PricewaterhouseCoopers is the only one under the jurisdiction of the Paris Bar.

Realistically, however, these four are in a position to dominate the Bar of Nanterre and to influence the professional body in charge of monitoring them. The Nallet Report refers to this fact and points out that over two thirds of the members of the Nanterre Bar are employed by the Big Five.⁵⁸

In managing their MDPs, the Big Five seem to be sensitive to the issue of conflict of interest. "We are being watched constantly by our critics and competitors and by the Bar regarding conflict of interests. More than anybody else we must be extremely cautious," says Gérard Nicolay of Landwell & Associés. It seems that the Big Five attempt to avoid conflicts not only with existing clients but also with potential clients. On the other hand, *avocats* who criticize the Big Five say that *avocats* within the Big Five are not free to choose their clients on a traditional basis, and are subject to strategic constraints imposed by Big Five management based on MDP financial considerations. Moreover, it would seem that, even with the best of strategic planning, a Big Five MDP in France would from time to time face a genuine ethical conflict of interest; but no such situation has been documented.

The French National Bar Council, despite criticism of the Big Five among the *avocats*, must consider the position of the legal profession in France in light of the Bar's severe economic difficulties.⁵⁹ Many young lawyers, having passed the bar examination, have been forced to delay their entrance into the profession because they could not find law firms willing to hire them and train them during the compulsory first two years of practice as a *stagiaire* (legal intern).⁶⁰ The Big Five hire many young associates and train them. According to *Juri-Avenir*,

⁵⁸ Nallet Report, at 31-32.

⁵⁹ See "Editorial" Bulletin du Bâtonnier (Paris) No. 12 March 26, 1996, No. 34 Oct. 15, 1996.

⁶⁰ In France an attorney after being sworn in must work for a period of two years under the supervision of a more senior attorney, generally a partner in a law firm, in order to gain access to the *Grand Tableau* (the list of practicing attorneys who have completed their two years of *stage*).

the Big Five from 1991 to 1998 devoted 473,706 hours to continuing legal education, and guaranteed to their associates decent and regular income.⁶¹ Furthermore, the 1990 reform had given rise to a dispute over the *périmètre du droit* (area of professional responsibility reserved to *avocats*). The Big Five distanced themselves from this dispute and presented their MDPs as acceptable and modern alternatives to other avenues of legal practice. The National Bar Council thus came to realize that it had to cope with MDPs rather than to fight them.

By its decision of March 14, 1998,⁶² the National Bar Council officially allowed all *avocats* to form associations and partnerships with members of other regulated professions including accountants and auditors. The National Bar Council thus officially recognized MDPs, but subject to certain principles, restrictions, and obligations, including the following:

(1) To avoid conflicts between the professional rules regulating *avocats* and auditors, an *avocat* affiliated with an MDP may not represent, or derive any revenue from, a client of an auditor of that MDP.

(2) The *avocats* affiliated with an MDP must practice under a name different from the name of the non-legal part of the MDP.

(3) The conflict-of-interest rules of the legal profession must be applied throughout the MDP, and an *avocat* may not represent a client if knowledge acquired about another client by anyone in any part of the MDP is likely to benefit unfairly, or to harm, either of the two clients.

⁶¹ Juri-Avenir. L'exercice de la profession d'Avocat en Réseau Pluridisciplinaire 1998 (hereinafter, "*Juri-Avenir 1998*"), at 12.

⁶² This decision was effectively ratified by the 1999 decision cited in note 51, *supra*.

(4) Most importantly, each MDP is obligated to disclose to its local Bar and to the National Bar Council substantial information concerning the structure of the MDP and relationships between the different bodies and professions within the MDP, their members, their composition, the rules governing their management, administration, and internal elections, their financial structure, the mode of remuneration of the partners, the type of computer system used, existing procedures to preserve attorney-client privilege, and the practices and rules applied within the MDP in order to respect ethical principles and rules of professional responsibility established by the Bar.

Although the March 1998 decision by the National Bar Council was an official acknowledgment by the *avocats* of the existence of MDPs as legal practitioners and members of the profession of *avocat*, the Big Five were reluctant to accept many provisions of this decision, in particular those having to do with the monitoring of their structures by a local Bar and especially by the National Bar Council. The Big Five's professional association, *Juri-Avenir*, published a response in a document⁶³ that was ultimately distributed to all members of the French Parliament. This document not only presents the arguments developed by the Big Five regarding the decision of the National Bar Council, but also attempts to position the Big Five within the French legal profession in a more favorable light than American or British law firms with offices in France.⁶⁴ It quotes the following from a report delivered to the Conference of the Heads of the French Bars in April 1998: "It is the American and British firms established in

⁶³ The document was *Juri-Avenir* 1998 (note 61 *supra*).

⁶⁴ *Juri-Avenir* 1998, at 5, calls MDPs the most efficient vehicle for the development of French law internationally, designed "to reinforce the status of French Business Law against the threat of Common Law hegemony." (The Big Five, of course, represent American and British traditions if not hegemony. They were founded in such places as London, Chicago, New York, and Cleveland.)

France rather than the Big Six that promote the Anglo-Saxon legal system in France."⁶⁵ It also states that the offices of American and British law firms in France are totally under non-French control, and that, in contrast, the Big Five's legal practices are French law firms with French assets that decided to join MDPs in order to enhance their development.⁶⁶

The *Juri-Avenir* document claims that the National Bar Council does not have jurisdiction to monitor or control any internal MDP agreement or regulation relating to rules of ethics and professional responsibility. It quotes the Minister of Justice during the debates over the 1990 reform to the effect that the National Bar Council was never meant to control the local bar associations. With respect to conflicts of interest, the *Juri-Avenir* document asserts that there is no example in France of a client's complaint based on a violation of professional secrecy by a member of the Big Five. It also asserts that the *avocat* within an MDP is not to be held responsible for actions by an auditor or an accountant, and that these professions are "distinct." Regarding the National Bar Council position on the strict incompatibility of the profession of *avocat* with the mandate of auditors, the *Juri-Avenir* document argues in favor of a less restrictive interpretation of applicable law. The appropriate test, it says, is whether another professional within the MDP has acted in a manner that would materially impair the objectivity of the auditor. Finally, the *Juri-Avenir* document asserts that the debate over MDP is misdirected and focuses unjustifiably on issues of ethics that are nothing but attempts to mask the *avocats'* fears for their future. The *Juri-Avenir* document blames the constraints imposed by

⁶⁵ *Juri-Avenir* 1998, at 6. U.K. and U.S. firms are lumped together as "Anglo-Saxon."

⁶⁶ *Juri-Avenir* 1998, at 11.

the *avocats*' professional rules for the lack of progress by the *avocats* and their loss of business opportunities.⁶⁷

An overall objective of the *Juri-Avenir* document seems to be to improve the public image of the Big Five, and to moderate the effect of the term "Big Five" itself, which can seem threatening to small practices. The *Juri-Avenir* document thus focuses attention on small MDPs that are claimed to involve 800 law firms and 4,100 *avocats*.⁶⁸ In terms of revenues, however, these small MDPs are in no way comparable to the Big Five, and the Nallet Report (discussed below) deals almost exclusively with the Big Five.

In the realm of professional politics, the Big Five, despite their undeniably strong presence within the French legal profession, have yet to emerge as a national force among the *avocats*. At the election of the National Bar Council in November 1999, *Juri-Avenir* obtained two seats⁶⁹ out of eighty. For the time being, therefore, the Big Five may not be able to secure a position on the Board or on a major committee of the National Bar Council.

c. The Nallet Report

It was in the aftermath of the March 14, 1998 decision of the National Bar Council that the Prime Minister of France requested what became the Nallet Report on MDP in France. The context of the report is existing French legislation and professional rules, and policies in Europe. Its purpose is to study if and how considerations of legal ethics can be reconciled with the concentration of several distinct professions in a multidisciplinary practice

⁶⁷ *Id.*, at 9, 14 and at 13.

⁶⁸ *Id.*, at 5, 19.

⁶⁹ Including that of Pierre Berger, President of *Juri-Avenir*.

providing among others legal services to clients. The report describes in some detail the presence in France of substantial law practices under the control of the Big Five. It states as a basic fact that prohibiting MPD in France is out of the question, and it sets forth recommendations for the regulation of MDP in France. In addition, the Nallet Report discusses ways in which French professional organizations and law firms in particular might be given improved access to capital resources.

The report's main recommendations concerning MDP are summarized below.⁷⁰

1. The report calls for legislation that would define MDPs and authorize the free creation of MDPs so defined. The report would open MDPs to all professions and not just to those that are statutorily regulated. Even so, the report focuses almost exclusively on MDPs of the type created in France by the Big Five.
2. The report calls for the creation of a national commission having jurisdiction over matters of professional ethics involving MPDs (a new *Comité national de déontologie des réseaux*). This commission would be authorized both to prescribe ethical rules where there were conflicts or gaps in the rules applicable to the professions in an MDP, and to resolve particular ethical cases where existing disciplinary bodies lacked jurisdiction. In principle, this new commission would when feasible apply pre-existing ethical rules and act through pre-existing disciplinary bodies. The report proposes that the new commission have eight members—three from bar organizations, two from audit/accounting organizations, and three from governmental agencies.⁷¹ (There would thus be one more bar than audit/accounting

⁷⁰ The following enumeration and summary are not found as such in the Nallet Report.

⁷¹ Each of the following would be entitled to name one member of this new commission: the National Bar Council; the Conference of *Bâtonniers*; the Paris Bar; the National Society of Auditors; the Order of Accountants; the Stock Exchange Commission [the French Securities and Exchange Commission]; the Ministry of Finance; the Chancellery of the Ministry of Justice.

representative.) The report further proposes that standing to bring matters before the new commission would be limited to those organizations and agencies, other governmental bodies, and firms and entities within MDPs.

3. The report would require that every MDP submit to the new commission, as well as to existing professional disciplinary bodies relevant to the MDP, all agreements and constitutive documents relating to the structure and operation of the MDP. According to the report, any such agreements and documents not so submitted would be void. The report would also give clients of the MDP access to such agreements and documents.
4. With respect to the professions of *avocat* and auditor, the report calls for the "absolute independence" of each profession from the other. With respect to auditors and accountants, the report would leave it up to the two professions to work out their relationship and, failing that, to have them consult the new commission referred to above.
5. The report endorses the principle of forbidding the sharing of fees between *avocats* and other professionals in an MDP. The report is unclear as to how, and how far, it would apply this principle, and recognizes that stating the principle does not answer questions relating to the sharing of expenses and the sharing of profits. Again, the report would turn these questions over to the new commission mentioned above.
6. The report calls for the independence of each profession in an MDP with respect to its own professional strategy and management, and the admission of partners.
7. The report touches on three specific questions of professional ethics.

(i) As to conflicts of interest, the report, without providing any factual data in support of its statement, says that existing MDPs claim to have adopted detailed and strict rules on the basis of recognized principles and norms, that no significant problems have arisen thereunder, and that it will suffice for these MDPs to make their rules public.

(ii) As to advertising, the report calls for common rules for all professions in an MDP, including those professions that do not now have any rules, based on the relatively restrictive rules applicable to *avocats*.

(iii) As to professional secrecy, the report states that the *avocats* in an MDP must remain absolutely bound by existing rules of the legal profession.

8. The last eleven pages of the Nallet Report deal with improvements in capital-raising by law firms through passive investment. The Nallet Report thus seeks to further one of the goals of the 1990 reform by strengthening the entities⁷² in which *avocats* practice as law firms. One such entity, the *société en participation* (which is a form of partnership) is limited to partnerships between individual lawyers and has had very little success since the 1990 reform. The Nallet Report proposes that juridical persons be allowed to enter into such partnerships in order to help reinforce or create larger, more concentrated structures with greater financial means.

The report also proposes that French law firms be authorized to create holding companies. The purpose is to provide *avocats* with a structure designed to help them finance their development at the national, European and global levels. The holding company would lend

⁷² The *Société Civile Professionnelle (SCP)*, the *Société d'Exercice Libéral (SEL)*, the *Association* and the *Société en Participation* are among the most common.

funds to the law firm, and interest would be deducted from the dividends paid by the firm to the holding company. According to the report, this should facilitate the financing by banks and other financial institutions of law firms through such holding companies while preserving the *avocats'* independence.

The Nallet Report further suggests that French law firms be authorized to issue certificates of investment without voting rights that could constitute part of the firms' capital. The *avocats* of these firms would retain all voting rights, and their passive investors would collect dividends. Investors would undoubtedly be tempted to put pressure on the *avocats* in order to make their investment profitable, and this could raise questions under the *avocats'* Code of Ethics.⁷³

The Nallet Report also makes significant recommendations for modifications of tax law as applied to law firms, along lines requested by the Paris Bar. The changes would permit the creation of tax-free reserves, and would facilitate a transition to lower levels of taxation. In addition, the report criticizes the existing system applied in most law firms in France whereby senior partners, upon retirement, treat their partnership shares as their own property which they sell to younger partners. The report calls for a different approach to retirement benefits, which would be less burdensome to French law firms and allow them significantly to increase their capital.

At this time, it is unclear whether and how any of these recommendations will be reflected in French legislation and professional rules. The Nallet Report sets out principles but does not provide any detailed guidance for applying those principles. Their implementation will depend on decisions by the French Government.

⁷³ Raymond Martin, La partie parallèle du rapport Nallet, JCP – La Semaine Juridique Edition Générale, No. 47, Nov. 24, 1999, at 2062.

3. United Kingdom

The legal profession in the United Kingdom is divided functionally between solicitors and advocates/barristers, and geographically among England and Wales, Scotland, and Northern Ireland. Except for the solicitors in England and Wales, the position of the profession is, briefly, to view MDP as problematic—as posing a serious potential threat to the core values of professional independence, loyalty to clients, and strict rules on conflicts of interest; and these branches of the profession (those other than the solicitors of England and Wales) supported the Position of the CCBE on MDP referred to above under Europe.⁷⁴

It is the solicitors of England and Wales, however, who, numerically and economically, comprise the most important branch of the U.K. legal profession. Their organization, The Law Society of England and Wales (the “Law Society”), has been recognized for certain purposes by Acts of Parliament, and its practice rules prohibiting MDP were adopted under statutory authority.⁷⁵ Subsequent to the adoption of those rules, however, there has been a change of government in the U.K., and the Law Society may now be seeking to anticipate parliamentary action that would authorize MDP, lest the Law Society find itself with little or no role in handling the matter. In the words of the Council of the Law Society in October 1999,

if the Law Society was not prepared to be proactive in shaping suitable rules and regulations then it might be forced to be reactive. The [U.K.] Government generally took the view that, subject to suitable safeguards, MDPs should be permitted. The Office of Fair Trading was watching the debate with interest and

⁷⁴ See the Law Society Gazette, Nov. 17, 1999, at 1. For the views of a leading English barrister questioning the need or desirability of MDP from the point of view of the client and the ethics of the legal profession, see “Paper Supporting the Oral Submissions by Daniel Brennan, QC, Chairman of the General Council of The Bar of England and Wales, to the Commission of the American Bar Association on Multidisciplinary Practices,” 8 August 1999 (the General Council of the Bar, London).

⁷⁵ The Courts and Legal Services Act 1990.

it appeared that there would be new powers relating to MDPs in the Competition Act (in force March 2000).⁷⁶

A year earlier (October 1998), the Law Society had issued a consultation paper entitled “Multi-Disciplinary Practices, Why? . . . Why not?” This paper had provided solicitors with a 29-page discussion of the Law Society’s prohibition against MDPs, and had said that “central to the debate” was “the fear that MDPs would threaten the independence and separate identity of the profession, and might reduce public access to justice.” It had then added that “traditional barriers have begun to break down. Those who oppose MDPs now tend to focus more on the practical problems MDPs may create. There is particular concern about how solicitors in MDPs should be regulated.”⁷⁷

The 1998 consultation paper next set out a history of the debate within the Law Society over MDP, and of the practice rules forbidding it; and pointed out that a solicitor is permitted to provide “business adviser” services, but not legal services, through a separate business entered into with non-lawyers, and to engage in certain activities when acting in a capacity other than as a practicing solicitor. Thus, the consultation paper said, there is a distinction between a practicing solicitor, in respect of whom there are substantial “consumer protections,” and the solicitor who is not practicing, in respect of whom “virtually none of the protections apply.” The paper then observed: “If we permit MDPs, it may be harder to preserve this clear line between a practice offering full client protections, and a business offering none of the protections offered

⁷⁶ Minutes of the meeting of the Law Society Council, Oct. 13-14, 1999 (hereinafter, “LSC Minutes”), at 21. Shortly thereafter the U.K. Chancellor of the Exchequer reportedly supported this observation: “Chancellor Gordon Brown was not specific and little guidance was being handed out by the Treasury, but he announced that the Government would look into whether the working codes of professionals impaired competition in any area. There was speculation last night that Mr. Brown was referring to the Law Society rules which prevent lawyers from forming partnerships with any other professions, for instance accountants.” Birmingham (U.K.) Post, Nov. 10, 1999, at 19.

⁷⁷ Consultation paper, at 4-5.

by a solicitor's practice."⁷⁸ The consultation paper also mentioned different models for MDPs, and arguments for and against them;⁷⁹ and discussed particular problems such as the handling of conflicts of interest within an MDP,⁸⁰ and whether MDPs might require a new regulatory structure.⁸¹

Attached to the consultation paper were nine pages of questions, distributed to members of the Law Society "to obtain [on a confidential basis] the full range of views of solicitors and organisations representing solicitors and other bodies." Recipients were requested to read the consultation paper before responding, and to take into account the views of clients. Although there are about 80,000 solicitors practicing in England and Wales, and 12,000 questionnaires were distributed, the Law Society received only 272 responses to its 1998 questionnaire. The responses have been described as "divided on the subject" and as favoring MDP on the order of 70% to 80% of the respondents.⁸²

Following the issuance of the 1998 consultation paper and questionnaire, the Council of the Law Society created a Working Party on MDP, which met in 1999 on June 17, July 21, and September 9 with the following objective:

To take forward a review of MDPs to ensure that restrictions on the business vehicle/organisation through which solicitors practise, are the minimum necessary in the public interest and do not stand in the way of solicitors' business development planning.⁸³

⁷⁸ *Id.*, at 7-10.

⁷⁹ *Id.*, at 12-23.

⁸⁰ *Id.*, at 24.

⁸¹ *Id.*, at 29.

⁸² Law Society letter of 4 Feb. '00. See Written Remarks of Alison Crawley to the ABA Commission on MDP (Law Society Center for Professional Responsibility); "Multi-Disciplinary Practices, Proposals for the way forward," Law Society staff preliminary report, Sept. 28, 1999 (hereinafter "Prelim. Rept.").

⁸³ Prelim. Rept., §12.

The Working Party considered in particular the responses to the Law Society questionnaire (discussed above), and “the conclusions drawn by the ABA Commission on MDPs”.⁸⁴

At its first meeting, the Working Party decided that “the public interest required that the burden of proof [should] be on those who argued for the retention of the current restrictions [on MDP].”⁸⁵ At its second meeting, the Working Party reached seven preliminary conclusions:

- “the ultimate goal should be to allow solicitors who wish to do so to provide any legal service through any medium to anyone, while still providing the necessary safeguards to protect the public interest;
- “the necessary protections fall into two broad groups: core principles of professional practice and key client protections;
- “the core principles are independence, freedom of choice, conflict of interest, confidentiality;
- “the key client protections relate to privilege, indemnity cover, dishonesty cover and complaints systems;
- “the long term goal is likely to require concentration on those public interest protections which can be provided by regulating the individual rather than the organisation, but recognizing that some safeguards may be required from the organisation itself;
- “new client protection issues arise in MDPs, in particular, transparency will be important—the client must know what services have been provided and by whom;
- “achievement of this goal is likely to need legislative change, following consultation with various government departments and other professions.”⁸⁶

⁸⁴ As mentioned, there were only 272 responses to the questionnaire. By the time of the Working Party’s first two meetings, it was already clear that the ABA House of Delegates would not approve the report of the ABA Commission on MDP, and by the time of the Working Party’s third meeting the House of Delegates had resolved, by a 75+-% vote, that no rule changes should be made to authorize MDP “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 Prelim. Rept. described this resolution as one “to defer a decision on the Commission’s report until February or July next year [2000].” Prelim. Rept. §16. Taking a different view, the Law Society *Gazette* reported that “the American Bar Association seems likely to reject a recommendation to allow them [MDPs].” Nov. 17, 1999, at 1.

⁸⁵ Prelim Rept., §19.

⁸⁶ *Id.*, §21.

The Working Party next proposed that “immediate consideration should be given to developing two interim models [of MDP] . . . without the need for legislation.” The two models were called (1) “legal practice plus”—whereby a firm of solicitors would be permitted to have a minority of non-solicitor partners—and (2) “linked partnerships”—whereby an independent firm of solicitors “links with, for example, an accountancy practice” and the “linked partnerships” would be permitted to share fees.

As regards “legal practice plus,” the Working Party was of the view that legislation would not be required if the solicitor partners bore “extra responsibilities” and the non-solicitors were required to enter into contracts with the Law Society.

As regards the interim solution of “linked partnerships” which, the Working Party said, “needs further work to see if the ban on fee sharing should only be relaxed in relation to certain specified alliances, or more generally,” the Working Party noted that this solution would be used mainly by the Big Five but also might be used by others including, possibly, purely commercial companies. The Working Party then listed three further issues to be explored: (1) passive investment; (2) conflict of duties between lawyers and auditors; (3) legislation.⁸⁷

The Working Party’s report was taken up on October 13-14, 1999 by the Council of the Law Society which, by an overwhelming majority, substantially adopted the preliminary conclusions mentioned above. In support of so acting, the Council referred to the possibility of Government intervention if the Law Society failed to act on MDP (as discussed at note 76 *supra*). In addition,

several members [of the Council] made the point that in a developing legal market, it was up to the Law Society to seize the initiative and to formulate an appropriate regulatory framework within which firms could choose to operate within MDPs if they so wished. The introduction of MDPs did not necessarily

⁸⁷ *Id.*, §§22-23.

equate with a loss of independence. Solicitors would still retain certain core values which would continue to identify them.

The Council formally resolved the first of the Working Party's points—"that the ultimate goal should be to allow solicitors who wish to do so to provide any legal service through any medium to anyone, while still providing the necessary safeguards to protect the public interest." The Council "noted" the Working Party's other six conclusions (see above); and said that the interim solutions of "legal practice plus" and "linked partnerships," as described in the Working Party's report, "should be considered".⁸⁸

Shortly after the October 1999 meeting of the Council, representatives of the leadership of the Law Society⁸⁹ were of the view that adoption of the "legal practice plus" approach (that is, an approach permitting lawyer-controlled MDPs) should remove certain of the pressures from within the solicitors profession to capitalize on opportunities represented by MDP, pressures brought by solicitors who would like to be able to have partners who were, for example, human-resource practitioners, or environmental practitioners. Accommodating these needs and permitting such non-Big Five MDPs, they said, might also help to reduce pro-MDP pressure by the U.K. Government.

As regards "linked partnerships," they acknowledged that the key question is whether sufficient protections of consumers and professional values can be provided (as mentioned in the Working Party report), and added that the Big Five can be expected to "chip away" at whatever safeguards are adopted.⁹⁰ Once "linked partnerships" are formed with the Big Five, why not

⁸⁸ LSC Minutes, at 21-22, confirmed in part by Law Society letter of 4 Feb. 2000..

⁸⁹ Kamlesh Bahl, Vice-President of the Law Society, and Paul Venton, Council Member and Chairman of the Working Party on MDPs, on Nov. 18, 1999.

⁹⁰ The British legal press reported favorable reactions by members of the Big Five to the position taken by the Council of the Law Society on Oct. 13-14, 1999. *E.g.*, "James Hodgson, partner at KLegal, the law firm associated with KPMG, says: 'This is very good news. It's certainly a step in the right direction.' KPMG and KLegal are not

with Boots [the drugstore chain], they asked? They foresaw risks involving passive investment in legal practices, and risks relating to conflicts of interest and professional integrity within MDPs. In response to a question, they reacted positively to the idea that a “linked partnership” could be for only a fixed term, subject to renewal with the assent of both parties.

The Law Society’s action regarding MDP has taken place against a background of commentary on the ambitions of the Big Five for legal practice in the U.K.⁹¹ A subtext, however, has been that, to date, this legal practice has not been of a “top tier” variety in London.⁹² Thus, in addition to the question of what rules will emerge in the U.K. to permit legal practice in the form of MDP, there seems to be a further question focused on the Big Five in particular: will their legal practices come to rival those of the leading London law firms?⁹³

under the same roof but Hodgson admits it is ‘likely they would all get together’ if the anti-MDP rules are lifted, providing a single point of contact for clients and what he sees as numerous benefits to lawyers. He says: ‘It has enormous implications for the profession. Lawyers will be getting involved at the strategic business stage. Our lawyers will be able to share profits and become partners in KPMG.’” *The Lawyer*, Oct. 18, 1999, at 52. Also, a former vice chairman of corporate finance at KPMG, now solicitor director-general of the Confederation of British Industry, has called on the Law Society to permit MDPs. *Law Society Gazette*, Jan. 8, 2000, at 1.

⁹¹ See, e.g., “Accountants and lawyers,” *The Economist*, March 6, 1999, at 68-69 (“Now all the Big Five have soaring legal ambitions”). The principal law firms in the U.K. affiliated with the Big Five are: Arthur Andersen—Garretts (London, Reading, Birmingham, Leeds and Manchester in England) and Dundas & Wilson (in Scotland); PricewaterhouseCoopers—Arnheim & Co., and Tite & Lewis (London).

⁹² A series of articles have appeared in *Commercial Lawyer* to the effect that law firms sponsored by the Big Five in the U.K. have encountered significant difficulties in developing legal practices commensurate with their ambitions. See, e.g., “Accountants in the Legal Market, Has the strategy failed?,” *Commercial Lawyer* Jan. 1998, at 40; “The turning point, Have the accountants lost the initiative?,” *Commercial Lawyer* Oct. 1998, at 16. In its Oct. 1999 issue *Commercial Lawyer* published an article (at 23) to the effect that Arthur Andersen’s English affiliated firm, Garretts, was experiencing difficulties. In its Dec. 1999 issue (at 2), *Commercial Lawyer* questioned the overall profitability of Arthur Andersen’s legal practices worldwide. On Jan. 13, 2000, the press reported that a former managing partner of Clifford Chance in London was leaving that firm to join Garretts and Arthur Andersen’s worldwide legal practices. *N.Y. Law Journal*, Jan. 13, 2000, at 1; *Financial Times*, Jan. 13, 2000, at 8.

⁹³ Possibly relevant in this connection (and in connection with the last sentence of the preceding note) is the following that appeared in *The Lawyer* article cited in note 90, *supra*: “Former Law Society President and Clifford Chance partner Michael Mathews, one of the driving forces behind MDPs, says: ‘Big City firms will have more to offer by differentiating themselves from the accountants, [rather than] going in with them. Judging by Slaughter and May’s current strategy, you wouldn’t expect them to think about it at all. I would be surprised if any of the others would immediately. I can tell you, I have not been put under any pressure from Clifford Chance partners to get [MDPs] through. . . . I have no particular desire to practice in an MDP but I believe there should be as many business opportunities open to lawyers as possible.’”

4. The Netherlands

The Netherlands has given rise to the most significant litigation in Europe over MDP. The parties are, on the one hand, the General Council of the Netherlands Order of Advocates⁹⁴ (the “Order”) and, on the other hand, individuals and entities acting in connection with the international firms of Price Waterhouse and Arthur Andersen.⁹⁵ At issue are the contemplated integration of a Dutch lawyer named J. W. Savelbergh into Price Waterhouse Nederland, which is a partnership of accountants, and the contemplated integration of a Dutch lawyer named J.C.J. Wouters into Arthur Andersen & Co. Accountants. In respect of Savelbergh/Price Waterhouse and Wouters/Arthur Andersen, the Order, acting through supervisory bodies in Amsterdam and Rotterdam, respectively, had found each contemplated integration to be incompatible with the Order’s rule known as the Cooperation Regulation 1993 (the “Regulation”).⁹⁶

In November 1995, the Order upheld the decisions of the supervisory bodies. Price Waterhouse and Messrs. Wouters and Savelbergh appealed the action of the Order to the District Court at Amsterdam (Administrative Law Section). (The District Court did not accept the appeal by Arthur Andersen because it had not made an intermediate appeal of the supervisory body decision to the Order’s General Council.) In February 1997 the District Court dismissed the appeals,⁹⁷ and the following month Price Waterhouse and Messrs. Savelbergh and Wouters

⁹⁴ *Algemene Raad van de Nederlandse Orde van Avocaten.*

⁹⁵ “KPMG and Ernst & Young opted for a less litigious route into the market by reaching a compromise agreement with the Dutch Bar, which allows its tax consultants to share profits with lawyers (provided that the accountants are not connected in any way to the lawyers).” “The Dutch experience”, European Counsel, Oct. 1999, at 8.

⁹⁶ *Samenwerkingsverordening 1993* (Sept. 23, 1993).

⁹⁷ Case Nos. 96/1283 and 96/2891 WET 29, decided Feb. 7, 1997.

appealed the District Court's action to the Council of State⁹⁸ (Administrative Division) of The Netherlands. It upheld the District Court on issues of Netherlands law, but referred to the European Court of Justice nine questions of European law, and suspended the appeal pending action by the European Court.⁹⁹ The European Court is expected to issue a decision in late 2001.

Central to the dispute is the Regulation. It was adopted by the Order to govern a particular form of association called an "integrated cooperation" if entered into between lawyers, or between lawyers and persons engaged in professions other than that of law. The announced purpose of the Regulation is to safeguard independent practice by the legal profession, and (in Article 2) it forbids members of the legal profession from incurring obligations prejudicial to the independence of legal practice. It defines an "integrated cooperation"¹⁰⁰ as

any cooperation in which the participants conduct their practice for their joint account and risk, or share with each other authority over such practice or ultimate responsibility therefor.

Members of the legal profession may enter into an "integrated cooperation" only if its primary purpose is the practice of law, and only if the non-lawyer members of the cooperation are members of a profession that has been recognized by the General Council of the Order pursuant to criteria found in the Regulation.¹⁰¹ Moreover, members of the legal profession must refrain from participating in a particular "integrated cooperation" until the General Council of the Order has determined that it complies with the Regulation.¹⁰²

⁹⁸ *Raad van State.*

⁹⁹ Decision by the Dutch Council of State on Aug. 10, 1999. The nine questions were published in the Official Journal of the European Communities on Oct. 16, 1999, Case C-309/99, pp. C 299/15-16.

¹⁰⁰ "Samenwerkingsverband." The definition is among the definitions in Article 1.

¹⁰¹ Articles 3, 4 and 6 of the Regulation.

¹⁰² Article 9 of the Regulation.

The General Council of the Order had not recognized accountants as members of a profession with which members of the Bar in The Netherlands could enter into an “integrated cooperation.” In contrast, it had recognized tax advisers, notaries, and patent agents as members of professions with which members of the bar could enter into an “integrated cooperation.” The principal reasons given by the Order for forbidding an “integrated cooperation” between lawyers and accountants were the following:

- The auditing function of the accountant is a public function calling for an objective assessment of the financial situation of the client, made in the interest of third parties other than the client, and does not involve the right of confidentiality. It is fundamentally different from the function of the lawyer in representing the partisan interests of the client, which does involve the right of confidentiality and places the lawyer in a position of trust independent from third parties. It is likewise fundamentally different from the functions of tax adviser, notary, and patent agent.
- The Regulation (as applied by the Order) does not prohibit lawyers from cooperating with accountants. The sole prohibition is cooperation in the form of an “integrated cooperation” where lawyers and accountants practice for their joint account and risk, and where they share authority over or ultimate responsibility for legal practice.
- The Order was created by statute to act in the public interest. In adopting and applying the Regulation, it has acted in the public interest to assure the independence of members of the legal profession in The Netherlands.

The District Court had upheld the Order on all points of Netherlands and European Law raised by the plaintiffs, and the Council of State affirmed the District Court on points of Netherlands law. As regards European Law, however, the Council of State, as the

highest administrative court in The Netherlands, felt constrained to refer to the European Court of Justice certain issues raised by plaintiffs, and to suspend the Dutch proceedings pending a decision by the European Court.¹⁰³ The questions currently pending before the European Court relate to two areas of European law: competition law; and law on the right of establishment.

In the area of competition law, the European Court has been asked whether the Order has violated Article 81 (formerly 85) or 82 (formerly 86) of the Rome Treaty by adopting and applying the Regulation to forbid “integrated cooperations” between lawyers and accountants; that is, whether, in so doing, the Order has acted unlawfully to prevent, restrict or distort competition within the European Union in a manner affecting trade between its member states (Article 81), or to abuse a dominant position in the European Union (Article 82). Central to these issues is whether the Order can claim exemption from these Treaty provisions on the theory that it was created by national legislation to act in the public interest to safeguard the independence of the legal profession in The Netherlands and the duty of loyalty that its members owe to clients, and that the Regulation has been adopted and applied in conformity with this legislation. These issues may turn on the related issues under European competition law of how the Order should be characterized (should it be distinguished from an association of economic competitors?), and whether the scope of authority vested in it by Dutch legislation was appropriate.

The other area of European law raised by questions submitted by the Dutch Council of State to the European Court of Justice involves freedom of establishment and freedom to provide services within the European Union. A threshold issue may be jurisdictional: are the

¹⁰³ In the Dutch court proceedings, the Council of European Bars and Law Societies (the CCBE) had attempted to intervene on behalf of the Order, but the Dutch court did not permit it to do so on the ground that the Order could adequately act on its own behalf. As mentioned above in the section on Europe, the CCBE is expected to intervene on behalf of the Order before the European Court.

Treaty of Rome provisions in this area applicable to a prohibition found in the internal Dutch Regulation? Here, the plaintiffs will presumably argue that the Regulation has cross-border effects affecting freedom of establishment and freedom to provide services within the European Union. If the European Court accepts this argument, it may refer to its 1995 ruling in the Gebhard case, dealing with the right of establishment of a German lawyer in Italy.¹⁰⁴ There, the Court made the following statement:

[N]ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it[.]

In summary, the litigation that has arisen in The Netherlands and that has been suspended pending responses from the European Court of Justice¹⁰⁵ turns on a narrow but crucial issue: is a national bar in the European Union (here, the Order) entitled to impose a rule (here, the Regulation) under which associations (“cooperations”) between lawyers and accountants must stop short of an “integrated cooperation”—meaning a form of association in which the lawyers and accountants share profits and losses, and in which the accountants share authority over or ultimate responsibility for the practice of law? The Court’s answer to that question should prove relevant to the ability of accounting firms fully to integrate legal practices within themselves, and to efforts by bar groups to place limits on lawyer-accountant associations—here

¹⁰⁴ Gebhard v. Consiglio dell’Ordine degli Avvocati di Milano, European Ct Justice C-55/94 (Nov. 30, 1995).

¹⁰⁵ A news article has reported that one of the plaintiffs in the litigation before the European Court, Price Waterhouse (now PricewaterhouseCoopers), has announced that it will integrate its Dutch legal practitioners into its legal services division called Landwell on July 1, 2000, without waiting for the decision of the European Court. “PwC snubs ECJ by defying Dutch ban”, *The Lawyer*, Nov. 15, 1999, at 9. The article is not altogether clear, however, as to whether Landwell in The Netherlands would be in a form inconsistent with the Regulation. If it is not consistent with the Regulation and the European Court supports the action taken by the Order, the latter presumably would then proceed to seek compliance with the Regulation.

the effort being to limit them to side-by-side arrangements in which the legal practice is kept separate from the entity that includes the accountants.

5. Germany

a. Summary and List of Defined Terms

The historic background for MDP in Germany was a legal profession that, into the 1970s and to a certain extent thereafter, had been trained mainly in a tradition of preparing persons to become members of the judiciary and of the civil service. It was under-trained for non-forensic activities. As a consequence, some business lawyers also qualified as accountants, or as tax advisers, or as both. Lawyers with multiple professional qualifications traditionally observed formalities whereby they practiced each profession separately.

The German Bar was divided over permitting lawyers to qualify and practice as, or to act jointly with, accountants and tax advisers. The bar associations and practitioners with relatively modest litigation practices were often opposed to these developments, while larger firms in business centers tended to favor them.

The division within the Bar found its way into the courts which, in decisions handed down over the years beginning in 1961, resolved the dispute, on both statutory and constitutional grounds, in favor of lawyers who wanted also to qualify as accountants and tax advisers. Court decisions in the 1960s permitted lawyers to share offices with accountants and tax advisers, and a 1975 decision confirmed that lawyers could form partnerships with accountants and tax advisers. The German Bar changed its rules to conform with these decisions.

Court decisions in 1987, 1989 and 1994 required the rewriting of the German bar association rules governing the legal profession, authorized multi-city law firms, and permitted the practice of law by limited-liability professional corporations. As a result, both the basic

German law governing the legal profession and the German bar rules were amended in the years 1994-98.

Under the law and rules as re-written, integrated MDPs are authorized in Germany among lawyers, accountants, tax advisers, and notaries. The law and rules do not authorize other professionals to enter into integrated MDPs with lawyers.

Under German law and professional rules governing the legal profession, an integrated MDP must be in the form of shared offices, or a partnership, or a limited-liability partnership, or a limited-liability professional corporation.

If the MDP is a limited-liability partnership or professional corporation, it must be controlled (owned and managed) by professionals from a given profession. Because an individual may qualify to practice in more than one profession, it is possible for the control requirement to be met in respect of more than one profession. If the MDP is in the form of shared offices or of a partnership, there is no control requirement. A decision on form of practice may turn on control, or on professional tradition, or on questions of management structure, taxation, or professional liability.

There is no compiled information on the make-up of German MDPs that are small in size and that include lawyers. Available information suggests that a high percentage of these small MDPs is controlled by lawyers. In many cases, lawyer control may have its origins in the efforts (mentioned above) by business-law practices to obtain the perceived advantages of also being qualified as accountants and tax advisers.

Of the fifty largest legal practices in Germany (the only practices as to which there is compiled information), forty-five (90%) are either lawyer-only firms or lawyer-controlled integrated MDPs. Four are law firms that have entered into non-integrated MDPs

with members of the Big Five. One is a non-lawyer-controlled integrated MDP known as Rödl & Partner.

Each of the Big Five has formed a non-integrated MDP with a German entity in which the professionals are lawyers. The essence of such an MDP relationship consists of the links (contractual or otherwise) between the German legal practice and (1) other entities in that MDP in Germany and (2) certain legal practices and entities outside Germany which are affiliated with that member of the Big Five.

The partnership of Rödl & Partner has expanded rapidly since 1989, particularly in former East Germany which until then lacked a private legal profession. The partners in Rödl are accountants and tax advisers, who control it, and lawyers.

With respect to Germany, the following defined terms are found in the following footnotes.

ANWBL 112	BT-Drucks 119	Henssler III 222	PatAnwO 252
BayGVBI 120	BverfG 107	Henssler IV 234	Raupach I 108
BayObLG 208	BverfGE 201	Henssler V 256	Raupach II 219
BGBI 192	CCP 295	HHP 295	RBerG 138
BGH 106	DAV 111	Juve Ranking 176	RiLi 133
BnotO 157	Gehre 233	LLC 220	Römermann 265
BORA 215	GG 158	LLP 219	Rulemaking Aly 210
BOSTB 272	Griffith & Schor. 170	Maxl 265	Schwedhelm&K. 142
BOWP 272	Hartung 267	Meurers 246	StBerG 140
BRAK 110	Hellwig Present. 325	NJW 135	StPO 229
Brangsch 181	Hengeler 293	O&R 298	WPO 150
BRAO 113	Henssler I 143	Oppenhoff 112	Zuck 127
Bruckhaus 292	Henssler II 222	PartGG 219	Zutt 109

b. Historic Background

The context of MDP in Germany has been the gradual evolution of the legal profession in which cases brought before the Federal Supreme Court¹⁰⁶ and the Federal Constitutional Court¹⁰⁷ have been the main causes of change.¹⁰⁸ Until the 1960s, the legal

¹⁰⁶ *Bundesgerichtshof* (hereinafter “BGH”), the highest German court in civil and criminal matters.

¹⁰⁷ *Bundesverfassungsgericht* (hereinafter “BVerfG”), which has jurisdiction over claims that basic constitutional rights have been infringed by public authority.

¹⁰⁸ Arndt Raupach, *Die Anwaltschaft auf dem Weg vom “Organ der Rechtspflege” zum “Anwalt 2000”*, in FREUNDESGABE FÜR FRANZ JOSEF HAAS, at 255, 263 (Georg Crezelius et al., 1996) (hereinafter “Raupach I”).

profession seemed to have been nearly static since the beginning of the century.¹⁰⁹ It was highly regulated and highly restrictive regarding growth and expansion. It enjoyed a nearly complete monopoly on rendering legal advice. For their part, the Federal Bar Association¹¹⁰ and the German Lawyers' Association¹¹¹ were not keen on change.¹¹²

In Germany, the lawyer¹¹³ was and still is defined as an organ of the administration of justice.¹¹⁴ Administration of justice is defined as all the functions that are allocated to the judiciary,¹¹⁵ and lawyers have thus been viewed as a part of the judicial system.¹¹⁶ In a 1974 decision, the Federal Constitutional Court characterized lawyers as occupying a position similar to that occupied by public servants.¹¹⁷ That classification of lawyers left its mark on the training of lawyers and their attitude toward different areas of the law. The legal profession's training was and still is based in large part on the outdated concept

¹⁰⁹ Jürg Zutt, Unmodernes, Moderns, Postmodernes, in Festschrift für Heinz Rowedder, 604 (Gerd Pfeiffer et al. eds., 1994) (hereinafter "Zutt").

¹¹⁰ *Bundesrechtsanwaltskammer* (hereinafter "BRAK"), also called the "Federal Bar" because membership is mandatory.

¹¹¹ *Deutscher Anwaltverein* (hereinafter "DAV"), also called the "German Bar Association."

¹¹² Raupach I, at 263; Walter Oppenhoff, *Anwaltsgemeinschaften*, 17 *ANWALTSBLATT* (hereinafter "ANWBL") 267 (1967) (hereinafter "Oppenhoff"); Dr. Kurt Ehlers et al., *Diskussion*, 17 *ANWBL* 276 (Main Lecture at the *Deutscher Anwaltstag* about needed reforms of the legal profession, like specialization, American-type partnerships, cooperation with accountants and tax advisers. The lecture was followed by a controversial discussion which revealed divisions within the German legal profession between reform-minded business lawyers and other practitioners with smaller practices.).

¹¹³ *Rechtsanwalt*. Regulated by the German Lawyers' Act, *Bundesrechtsanwaltsordnung*, v. 1. 8. 1959 (BGBl. I S. 565), as amended by *Gesetz zur Änderung der Bundesrechtsanwaltsordnung, Patentanwaltsordnung und anderer Gesetze*, v. 7. 8. 1998 (BGBl. I S. 2600) (hereinafter "BRAO").

¹¹⁴ *Organ der Rechtspflege*. §1 BRAO.

¹¹⁵ 2 KLAUS STERN, *STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND*, at 900 (1980).

¹¹⁶ Koch, §1 BRAO, in *BUNDESRECHTSANWALTSORDNUNG*, at 21 (Martin Henssler & Hanns Prütting eds., 1997) (citing the official reasoning regarding one of the predecessors of the BRAO).

¹¹⁷ BVerfG, 1974 NJW, at 103.

of lawyers working in the judiciary and in governmental administration.¹¹⁸ In 1975, the Federal Government said of this educational system that it “dates back to the 19th Century. It was molded by that period’s ideas of the sovereign state, its tasks, and the function of the law.”¹¹⁹ Legal education was meant to provide “qualifications for becoming a judge or a government lawyer in the higher administrative service,”¹²⁰ and it has focused until recently only on lawyers as judges and civil servants in the administration of the country. Contract drafting and negotiation techniques were not part of the curriculum,¹²¹ and preparation of the practicing attorney was limited to several months during the mandatory practical training following graduation from law school¹²² when the trainee was required to work at a law firm. This education overemphasized the forensic at the expense of the consultative aspects of the legal profession.¹²³

In addition, tax law was neglected by law school curricula and during the mandatory practical training, despite the fact that tax advice including tax-law advice was always an important subject for business students. Thus, tax advice was provided to a great extent not by the legal profession but by accountants and tax advisers.¹²⁴ The implications of this were far-reaching. As one author put it: “[T]he inability [of lawyers] to tackle tax and accounting

¹¹⁸ Raupach I, at 255; Kurt Ehlers, *Diskussion*, 1967 ANWBL, at 276.

¹¹⁹ Bericht der Bundesregierung über die Juristenausbildung in den Ländern, BT-Drucks. 7/3604, S. 2613 (7.5.1975).

¹²⁰ *E.g.*, §1 *Bayerische Justizausbildungsordnung* (v. 16. 4. 1993, BayGVBl. 1993, at 336.) (Bavarian ordinance regarding the education/training of lawyers).

¹²¹ More recently, several universities (e.g., Humboldt University Berlin, University of Cologne) opened institutes for lawyer-centered education.

¹²² *Referendariat*.

¹²³ Raupach I, at 256.

¹²⁴ Raupach I, at 257; Oppenhoff, at 269 (also stressing the importance of tax law).

problems caused companies—especially the small and medium-sized ones—to turn more and more to tax advisers and accountants, even when legal questions were involved.”¹²⁵

Structural deficiencies in the legal profession added to the problem. There was nearly no specialization. Parts of the legal profession were even hostile toward any specialization. An example of such hostility is an article published in 1956 under the heading, “Against the deadly sin of specialized attorneys.”¹²⁶ The author was of the view that specialized lawyers can only be amateurs. Most lawyers were single practitioners.¹²⁷ Partnerships¹²⁸ were rare and small. Characteristically, in the one place the German Lawyers’ Act mentioned partnership and cooperation, it was to prohibit certain forms of cooperation.¹²⁹ One of the prevailing types was the two-person-partnership which was just an ersatz for an old-age pension scheme for the more senior of the two.¹³⁰

In economic centers like Frankfurt and Düsseldorf, the “big” business law firms had more than three partners but seldom more than ten.¹³¹ There were more partners than associates. These partnerships were often the creatures of individual partners and depended on

¹²⁵ Zutt, at 607.

¹²⁶ Werner Neuhäuser, *Wider die Todsünde der Fachanwaltschaften*, 1956 ANWBL, at 54.

¹²⁷ In 1967 a nine-partner partnership was the largest, and only 26.5 % of all lawyers were members of partnerships, 1968 ANWBL 109. Even in 1987 only 40.9% of all lawyers were practicing in partnerships and the average size was 2.79 lawyers/partnership. Rüdiger Zuck, *Formen anwaltlicher Zusammenarbeit*, 1988 ANWBL, at 19, 20 (hereinafter “Zuck”).

¹²⁸ Partnerships or *Sozietäten* were the only form of association for combinations of several lawyers to practice law jointly. A BGH decision in 1971 held the partners of such combinations to be jointly and severally liable. BGH, BGH Zivilsachen, at 56, 355 (357); see also §59a BRAO enacted in 1994.

¹²⁹ Zuck, at 19 (§45 Nr. 4 BRAO).

¹³⁰ Oppenhoff, at 268. Typically, such a partnership consisted of two lawyers who differed in age by 20 to 30 years. The younger one worked for several years as an employee, then as a partner “for” the older one. The younger partner was normally not entitled to the same share as the founder of the law firm. After the latter’s retirement the younger partner became entitled to all the profits.

¹³¹ Raupach I, at 260.

them for their existence.¹³² A professional rule prevented lawyers from forming partnerships with lawyers in different cities¹³³ or from opening branch offices.¹³⁴ Other rules limited their ability to choose freely their residence and place of law office.¹³⁵ The prevailing opinion within the profession was that the provision of legal services depended very much on the individual attorney and his or her personal relationship with the client.¹³⁶

A 1991 study of public opinion initiated by the German Ministry of Justice, in cooperation with the German Lawyers' Association and the Federal Bar Association, found that lawyers were perceived mainly as litigators and not as legal advisers; that they were not considered to be sufficiently dedicated to the needs of clients; that they were considered to be lacking in understanding of economic and technical facts, especially with regard to certain industries; and that small and medium-sized companies perceived other consulting professions as being more service-oriented and more knowledgeable concerning certain sectors of the economy and also concerning certain issues affecting individuals.¹³⁷

¹³² Zutt, at 606.

¹³³ This rule, *Verbot der überörtlichen Sozietät*, declared unconstitutional by the BGH in 1989, was found in §28(1) *Grundsätze des anwaltlichen Standesrechts* (1973), previously *Richtlinien für die Ausübung des Anwaltberufs* (1957). These Guidelines (hereinafter "RiLi") were adopted by the Federal Bar Association in cooperation with local bar associations under the old §177 BRAO to state the general opinion within the legal profession on the performance of legal services, especially regarding good practices.

¹³⁴ §28 BRAO.

¹³⁵ §§18(1), 23 BRAO (*Lokalisierungsgebot*: lawyers must be admitted to only one regional court and/or one local court in the same district); §27(1) BRAO (*Kanzleipflicht*: duty to have office in that district); §27(1) BRAO (*Residenzpflicht*: mandatory requirement to establish residence in that district). Only the residence requirement was abolished in 1994. The other provisions are still in force, but are interpreted in a way that allows for partnerships having offices in different cities and countries. BGH, 1989 NJW 2890, 2891 (Beschl. v. 18.9. 1989 – AnwZ (B) 30/89 – EGH Nordrhein-Westfalen).

¹³⁶ Raupach I, at 260.

¹³⁷ GERHARD HARTSTANG, *ANWALTSRECHT*, at 9-10 (1991), providing the results of the PROGNOSE/Infratest Studie, which was published in Sonderheft, *Zukunft der Anwaltschaft*, ANWBL 3/87.

Despite these perceived deficiencies, the legal profession has been well protected against competition. Under the Legal Advice Act,¹³⁸ lawyers enjoy a nearly complete monopoly in rendering legal advice and conducting litigation. Although accountants are allowed to render legal advice that is incidental to their work,¹³⁹ and tax advisers may give tax-law advice,¹⁴⁰ beyond that they are barred from giving legal advice. This monopoly is enhanced by another provision which bars fully-qualified attorneys who are employees of accounting and tax-advisory firms from rendering general legal advice.¹⁴¹ This provision allows employees to give legal advice only to the extent that their employers are authorized to do so. Thus, a non-lawyer cannot circumvent the monopoly by employing lawyers.¹⁴²

The way around these restrictions in Germany has been for one person to combine the professions of lawyer, accountant, and tax adviser.¹⁴³ According to a commentary on the professional rules, edited in 1956, a lawyer who simultaneously practices those three professions should be allowed to use all three professional titles.¹⁴⁴ In a 1961 decision,¹⁴⁵ the Federal

¹³⁸ Art. 1 *Rechtsberatungsgesetz* (hereinafter "RBerG"), enacted in 1935, abolished the freedom to handle legal matters on behalf of third persons.

¹³⁹ Art.1 §5 RBerG.

¹⁴⁰ §§2, 3, 33 Tax Advisory Act (*Steuerberatungsgesetz*) (hereinafter "StBerG"); Art.1 §4 RBerG.

¹⁴¹ Art.1 §6 RberG.

¹⁴² Schwedhelm & Kamps, Unerlaubte Rechtsbesorgung durch Steuerberater und Steuerbevollmächtigte und ihre Folgen, 48 ANWBL, at 245, 251 (1998) (hereinafter "Schwedhelm & Kamps").

¹⁴³ Martin Henssler, in KOMMENTAR ZUR BUNDESRECHTSANWALTSORDNUNG, at 126-127 (Martin Henssler & Prütting eds., 1997) (hereinafter "Henssler I"); Kleine-Cosack, KOMMENTAR ZUR BUNDESRECHTSANWALTS-ORDNUNG, at 55 (1993). Neither commentary questions the compatibility of the three professions, which are classified as being "of a similar kind".

¹⁴⁴ Werner Kalsbach, *Standesrecht des Rechtsanwalts*, at 74, 134 (1956) (written by a judge on the disciplinary court of the British Occupation Zone).

¹⁴⁵ BGH, 1961 NJW 1723 (Beschl. v. 5.6.1961 – AnwZ (B) 16/60 - EGH für RAe beim OLG Hamm).

Supreme Court concurred that “the traditional profile of the legal profession included attorneys who at the same time practiced as accountants and tax advisers.”¹⁴⁶

In that case, the issue before the court was whether an accountant could be admitted to the Bar although he also wanted to continue practicing as an accountant. The court decided that the two professions were compatible under certain provisions of the German Lawyers’ Act.¹⁴⁷ The court relied on of the Guidelines for Professional Conduct of Lawyers,¹⁴⁸ which permit a lawyer to use the title of accountant when acting as an attorney.¹⁴⁹ The court also relied on the then (1961) new Accountants’ Act and Tax Advisory Act. According to the Accountants’ Act, the practice of accounting is compatible with legal practice.¹⁵⁰ The Federal Supreme Court concluded that the two professions are of a similar kind and can thus be engaged in concurrently.¹⁵¹

The Tax Advisory Act includes a similar provision, which states that the profession of tax adviser is compatible with certain other professions.¹⁵² The Federal Supreme Court interpreted that provision to find the profession of tax adviser compatible with the legal

¹⁴⁶ *Wirtschaftsprüfer* (accountants) and *Steuerberater* (tax advisers).

¹⁴⁷ The legislative intent underlying §7 Nr. 8 BRAO is to safeguard the necessary trustworthiness of attorneys. Although this proscribes anything compromising their integrity in the eyes of the public, having a second profession was not deemed to interfere with their independence and objectivity. See Henssler I, at 117.

¹⁴⁸ §70 RiLi (1957).

¹⁴⁹ BGH, 1961 NJW, at 1723.

¹⁵⁰ §43(4) *Wirtschaftsprüfungsordnung* (hereinafter “WPO”). See also the Federal Government (*Bundesregierung*) Official Reasoning on the Draft Accountants’ Act, BT-Drucks. 3/201, 1, 55 (1958) (stating that, under the then-applicable professional rules for “the liberal professions (e. g. attorney and tax adviser), an occupation at a scientific institution” would be compatible with the profession of accountant).

¹⁵¹ BGH, 1961 NJW, at 1724.

¹⁵² §22(3) Nr. 2 StBerG.

profession.¹⁵³ The court based this interpretation on the fact that both tax advisers and lawyers are allowed by law to give tax-law advice. A lawyer is the “competent adviser and representative in all legal matters”¹⁵⁴ which includes matters of tax law.¹⁵⁵ The court pointed to other similarities: Both professions are defined as not being a trade or business; both are liberal professions and require higher education at a university; both are governed by similarly strict professional rules and professional organizations.¹⁵⁶ In a later decision the court also established the compatibility of the profession of tax adviser with that of *Anwaltsnotar*¹⁵⁷ (hereinafter “lawyer/notary”).¹⁵⁸

Based on the opinion that accountants/auditors, tax advisers and lawyers are similar professions, the Federal Supreme Court and Federal Constitutional Court in further decisions opened the rendering of legal advice more and more to forms of cooperation among lawyers, accountants and tax advisers. In these cases, a local bar association was regularly the opposing party. For its part, the Federal Bar Association amended its Guidelines in conformity with those decisions. The first form of cooperation allowed by the Federal Bar Association’s

¹⁵³ BGH, 1968 NJW 844, 845 (Beschl. v. 4. 1. 1968 AnwZ (B) 10/67 - EGH Celle).

¹⁵⁴ §3 BRAO.

¹⁵⁵ §3 Nr. 2 StBerG.

¹⁵⁶ §§2, 113 BRAO; §§1(2), 4-5 StBerG.

¹⁵⁷ The German profession of notary is highly regulated under the *Bundesnotarordnung* (hereinafter “BNotO” or “Notary Act”). Notaries are fully trained lawyers who have to pass strict entry requirements. There are two different regimes regarding notaries. In parts of southern and west Germany, the notaries are not allowed to be lawyers simultaneously. The rest of the country permits *Anwaltsnotare*, notaries who are simultaneously lawyers; they must follow certain rules to safeguard their independence. §3(2) BNotO.

¹⁵⁸ BGH, 1970 NJW 425, 426 (Urt. v. 27.11. 1969 – X ZR 22/67 - Karlsruhe). Citing Art. 3 German Constitution, *Grundgesetz* (hereinafter “GG”), which provides for the right to equal treatment, the court ruled that it would constitute unjustified unequal treatment if a lawyer who was also a tax adviser could not become a notary, as other lawyers, even those specializing in tax law, were freely admitted to that profession.

Guidelines was adopted in 1957, permitting lawyers to share offices with accountants.¹⁵⁹ At that time, however, partnerships could only be formed with other lawyers.

Dual- or treble-qualified lawyers were allowed to cooperate as accountants or tax advisers with other accountants or tax advisers while simultaneously practicing as independent lawyers. In its 1961 decision, the Federal Supreme Court had established that a local bar association could not prevent a lawyer/accountant from practicing as a lawyer on the ground that he or she had formed an accounting firm with a non-lawyer accountant.¹⁶⁰ The court based that decision mainly on the professional rules permitting simultaneous admissions as lawyer and accountant,¹⁶¹ and on the similarity of the two professions.¹⁶²

In 1968, the court went further, allowing lawyers to share offices with firms of tax advisers and accountants.¹⁶³ A lawyer who was senior partner of a firm that also consisted of several non-lawyer tax advisers and accountants was permitted to practice as a lawyer and allowed to share offices with that firm. The Federal Supreme Court invalidated the provision in the Federal Bar Association's Guidelines that prohibited office-sharing with tax advisers. The Guidelines were characterized not as legal norms but as principles derived from experience which can be superseded by new developments. Once-banned practices could become legal, especially if there was a change in the law. The judges left open the question whether the Guidelines provision banning partnerships with accountants and tax advisers and office-sharing

¹⁵⁹ §21(1) S. 2 RiLi.

¹⁶⁰ BGH, 1961 NJW, at 1723.

¹⁶¹ §70 of the then applicable RiLi.

¹⁶² BGH, 1961 NJW, at 1723, 1724.

¹⁶³ BGH, 1968 NJW, at 844. Regarding accountants that question was already touched upon in the 1961 BGH case where the contract included the possibility of the sharing of offices by lawyers and accountants. The court held that that possibility was not a sufficient ground not to admit the lawyer to the bar.

with the latter still represented the common experience of the legal profession. The court expressed doubts, citing several representatives of the legal profession who were of the opinion that even partnerships between lawyers, accountants and tax advisers were legal. The court held that lawyers could not be banned from sharing offices with tax advisers, and that new clear legal norms would take precedence over the Guidelines in any case. The court observed that the new Tax Advisory Act had established that tax advisers are similar to lawyers.¹⁶⁴ In the dicta of a 1975 decision, the Federal Supreme Court confirmed the 1968 ruling, especially with regard to the legality of partnerships between lawyers and both accountants and tax advisers.¹⁶⁵

Regarding lawyer/notaries, the prohibition of multidisciplinary combinations with tax advisers was not lifted until the late 1980s, with accountants until 1998.¹⁶⁶ The prohibition on combinations between lawyer/notaries and tax advisers was found impermissible on the ground that a combination between a lawyer/notary and another lawyer who was simultaneously a tax adviser was generally permitted. The Federal Constitutional Court held that a different treatment of professionals who were only tax advisers would infringe upon their right to equal treatment under the German Constitution.¹⁶⁷ The court said that the differences between tax advisers and lawyer/tax-advisers were not of a kind and significance that would render unequal treatment constitutional. Tax advisers giving tax-law advice were analogized to lawyers.¹⁶⁸ In

¹⁶⁴ *Id.*, at 846.

¹⁶⁵ BGH, 1975 NJW, at 1414, 1415 (Beschl. v. 17.3.1975 – NotZ 9/75 – Frankfurt); Raupach I, at 258.

¹⁶⁶ They had, however, been allowed to practice simultaneously as tax advisers, BGH, 1970 NJW, at 425.

¹⁶⁷ BVerfG, 1989 NJW, at 2611 (stating also that if there had been a similar prohibition against combinations between lawyer/notaries and lawyer/tax advisers, all constitutional standards would have been met).

¹⁶⁸ *Id.*, at 2612 (citing BGH, 1970 NJW, at 425, and stating: “Both professions are defined as independent organs of the administration of (tax) justice. Lawyers and tax advisers are required to be members of their respective local professional organizations, bar associations and chambers of tax consultants, which enjoy self-regulatory powers and supervise compliance with professional rules. They are also subject to the disciplinary

its 1998 decision, the Federal Constitutional Court overruled its earlier decisions¹⁶⁹ banning combinations between lawyer/notaries and accountants.¹⁷⁰ The court cited a change in the perception of the concept of basic rights, which would require, in the case of the severe restriction of basic constitutional rights and freedoms, Parliament itself to enact a prohibition. The court said that a prohibition against partnerships between lawyer/notaries and accountants would be such a restriction, and that it was no longer permissible to derive the prohibition from the context of the Notary Act and other laws.¹⁷¹

In 1994 and 1998, the court's rulings were incorporated in the German Lawyers' Act and the Notary Act, which thenceforth included statutory provisions¹⁷² explicitly allowing the formation of partnerships and office-sharing as among lawyers, lawyer/notaries, accountants, tax advisers, and patent-attorneys.

The legalization of more and more opportunities to cooperate with other professions was closely followed by the legal profession. On different occasions, like the General Meeting of the German Lawyers' Association¹⁷³ in Bremen in 1967, the issue was discussed; bar association publications¹⁷⁴ covered the subject intensively; and it was reviewed

courts. The professional duties have been regulated in a parallel manner and are largely congruent, §§57 subsequent StBerG, §§43 subsequent BRAO”).

¹⁶⁹ BVerfG, 1980 NJW 2123; BVerfG 1989 NJW 2611; see also Stefan Kraus & Detlef Mäder, *Die Verbindung von Anwaltsnotaren und Wirtschaftsprüfern*, 1997 ANWBL, at 387-391.

¹⁷⁰ BVerfG, 1998 NJW, at 2269. (The constitutional complaint was brought by two lawyer-dominated multidisciplinary partnerships, Oppenhoff & Rädler and Pünder, Volhard, Weber & Axster. See Alex Griffith & Frank Schornstheimer, *Multidisziplinäre Partnerschaften – Sag niemals nie*, JUVE NACHRICHTEN, June 1998, at 1, 7 (hereinafter “Griffith & Schornstheimer”).

¹⁷¹ BVerfG, 1998 NJW at 2270.

¹⁷² §59a BRAO; §9 BNotO.

¹⁷³ *Deutscher Anwaltstag*.

¹⁷⁴ *Anwaltsblatt* (ANWBL) is the monthly DAV publication and *BRÄK-Mitteilungen* is its BRAK counterpart.

by the Professional Rules Committee of the Federal Bar Association.¹⁷⁵ Comments favoring cooperation were invariably opposed by more cautious voices which in the beginning were against any form of cooperation and later only favored limited change. The main motivation of the pro-MDP advocates was fear of losing market share. Walter Oppenhoff, an influential lawyer from Cologne, voiced this fear when he stated during the main speech at the General Meeting in 1967 that business circles would be looking for reliable and conclusive advice and would not be interested in which title the adviser held. The adviser could be a lawyer, accountant, or anything else, Oppenhoff said. By 1999, Oppenhoff's firm had become a lawyer-controlled MDP in which almost 90% of the professionals were lawyers.¹⁷⁶

In the discussion following that speech, after stating that the problem was not that urgent for the accountants as they could employ lawyers, another speaker continued: “[T]he legal profession is losing more [market share] the longer it takes to solve the problem, as the client does not care about professional rules but turns to the accountants for advice. They even do that in matters that genuinely belong to the legal profession, like the execution of wills, and the drafting of corporate documents.”¹⁷⁷

Those two statements evidence a conviction that clients would be interested in integrated services. It was also suggested that those within the legal profession who were against

¹⁷⁵ Fritz Schmitz, *Diskussion*, 1967 ANWBL, at 277 (chairman of that committee).

¹⁷⁶ Oppenhoff, at 272, 274. The Oppenhoff paper was presented as the main speech at the Deutscher Anwaltstag. According to DAV General Manger Brangsch, 1968 ANWBL 201, the speech had great impact inside and outside Germany. It was cited in BGH, 1968 NJW 844, 846 to show that common opinion (§177(2) BRAO) on sharing offices and even partnerships might have changed. Oppenhoff was President of the DAV from 1959 to 1963, and Chairman of the Business Law Section of the International Bar Association. He was a founder of a law firm which became part of Oppenhoff & Rädler Linklaters & Alliance and, in Germany, is a lawyer-controlled MDP. In 1999, besides some 253 lawyers, 40 non-lawyer professionals (accountants, tax advisers) worked at this firm. ASTRID GERBER ET AL., *JUVE HANDBUCH 1999/2000*, 473 (2^d ed. 1999) (hereinafter “JUVE RANKING”). See also the web site <<http://www.oppenhoff-raedler.com/english/index.html>>; Maximilian von Gleichenstein, *Anwaltschaft auf neuen Wegen*, 1970 ANWBL, at 6, 7; Zutt, at 607; Raupach I, at 257.

¹⁷⁷ Carl August Pauly, *Diskussion*, 1967 ANWBL, at 279.

the legalization of MDP would be single practitioners, focusing on litigation, who would not be affected by losses of advisory business.¹⁷⁸ The pro-MDP advocates belonged and still belong to firms performing mainly legal advisory services related to business law. For them, the MDP question was one of modernization and progress through lawyer-controlled MDPs.¹⁷⁹ The division within the legal community over MDP was also visible in cases before the Federal Supreme Court and Federal Constitutional Court, in which representatives of different branches of the legal profession opposed each other.¹⁸⁰

The professional organizations adjusted their position. Revising his previous general rejection of MDP, the General Manager of the German Lawyers' Association, Heinz Brangsch, welcomed the Federal Supreme Court decision that allowed office-sharing with tax advisers; stressed that the legal profession should be more proactive regarding reforms and not rely on the courts and legislature to act; and suggested that the profession of tax advisers should be included in the bar associations as this would facilitate the formation of partnerships and shared offices.¹⁸¹ The Journal of the German Lawyers' Association implied as early as 1970 that it was generally acknowledged that a partnership between accountants and lawyers was legal.¹⁸² The article reported on a joint seminar of the German Lawyers' Association and the Institute of

¹⁷⁸ Walter Oppenhoff, *Schlußwort*, 1967 ANWBL, at 280, 281.

¹⁷⁹ Zutt, at 608 (stating that the successful modernization process of business law firms is also shown by the possibility of retaining the same name after the name partner left or died, and the possibility of having a firm with offices in more than one city). Oppenhoff had touched on those points in his speech in 1967.

¹⁸⁰ BGH, 1961 NJW, at 1723; BGH, 1964 NJW, at 2063 (Beschl. v. 13. 7. 1964 AnwZ (B) 1/64 - EGH Stuttgart) BGH, 1968 NJW, at 844.

¹⁸¹ Heinz Brangsch, *Tätigkeitsbericht 1967/68*, 1968 ANWBL, at 201-203 (Annual Report presented at the General Meeting on May 25, 1968 in Berlin) (hereinafter "Brangsch").

¹⁸² DAV, *Sozietät zwischen Anwälten und Wirtschaftsprüfern*, 20 ANWBL, at 346 (1970).

Accountants¹⁸³ on the legal problems involved in such a partnership.¹⁸⁴ At a meeting in 1972, the board of the German Lawyers' Association concluded that the Federal Bar Association should act on the issue of forming partnerships with tax advisers.¹⁸⁵ In a 1969 amendment to the Federal Bar Association's Guidelines, lawyers had been allowed to share offices with tax advisers.¹⁸⁶ In 1970, this had been extended to patent attorneys.¹⁸⁷ Since 1973, the professional rules have allowed lawyers to form partnerships with both those professions and with accountants.¹⁸⁸ Regarding the lawyer/notaries, the Federal Bar Association had no jurisdiction over prohibitions derived from the laws regulating the notaries. In the late 1990s, the legislature wanted to reform those laws. At hearings held by the Legal Committee of the German Parliament¹⁸⁹ on June 25, 1997, both the German Lawyers' Association and the Federal Bar Association gave a favorable opinion on partnerships between lawyer/notaries and accountants, but the Federal Chamber of Notaries and the German Notaries' Association were opposed.¹⁹⁰

The accountants had been authorized to perform legal services that were directly related to specific accounting assignments.¹⁹¹ In 1963, the Federal Supreme Court extended the

¹⁸³ *Institut der Wirtschaftsprüfer*, which is a private voluntary association of accountants (*Wirtschaftsprüfer*) and accounting firms (*Wirtschaftsprüfungsgesellschaften*).

¹⁸⁴ DAV, *Sozietät zwischen Anwälten und Wirtschaftsprüfern*, 1970 ANWBL, at 346. The seminar covered delimitation of tasks, firm name, profit-sharing, professional liability insurance, partnership agreements.

¹⁸⁵ DAV-Vorstand, *Sitzung des DAV-Vorstandes*, 1972 ANWBL, at 376 (minutes of the board meeting).

¹⁸⁶ §23(2) RiLi (effective Jan. 1, 1969).

¹⁸⁷ §§23 RiLi (effective Jan. 1, 1970).

¹⁸⁸ §30 RiLi (adopted June 21, 1973).

¹⁸⁹ *Bundestag*.

¹⁹⁰ BVerfG, 1998 NJW, at 2269. The two notaries groups are the *Bundesnotarkammer* and the *Notarverein*.

¹⁹¹ Art. 1 §5 Nr. 2 RBerG. See Stephan Weth, Art. 1 §5 Nr. 2 RBerG, in BUNDESRECHTSANWALTSORDNUNG, at 1273-1275 (Martin Henssler & Hanns Prütting eds., 1997).

competence of tax advisers who until then were only allowed to provide help in tax matters.¹⁹² Since then, tax advisers have also been allowed to provide legal advice as long as it is necessary for the performance of their profession under the particular circumstances. Although neither profession was ever allowed to provide general legal advice, they both were regularly accused of stepping over the line. The result was numerous publicized rulings of lower and higher courts.¹⁹³ Tax advisers have been ordered to refrain from the drafting of contracts as diverse as certificates of incorporation, company purchase contracts, leases, and employment contracts; and there are also several decisions relating to the representation of clients with respect to third parties or in the courts.¹⁹⁴ Accountants also have been frequently cited for breaches of the Legal Advice Act. In a decision against the *Deutsche Treuhand-Gesellschaft* (“DTG”), the predecessor of a KPMG entity, the German Lawyers’ Association was the plaintiff. The DTG was ordered to cease and desist from performing surveillance of contract compliance and from litigating in court for breach of contractual duties.¹⁹⁵ The German Lawyers’ Association resisted the expansion of competing professions into the legal-service sector, seeking to cause the business community to be more thoughtful concerning the risks involved when legal work is assigned to accounting and tax-advisory firms.¹⁹⁶

¹⁹² BGH, 1963 NJW, at 2027 (Urt. v. 27.5.1963). Debate surrounding the impact of that decision was finally settled in 1998 when the legislature changed the wording of Art. 1 §5 Nr. 2 to include tax advisers, BGBI. 7.9.1998 I 2585, 2597.

¹⁹³ Probably ever since the enactment of the RberG questions have been raised concerning the illegal rendition of legal advice by accounting firms, firms of tax advisers, and individual practitioners in those professions. Court decisions relating to the problem have been handed down every year since at least the early 1960s.

¹⁹⁴ Schwedhelm & Kamps, at 247 (listing numerous decisions by different courts dating back to 1961).

¹⁹⁵ BGH, 1967 NJW 1558 (Urt. V. 9. 5. 1967 –Ib ZR 59/65) (establishing the right of the DAV to sue on behalf of its members).

¹⁹⁶ Brangsch, at 203-204; DAV, *Aus der Arbeit des DAV*, 1962 ANWBL, at 139, 140 (report on DAV Activities).

Three further court decisions should be mentioned.

1. A major 1987 decision by the Federal Constitutional Court invalidated the until-then basic regulations of the legal profession, necessitating revisions thereof.¹⁹⁷ The Federal Bar Association's Guidelines had been premised on the general duty under the Lawyers' Act that every lawyer must act conscientiously and be of good moral character.¹⁹⁸ Reversing earlier decisions, the Federal Constitutional Court held that this general statutory duty no longer sufficed to give legal effect to the Guidelines.¹⁹⁹ The court said that a constitutional principle²⁰⁰ requires that any restriction of a basic constitutional right must be based on a formal legal norm, meaning an act of law adopted by the legislature or, depending on the restriction's severity, on ordinances or administrative rules of other authorities like government agencies. The latter norms would be valid restrictions only if based on a limited and explicitly delegated rulemaking power.²⁰¹ The court held that the Guidelines were not legal norms and thus could not be used to restrict rights granted by the Constitution—here the freedom to pursue a profession—mainly because the German Lawyers' Act did not include a delegation of true rulemaking power to the Federal Bar Association.²⁰² Nevertheless, the court provided for a phase-out period for the Guidelines.²⁰³

¹⁹⁷ BVerfG, 1987 ZIP 1559 (Beschl. v. 14.7.87 – BvR 537/81, BvR 195/87 (EG Hamm), §1(1) S. 1 RiLi, §§ 9,10 RiLi (duty to adhere to objectivity), BVerfG 1987 ZIP 1606 (Beschl. v. 14.7.87–BvR 362/79 (EG Stuttgart), §2 RiLi) (restrictions on advertising) (handed down on the same day on the basis of similar reasoning).

¹⁹⁸ §43 BRAO.

¹⁹⁹ BVerfG, 1987 ZIP, at 1559, 1564.

²⁰⁰ *Grundsatz vom Vorbehalt des Gesetzes.*

²⁰¹ BVerfG, 1987 ZIP, at 1559, 1563 (citing earlier decisions, BVerfGE 33, 125 and BVerfGE 71, 162).

²⁰² BVerfG, 1987 ZIP, at 1559, 1563. The German Parliament, in deliberating the BRAO, had already indicated that the RiLi should not be deemed to have a normative character.

²⁰³ BVerfG, 1987 ZIP, at 1559, 1564.

2. In a second case, in 1989, the Federal Supreme Court applied the 1987 decision by the Federal Constitutional Court. This case challenged the prohibition preventing a partnership from establishing offices in different cities.²⁰⁴ The court stated that the professional rule in question could no longer be used to specify the professional duties of lawyers and, furthermore, that the obligations established in the German Lawyers' Act regarding residence and the location of offices and branches do not disallow multi-city partnerships.²⁰⁵ That decision brought about a dramatic change in the German legal profession. Leading German law firms in different cities merged with each other, creating even larger firms.²⁰⁶ The decision also made possible what was called the "attack on Frankfurt"²⁰⁷—the movement whereby foreign law firms started to open German offices, especially in Frankfurt, and to a lesser extent in other German cities. It also caused the emergence of law firms having close relationships with the Big Five accounting firms, which will be discussed later.
3. A third judicial milestone in the development of the legal profession was the decision by the Highest Bavarian Civil Court,²⁰⁸ in 1994, allowing lawyers to form professional limited liability companies.²⁰⁹

²⁰⁴ §28 RiLi (*Verbot der überörtlichen Sozietät*).

²⁰⁵ BGH, 1989 NJW, at 2890-2891 (Beschl. v. 18. 9. 1989 – AnwZ (B) 30/89 - EGH Nordrhein-Westfalen). In this case the predecessor of Oppenhoff & Rädler was suing the Cologne Bar Association. Boden Oppenhoff & Schneider, Cologne, wanted to merge with Rasor & Schiedermaier, Frankfurt.

²⁰⁶ In 1990 mergers resulted in, e.g., Bruckhaus Westrick Stegemann, and Hengeler Mueller Weitzel Wirtz, and Pünder, Volhard, Weber & Axster. Those firms or their successors as well as Oppenhoff & Rädler belong now to the top ten German law firms. See Astrid Gerber et al., JUVENILE RANKING, at 13.

²⁰⁷ See Raupach I, at 261.

²⁰⁸ *Bayerisches Oberstes Landgericht* (hereinafter "BayObLG") (Beschl. v. 24. 11. 1994–3 ZBR 115/94) 1995 NJW, at 199.

²⁰⁹ *Rechtsanwaltsgesellschaften mbH*. See also OLG Bamberg (Beschl. v. 1. 2. 1996) 1996 MDR, at 423 (the Higher Regional Court held that an attorney/tax adviser limited liability company was legal).

c. Current Law

In 1994, the German Parliament revised the German Lawyers' Act pursuant to the court decisions mentioned above. Besides revising the rulemaking process of the German legal profession,²¹⁰ the Parliament adopted new provisions to authorize lawyers to form (1) multi-city partnerships, and (2) multidisciplinary partnerships²¹¹ with auditors, tax advisers, and patent attorneys.²¹² In 1998, the legislature adopted laws regarding the Lawyers' Limited Professional Liability Company,²¹³ and the legality of multidisciplinary partnerships between lawyer/notaries and the other professions just mentioned.²¹⁴ In 1996, the Rulemaking Assembly adopted new professional rules²¹⁵ to replace the rules whose basis had been found unconstitutional. Ultimately, the rules governing MDPs derive from statutes based on judicial construction of the German Constitution.²¹⁶

The different statutes regulating the provision of legal services, accounting services, and tax advice not only permit but also contain restrictions on the formation of integrated MDPs. The legality of cooperation through an integrated MDP depends on the professions involved, and the form of the MDP; and in some cases there are requirements with

²¹⁰ §§59b, 191a BRAO delegate the rulemaking power to an elected assembly of bar members (*Satzungsversammlung*) (hereinafter "Rulemaking Assembly"). §59b lists the subjects which may be included in the professional rules. §§191a-191e regulate the election procedure and the decision-making process of that assembly as well as the procedure for challenging adopted rules.

²¹¹ *Interprofessionelle Sozietät*. The partnership is the traditional form for joint professional activities by the legal, accounting and tax advisory professions.

²¹² §59a BRAO, *Gesetz zur Neuordnung des Berufsrechts der Rechtsanwälte und der Patentanwälte* v. 08.09.1994 (BGBl. I 2278).

²¹³ *Rechtsanwaltsgesellschaft mbH. Gesetz zur Änderung der Bundesrechtsanwaltsordnung, der Patentanwaltsordnung und anderer Gesetze* v. 07.09.1998 (BGBl. I 2600).

²¹⁴ *Gesetz zur Änderung der Bundesnotarordnung und anderer Gesetze* v. 07.09.1998 (BGBl. I 2585).

²¹⁵ *Berufsordnung Rechtsanwälte* (hereinafter "BORA").

respect to the holding of capital, voting rights, and managerial authority as between the different professions in the MDP. The different professional codes also contain certain restrictions relating to MDPs.

Members of each of the legal, accounting and tax advisory professions are permitted to share offices,²¹⁷ or to form a partnership,²¹⁸ limited-liability partnership,²¹⁹ or professional limited-liability company,²²⁰ with members of the other two professions. (While accountants and tax advisers may be permitted to engage in group practice in additional ways,²²¹ lawyers, by virtue of the German Lawyers' Act, are limited to the four forms of group practice specified in the preceding sentence.)²²² Furthermore, the professional codes include provisions which establish with whom members of the several professions may form integrated MDPs. The

²¹⁶ Article 12 GG, which establishes the Freedom of Profession and limits state interference therewith.

²¹⁷ *Bürogemeinschaft*. §59a(4) BRAO; §44b WPO; §56 StBerG.

²¹⁸ *Sozietät*. §59a(1) BRAO; §44b WPO; §56 StBerG.

²¹⁹ *Partnerschaftsgesellschaft* (hereinafter "LLP"). §§1(2), 3 PartGG, *Gesetz zur Schaffung von Partnerschaftsgesellschaften und zur Änderung anderer Gesetze* (hereinafter "PartGG") v.30.07.1994 BGBI I S. 1744, amended by *Gesetz zur Änderung des Umwandlungsgesetzes, Partnernerschaftsgesellschaftsgesetzes und anderer Gesetze* v. 29.07.1998 BGBI I S. 1878, 1881. The LLP, created especially to meet the needs of the liberal professions, combines elements of the partnership and the corporation. Liability is limited to the property of the LLP and those partners involved in a given assignment, §8(2) Part GG. Until 1998, only 392 LLPs involving lawyers had been formed. Reluctance to make use of the LLP is probably due to its tax treatment as a partnership and resulting limitations with regard to pension reserves. Arndt Raupach, "Globalisierung, Full Service-Concept und Multi-Disciplinary Practices" auf dem Beratungsmarkt, in Festschrift FACHANWALT FÜR STEUERRECHT 14, 42 (AG der Fachanwälte für Steuerrecht e. V. ed., 1999) (hereinafter "Raupach II").

²²⁰ The professional limited liability company (hereinafter "LLC") is a form of *Gesellschaft mit beschränkter Haftung* or *GmbH*, §59c(1) BRAO; §27 WPO; §49 StBerG.

²²¹ Forms available to other professions but not to lawyers are the *Aktiengesellschaft [AG]* (corporation), *Kommanditgesellschaft auf Aktien [KGaA]* (combines limited partnership and company limited by shares and has at least one general partner), *Offene Handelsgesellschaft [OHG]* (general commercial partnership), and *Kommanditgesellschaft [KG]* (limited commercial partnership with at least one general partner).

²²² §§59a, c-m BRAO, §1 Part GG. See Martin Henssler, *Die interprofessionelle Zusammenarbeit in der Sozietät*, 1999 WPK MITT, at 2, 5, 6 (hereinafter "Henssler II"). The amendments to the BRAO do not provide for the corporation (*Aktiengesellschaft*), although the BayObLG had said that such a provision would be desirable. Martin Henssler, *Die gesetzliche Regelung der Rechtsanwalts-GmbH*, 1999 NJW, at 241, 246 (hereinafter "Henssler

applicable provision in the German Lawyers' Act lists the following as the only professionals with whom lawyers are entitled to enter into integrated MDPs: members of bar associations,²²³ members of the patent bar, certified bookkeepers,²²⁴ accountants, tax agents,²²⁵ and tax advisers.²²⁶ Members of the bar who are also notaries must limit their involvement in integrated MDPs to their lawyer function.²²⁷ The statutory list is exclusive, and other professionals (such as financial consultants, engineers, architects, environmental experts, insurance agents, real estate brokers) are not entitled to form integrated MDPs with members of the legal profession. In permitting integrated MDPs that include lawyers, the German Parliament limited such MDPs to those comprising the listed professionals (essentially, lawyers, accountants and tax advisers) in order to safeguard rules (such as the rules on confidentiality) designed to protect clients of the legal profession.²²⁸

III") (stating that lawyers' professional organizations had not asked for the right to form corporations, but reporting that a Lawyer LLC in Berlin had sought to transform itself into corporate form).

²²³ They include, besides German lawyers, *Kammerrechtsbeistände* (persons granted unlimited permission to perform legal services under Art. 1 §1 RBerG, old Version, and who are admitted to the bar pursuant to §209 BRAO), and foreign lawyers admitted to the Bar under §§206, 207 BRAO.

²²⁴ *Vereidigte Buchprüfer* (ranking below the accountant as to education and professional competence, and not required to have a university education). §§128-131b WPO.

²²⁵ *Steuerbevollmächtigte* (ranking below the tax adviser as to education and professional competence). Lawyers could not form partnerships with *Steuerbevollmächtigte* before the new §59a BRAO came into effect, BGH, *BGH Zivilsachen* 72, 322, 327. See Henssler I, at 621.

²²⁶ §59a(1) S. 1 BRAO. Although it only applies to partnerships, it is extended to LLC by §59e(1) S. 1 BRAO, which refers to §59a(1) S. 1 BRAO; to LLP by §1(3) PartGG, which refers to the acts and rules regulating the profession and thus to §59a(1) S. 1 BRAO; and also to shared offices by §59a(4) BRAO.

²²⁷ The lawyer/notary (*Anwaltsnotare*) is governed by §59a(1) S. 3, 4 BRAO. §9(3) BNotO clarifies that lawyer/notaries should not engage in any acts incompatible with their position as notaries. §8 BNotO affords them the right to work simultaneously in specified professions.

²²⁸ Thus, the list is limited to professionals subject to strict rules like those governing lawyers, and subject to supervision by professional bodies similar to bar associations. Henssler II 2 (citing a BVerfG decision for legislative intent, BVerfG, 1982 STB 219).

The statutes regulating accountants and tax advisers contain their own rules on the formation of a simple partnership²²⁹ or a certified firm of either accountants²³⁰ or tax advisers.²³¹ In effect, the applicable statutes permit members of those two professions to form partnerships or certified firms of the respective professions to the same extent that lawyers are statutorily permitted to do so.²³²

Besides fulfilling certain professional qualifications, the professionals in an integrated MDP must be actively involved in the performance of professional services.²³³ That follows from the underlying legal concept of entities of joint professional activity and the exclusive categories of potential shareholders/partners. Thus, only the statutorily listed professionals are authorized to have capital (equity) participations in integrated MDPs;²³⁴

²²⁹ The Tax Advisory Act, §56 StBerG, lists the same professions as §59a BRAO. The Accountants Act, §44b(1) WPO, is less restrictive than §59a BRAO and the analogous provisions of the StBerG as it allows partnerships and simple liability companies to be formed with any (liberal) profession that is subject to the supervision of a disciplinary body (*Berufskammer*) and that also is afforded the privilege under §53(1) Nr. 3 Code of Criminal Procedure (*Strafprozeßordnung*) (hereinafter “StPO”). That provision would thus allow an integrated MDP that included physicians and pharmacists.

²³⁰ *Wirtschaftsprüfungsgesellschaft*. Only lawyers, tax agents, tax advisers and certified auditors can be members of such a firm, §28(4) WPO.

²³¹ *Steuerberatungsgesellschaft*. §50a StBerG.

²³² Certified firms of accountants or tax advisers may not include patent attorneys, however. They could only join such firms if they fulfilled certain requirements (exceptional permit, professional activity in the firm etc.) §§28(2), (4), 43a, 44b WPO; §§50(3), 50a(1) Nr. 1, 36 StBerG.

²³³ Partnerships: §59a BRAO; §56 StBerG (see HORST GEHRE, *STEUERBERATUNGSGESETZ* 186 (3rd ed. 1995) (hereinafter “GEHRE”); §44b WPO. LLP: §1(1) Part GG. LLC: §59e(1) S. 2 BRAO expressly states that in a lawyer LLC the shareholders must be active professionals. BT-Drucks. 13/9820, S. 14 (9.2.1998), states that the professional GmbH is not for investment but a special form for the performance of legal services. Non-active professionals are allowed to participate in certified accounting firms if they are qualified accountants, §28(4) Nr. 1 WPO (tax advisers, lawyers, certified bookkeepers and tax agents must be active– “*tätig*”). In certified firms of tax advisers, non-active attorneys, accountants, certified auditors, tax advisers and tax agents may be shareholders/partners, §50a(1) Nr. 1 StBerG (GEHRE, at 169.). The StBerG requires active involvement only for those professionals who do not meet certain qualification standards.

²³⁴ Martin Henssler, *Interprofessionelle Zusammenarbeit von Rechtsanwälten, Wirtschaftsprüfern und Steuerberatern*, in *SOZietäten UND ANDERE ZUSAMMENSchlüsse RECHTS- UND STEUERBERATENDER BERUFE*, at 9, 13 (Michael Streck & Deutsches Steuerberaterinstitut eds., 1999) (hereinafter “Henssler IV”), Henssler II 2.

moreover, these professionals are not permitted to hold their MDP participations on behalf of third persons.²³⁵

MDPs may only be formed by natural persons. Although the rules regulating the accounting profession do not contain this restriction,²³⁶ such a restriction exists with respect to lawyers and tax advisers.²³⁷ Thus, MDP partnerships which include either of those professions may not include legal persons as partners. In addition, the rules on LLPs, as well as on lawyer LLCs and tax-adviser LLCs, state that they can only be formed by natural persons.²³⁸ The rules regulating accountants allows certified accounting firms to be owned by legal persons which are themselves such firms,²³⁹ but if an MDP is to be recognized as either a law firm or a certified firm of tax advisers, legal persons may not be shareholders therein.

For some forms of integrated MDP, certain requirements must be met as to the professionals holding capital, constituting management and exercising apparent authority. If the MDP is in partnership form and all the partners belong to listed professions, there are no such

²³⁵ §59e(4) BRAO; §52e(4) PatAnwO; §28(4) Nr. 2 WPO; §50a(1) Nr. 2 StBerG. For partnerships the same follows from the requirement that that all partners engage in joint professional activity.

²³⁶ §44b WPO allows natural and artificial (legal) persons to be partners in a partnership.

²³⁷ Tax Advisory Act: §56(1) S. 2 StBerG; Henssler IV, at 14 (legal persons are restricted to office-sharing arrangements). German Lawyers' Act: WILHELM FEUERICH & ANTON BRAUN, BUNDESRECHTS-ANWALTS-ORDNUNG, at 593 (1999, hereinafter "FEUERICH & BRAUN") (listing only natural persons); 2 INSTITUT DER WIRTSCHAFTSPRÜFER, HANDBUCH DER WIRTSCHAFTSPRÜFER, at 42 (1998). For a contrary view of the German Lawyers' Act in this respect see Henssler II at 3; Henssler IV at 15 (the wording of §59a(1) BRAO is not specific enough under the standards set by the BVerfG). See, however, with respect to the lawyer LLC, BT-Drucks. 13/9820, S. 11 (9.2.1998); BR-Drucks. 1002/97 S. 15.

²³⁸ §1(1) PartGG. Lawyer LLC: §59e(1) BRAO; Henssler III, at 243; FEUERICH & BRAUN, at 628 (the personal professional activity of the GmbH shareholders is required). Tax adviser LLC: GEHRE, at 170. For exceptions regarding a tax adviser LLC, see §50a(2) StBerG, allowing *Gesellschaften bürgerlichen Rechts* (civil law partnerships), *Stiftungen* (foundations) and *eingetragenen Vereinen* (registered associations) to own shares if they function as holding companies of natural persons.

²³⁹ §28(4) WPO (the majority requirement must be met by each of the *Wirtschaftsprüfungsgesellschaften*).

requirements.²⁴⁰ Bar members may thus constitute a minority in the integrated MDP in partnership form and still perform legal services. As discussed below, however, nearly all of the fifty largest German firms offering legal services are either lawyer-only or lawyer-controlled firms. Likewise, tax advisers or accountants may constitute a minority in an MDP in the form of a partnership. Similarly, for the simple limited-liability partnership (LLP), there is no mandatory majority requirement regarding lawyers or accountants or tax advisers.²⁴¹ If, however, an LLP wants to qualify as a certified accounting firm²⁴² or certified firm of tax advisers,²⁴³ certain ratio requirements must be met. A majority of the firm's partners must be accountants in order for it to qualify as a certified accounting firm.²⁴⁴ (Parity is sufficient if the firm consists of two partners.) To be recognized as a certified firm of tax advisers, the firm must have at least as many partners who are tax advisers as it has partners from other permitted professions,²⁴⁵ and the tax advisers must retain control of management and authority to deal with third parties.²⁴⁶

An MDP in the form of a limited-liability company (LLC) may act at the same time as a law firm, a certified accounting firm, and a firm of tax advisers, but only if it meets the professional-ratio requirements imposed by statute for each profession. Under the Lawyers' Act, an LLC is recognized as a law firm only if lawyers hold a majority of the capital and have a

²⁴⁰ Henssler II, at 2-5.

²⁴¹ *Id.*, at 5-6; §44b(1) WPO.

²⁴² *Wirtschaftsprüfungsgesellschaft*. §27 WPO.

²⁴³ *Steuerberatungsgesellschaft*. §49 StBerG.

²⁴⁴ §28(2) S. 3 WPO.

²⁴⁵ §50(4) StBerG.

²⁴⁶ §32(3) S. 2 StBerG: See Meurers, in STEUERBERATUNGSGESETZ, at 460-462 (Kuhls et al., 1995) (hereinafter "Meurers").

majority of the votes and of the managing partners.²⁴⁷ For accountants, the LLC requirements are similar to those for the LLP. Thus, accountants must hold a majority of the capital, and have a majority of the votes and of the managing directors (although in the case of an LLC with only two managing directors parity would be sufficient).²⁴⁸ The combined effect of these statutory requirements for lawyers and accountants is that an MDP in LLC form can be recognized as both a law firm and a certified accounting firm if some of the shareholders and managing directors have qualified both as lawyers and as accountants.²⁴⁹ Put differently, equal numbers of persons qualified only as lawyers and only as accountants could not form an LLC that would be recognized as both a law firm and a qualified accounting firm. The Tax Advisory Act requires that, if tax advisers are in an LLC, they must exercise management authority and responsibility; as to vote, it only requires a majority vote comprising the votes, taken together, cast by qualifying professionals (namely, tax advisers, tax agents, lawyers, accountants, and certified bookkeepers); and it also provides that, under certain conditions, there need only be as many tax-adviser managing directors as there are managing directors from other professions.²⁵⁰

Similar rules apply to multinational multidisciplinary partnerships.²⁵¹ The above-named professionals with foreign qualifications and foreign professional residences can be members of cross-border multinational partnerships, if they meet certain requirements.²⁵²

²⁴⁷ §§59c-59m (esp. 59e(3) and f(1)) BRAO.

²⁴⁸ §28(2) S. 3 and (4) Nr. 3 WPO.

²⁴⁹ Henssler II, at 5. Such double-qualified professionals are counted both as lawyers and as accountants. §§59e(3), 59f(1) BRAO; §28(2) (4) WPO.

²⁵⁰ §§32(3) S. 2, 50(4) StBerG. *See* Meurers, at 460-462.

²⁵¹ §59a(3) Nr. 2 BRAO; FEUERICH & BRAUN, at 595; HENSSLER I, at 624.

²⁵² §59a(3) Nr. 1 BRAO. Multinational partnerships may include lawyers from European Union member states and from other countries that fulfill the requirements for establishing offices in Germany, §§ 206, 207 BRAO. As to non-lawyers §59a(3) Nr. 2 BRAO refers to the codes regulating other professions. They all allow

Multinational multidisciplinary LLPs and LLCs cannot, however, be admitted as certified firms of tax advisers²⁵³ or as certified accounting firms.²⁵⁴

The rules on the sharing of fees by lawyers are no obstacle to the formation of otherwise permissible multi-disciplinary entities in Germany. It has long been accepted that sharing fees with non-lawyer professionals (accountants; tax advisers) in such entities is allowed. The concepts of partnership and of LLC MDPs are deemed to imply that fees are susceptible of being shared with the non-lawyer partners or co-shareholders in the MDPs.²⁵⁵

The rules regulating lawyers prohibit a lawyer from belonging, as a lawyer, to more than one entity of joint professional activity.²⁵⁶ These rules as they apply to both partnerships and LLCs are interpreted as dealing only with a lawyer's role as a lawyer.²⁵⁷ Thus, a lawyer who had also qualified as an accountant and as a tax adviser could join multiple entities—one as a lawyer, another as an accountant, a third as a tax adviser.²⁵⁸ Accountants and

multinational partnerships. In general foreign-qualified professionals should be afforded a privilege comparable to the privileges under the German codes of civil (§ 383 *Zivilprozeßordnung [ZPO]*) and criminal procedure (§53 StPO) and be comparable to their German counterparts as to education and authority. Their files must be protected against seizure, and their function must correspond to the German profession in question. FEUERICH & BRAUN, at 595. §52a(3) Nr. 2 *Patentanwaltsordnung* (hereinafter "PatAnwO") (Patent Attorney Act), §56(2) StBerG, §44b(2) S. 2 WPO all use the same referral mechanism.

²⁵³ §§49-50a StBerG do not include any rule on multinational certified firms, in contrast to §56 StBerG.

²⁵⁴ §28(3), (4) WPO. Accountants can associate themselves in a certified firm only with foreign accountants. Their profession and appointment have to be regulated in a similar way and they have to be granted an exceptional permission by the competent authority.

²⁵⁵ FEUERICH & BRAUN, at 588. The prohibition of fee-sharing is only directed at persons outside the professional entity. Partnership: §27 BORA. LLP: §1(1), (3) PartGG (referring to the regulation of the respective professions). LLC: §59e(4) BRAO; BT-Drucks. 13/9820, S. 31 (9.2.1998).

²⁵⁶ §31 BORA. Partnership: BGH, 1999 WM 1849, 1850 (Beschl. v. 21.6.1999 – AnwZ (B) 89/98 – EGH Nordrhein-Westfalen); FEUERICH & BRAUN, at 591; Martin Henssler, *Das Verbot der Sternsozietät gemäß §31 Berufsordnung der Rechtsanwälte – einreformbedürftige Norm*, 1998 ZiP, at 2121, 2123-2124 (hereinafter "Henssler V"). LLC: §59e(2) BRAO; BR-Drucks. 1002/97; BGH 1999 WM, at 1849, 1850; Henssler V, at 2123.

²⁵⁷ Partnership: BT-Drucks. 12/4993, S. 33 (19.05.1993). LLC: BR-Drucks. 1007/97, S. 15; FEUERICH & BRAUN, at 629-630. See also the wording of §59e(2) BRAO. The rules for patent attorneys are similar.

²⁵⁸ See Henssler V, at 2127.

tax advisers may be less restricted than lawyers in this respect, for the extension of the one-entity prohibition to non-lawyer professionals who are associated with lawyers was overruled on constitutional grounds by the BGH.²⁵⁹

In the MDP context, another issue of importance is which regulation of professional conduct applies and how is it enforced.²⁶⁰ Although the regulation of professional conduct is not completely uniform, in some respects the lawyers, accountants and tax advisers in an integrated MDP are regulated substantially the same. Lawyers, accountants and tax advisers are subject to similarly strict rules on the protection of client's confidences. Under criminal law, it is an offence to reveal confidences that were entrusted to those professionals in their professional capacity.²⁶¹ Furthermore, the codes of criminal and civil procedure recognize privileged communications by a client, and the professional's right to refuse to testify about them.²⁶² Unlike auditors in other countries, auditors in Germany are not required to disclose certain audit results to the authorities. All three professions are defined as non-commercial, liberal professions; and all three professional codes stress that professional independence is indispensable.²⁶³

The codes differ in some respects, however, as to whether a rule protects the public interest or simply regulates the contractual relationship with the client. Thus, where the

²⁵⁹ §31 BORA; BGH, 1999 WM, at 1849. Citing the above-mentioned BVerfG decisions, the BGH concluded that the Rulemaking Assembly had overstepped its powers, that there was no delegating norm that would meet the constitutional requirements, and that §59a BRAO would not be applicable.

²⁶⁰ All three professions are regulated on two levels. First, the codes include professional duties. Second, the duties prescribed in a given code are spelled out by professional rules enacted by the rulemaking assembly of the respective professional organization.

²⁶¹ §203(1) Nr. 3 StGB. See also §43(1) S. 1 WPO (accountants), §43a(2) BRAO (lawyers), §57(1) StBerG (tax advisers).

²⁶² §53(1) StPO, §383 ZPO.

²⁶³ §43a BRAO, 43(1) S. 1 WPO, §57(1) StBerG.

public interest is not involved, accounting and tax-advisory services rendered by an MDP may be subject to different rules than legal services rendered by the MDP.²⁶⁴ When, however, a rule is in the public interest for one profession in an MDP, that rule may be binding on all professions in the MDP, and the strictest rule may be applicable.²⁶⁵ This approach may apply to prohibitions on engaging in certain activities,²⁶⁶ and to conflict-of-interest rules.

Lawyers, accountants and tax advisers are subject to conflict-of-interest rules, but those rules for lawyers are stricter than for the other professions.²⁶⁷ The rules for lawyers are extended to all members of the same entity of joint professional activity.²⁶⁸ Upon becoming aware of a conflict of interest, a professional is required to withdraw from all the matters involved and to inform the client.²⁶⁹ That rule is reinforced by a provision in the criminal code if the breach of duty is committed purposefully.²⁷⁰ Clients cannot waive conflicts of interest,

²⁶⁴ Henssler IV, at 16, 17. Contrast §54a(1)WPO (accountants) and §67 StBerG (tax advisers) with the stricter rule for lawyers in §51(1) Nr. 2 BRAO (differing rules relating to limitation of liability).

²⁶⁵ §30 BORA; Volker Römermann, §30 BerufsO, in ANWALTICHE BERUFSORDNUNG, at 756 (Wolfgang Hartung & Thomas Holl eds.; 1997), (hereinafter "Römermann"); Henssler IV, at 15; Peter Maxl, §56, in STEUERBERATUNGSGESETZ, at 532-533, 535 (Clemens Kuhls et. al., 1995) (hereinafter "Maxl").

²⁶⁶ *Tätigkeitsverbote*.

²⁶⁷ Maxl, at 535. A lawyer is not allowed to act in the same legal matter for opposing interests, §43a(4), BRAO, implemented by §3 BORA. Legal matter is to be understood in a broader sense than just the claim at issue. Elapse of time and change of personnel do not always substantially change the legal matter. See Werner Hartung, §3 BORA, in ANWALTICHE BERUFSORDNUNG, at 88 (Hartung & Holl eds., 1997) (hereinafter "Hartung").

²⁶⁸ Art. 3(2) BORA. That extension is valid, although it is not mentioned in §43a(4) BRAO. A regulation for *GmbH*, *Sozietäten* etc. was viewed by the legislature as superfluous. See Hartung, at 83. A special rule applies when a professional changes firm. The new firm is only subject to the extension of the prohibition if that professional was involved in the matter of conflicting interest. Hartung, at 101.

²⁶⁹ §3(3) BORA.

²⁷⁰ §356 StGB; Hartung, at 82. That provision is applicable to lawyers and patent attorneys who are entrusted with the legal matter. Members of the same entity who are not actually involved are treated as being entrusted. See Peter Cramer, §356, in STRAFGESETZBUCH, at 2355 (Adolf Schönke et al. eds., 1991).

because they are designed to protect the public interest.²⁷¹ This concept of protecting the public interest is in the rules for the legal profession, and is a major difference between those rules and the rules for the accounting and tax-advisory professions.²⁷² Lawyers are also prohibited from accepting an assignment in the case of prior conflicting activity in the same matter whether acting as a lawyer or in a different capacity,²⁷³ and this rule is extended to all members of the same firm.²⁷⁴ There are no similarly strict rules for accountants or tax advisers.²⁷⁵

Regarding restrictions on engaging in commercial activities as a second profession, the regulation of accountants and tax advisers is stricter than that of lawyers.²⁷⁶ Other divergences in public-interest regulation of the three professions concern the handling of files,²⁷⁷ mandatory professional liability insurance,²⁷⁸ and advertising.²⁷⁹

On its face, the principle that, in an integrated MDP, the strictest professional rule should apply helps to ensure that the highest professional standards are maintained. The

²⁷¹ BGH, *BGH Strafsachen*, at 15, 336; Hartung, at 86 (mentioning in particular the confidence of the public in the integrity and trustworthiness of the Bar).

²⁷² §6(2) *Satzung über die Rechte und Pflichten bei der Ausübung der Berufe der Steuerberater und der Steuerbevollmächtigten* v. 18. 11. 1996 (hereinafter “BOSTB”); §3(1) *Berufsordnung Wirtschaftsprüfer* (hereinafter “BOWP”). These regulations are not included in the codes, but only in the professional rules.

²⁷³ §45(1)(2) BRAO.

²⁷⁴ §45(3) BRAO.

²⁷⁵ Henssler IV, at 16.

²⁷⁶ Maxl, at 535. See §57(4) StBerG (tax advisers), §§43a(3) Nr. 1, 43a(4) Nr. 6 WPO (accountants). See also Henssler IV, at 16 (a lawyer may be a managing director of a consulting firm, but a tax adviser or accountant may not).

²⁷⁷ §51b WPO (accountants) and §50(1) BRAO (lawyers) cover both client files and internal memos. Contrast §66 StBerG (tax advisers).

²⁷⁸ For accountants, §54(1) WPO does not allow a yearly premium cap on professional liability insurance. §44b(4) WPO affirmatively requires accountants to ensure that all partners in an inter-professional partnership (*Sozietät*) are covered in accordance with insurance requirements for accountants.

²⁷⁹ §§31-36 BOWP (accountants) and §§10-23 BOSTB (tax advisers) are much stricter than §§6-10 BORA (lawyers) and thus would have to be applied instead of the lawyers’ rules. See Römermann, at 757.

question of compliance with the highest professional standards also depends on enforcement, however. For constitutional reasons, criminal sanctions can only be imposed on members of those professions actually named in the criminal-code provisions in question.²⁸⁰ Under the professional codes, disciplinary sanctions are limited by each code to the members of the respective profession covered by that code.²⁸¹ Thus, only a lawyer can be disciplined by a bar association, which has no jurisdiction over accountants and tax advisers. Similarly, a lawyer may not be disciplined by a chamber of auditors or a chamber of tax advisers.²⁸²

In principle, a breach of a professional code by any one member of a profession in a firm is attributable to all members of that profession in the firm, and renders them open to possible discipline.²⁸³ In practice, however, because serious disciplinary measures are subject to constitutional safeguards, the consequences of attribution are also subject to those safeguards.²⁸⁴ Another possibility of rule enforcement is by the client through non-payment of fees or claims for damages on the ground of conduct by the firm inconsistent with its professional obligations; and agreements by clients to waive their rights in this respect are not enforceable.²⁸⁵

Besides allowing those forms of integrated MDP mentioned above, the professional rules also allow non-integrated forms of cooperation. Contractual cooperative relationships are open not only to those professionals who are allowed to form partnerships or

²⁸⁰ Art. 102(2) GG. Thus the criminal-code provision on conflicts of interest, §356 StGB, is only applicable to lawyers.

²⁸¹ Lawyers: §§113(1), 114. BRAO. Accountants: §§67-68 WPO.

²⁸² *Wirtschaftsprüferkammer* or *Steuerberaterkammer*.

²⁸³ §30 BORA; Römermann, at 756 (lawyers). §44b(5) WPO; Maxl, at 533, 535 (accountants).

²⁸⁴ Römermann, at 757 (on Freedom of Profession under Art. 12 GG).

²⁸⁵ On non-payment of fees and non-waivability, see §134 BGB; Horst Eylmann, *Vorbemerkung* §43, in BUNDESRECHTSANWALTSORDNUNG, at 338-339 (Martin Henssler & Hanns Prütting eds., 1997).

LLCs, but also to other professionals not entitled to participate therein. Contractual cooperative relationships are thus possible between, for example, lawyers and architects and engineers to provide advice on zoning and construction law, or lawyers and medical experts to cooperate in malpractice cases.²⁸⁶ Such an arrangement could include a referral agreement, or the obligation to provide certain services together. Lawyers entering into such arrangements are subject to regulation under their own professional rules, and must honor the duty to protect confidences and comply with requirements regarding their independence. The lawyer participants must enter into separate contracts with the clients. Thus, none of the cooperating parties may act as the only contracting partner toward a client and then let the other cooperating parties share in the overall profits of the service. This restriction is specifically covered by the lawyers' professional code.²⁸⁷ The cooperation contract should include a provision on the protection of client confidences. Furthermore, lawyers' files should be segregated, to ensure that the files are protected by the privilege and against seizure. Lawyers are permitted to advertise to a certain extent that they cooperate with other professionals, but only in the case of long-term contractual arrangements proven by actual joint activity.²⁸⁸

d. MDP in Practice

As discussed above, MDPs in Germany that include legal practices may be in integrated form (in which case they are essentially limited to lawyers, accountants and tax advisers) or in non-integrated form. MDPs that include lawyers vary substantially in size and in

²⁸⁶ Henssler IV, at 21.

²⁸⁷ §27 BORA. *See* Henssler IV, at 21.

²⁸⁸ §43b BRAO, §8 BORA. *See* Henssler II, at 6-7, Henssler IV, at 22.

composition. There are no compilations of MDPs comprising twenty or fewer professionals, but a sampling of available information suggests that lawyers in such MDPs are often in the majority or on an equal footing with the other professionals in those MDPs.²⁸⁹

The 50 largest legal practices in Germany break down as follows:²⁹⁰

- 15 consist only of lawyers;
- 30 are lawyer-controlled integrated MDPs;
- 4 are affiliated with four of the Big Five in non-integrated MDPs;²⁹¹
- 1 (Rödl & Partner, discussed below at note 327) fits into none of the foregoing categories.

The line between the 15 lawyer-only firms and the 30 lawyer-controlled MDPs is rather arbitrary, for the latter category includes MDPs which offer a broad range of business-law services and in which the lawyers greatly outnumber the non-lawyer professionals.²⁹² The four firms said to have the highest reputation in business law, while technically lawyer-controlled

²⁸⁹ Examples are five lawyers, two tax advisors (Pfeiffer Schneider Breski, <<http://www.psb-taxlaw.de/>>, visited 2/1/00); seven lawyers, one accountant/tax adviser (Fella Schäller & Redl, <<http://www.die-kanzlei-fsr.de/>>, visited 2/2/00); two lawyers, one tax adviser (Sakowski Sakowski, <<http://www.sakowski.de/>>, visited 2/2/00); four lawyers, two tax advisers, one tax adviser/certified bookkeeper (Schiffer Peters & Partner, <<http://www.schiffer.de/>>, visited 2/2/00); eleven lawyers, one tax adviser/accountant (Fries+Fries, <<http://www.fries-fries.de/>>, visited 2/2/00). A non-lawyer controlled integrated MDP--two tax advisers, one lawyer--is Kellermann & Partner GbR (<<http://www.kellermann-und-partner.de/html/kanzlei.html>>, visited 2/1/00). To find those MDPs the web-site www.yahoo.de (categories "Rechtsanwaltskanzleien", "Dienstleistungen für Firmen") was used as a starting point. This method did not reveal all existing MDP web-sites; moreover, many small firms might not have web-sites.

²⁹⁰ IJVE RANKING, at 473. The ranking is by number of admitted lawyers as of summer 1999. Classification as multidisciplinary refers to whether the entities include non-lawyer professionals without regard to lawyers having dual or multiple qualifications. Control is measured in terms of number of professionals.

²⁹¹ Arthur Andersen: since January 2000, Andersen Luther Rechtsanwalts-gesellschaft mbH (one of the ten largest German law firms by number of lawyers). Ernst & Young: Menold Herrlinger Rechtsanwälte. PricewaterhouseCoopers: PwC Veltins Rechtsanwalts-gesellschaft mbH. WEDIT Deloitte Touche (German member of Deloitte Touche Tohmatsu International): Raupach & Wollert-Elmendorff Rechtsanwalts-gesellschaft mbH. As regards KPMG, its affiliated German law firm, KPMG Treuhand & Goerdeler GmbH, was not among the 50 largest legal practices in Germany in the summer of 1999.

²⁹² E.g., Bruckhaus Westrick Heller Löber (hereinafter "Bruckhaus"), the second largest law firm in Germany, has just one non-lawyer professional. According to its web-site the firm offers legal advice in all business-related fields including tax law. <<http://www.bwhl.de/homepage2.html>> (visited 2/7/00).

MDPs, might be classified as lawyer-only firms.²⁹³ Other lawyer-controlled MDPs may not themselves offer a full range of services implicit in the concept of MDP.²⁹⁴

Of the ten largest German law firms, at least four fashion themselves as MDPs. In each, lawyers constitute a majority of the professionals.²⁹⁵ They are organized as partnerships.²⁹⁶ (The German limited liability corporation (LLC) has not been used by them and is viewed as a non-traditional form for practicing law.²⁹⁷) The percentage of lawyers in terms of total professionals is on the order of 86% to 97% for three of these four firms. One of these three firms is also affiliated with a firm that performs audits and renders tax advice, and with another firm that establishes annual accounts and prepares tax returns.²⁹⁸ This firm started off mainly as

²⁹³ JUVE RANKING, at 13. The four are Bruckhaus (preceding note); Hengeler Müller Weitzel Wirtz (which has only lawyers) (hereinafter “Hengeler”); Deringer Tessin Herrmann & Tessin (since 1/1/00 Freshfields Deringer); and Gleiss Lutz Hootz and Hirsch. They have few non-lawyer professionals and do not engage in audit or compliance work. Bruckhaus and Hengeler in particular are listed as leading firms in a wide variety of business-law areas. See also Raupach II, at 33.

²⁹⁴ Raupach II, at 33 (audit and compliance services may be out-sourced to affiliated entities).

²⁹⁵ JUVE RANKING, at 473, provides the following data for these four MDPs: Oppenhoff & Rädler Linklaters & Alliance (hereinafter “O&R”) has 253 lawyers and 40 non-lawyer professionals including Prof. Dr. Albert Rädler; Clifford Chance Pünder (hereinafter “CCP”) has 205 lawyers, 18 non-lawyer professionals; Feddersen Laule Ewerwahn Scherzberg has 151 lawyers, 4 non-lawyers; Haarmann Hemmelrath & Partner (hereinafter “HHP”) has 141 lawyers, 81 non-lawyers. Although these firms differ as to how many non-lawyer professionals are partners or associates, their web-sites and the characterization in JUVE suggest that they follow the MDP approach. Some also have affiliated firms which provide accounting and tax services, including compliance and audit. Data for CCP antedate the merger with Clifford Chance, which may entail a change in approach.

²⁹⁶ Three are *Sozietäten*. CCP was a *Sozietät* but after the merger with Clifford Chance may be a limited-liability partnership under New York law, <<http://www.puender.com/uk/home/index.shtml>> (visited 1/17/00).

²⁹⁷ Interview with HHP partners Drs. Markus Wenserski, Martin Dummler and Hans-Joachim Fritz, 12/20/99. See Raupach II, at 43.

²⁹⁸ O&R. <<http://www.oppenhoff-raedler.com/english/index.html>> (visited 1/17/00). O&R Oppenhoff & Rädler GmbH Wirtschaftsprüfungsgesellschaft Steuerberatungsgesellschaft provides accounting and tax advisory services in Munich, Frankfurt, Cologne and Hannover. O&R Advisa GmbH Steuerberatungsgesellschaft does business accountancy and payroll accounting, prepares annual accounts and tax returns, and performs similar services. Likewise, a CCP predecessor was affiliated with a certified firm of tax advisors, PVW Treuhand GmbH Steuerberatungsgesellschaft; following the merger with Clifford Chance, CCP seems to have severed ties with that firm.

separate traditional law firms specializing in business law which later merged. At least one of the original firms, however, began as a multidisciplinary partnership focused on tax law.²⁹⁹

In another large law firm fashioning itself as an MDP,³⁰⁰ only 63% of the professionals are lawyers. This firm was founded in 1987 as an MDP by former members of the accounting firm of Peat Marwick & Mitchell. The MDP comprises a law firm, a parallel accounting and tax advisory firm, which does audit and compliance work, and a parallel consulting firm.³⁰¹ The separation of the different entities is designed to respect professional regulations.³⁰² The firm considers itself, functionally, to be a combined virtual partnership of all of the entities and, in effect, a single MDP.

The foregoing focus on large, lawyer-controlled MDPs for which data are available tends to obscure the fact that there have been and are a great many small entities for which compiled data are not available. They may, however, constitute the typical German MDPs in which, as mentioned, lawyer-control may be a common feature.

A different category of MDP in Germany comprises non-integrated affiliations between Big Five firms and law firms. Each of the Big Five has created such an MDP with a law firm.³⁰³ The emergence of those MDPs began shortly after the Federal Supreme Court decision in 1989 that allowed multi-city partnerships. Prior to that decision, there were employees of the Big Five who were mainly working in the tax departments and who also

²⁹⁹ Rädler Raupach & Partner.

³⁰⁰ HHP.

³⁰¹ Haarmann Hemmelrath Management Consultants, <<http://www.hhmc.de/beratungsansatz.htm>> (visited 1/31/00).

³⁰² Interview with Dr. Martin Dummler, 1/31/00.

³⁰³ The Big Five and their respective affiliated law firms are listed *supra* in note 291.

engaged in a quasi-independent legal practice. Although trained lawyers, they are not allowed under the Legal Advice Act³⁰⁴ to perform legal services when employed by an accounting firm. Their legal practices were nevertheless affiliated with the Big Five accounting firms, either formally or informally, and the relationship was largely based on the referral of business. Big Five firms also cooperated with local law practices. With the liberalization of the rules on multi-city partnerships, the Big Five began consolidating their various forms of internal and affiliated legal practice in different cities.³⁰⁵

Another approach has been to attract top lawyers who would leave their traditional law firms to help set up Big-Five-affiliated multi-city firms by bringing the lawyers' clients and reputation from the traditional firms to the law firms affiliated with the Big Five.³⁰⁶ One such lawyer has said that the main reason for affiliating legal services with the Big Five was growing concentration in the accounting profession which put downward pressure on fees and caused the Big Five to seek the higher fees obtainable for advisory services.³⁰⁷ Another lawyer who joined a Big-Five-affiliated law firm has said that more and more legal work involving cross-border mergers and acquisitions will be channeled through the accounting firms.³⁰⁸ Also, according to lawyers in German law firms affiliated with the Big-Five, a major aspect of such

³⁰⁴ *Rechtsberatungsgesetz.*

³⁰⁵ Griffith & Schornstheimer, at 11 (describing the development of KPMG Treuhand & Goerdeler GmbH); telephone interview with Dr. Stefan Kraus of Andersen Luther, 12/9/99.

³⁰⁶ *E.g.*, PricewaterhouseCoopers joined forces with Prof. Michael Veltins, member of the Wessing law firm and head of its Leipzig office; and WEDIT Deloitte Touche joined forces with Prof. Arndt Raupach, a tax lawyer from Oppenhoff & Rädler.

³⁰⁷ Raupach II, at 22.

³⁰⁸ Prof. Veltins (*see* two notes above). *See also* Griffith & Schornstheimer, at 10.

affiliation involves cooperation between law firms, including non-German firms, forming an international network of affiliation with a particular member of the Big Five.³⁰⁹

Common to all the Big Five affiliated law firms in Germany is that they are stand-alone operations in non-integrated MDPs. Conceivably, the Big Five find it advantageous to recruit German lawyers into stand-alone legal practices. Whether or not this is the case, there are legal constraints to incorporating these practices in integrated MDPs. First, the Legal Advice Act prevents accounting firms from giving legal advice. Second (as discussed below), four of the Big Five affiliated legal practices have been established as limited liability corporations (LLCs) in each of which lawyers must constitute a majority.³¹⁰

Furthermore, rules of the U.S. Securities and Exchange Commission (the “SEC”) may affect the affiliation of law firms with the Big Five in Germany. Under those rules, auditing and legal advice are not permitted by the same firm if the SEC’s materiality threshold is met. On the assumption that, regarding matters over which the SEC has jurisdiction, its rules are applicable to law firms affiliated with the Big Five in Germany, such a law firm may do a kind of conflict check using publicly available data on auditing assignments of the affiliated auditing firm.³¹¹ The applicability of SEC rules has been criticized as effecting a near-total exclusion of the Big Five’s affiliated law firms in Germany from the market for legal services in the field of international mergers and acquisitions.³¹²

³⁰⁹ Interview with Veltins, 10/22/99; interview with Kraus, 12/9/99.

³¹⁰ §59e(2) BRAO. Also, a majority of the managing directors must be lawyers. §59f BRAO.

³¹¹ PwC Veltins uses a list compiled by PricewaterhouseCoopers (interview with Veltins, 10/22/99). Andersen Luther does a check using databases (interview with Kraus, 12/15/99).

³¹² Raupach II, at 41.

Of the five law firms affiliated with the Big Five, only one is a partnership,³¹³ which is the traditional form of practice in Germany; and the other four are LLCs.³¹⁴ There are some tax advantages provided by the LLC form (it permits the deduction of payments into retirement funds). The LLC has a line-managed, hierarchic corporate structure similar to the organizational form of the Big Five themselves, and an LLC may designate positions in the same way as the Big Five do (thus, the LLC may call associates managers or assistants). In the Big Five affiliated law firms, there tend to be more associates per partner than in traditional German law firms,³¹⁵ only the worldwide partners, but not the national partners, may be full equity partners, and service lines and standardized service products may be developed.

One of the Big Five affiliated law firms (the only one in traditional partnership form) seeks to maintain the image of an independent law firm.³¹⁶ It has only limited contractual obligations toward the accounting firm, no exclusivity agreement, and no interlocking personnel. The other four of the Big Five affiliated law firms tend to work closely with their respective accounting firms. They include the Big Five name in the law-firm name. There may be interlocking personnel and cost-sharing. They may rent their offices from and be located near the accounting firms. "The offices are separate to the extent required by the professional rules and are otherwise as close as possible."³¹⁷

³¹³ Menold Herrlinger (Ernst & Young).

³¹⁴ Raupach II, at 42. The four LLCs are Andersen Luther, KPMG Treuhand & Goerdeler, PwC Veltins, and Raupach Wollert-Elmendorff (Deloitte Touche Tohmatsu).

³¹⁵ *E.g.*, the Andersen Luther partner/associate ratio is 1 : 5, the PwC Veltins ratio is 1 : 4, while traditional German law firms tend to be 1 : 2 (Hengeler aims for a 1 : 1 ratio). Raupach II, at 32.

³¹⁶ Menold Herrlinger (Ernst & Young). See Griffith & Schornstheimer, at 9 (citing Rudolf Belzer (a partner), as saying that it wants to retain the image of an independent firm in order to acquire clients). According to JUVE RANKING, at 20, Menold Herrlinger has succeeded in being accepted as an independent firm.

³¹⁷ Interview with Kraus, 12/15/99.

A different, and potentially more important, level of cooperation is the international network of law firms affiliated with a given Big Five firm. Within that global network, training may be organized for all the network law firms, network-wide procedures may be developed, risks and profits may be shared, client referrals may take place, and legal services may be coordinated in respect of cross-border transactions. Generally, such a law firm leaves tax advice to the affiliated accounting firm³¹⁸ in order to avoid intra-group competition.³¹⁹

The German law firms affiliated with the Big Five describe themselves as full-service, business-oriented firms. One ranks among the top ten German law firms.³²⁰ One has merged with a leading construction-law practice and a labor-law practice and has offices in eight German cities.³²¹ Some are active in handling mergers and acquisitions (“M&A”),³²² and some have developed expertise in information technology.³²³

Criticisms have been voiced concerning the Big Five and their affiliated law firms. In a statement regarding the merger between Price Waterhouse and Coopers & Lybrand, the German Lawyers’ Association made the following observations: The affiliated law firms would not safeguard confidences of clients but would share them with the accounting firms (and vice versa) in order to improve market position. Client letters would not always be answered by the addressee, and the accounting firm might answer a letter even if it was addressed to the law

³¹⁸ The exception is Raupach & Wollert-Elmendorff (Deloitte Touche Tohmatsu) which specializes in legal advice with a focus on tax matters. See JUVE RANKING, at 419, 427.

³¹⁹ Griffith & Schornstheimer, at 10 (quoting Veltins: “We do not want to have any competition in the same house”).

³²⁰ Andersen Luther.

³²¹ PwC Veltins.

³²² In 12 months (1998-99) PwC Veltins was involved in 28 M&A transactions involving US\$ 2.75 billion. JUVE RANKING, at 313. See *id.*, at 312 re Menold Herrlinger (Ernst & Young) and M&A.

³²³ *E.g.*, Andersen Luther; PwC Veltins.

firm. The use of “Chinese walls” would be introduced into legal-advisory activities although they would not comply with the stricter conflict-of-interest rules of the legal profession. The independence of the legal profession would be compromised given the economic imbalance between Big Five accounting firms and their affiliated law firms (the lawyers are greatly outnumbered and are dependent economically on the accounting firms which manage the international networks and own their logos and good will).³²⁴

An officer of the German Lawyers’ Association subsequently amplified these concerns. He observed that lawyers’ independence in the affiliated law firms could also be restricted by contractual arrangements with the Big Five; and he offered examples from his own experience of conflicts-of-interest problems arising in the context of the affiliated firms using “Chinese walls” in order to represent different bidders in an M&A or privatization context.³²⁵

For its part, the Rulemaking Assembly reacted to the Big Five affiliated law firms and other MDPs by adopting a rule that forbids fee-sharing between an ostensibly independent legal practice and non-legal activities in an MDP. The Rulemaking Assembly wanted specifically to prevent the establishment of an earnings pool by an accounting firm and its sponsored, affiliated law firm that would enable the former financially to subsidize the latter.³²⁶

Among the fifty largest legal practices in Germany—in addition to lawyer-only firms, lawyer-controlled integrated MDPs, and law firms affiliated with accounting firms in non-integrated MDPs, discussed above—there is, exceptionally, the integrated MDP controlled by

³²⁴ DAV, *Stellungnahme zum Zusammenschluß Price Waterhouse/Coopers & Lybrand*, at pp. 5-8 (April 1998).

³²⁵ Dr. Hans-Jürgen Hellwig, DAV Vice President, Presentation, American Bar Association Commission on Multidisciplinary Practice, Feb. 4, 1999 (unpublished paper) (hereinafter “Hellwig Presentation”), confirmed by interview 12/20/99.

³²⁶ Römermann, at 656-657 (quoting BRAK rulemaking-assembly minutes).

non-lawyers, the single exception to date being Rödl & Partner *GbR Wirtschaftsprüfer Steuerberater Rechtsanwälte* (“Rödl”).³²⁷ It is an integrated MDP controlled by non-lawyers (by accountants and tax advisers).³²⁸ It is a partnership (*Sozietät*) as to which there is no requirement that members of a given profession constitute a majority of the partners.³²⁹

Founded in 1977, Rödl developed rapidly beginning in 1989, especially in East Germany at a time when it lacked (among other things) a private legal profession. The firm benefited from the collapse of East Germany, from German reunification, and from the 1989 Federal Supreme Court decision permitting multi-city partnerships. Specialized in accounting, tax-advisory and legal work for small and medium-sized (often, family-owned) businesses, Rödl developed clients that were establishing new companies in Eastern Germany, and added consulting to audit-related and tax-compliance work. It has grown and has offices in a number of cities within and outside Germany. It views itself as competing more with accounting firms than with traditional law firms, and a team of Rödl professionals handling a particular assignment is usually headed by an accountant or a tax adviser, although where legal services predominate a lawyer might be in charge.³³⁰

³²⁷ “Partnership under the civil code [GbR] of Accountants Tax Advisers Lawyers.” The use of all three professional titles suggests that at least one partner has qualified in each profession. Rödl is also affiliated with a separate accounting/tax advisory firm, Dr. Rödl & Partner GmbH *Wirtschaftsprüfungsgesellschaft Steuerberatungsgesellschaft*, and a separate consulting firm, Rödl & Partner Consulting GmbH, each in the form of an LLC. There is also an affiliated manager-training institution, *Privatakademie für Managementtraining* GmbH Nürnberg.

³²⁸ JUVE RANKING, at 473 (Germany: 86 lawyers, 180 non-lawyers; admitted outside Germany (Central and Eastern Europe): 31 lawyers, 61 non-lawyers). 13 managing partners supervise the partnership, Nicolaus Weber, unpublished conference paper, 6/28/99.

³²⁹ This feature of no majority requirement was criticized in Hellwig Presentation, at 7.

³³⁰ <<http://www.roedl.de/frame.cgi>> (visited 1/17/00). Nikolaus Weber, unpublished conference paper, 6/28/99 (it breaks down Rödl revenues as follows: accounting/auditing 31%, tax advice 28 %, legal advice 16%, business/IT consulting 25%). Bernd Rödl (founding partner), *Branche im Umbruch*, <[http://www.roedl.de/\(nologin\)/dienstleist/wirtschaftsp/wp_thesen.html](http://www.roedl.de/(nologin)/dienstleist/wirtschaftsp/wp_thesen.html)> (visited 1/17/00).

6. Other European Jurisdictions--Austria, Belgium, Italy, Spain, Sweden, Switzerland

a. **Austria**

In April 1999, the Austrian Parliament authorized members of the accounting profession to enter into MDPs with other professionals, provided the accountants had the same status in the MDPs as the other professionals.³³¹ While the possibility of similar legislation relating to lawyers has been discussed in committee in the Austrian Parliament,³³² information supplied by members of the Bar in Vienna and in Salzburg indicates that lawyers in Austria are not authorized to participate in MDPs, and that the proposed legislation relating to lawyers is being reviewed in light of the Position of the CCBE on MDP (discussed above under Europe) and pending action by the American Bar Association with respect to MDP.

It has been possible in Austria for the same person to qualify as both an accountant and a lawyer.³³³ In the few cases of dual qualification (a process taking ten years or more), such a person would belong to two separate professional companies, one a legal practice and the other an accounting practice, and would keep separate the activities devoted to each of the two companies. In effect, this means that a lawyer can be affiliated with both a law firm and an accounting firm, provided there is a formal separation of professional conduct in each firm. Recently, Big Five accounting firms³³⁴ have reportedly contacted Austrian law firms with a view to establishing contractual referral relationships.

³³¹ *Bundesgesetz über die Wirtschaftstreuhandberufe* §§70, 71 (April 9, 1999).

³³² *Bericht des Justizausschusses*, 1681 *Beilagen zu den stenographischen Protokollen des Nationalrates XX. GP* (17.3.1999) (proposal by the judiciary committee of the lower house of the Austrian Parliament to initiate legislation which would allow international and multidisciplinary partnerships or other forms of MDP in order to improve the competitiveness of Austrian lawyers).

³³³ § 5 *Richtlinien zur Berufsausübung der Rechtsanwälte* (according to that professional rule a lawyer may have a second job as long as such activity does not compromise his or her integrity and independence).

³³⁴ *Wirtschaftstreuhandorganisationen*.

b. Belgium

On January 6, 2000, the French section of the Brussels Bar entered into an agreement (the “January 2000 Agreement”)³³⁵ with the profession of auditors (*reviseurs*) that will permit one or more auditors and one or more lawyers (*avocats*) to share expenses through the creation of a common service organization—called a *société de moyens*. The common service organization, at the election of the professionals creating it, may or may not be in corporate form. Each professional service organization must be the subject of a written contract between the parties creating the organization; this contract must list the facilities to be used in common, and must specify how expenses will be shared.

Under the January 2000 Agreement, each contract creating a professional service organization must “forbid any sharing of fees or of any remuneration provided by clients” (and must also expressly incorporate by reference certain provisions of the January 2000 Agreement).³³⁶ The Agreement thus expressly forbids an integrated professional practice, and is limited to the sharing of expenses. It refers to statutory provisions whereby only lawyers may enter into partnership with lawyers, and only auditors may enter into partnership with auditors.

According to an announcement by the two professions:³³⁷

- the agreement envisages a trial period during which the two professions are expected to develop a common basis for their respective professional rules;

³³⁵ *Convention entre l'Ordre français des avocats du barreau de Bruxelles et l'Institut des Réviseurs d'Entreprises.*

³³⁶ The requirements regarding a written contract including the prohibition on fee-sharing are in Article 3. The provisions that must be incorporated by reference are Articles 4 (professional ethics and independence), 5 (conflicts of interest), 6 (permitted and forbidden references on letterhead etc.), 9 (giving professional bodies access to relevant documents and materials), 10 (dispute resolution).

³³⁷ Also dated Jan. 6, 2000.

- to protect the client, the two sets of professional rules will be observed, and means of enforcement will be developed;
- multidisciplinary cooperation will be encouraged for the benefit of the client.

As regards the last point, the announcement mentions that what is envisaged is “a small building in which will be brought together a lawyer, an auditor, an accountant, a tax adviser, a *notaire*, and a *huissier de justice* (process-server).”

c. Italy

In Italy, there is no prohibition against MDP, and it has been argued that partnerships (*associazioni*) between lawyers and members of other regulated professions are and should be legal.³³⁸ Thus, according to this argument, so long as the MDP comprises only regulated professionals such as that of lawyer (*avvocato*) and public accountant (*dottore commercialista*) and is in the form of a partnership, it should be permitted. Two problems have been noted, however.

The first is a perceived European bias against MDP, especially at the level of the European Bar Council (CCBE), discussed above under Europe. It would seem that, in Italy, pending resolution of the litigation brought by the Netherlands Bar against two of the Big Five firms (discussed above under The Netherlands), this perceived European bias may act to some extent as an informal brake on MDP in Italy.

The other problem is that the feasibility of MDP in Italy is thought to depend on legislation that will permit lawyers to practice in corporate form (as distinguished from

³³⁸ Danovi, *Associazioni professionali multidisciplinari, Dottori Commercialisti*, No. 46 (1997), at 8-10.

partnership form), and that will expressly authorize MDP. Legislation to permit legal practice in corporate form has been proposed but has not yet been adopted.

For the moment, there seem to be two forms of MDP in Italy. One involves legal practitioners, known as *commerzialisti*, who are not members of the Bar and who have freely entered into certain types of MDP. The other involves the Big Five, which in some cases (e.g., Ernst & Young) have established relationships with members of the Bar or firms of lawyers comprising members of the Bar. These relationships seem to be non-structural in nature and to depend on ad hoc contractual understandings.

d. Spain

Perhaps the best-known development in the area of MDP was the merger in April 1997 of the Madrid-based law firm of J.&A. Garrigues with Arthur Andersen's Spanish tax and law network to form Garrigues & Andersen.³³⁹ More recently, effective January 1, 1999, the Spanish law firm of PricewaterhouseCoopers Juridico y Fiscal merged with two other Madrid firms, Estudio Legal and the Madrid operations of Mullerat & Roca. Thus, MDP clearly exists in Spain.

In 1997, the Spanish National Bar Council (*Consejo General de la Abogacía Española*) drafted a Decree that, if adopted in its present (October 1999) form, would include provisions affecting MDP in Spain. This draft Decree—entitled *Estatuto General de la Abogacía Española*—contains three relevant provisions—Articles 21, 22 and 29. They declare certain activities and behavior to be incompatible with the legal profession. In particular, Article

³³⁹ See *The American Lawyer*, June 1998, at 49. One commentator who is generally skeptical about successful legal practice by the Big Five seems to consider Garrigues-Andersen to be a success. See "Behind the Andersen Legal results," 36 *Commercial Lawyer* Dec. 1999, at 3.

22(2)(b) states that auditing is incompatible with the practice of law. It would seem, therefore, that, if this Decree were to be adopted, it could have an impact on the MDPs that have been established by Arthur Andersen and PricewaterhouseCoopers in Spain, and any similar MDPs. The proposed Decree is reportedly in the final stage of the approval procedure by the Spanish Government.

e. Sweden

In Sweden, the title of “*Advokat*” is protected, but the scope of professional activity reserved to an *Advokat* is quite limited. Thus, anyone can give legal advice, and a person who has been trained in the law but who has not qualified as an *Advokat* may act as or find employment as a legal professional. In theory, therefore, MDP is quite feasible in Sweden, and the Big Five in particular should find Sweden a favorable venue for their legal practices. Another factor favoring the Big Five is that qualification as an *Advokat* involves passing a bar examination and an apprenticeship of five years, and there are only a limited number of independent law firms that can provide five years of training to a prospective *Advokat*.³⁴⁰

Notwithstanding these handicaps, the Swedish Bar—*Sveriges advokatsamfund*—has been able, to a certain extent, to maintain the superior professional value of the title of *Advokat* and to resist the participation in MDPs (including Big Five MDPs) of persons using that title. The Big Five, particularly Arthur Andersen, Ernst & Young, and KPMG, have established associated legal practices in Sweden, but thus far the lawyers in those legal practices have not been permitted by the *Sveriges advokatsamfund* to use the title of *Advokat*. The Big Five have attracted young lawyers by offering them compensation and training, but have not yet been able

³⁴⁰ There are very few independent law firms in Sweden with 25 or more lawyers, and only three with more than 200.

to offer them the professional status of *Advokat*. In addition, the *Sveriges advokatsamfund* has to a certain extent successfully policed the agreements entered into and the names used by Big Five legal practices in Sweden. Thus, in 1998 it reportedly reviewed the agreements between KPMG and its associated Swedish law firm and caused the latter to put an end to the agreements and to change the name under which it was practicing; and in 1999 it took similar action with respect to Arthur Andersen and its associated Swedish law firm.

Reportedly, there is dissent within the Swedish legal profession concerning the policy of the *Sveriges advokatsamfund* and its Disciplinary Committee toward lawyers in Big Five legal practices, and the *Sveriges advokatsamfund* is under pressure to reconsider this policy. Even so, it seems to remain a powerful and well-regarded professional association with close ties to the Swedish Government for which it handles substantial legislative work. In addition, three of the eleven members of the Disciplinary Committee of the Swedish Bar are representatives of the Swedish Government. The Bar, by largely maintaining its unity and by remaining on excellent terms with the Government, to date seems to have been able to provide a degree of resistance to legal practice in Sweden by the Big Five.

Another source of resistance to the Big Five in Sweden has been the local accounting profession. Through litigation, it has successfully refused to allow accountants in Sweden to engage in activities unrelated to accounting. In October 1997, the local administrative court in Stockholm prohibited cross-ownership between Price Waterhouse accounting activities and Price Waterhouse consulting activities (“the accounting firm must be independent in fact as well as in form, and must conduct itself in such a way that third parties will perceive it to be independent”).

Notwithstanding developments to date that somewhat limit MDP in Sweden, there is proposed legislation before Parliament that, if enacted, would remove certain of the present barriers that inhibit *Advokat* and accountants seeking to form an MDP.

f. Switzerland

In Switzerland, the legal profession does not have a general monopoly of legal practice. In some cantons, lawyers have been granted the exclusive right to handle certain types of litigation (which may not include landlord-tenant cases, labor law cases, and tax cases, with respect to which non-lawyers may also represent clients).³⁴¹ Outside the area of litigation, professionals other than lawyers are permitted to provide legal services in most parts of the country. Historically, the Swiss legal profession has been regulated only by the cantons and by cantonal bar associations. Federal legislation (discussed in the last three paragraphs below) that would affect the legal profession was pending before the Swiss Parliament in early 2000.

In general, lawyers in Switzerland can be divided into (1) those who only graduated from law school; (2) those who are not registered as lawyers but who fulfilled all necessary requirements for registration and have been awarded a special certificate (*Anwaltpatent* or *brevet d'avocat*),³⁴² and (3) those who are registered members of the independent legal profession.³⁴³ Not all three groups exist in each canton. The classification of lawyers is mainly relevant with regard to the competence to litigate and the applicability of

³⁴¹ *Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte* (Federal Act on Freedom of Movement of Lawyers), Deliberations at the *Nationalrat*, *Amliches Bulletin der Bundesversammlung* (Official Bulletin of the Federal Assembly), 99027, at 1551 and ff. (Sept. 1, 1999). Much of the information herein has been taken from these deliberations.

³⁴² *E.g.*, in Geneva, the *brevet d'avocat* is awarded after legal studies at a university and a certain period of practical training at a law firm. *Loi sur la profession d'avocat* (hereinafter "Geneva") Arts. 5, 24.

professional rules.³⁴⁴ Some cantons, like Geneva, afford the third group (registered lawyers) a monopoly on litigation.³⁴⁵ These lawyers are not allowed to form partnerships except with other registered lawyers,³⁴⁶ and similar restrictions are also applicable in other cantons in Western Switzerland. Thus, in these cantons, registered lawyers may not enter into multidisciplinary partnerships (MDPs).

In other cantons, the rules are less strict. In at least one canton, Solothurn, not even litigation is subject to a monopoly of the legal profession, and anyone may represent litigants for remuneration in court.³⁴⁷ While Zurich and other cantons reserve representation in court to members of the legal profession, the holder of a Zurich *Anwaltspatent* who is not a registered lawyer is allowed to litigate.³⁴⁸

The rules on association in cantons like Zurich, St. Gallen and Thurgau are also less restrictive than in Geneva, and lawyers in those cantons are permitted to form partnerships with persons who are not admitted to the bar and even with limited liability companies.³⁴⁹ Thus, lawyers in those cantons are allowed to enter into MDPs and, therein, to work for non-lawyers, to represent clients, and to engage in litigation. Under local bar association rules, lawyers in a

³⁴³ E.g., Geneva, Arts. 2, 5.

³⁴⁴ *Botschaft zum Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte* (Official reasoning of the Government on Draft Act of Law regulating the freedom of establishment), *Bundesblatt* 99. 027, at 6021.

³⁴⁵ Geneva, Art. 2.

³⁴⁶ Geneva, Arts. 11, 30.

³⁴⁷ *Die Freizügigkeit der Anwaltschaft*, *NEUE ZÜRICHER ZEITUNG*, Dec. 17, 1999, at 15.

³⁴⁸ §1 *Gesetz über den Rechtsanwaltsberuf* (Zurich Attorneys Act) (July 3, 1938 as amended Dec. 1999).

³⁴⁹ *Züricher Anwaltsverband* (Zurich Bar Association), *Statuten* § 2 Abs. 3 (Jan. 1999), which is also relied on elsewhere herein. (An example is *Homburger Rechtsanwälte* which includes non-lawyer *eidgenössisch diplomierte Steuerexperten* (certified tax experts) in the firm as partners and associates.)

Zurich MDP are required to safeguard their professional independence and to ensure that the non-lawyers therein comply with the law and legal professional rules.

Outside the area of litigation, legal work in Switzerland may be performed not only by independent lawyers but also by professionals with legal qualifications who are employed by banks or accounting firms or certain other entities. These professionals are not registered as lawyers, but increasingly they hold the *Anwaltspatent* or *brevet d'avocat*, in which case, in some cantons, they are subject to the professional rules of, and to supervision by, the local bar associations. In some cantons, banks, accounting firms, insurance companies, and even industrial companies employ lawyers in internal MDPs. In certain cases, these internal MDPs, individually, employ more lawyers than the largest law firm in the region.³⁵⁰ MDPs in Swiss banks have focused on legal and other services related to estate planning. As regards insurance companies, on the other hand, the Swiss courts, on grounds of conflicts of interest, have attempted to put an end to the practice whereby legal employees of insurers handle claims on behalf of insureds.

Each of the Big Five MDPs in Switzerland provides a range of legal consulting services for corporate clients, and general legal advice for private clients. Both their legal departments and their tax departments employ lawyers. They incorporate new companies, advise on mergers, draft and adapt articles of incorporation and by-laws; they advise on inheritance law, spousal-support law, and immigration law. KPMG engages in services relating to litigation.

³⁵⁰ Max Meyer, *Kartellistische Zunfordnung der Anwälte und Notare*, NEUE ZÜRCHER ZEITUNG, April 28, 1992, at 39.

In addition, there are stand-alone Swiss law firms that are affiliated with the Big Five.³⁵¹ One of them is Andersen Legal, Lichtsteiner & Sauber, Rechtsanwälte, Zurich, which was founded in May 1999. It has a contractual relationship with Andersen Legal Network C.V., a Dutch entity, regarding name use and services. Within this Network, continuing legal education is organized, service line products are developed, and expansion is coordinated. The law firm concentrates on corporate work, and tax advice is left to Arthur Andersen with which the law firm cooperates but has no contractual relationship. The law and non-legal offices are separate but physically close. When Andersen Legal works on referral from the Andersen accounting firm, it usually has a separate relationship with the client. In some cases it acts as a sub-contractor and bills its services to Arthur Andersen.

It is expected that a new Federal law, applicable throughout Switzerland, will give registered lawyers the exclusive right to handle litigation. The two chambers of the Swiss parliament have before them drafts of a statute³⁵² necessitated by treaties with the European Union and its member states which require Switzerland to allow lawyers admitted in those states to represent their clients in Swiss courts and to establish their practices in Switzerland, subject to compliance with professional rules. Furthermore, the statute is needed to implement, with regard to the legal profession, the constitutional provision that obligates the Confederation to ensure the recognition in all cantons of a professional certificate acquired in any canton.³⁵³

³⁵¹ Information supplied by Urs Lichtsteiner, of Andersen Legal, Lichtsteiner & Sauber, Rechtsanwälte, Zurich.

³⁵² See note 341 *supra*..

³⁵³ Art. 33 Abs. 2 *Bundesverfassung [BV]* (Federal Constitution).

Although the bills in the two chambers differ in some minor respects, under both only registered lawyers would be allowed to represent clients in court. In addition to other requirements, lawyers would have to establish that they were independent in order to be registered. The definition of independence is somewhat different in the two bills, however.

Under both bills, a lawyer who was employed by an accounting firm, bank or insurance company would not be independent and, accordingly, would not be entitled to represent clients in court. That interpretation seems clear in the lower chamber (*Nationalrat*) bill and almost as clear in the upper chamber (*Ständerat*) bill. In the latter bill, it remains uncertain whether a contractual obligation between a law firm and another entity whose members were not registered in a Swiss canton would be sufficient grounds for concluding that the lawyers working in that firm were not independent. If that were to be the case, lawyers whose firms belonged to, or had referral agreements with, international networks might not be deemed independent for purposes of the statute. In any event, Article 1 of the proposed new statute does not include legal consulting services, which lie outside the scope of the statute. Thus, the MDP legal consulting services of banks, the Big Five and others in Switzerland should not be affected by this statute.

7. Ontario, Canada

The Canadian literature on MDP is voluminous, reflecting extensive study of the subject both as it has been analyzed and debated outside Canada and as to its actual and potential consequences inside Canada.³⁵⁴ Most of this literature post-dates the creation in 1996 of an affiliation between Ernst & Young and the Toronto law firm of Donahue & Partners. The latter is commonly referred to as the “captive law firm” of the former, is understood to pay the former both rent and a fee for management services, and is held out as “a member of Ernst & Young International.” The creation of this “captive law firm” has been described as a “wake-up call”³⁵⁵ for the Ontario law society—the Law Society of Upper Canada (“LSUC”)—which shortly thereafter undertook studies of MDP and the then-existing LSUC rules that forbade MDPs in Ontario.³⁵⁶ (The LSUC is the rule-making body for all lawyers in Ontario.)

The result of these studies has been two-fold. The first result occurred in 1999 and consisted of the adoption by the LSUC of its By-Law 25 entitled “Multi-Discipline Practices” and the subsequent issuance by the LSUC of rules for entering into a “multi-discipline partnership.”³⁵⁷ The second result, still in progress, is the in-depth examination, by an LSUC

³⁵⁴ E.g., Roach and Iacobucci, “Multi-Disciplinary Practices and Partnerships: Policy Options” (1998); Charles River Associates per Trebilcock and Csorgo, “Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective” Aug. 4, 1999; Canadian Bar Ass’n (“CBA”) per Buckley, “Multi-Disciplinary Practices: Towards a Policy Framework” Feb. 1998; CBA, “Multi-Disciplinary Practices: An Interim Report” Aug. 1998; CBA per Bogart, “Context—Approaching the Regulation of MDPs” June 1998, and “Developments since the Interim Report on Multi-Disciplinary Practices of August 1998” Dec. 1998; CBA per King, “Legal Issues Relating to Multi-Disciplinary Partnerships” Feb. 1999; CBA, “Striking a Balance” Aug. 1999; Federation of Law Societies of Canada per Earle, “Multi-Disciplinary Partnerships: Report to Delegates” Aug. 1999; Law Society of Upper Canada (“LSUC”) Working Group on Multi-Disciplinary Partnerships, “Report to Convocation” Feb. 27, 1998, and “Report to Convocation” Sept. 25, 1998; LSUC Multidisciplinary Practice Task Force, “The Affiliated or ‘Captive’ Law Firm” Sept. 1999.

³⁵⁵ According to Robert P. Armstrong, Q.C., Treasurer of the LSUC.

³⁵⁶ See the two LSUC documents entitled “Report to Convocation” in note 354 *supra*.

³⁵⁷ By-Law 25 was adopted by the LSUC on April 30 and amended on May 28, 1999. The relevant rules are found in LSUC, “Guide to Application to Enter into a Multi-Discipline Partnership” June 30, 1999.

task force, of “captive law firms” and their affiliated sponsors outside the legal profession. The affiliations under study would be based on cost-sharing (but not fee-sharing) and mutual-referral arrangements between such law firms and their non-law-firm sponsors.

It should be noted that, at the federal bar level in Canada, views have been expressed to the effect that the LSUC has been too restrictive in its approach to MDP.³⁵⁸ It has also been recommended that the issue of MDP in Canada should be the subject of a “national approach,”³⁵⁹ but for the moment By-Law 25 of the LSUC is the relevant regulatory document in respect of Ontario, and a “national approach” seems unlikely in the foreseeable future.

By-Law 25 prohibits a member of the LSUC from engaging in the practice of law except in accordance with its terms,³⁶⁰ and permits a member of the LSUC

in connection with the member’s practice of law, [to] provide to a client only the services of an individual who is not a member who practises a profession . . . that supports or supplements the practice of law.³⁶¹

Subject to these requirements, as well as to licensing requirements (mentioned below), By-Law 25 authorizes an LSUC member

[to] enter into a partnership or association that is not a corporation with an individual who is not a member [of the LSUC] who practises a profession, trade or occupation that supports or supplements the practice of law for the purpose of permitting the member [of the LSUC] to provide to clients the services of the individual.³⁶²

³⁵⁸ E.g., in “Striking a Balance”, note 354, *supra*, a committee of the CBA, at 37, recommended that there be no distinctions drawn “between Captive Law Firms, and fully integrated partnerships”; that “there be no restriction on the kinds of services provided by MDPs”; and that there be “no requirement of control of MDPs by lawyers.”

³⁵⁹ See Earle, note 354, *supra*, at 12.

³⁶⁰ By-Law 25 §2. In §1(2) the practice of law is defined to mean the giving of any legal advice on the laws of Canada or any subdivision of Canada “or the provision of any legal services.”

³⁶¹ By-Law 25 §3.

³⁶² By-Law 25 §4(1).

Under By-Law 25, the “individual” (that is, the non-lawyer participant in the partnership) must meet certain requirements and must agree with the LSUC member (the lawyer in the partnership) that the LSUC member will have “effective control” of the partnership, and that the non-lawyer individual will comply with the Rules of Professional Conduct and the policies and guidelines of the LSUC.³⁶³ In summary, then, MDPs are permitted in Ontario only if they are controlled by lawyers, render only legal services and services ancillary thereto, and are subject to the professional rules of the legal profession.

In addition, an MDP may not be formed in Ontario except pursuant to license by the LSUC. To this end, the lawyer proposing to form an MDP must apply in writing to the LSUC for approval, and must submit with the application (among other things) the relevant agreement(s) that will govern the MDP.³⁶⁴

³⁶³ By-Law 25 §§4(2)-5.

³⁶⁴ By-Law 25 §§6-ff. *See also* LSUC “Guide to Application”, note 357, *supra*.

8. New South Wales, Australia

In New South Wales, Australia [“NSW”], lawyers are under the jurisdiction of the Law Society of NSW. At the request of the Attorney General of NSW, the Law Society’s rules affecting MDP were reviewed by the Legal Profession Advisory Council, which, in November 1998, issued a “Report and Recommendation ... in respect of Multidisciplinary Partnerships and Solicitors’ Professional Code of Conduct.”³⁶⁵ The Recommendation found that certain provisions of the Solicitors Professional Conduct and Practice Rules were not in the public interest

in that such rules adversely discriminate against non-solicitor partners in a multidisciplinary partnership and would effectively act as a bar to the formation of such partnerships³⁶⁶

As a result of this Recommendation, the Law Society of NSW, in December 1999, amended its MDP rules, which theretofore had required that solicitor partners in an MDP must have majority voting rights and must be entitled to receive not less than 51% of the net receipts earned by the MDP. As a result of the action taken in 1999, the applicable provisions of the NSW Solicitors’ Rules became Rule 40, which no longer contains the contested provisions on voting rights and on net receipts. Thus, non-solicitor participants in an MDP in NSW are no longer restricted as to voting rights or as to allocable net receipts.

To ensure the retention of the ethical and professional duties of solicitors in an MDP, revised Rule 40 now contains provisions to the following effect:³⁶⁷

³⁶⁵ The Report and Recommendation resulted from a study undertaken pursuant to a letter request dated June 24, 1997 from the Attorney General of New South Wales.

³⁶⁶ Report and Recommendation, at 13, referring to rules 40.1.1 and 40.1.6.

³⁶⁷ Law Society Journal (NSW, Australia), Dec. 1999, at 86.

- NSW legal practitioners in an MDP “must have the authority and responsibility for the management of the legal practice and delivery of legal services in NSW;”
- the MDP must conduct its legal practice in compliance with the law and regulations and rules thereunder governing the legal profession; in particular, the MDP in its legal practice must observe legal professional rules governing client privilege, conflict of interest, and disclosure requirements;
- “the ethical and professional duties of solicitor members of the [MDP must not be] affected by other members of the [MDP];”
- “the services offered by the [MDP must be] accurately and fairly represented to clients and potential clients and [the MDP] should disclose to clients the qualifications of persons providing those services.”

While the Solicitors’ Rules were under review, a bill was introduced in the Legislature of NSW which, if enacted, would permit legal practices in corporate form (1) to be owned in part by non-lawyer professionals, and (2) to raise outside capital from the public. Under the proposal, law firms that incorporate would be required to publish their financial accounts, and there would be strict rules applicable to the directors of such a corporation. It is not certain that this proposed NSW legislation will be viewed favorably in all respects at the federal level by the Australian Securities and Investments Commission.³⁶⁸

³⁶⁸ For a summary of the bill, see “Shackles removed for law firms,” *The Australian Financial Review*, Sept. 3, 1999, at 1.

9. Conclusions Regarding the Survey

In a number of jurisdictions outside the United States, developments and rules relating to MDP are in a state of flux. In some (and perhaps many) of these jurisdictions, official and professional attitudes toward MDP are likely to be influenced by action taken in respect of MDP in the United States—a point that seems inherent in the comparative size and vitality of the U.S. legal profession and its worldwide influence on the practice of law, and a point that has been expressly made by a number of lawyers and bar leaders abroad who have commented on MDP.

Reciprocally, decision-makers in the United States can look abroad to see how MDP has worked there, and to gain an understanding of concerns and regulatory issues that may be of general relevance both here and abroad. Any reciprocal analysis should, however, take account of the distinguishing characteristics of the U.S. profession set out above in Chapters 5 and 6. These distinguishing characteristics suggest that the proper study of matters affecting the U.S. profession must begin with the U.S. profession itself—its history, training and organization, the development of its standards and values, the debate and interplay that have produced its professional rules, in sum, its identity and vigor that give it specificity, substance, and singularity. Although (not surprisingly) many aspects of the U.S. legal profession have been imitated abroad, it cannot be adequately evaluated, especially in the context of MDP, if it is viewed as a mere replication of the profession in one or more foreign countries.

MDP abroad is not a uniform phenomenon. It has been shaped by the history and circumstances—by the relative strengths and weaknesses—of individual legal professions in individual countries. The reason for the U.S. legal profession to look to certain other jurisdictions is that they already have MDP and, perforce, the concerns and issues that come with

it, and that a study of their experience with MDP may therefore yield relevant information and analysis.

A simplified distillation of overseas experience suggests that MDPs controlled by lawyers, when compared with MDPs controlled by non-lawyers, may be relatively lacking in problems; and that MDPs controlled by non-lawyers can be put into two categories: integrated MDPs and non-integrated MDPs. In the former, lawyers constitute a non-controlling part of an entity in which the performance of legal services may only be an ancillary activity. In the latter (the non-integrated MDP), the legal practice retains its own identity, and is linked to other parts of the MDP which are controlled by non-lawyers. Although (at one extreme) the separate identity of the legal practice may be largely a matter of form, the separate legal practice can (in varying degrees in various cases) embody considerable ethical and professional substance.

The Netherlands Bar has attempted to draw a line between integrated and non-integrated MDPs, permitting the latter but not the former. Two (but not all) of the Big Five have challenged the drawing of this line, and have caused questions involving European law on competition and on the right of establishment to be brought before the European Court of Justice. Its decision, expected in late 2001, may address efforts to distinguish between integrated and non-integrated MDPs controlled by non-lawyers, and thus may have considerable impact on European disputes over MDP.

A similar line of demarcation may be emerging in England and in Ontario, where there are proposals to permit non-integrated but not integrated MDPs controlled by non-lawyers. In France and in Germany, it can be noted that none of the Big Five MDPs is an integrated MDP. They all take the form of affiliated law firms. It can also be noted that, while the relationships between these affiliated law firms and the respective Big Five entities are often so close as to

suggest the functional equivalent of integrated MDPs, there is no single model of affiliation. Attitudes toward the value of separateness seem to vary among the affiliated law firms, and in one case in Germany the affiliated Big Five legal practice overtly seeks to operate as a traditional, stand-alone law firm. Moreover, where separateness is preserved even if only as a matter of organizational form, the importance attached to that separateness may change over time.

Were non-integrated MDPs abroad to become a paradigm where non-lawyers control the MDP, acceptance of this concept would be but a point of departure for dealing with such matters as assuring lawyer independence and applying the legal profession's rules on conflicts of interest in the context of a legal practice affiliated with entities, particularly entities of greater economic strength, that, by contract or otherwise, are in a position to control the legal practice. The Nallet Report in France calls for (among other things) requiring transparency as regards the nature of the relationship between the legal practice and such other entities, and creating a special commission that would have jurisdiction over MDPs. It seems far from certain, however, that such steps will in fact be undertaken or, if attempted, will prove susceptible of effective implementation.

Another approach, implicit in some pending studies abroad, would be to adopt rules applicable to the legal profession setting forth permissible and impermissible contractual and operational arrangements that a law firm could enter into in creating a non-integrated MDP. While the possibility of establishing such rules for the legal profession has been suggested, the search for workable and enforceable rules is at best an on-going challenge. This approach would have to be forcefully pursued with considerable analytical skill before it could be expected to

provide rules for permitting MDP in a manner that would safeguard the legitimacy of legal practice.

The principal focus abroad has been on MDPs involving the Big Five. Whether other (non-Big Five) MDPs controlled by non-lawyers should be permitted in integrated or non-integrated form has on occasion been discussed abroad as well. In Germany, by legislation, lawyers may not enter into an integrated MDP with another profession unless that profession is deemed to have adequate rules for the protection of client confidences. Accordingly, lawyers may only enter into non-integrated MDPs with most professions, since most professionals other than lawyers, accountants and tax advisers are not deemed to be subject to such rules.

The financial resources of the Big Five, their major presence as providers of legal services in Europe, and the resulting competitive position of traditional law firms, have given rise to the question of whether a traditional law firm should be granted access to equity capital provided by investors other than professionals active in the firm. The Nallet Report strongly recommends that such investors should be allowed to acquire equity in traditional law firms or in holding companies owning the firms. This approach would be an understandable response to the relative economic power of the Big Five in a country like France, where certain of their affiliated law firms may have sought market share for legal services on the basis of low levels of profitability for those services.

On the other hand, permitting outside equity investment in law firms raises ethical concerns for the professional independence of lawyers. These concerns might have the effect not of persuading the legal profession actually to endorse outside equity investment in otherwise independent law firms, but to focus ever more carefully on non-integrated MDPs, that is, on

appropriate professional rules to govern legal practices that enter into MDPs resting on contractual links and constitutive relationships with entities controlled by non-lawyers.

The reality, however, is that no legal profession abroad has yet developed, much less applied, special rules for legal practices participating in non-integrated MDPs. At this juncture, it can only be said that experience abroad suggests the possibility of such rules, but gives no assurance that they will be developed in a manner that would permit law firms to enter into MDP affiliations and at the same time retain their essential professional vitality.

Chapter 10

Identifying and Appraising the Factors Looking Toward Change

1. Increasing Transactional Complexity
 2. The Growth of the Theory of “Market Regulation” and Consumerism
 3. The Advances of Expert Systems
 4. The Difficulty of Defining the “Practice of Law”
 5. The Desire for Liquidity of Professional Interests
 6. The Economic Power of Proponents of MDP
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Whether there are factors that make MDP “inevitable” or not is a matter of speculation. While that speculation is not helpful in and of itself, the isolation of factors that some people claim will favor MDP may help develop a strategy that will protect the unique benefits that a legal profession operating with independence, confidentiality and freedom from conflicts of interest brings to its clients.

The committee has isolated six major factors that tend to favor MDP

1. Increasing Transactional Complexity – Early English Law was simple by comparison with modern law because it dealt with a simple, local society. Relatively few concepts (*e.g.*, *trespass vi et armis*, trespass on the case, *detinue* and *assumpsit*) were entirely sufficient in a society where the rules were designed to regulate only the quality of work from a few easily understood occupations and the rights of people in uncomplicated relationships.¹

¹ See, *e.g.*, Professor Robert C. Palmer’s descriptions of his book, *English Law in the Age of the Black Death, 1348-1381*, at <http://vi.uh.edu/pages/bob/bib/BDCOV.HTM> (also at [BDTHES.HTM](#) and [BDOBS.HTM](#))

By contrast, it has been estimated that the documentary “confirms” generated in modern derivatives trading, one of the many arcane areas of modern law, require logical decision trees that contain some 2,500 variables.² The increased complexity of modern legal issues and the specialized knowledge required to understand the factual predicates for appropriate legal analysis have required that lawyers collaborate ever more closely with members of other disciplines. Many law firms have developed referral relationships with other professionals to avail themselves of the necessary technical advice. Yet other law firms have hired expert professionals to provide the advice in house. Likewise, some non-legal professional firms have hired lawyers to help them with the understanding of the legal issues surrounding their clients’ technical problems.³ One of the pressures for MDP has been the desire on the part of these firms to compensate other professionals on the basis of profit sharing both to recognize their efforts on behalf of the firm and to help attract the highest quality personnel.

2. The Growth of the Theory of “Market Regulation” and Consumerism –

Almost 20 years ago ethics commentators began observing that trust in the “market” was beginning to replace professional regulation as a means of monitoring and policing the practice of law.⁴ Since that time many things have changed that have established the “market” as a dominant force in the delivery of legal services. Because of the increasing faith in the market as an effective and appropriate regulatory force for the legal profession, decisions made by the

² See *Legal Advice Without the Lawyers*, N.Y.L.J., Nov. 15, 1999, <http://www.nylj.com/tech/111599t1.html>.

³ The law firms that employ professionals from different disciplines are not always large. Personal injury firms may employ health care workers to aid in the assessment of injury. Environmental law firms may employ engineers. Small “elder law” firms may employ social workers or health care workers, CPA’s and money managers. See footnote 48 to the Reporter’s Notes to the ABA Commission on Multidisciplinary Practice at p. C33. The website of Charles F. Robinson, whose “lament” is recorded in the footnote, has interesting and pertinent comments on the future of the practice of law at <http://www.rclaw.com/future.html>.

⁴ John Leubsdorf, *Three Models of Professional Reform*, 67 Cornell Law Rev. 1021 (1982).

consumer of legal services have become a very important catalyst for changing the methods of delivery of legal services.

In its hearings, the ABA Committee on Multidisciplinary Practice heard testimony or received direct replies from several consumer organizations.⁵ These groups claimed that the consumer needed and could successfully make informed choices about whether to use an MDP or a group of independent professionals. Each claimed that giving choices to consumers of legal services would reduce the cost of those services as well as their complexity. In commenting on the final report, Wayne Moore, representing the AARP Foundation, wrote that consumers are interested in choice, access, convenience and cost of legal services.⁶

The testimony of these consumer representatives does not prove demand for choice in the form of MDP, except insofar as they make the argument that the position of the organized bar is self-serving and designed to facilitate “lawyers defending their economic turf.”⁷ These claims make it more likely that MDP could succeed if only because these claims might appeal to legislators or other relevant decision-makers.

The Committee has reviewed, and would expect interested members of the Bar to take account of, analyses of MDP that either favor, or consider that market forces will render

⁵ Consumers Alliance of the Southeast, HALT, Inc., Consumers First, Americans for Competitive Telecommunications, Center for Consumer Affairs, Citizens Advocacy Center, Electric Consumers Alliance and the AARP Foundation

⁶ <http://www.abanet.org/cpr/aarp.html> The AARP operates its own Legal Services Network, a Yellow Pages advertising program, under which lawyers who meet certain criteria and who agree to fix some of their fees may appear under an AARP listing. Moore says that the AARP is not endorsing lawyers, but he says, “We go through the process of choosing a lawyer that you would do if you had the time.” Lawyers pay an annual fee of \$1200 or more to be listed by AARP. *The Legal Intelligencer*, June 2, 1997.

⁷ Testimony of James C. Turner, an attorney and Executive Director of HALT, Inc.

inevitable, MDPs in which the practice of law is owned or otherwise controlled by nonlawyers.⁸

These analyses tend to view the legal profession as a cartel whose ethical rules serve economically unhealthy protectionist ends. Instead, according to these analyses, “The legal profession should welcome [such] MDPs as creating new career and economic opportunities for its members.”⁹ The goals of organized bar groups, it is said, “are no different from [those of] any other trade union or interest group pursuing economic protectionism.”¹⁰

MDPs in which the practice of law is owned or otherwise controlled by nonlawyers, it is said, are well suited to provide “one-stop shopping,” which clients will demand. To this is added the observation not only that client demand will cause the proliferation of this type of MDP, but also that the consumer should not be inhibited by rules of the legal profession in determining where to seek legal services. In sum, such “MDPs might be able to offer clients a superior product at lower cost”¹¹

This line of reasoning emphasizes consumer forces--emphasizes that choices made by consumers, including sophisticated business consumers, have become powerful agents for change in the delivery of legal services. Additionally, it is said, complex legal problems and the need for multidisciplinary input have fueled client demands for “one-stop shopping.”

⁸ E.g., Daniel R. Fischel, Dean, Univ. Chicago Law School, Multidisciplinary Practice, Seminar in Law and Economics, Harvard Law School, March 21, 2000 (such MDPs are desirable); Paul J. Sax, Chair, Section of Taxation, American Bar Association, presentation at Symposium on Multidisciplinary Practice Oct. 25, 1999, sponsored by Center for International Law, New York Law School (such MDPs are inevitable).

⁹ Fischel, note 1, *supra*, at 35.

¹⁰ *Id.*

¹¹ *Id.*, at 33.

In this light, consideration can be given to the changes proposed by this Report (see Chapter 12 below). If adopted (and subject to certain safeguards), these proposed changes will permit the following:

- The provision of nonlegal services by law firms.
- Interprofessional contractual relationships between legal and nonlegal professionals for the systematic and continuing provision of legal and nonlegal professional services.
- Within the context of such relationships, the sharing of expenses, the referral of clients, and the advertising of the relationships.

Thus, changes proposed by this Report, if adopted, will make available to consumers two forms of multidisciplinary practice that have been proposed in the debate on MDP.¹² The Committee's proposed changes do not, however, include changes that would permit MDPs in which the practice of law is owned or otherwise controlled by nonlawyers. Even were changes permitting such MDPs to be considered desirable, the Committee is of the view that substantial additional time would be required to develop informed views about suitable rules to this end. At the present time, the Committee does not consider it appropriate to undertake the formulation of possible rules permitting such MDPs. On the other hand, the Committee is quite mindful of the views mentioned above relating to consumer forces, and would deem it prudent for the NYSBA, first, to be a sensitive and informed observer of those forces and, second, should consumer interests and the public interest in general so demand, to remain open to a reconsideration of MDPs in which the legal practice is owned or otherwise controlled by non-lawyers.

¹² These two forms correspond to Models 3 and 4 posted in March 1999 by the ABA Commission on MDP. <<http://www.abnet.org/cpr/multicom.html>>

3. The Advance of Expert Systems¹³ – Even the largest clients and law firms are attuned to the issue of costs. The application of computer technology is sometimes seen as addressing this concern. To this end some law firms are developing expert systems that simulate the decisions an experienced professional would make about a given fact pattern.

Linklaters & Alliance, a London-based law firm, has developed “Blue Flag,” a line of computerized products using expert system technology, which can replicate the advice of a live lawyer in certain circumstances. One of the Blue Flag¹⁴ systems, for example, advises investment banks about the laws of 31 countries. If a bank wants to buy or sell securities across 20 countries, the system can outline the legal requirements of each jurisdiction. A London-based technology consultant, Neil Cameron, claims that “Blue Flag is the most revolutionary advance in high-value, low-volume e-Commerce — and there is still no U.S. equivalent.”¹⁵ Linklaters claims its system reduces the cost to the client.¹⁶

Davis, Polk & Wardwell is developing its “Global Collateral Project” which focuses on cross-border financing transactions. By entering the variables for a specific transaction a client can retrieve the analyses the firm has made of similar transactions. The

¹³ In the jargon of the computer world, “Expert Systems” are software programs that mimic the decisions human beings would make given the same set of facts and rules.

¹⁴ <http://www.blueflag.com>

¹⁵ *Legal Advice Without the Lawyers*, op. cit., supra.

¹⁶ Paul Nelson, the partner in charge of the project, estimates that the traditional cost of a one-time survey of the banking law in the hypothetical 20 jurisdictions would cost 125,000 pounds sterling. The same fee plus an annual maintenance fee of 40,000 pounds sterling would allow an unlimited number of surveys.

theory is that this “preliminary analysis” would be used as a basis for supplemental value added legal advice from the firm.¹⁷

The Sydney, Australia, firm of Blake Dawson Waldron also has a program that makes a preliminary determination whether the terms of an advertisement violate the provisions of any Australian rule relating to advertising claims.¹⁸ Elizabeth Dawson, the partner in charge of the Blake Dawson project, says, “From a client’s perspective, the products deliver hundreds of thousands of dollars of legal/compliance advice for a fraction of that cost.” She adds, “From the firm’s perspective, the products, or eServices, as we now call them, allow us to break the nexus between time billing and profitability.”¹⁹

The accounting profession is pursuing the same ends. “Ernie,” an Ernst & Young system, allows \$5,000 per year subscribers to ask an unlimited number of questions about business, tax and technology matters. Live Ernst & Young consultants answer the questions and return an answer within two days. The answers are stripped of their identifying characteristics and become part of the Ernie database, searchable by subscribers.²⁰

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* Compare this with the Private Letter Ruling Procedures of the Internal Revenue Service.

So far, the firms using expert systems view them as feeders for value added services.²¹ It is easy to imagine, however, that the concept could be applied to estate planning,²² estate administration or other “bread and butter” areas of practice.²³

In many areas of practice (perhaps with the important exception of litigation²⁴) lawyers working with computer programmers, accountants, actuaries or other professionals could develop expert systems to sell individualized “legal” product to consumers or to businesses.²⁵ In those cases, nonlawyers might expect to share profits, if any, with the lawyers. In some cases, there might be no lawyers involved.

Some expert systems now perform routine functions often or historically performed or supervised by lawyers. Mortgage.com²⁶ and eOriginal²⁷ both claim to be able to

²¹ *Id.*

²² See <http://www.willdrafter.com/docs/instructl.htm>.

²³ Note that enforceability of statutes against web-based companies is difficult. By locating a server in a “friendly” jurisdiction, individuals engaged in the unauthorized practice could maintain anonymity and be free from the jurisdiction of the United States. This is now the case for Internet gambling, a much more interesting pursuit for attorneys general.

²⁴ But see <http://www.cybersettle.com> that bills itself as the world’s first online claim resolution system. See also *An End to Endless Negotiation — Cybersettle.com Resolves Disputes Quickly With Enhanced, Secure Web Site*, PR Newswire Association, Inc. PR Newswire, November 16, 1999.

²⁵ Even the Texas bar, with its aggressive unauthorized practice committee, would be required by statute to allow such programs so long as they displayed the required disclaimer and so long as they did not affect interests in real property. See the amendment to Section 81.101 of the Government Code, as amended June 19, 1999.

²⁶ <http://www.mortgage.com> and <http://www.mycorporation.com/incorporatenow.htm> See also *Mortgage.com Unveils Strategy to Drive Internet Technology and Cost Savings to Point of Sale for Realtors*, PR Newswire Association, Inc. PR Newswire, November 15, 1999.

²⁷ <http://www.das-inc.com/industry/realestate.html>. The eOriginal website also says that legal contracts and wills are “industry applications under review.”

process mortgages and manage real estate closings more efficiently than by using the traditional paper transaction.²⁸

The use of expert systems may pose the greatest threat to the core professional values that we seek to protect for clients. They may also be very attractive to consumers.

4. The Difficulty of Defining the “Practice of Law” – The ABA Commission report defined the “practice of law” in very broad terms.²⁹ By contrast, some people believe that the practice of law means only that you have appeared in court and claimed that you are a lawyer.³⁰

On January 22, 1999, Judge Barefoot Sanders, Senior Judge of the United States District Court for the Northern District of Texas, decided that “Quicken Family Lawyer,” a computer software product of Parsons Technology, Inc. that offered 100 different legal forms, was engaged in the unauthorized practice of law in Texas. He enjoined the sale of the product. Subsequent to the filing of the appeal and prior to a decision of the Fifth Circuit Court of Appeals the Texas legislature amended the unauthorized practice of law statute to allow the sale of Quicken Family Lawyer and other similar programs so long as they contained an appropriate disclaimer.³¹

²⁸ It is not clear how these companies will fare in Texas. Chapter 83 of the Government Code prevents the unauthorized practice of law with respect to certain documents involving real property. The amendments to Section 81.101 specifically continue the prohibitions in Chapter 83.

²⁹ The definition is based substantially on District of Columbia Rule 49.

³⁰ Testimony of James C. Turner before the ABA Commission. (The principal drafter of this section of the report has been told by a former member of the New York Committee on Unauthorized Practice that the “unauthorized practice of law” means appearing in court and claiming you’re a lawyer when you’re not.)

³¹ House Bill 1507, 1999 Tex ALS 799, Gen. Laws 799, 1999 Tex Ch 799; Approved by the Governor June 19, 1999.

The Fifth Circuit Court of Appeals vacated the injunction and judgment of Judge Sanders and remanded the case to the district court “for further proceedings, if any should be necessary, in light of the amended statute.”³²

When they are confronted by unauthorized practice allegations, the “Big 5” accounting firms simply deny that they are engaged in the practice of law at all.³³

No single definition of “the practice of law” will apply in all the situations in which that phrase is used. For example, the activities that are properly forbidden to nonlawyers as constituting “the practice of law” differ from those forbidden to people who are lawyers but who are not admitted in the forbidding state as constituting “the practice of law” within that state. Whether an activity should fall within one of these prohibitions may turn, not just on whether it calls for the use of traditional legal skills, but also on other factors such as the qualifications of a particular group of nonlawyers to accomplish the activity in question, and the public’s need to call on that group of nonlawyers to conduct the activities.

The lack of a consistent definition of the practice of law and the fact that the definition can be changed legislatively, administratively or by court rule³⁴ makes it difficult to enforce unauthorized practice statutes. At least one commentator suggests that rather than seek

³² 179 F.3d 956 (5th Cir. 1999).

³³ When the Texas Supreme Court Committee began its investigation of Arthur Andersen and Deloitte & Touche, the Arthur Andersen spokesman said, “We are not engaged in the unauthorized practice of law in Texas or any other jurisdiction. It’s flatly against our policies to do so.” Deloitte issued a written statement that said, “Deloitte & Touche L.L.P. does not engage in the unauthorized practice of law in Dallas, Texas, or elsewhere.” *The Dallas Business Journal*, Business Dateline, June 5, 1998.

³⁴ Note the ability of Lawyers, CPA’s and enrolled agents to practice before the Tax Court. *See also* Section 7452 of the Internal Revenue Code.

to enjoin “unauthorized practice”, the courts should require that nonlawyers be regulated “in ways that impose sanctions as stringent as those provided for lawyers”.³⁵

Some commentators have questioned whether consumers “protected” by the market need regulatory protection from the unauthorized practice of law.³⁶ Many commentators suggest that specific harm from nonlawyer practice cannot be established.³⁷

5. The Desire for Liquidity of Professional Interests – In 1987, Steven Brill, Yale Law graduate and sometimes controversial editor of The American Lawyer, put forth the idea of a public law firm.³⁸ Brill recanted his view nine years later by branding it as a “completely awful idea.”³⁹ In the late 1960s, many years before Brill articulated the idea, at least one member of the investment banking community had taken the plunge. When Goldman Sachs went public in May 1999, employees owned two-thirds of an enterprise valued on the market at more than \$33 billion.⁴⁰

Craig Johnson, a founder of the Venture Law Group in Menlo Park, CA, says he was told that the normal valuation for a professional service firm is 20 times trailing earnings. Under this formula a firm with \$1.5 million in earnings that was willing to leave \$750,000 in the firm would be worth \$15,000,000. As Johnson points out, the short-term pain a firm must accept

³⁵ Charles W. Wolfram, MODERN LEGAL ETHICS 831 (1986).

³⁶ Milton S. Friedman, CAPITALISM AND FREEDOM 144-49 (1962), *reprinted in* Hazard and Rhode, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 410 (3d ed. 1994).

³⁷ *A Brief History of the Unauthorized Practice of Law*, 1994 Survey and Related Materials on the Unauthorized Practice of Law/Nonlawyer Practice, American Bar Association (1996), pp. xvii-xviii; Wolfram, *op. cit.*, § 15.1.2, at 828-34.

³⁸ “Psst – Wanna Buy a Hot Stock,” The American Lawyer, November 1987 as reported at <http://www.lawnewsnetwork.com/stories/A3480-1999Jul16.html> on July 1, 1999.

³⁹ “Ruining the Profession,” The American Lawyer, July/August 1996, reported at the web address cite above.

⁴⁰ *Id.*

(by reducing partner distributions) must be balanced against the desire to increase long-term value.⁴¹

Professional service firms other than law firms are already testing these waters. Centerprise, a conglomerate accounting and consulting firm⁴² with aggregate revenues of \$191.1 million, designed to offer a “full range of consulting, accounting, tax and related professional services,” was to have gone public in early November, 1999 by selling 10.5 million shares at \$11.50-13.50 per share. The proceeds of the public offering were to have been used to provide working capital and to purchase the interests of partners. The public market would have provided partners with liquidity for their shares.⁴³

The offering was withdrawn because an increase in the Producer Price Index and the success of the United Parcel Service initial public offering on the same day made market conditions “unfavorable” for the sale.⁴⁴

The possibility of liquidity at a multiple of earnings is obviously a strong incentive for repealing rules against ownership of law practices by other than lawyers.

6. The Economic Power of Proponents of MDP – The major factor in the development of MDP worldwide and in the United States has been the immense economic power of the major accounting firms. The “Big 5” international accounting firms have been the principal proponents of relaxation of the rules against MDP with lawyers. To date, these firms

⁴¹ *Id.*

⁴² Including Urbach Kahn & Werlin, P.C. in Albany, NY.

⁴³ Form S-1/A, October 14, 1999, as filed with the Securities and Exchange Commission.

⁴⁴ TheStreet.com, November 10, 1999

have simply denied that they are engaged in the practice of law in the United States.⁴⁵ The fact is that they have also spent huge sums in lobbying for changes in rules that would allow them to practice law and any other profession they thought was profitable. When the Texas Unauthorized Practice Committee with an annual budget of \$60,000 began to investigate Arthur Andersen, the accounting firm hired Weil, Gotshal and Manges to represent it. Rumor has it that the fees paid to Weil, Gotshal exceeded the annual budget of the Texas committee by more than an order of magnitude. It has also been said that the accounting profession spent an eight-figure dollar amount to secure their very limited tax practitioner privilege under the Internal Revenue Code.⁴⁶ This battle was won against the active lobbying of the American Bar Association.

It was prior to the normal course of decision in the Fifth Circuit Court of Appeals that the Texas Legislature was persuaded to amend their unauthorized practice of law statute to allow the continuing sale of Quicken Family Lawyer.

The substantial economic power of international professional service organizations with hundreds of thousands of employees must be taken seriously.

⁴⁵ Note 23, *supra*. Of course they are permitted to practice in some other countries.

⁴⁶ Remarks of Professor Mary C. Daly at the New York State Bar Association Trusts and Estates Section Fall Meeting, October 9, 1999. Section 7525 of the Internal Revenue Code. This privilege is not available to nonlawyer practitioners "when they are doing other than lawyers' work" United States v. Frederick, 182 F3d 496 (7th Cir., 1999). In the opinion of many tax practitioners this privilege is of very little, if any, value to the accounting profession.

PART THREE

ANALYSIS OF THE PRINCIPAL ISSUES AND RECOMMENDATIONS

Chapter 11

Clients, the Public, Law Firms, and the Professional Responsibilities of Lawyers

1. Fiduciary Duties to Clients
 - Confidentiality
 - Conflicts of interest
 - Independent judgment
 - Competence

 2. Duties Arising from Lawyers' Roles in the Adversary and Governmental Systems.
 - Advocacy
 - Access to legal services
 - The independent legal profession and the rule of law
-

Considering whether lawyers and other professionals should be allowed to join in various practice arrangements calls for analysis of whether and how the obligations and functions of the professions in question are compatible. Because there are many professions whose members might conceivably work together with lawyers, and because these professions differ enormously among themselves, it will be essential to look at each profession separately before reaching conclusions about its compatibility with legal practice. This report will not undertake such a comprehensive survey. It will focus on the lawyers' end of the compatibility inquiry, with references to accountants and others who might be included in multidisciplinary practice.

The duties of lawyers and law firms have two main sources. *First*, because clients entrust matters vitally affecting them to lawyers, and because it is very hard for a client to monitor a lawyer's performance, lawyers have extensive fiduciary duties to their clients, enforceable though

a variety of remedies. This distinguishes lawyers from other professionals, whose fiduciary duties may be different (for example, in the case of physicians) or weaker (for example, in the case of real estate agents) or who may have no “clients” at all (for example, in the case of journalists).

Second, the legal profession’s role in the administration of justice imposes obligations on lawyers and their firms. In litigation, lawyers help make the adversary system work through honest but partisan advocacy. They play similar but modified roles when they provide representation before administrative agencies, negotiate contracts, and perform other functions. More broadly, the legal profession contributes in various ways to the legal system, and hence to the protection of rights and the rule of law. Because these functions are entrusted to lawyers, they possess both special powers and special duties, such as limits on trial publicity and advocacy.

The obligations that arise from these various sources are nuanced and qualified, because they reflect a balance of competing policies. They vary with the situation, and in some cases with the jurisdiction or with the sophistication of the client. The following discussion therefore unavoidably oversimplifies in some respects. It also does not cover every obligation lawyers owe.

1. Fiduciary Duties to Clients

- a. **Confidentiality**

Like members of most other professions, lawyers and law firms may not disclose clients, confidential information. The lawyer’s obligation is particularly broad, however, because it covers substantially all information learned in the course of a representation.¹ In addition, confidential communications to a lawyer are protected not only against the lawyer’s voluntary disclosure but against court compulsion: they are guarded by the attorney-client privilege.

¹ ABA Model Rules of Professional Conduct [hereinafter “Model Rules”], Rule 1.6(a); N.Y. Code of Professional Responsibility, DR 4-101; Restatement of the Law Governing Lawyers [hereinafter “Restatement”] §§ 59, 60.

Communications with members of other professions may have no or limited privileges,² or privileges subject to exceptions unlike those applicable to lawyers.³

Lawyers' confidentiality duties likewise vary from those of other professionals. Depending on the jurisdiction, for example, lawyers are allowed, forbidden or required to disclose ongoing and projected client frauds; but lawyers in all jurisdictions are forbidden to disclose past frauds in which they were not involved.⁴ By contrast, federal legislation and possibly professional standards require an auditing accountant to ensure disclosure of frauds that could materially affect the audited corporation's financial statements, including completed frauds not involving the accountant.⁵ Members of both professions must balance the need to secure the client's confidence against the need to protect the public; but the rules also reflect the fact that a core function of lawyers is to defend clients against charges of past wrongdoing, while a core function of accountants conducting an audit is to promote full and accurate disclosure of clients' financial situations. The distinction can be otherwise described: because an audited business must disclose certain unlawful activities, an accountant may conclude and certify an audit only if this has been done to the best of

² Communications to accountants, for example, are privileged only in a minority of states, and in limited ways relating to tax return preparation. 26 U.S.C. § 7525; *Couch v. United States*, 409 U.S. 322, 335 (1973); 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5427 (1980); see *United States v. Arthur Young & Co.*, 465 U.S. 805 (1994).

³ *Compare* *Prink v. Rockefeller Center Inc.*, 398 N.E.2d 517 (N.Y. 1979) (wrongful death action waives psychiatrist-patient privilege of deceased who allegedly fell from window) *with* *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998) (lawyer-client privilege survives client's death).

⁴ Model Rules 1.6; N.Y. Code of Prof. Responsibility, DR 4-101; Thomas D. Morgan & Ronald D. Rotunda, 1999 *Selected Standards on Professional Responsibility* 133-42 (1999).

⁵ 15 U.S.C. § 78j-1 (§ 10A of the Securities Exchange Act of 1934, as inserted by Securities Litigation Reform Act of 1995, § 301(a)); American Institute of Certified Public Accountants, Code of Professional Conduct, rule 301, and Statement on Auditing Standards No. 82 (1997); U.S. General Accounting Office, *The Accounting Profession: Major Issues: Progress and Concerns* 60-80 (1996); Marc. J. Epstein & Albert D. Spalding, Jr., *The Accountant's Guide to Legal Liability and Ethics* 67-71, 143-46, 158-59, 266-71 (1993).

his knowledge,⁶ while a lawyer may properly take many steps to defend a client who has committed fraud without the lawyer's assistance but has not disclosed it. Other professions strike still different balances.⁷

These variations of privilege and confidentiality rules would pose obvious problems for members of different professions practicing in the same firm. One profession might be required to disclose what another was required to keep secret. If the firm provided services of different professionals to the same client, the firm's obligations to its client or the public might be unclear or contradictory.⁸ Rules or procedures that might resolve such problems for some professions might not work for others having different rules.

b. Conflicts of interest

Although most professionals confront conflicts of interest, American lawyers have evolved far more detailed and stringent rules to regulate them than have members of other professions, or indeed lawyers abroad.⁹ One explanation for this pattern is that clients and former clients have had the means and the motives to enforce and develop the conflicts rules by means of

⁶ Apparently, under the rules promulgated by the American Institute of Certified Public Accountants and cited in the previous note, an accountant may withdraw without completing the audit or disclosing the fraud if the client refuses to do so. The legislation cited in that note, however, requires disclosure even if the accountant withdraws.

⁷ *E.g.*, American Institute of Architects, Code of Ethics and Professional Conduct, rules 2.105, 3.401 (disclosure required when breach of law will materially affect public safety).

⁸ See also Revised Uniform Partnership Act § 102(f) (1997) (each partner's knowledge is imputed to the partnership).

⁹ *E.g.*, Certified Financial Planner Board of Standards, Code of Ethics and Professional Responsibility, rules 401-04 (requiring disclosure of conflicts of interest, but not defining what they are); American Institute of Certified Public Accountants, Code of Professional Conduct, Rule 102 (accountant "shall be free of conflicts of interest") and Interpretation 102-2 (describing forbidden conflicts when accountant simultaneously provides services to clients in matters in which they are opposed, or in which duty to a client conflicts with accountant's own interests or obligations); National Association of Social Workers, Code of Ethics 1.06 (describing certain conflicts, and requiring disclosure and efforts to resolve, including in some instances withdrawal); see Marc A. Rodwin, *Medicine, Money, and Morals: Physicians' Conflicts of Interest* (1993) (contending that medical profession permits undesirable conflicts).

motions to disqualify counsel. More basically, of course, the conflicts rules reflect the high value that lawyers and judges place on the principles of loyalty, fiduciary duty and confidentiality that underlie the profession. Rather than trying to set forth all the lawyer conflicts rules,¹⁰ this report will simply note some problems they pose for new forms of practice involving members of different professions.

Because the lawyer rules are firm-wide they affect the size and structure of law firms. In general, whenever a conflict of interest disqualifies one lawyer in a firm, the whole firm and all its lawyers are disqualified. Despite the existence of certain exceptions, notably for former government lawyers and for certain personal conflicts, this principle governs most conflicts.¹¹ It reflects factors including the prevalence and desirability of sharing information and commitment within a firm, the difficulty of monitoring screening systems, and the importance of fostering client trust and confidence.

The more complex a firm's practice becomes, the more likely it is that conflicts of interest will arise, and the more advanced its procedures for checking conflicts must be. Such procedures must deal not just with conflicting representations of two clients in the same matter but also with other conflicts rules applicable to lawyers--for example, those forbidding suit against a firm client even in a matter unrelated to those in which the firm represents the client, and those forbidding certain suits against former clients.¹²

Bringing nonlawyers into a law firm raises problems under the principle imputing conflicts throughout the firm. Exempting nonlawyers from the principle could dilute its

¹⁰ See Restatement, ch. 8.

¹¹ Model Rules, rules 1.10, 1.11; N.Y. Code of Professional Responsibility, DR 5-102, DR 5-105(D), DR 5-108, DR 9-101(B); *Kassis v. Teacher's Ins. & Annuity Ass'n*, 659 N.Y.S.2d 515 (N.Y. 1999); Restatement §§ 123-24.

¹² Model Rules, rules 1.7, 1.9; N.Y. Code of Professional Responsibility, DR 5-105, 5-108; Restatement §§ 128-30, 132.

effectiveness. Including them could multiply conflicts, particularly if the resulting firms were as large and complex as the Big Five accounting firms are today. Similar problems would arise from other lawyer conflicts rules that are more stringent than those of other professions. For example, including within a law firm professionals who give expert witness testimony would normally, absent an exemption for nonlawyers, disqualify the firm's lawyers from participating in any case in which the nonlawyers testify.¹³

In at least one situation, lawyers' rules are less restrictive than those of another profession. Both lawyers and accountants limit business transactions with clients, but for different reasons and hence in different ways. The lawyer rule protects the client, who may therefore sometimes waive it if properly informed. The accountant rule protects the public by promoting the independence of auditing accountants from management, so it is not subject to waiver by the client.¹⁴ If this rule were to apply to lawyers in a firm containing accountants, it would prevent such frequent (but sometimes questioned) practices as sitting on a client's board or accepting payment in a client's stock. Indeed, in the SEC's view it might prevent the firm from providing legal services to any client that the accountants in the firm audited.¹⁵

¹³ Model Rules, rule 3.7; N.Y. Code of Professional Responsibility, DR 5-102.

¹⁴ Compare Model Rules, rule 1.8(a); N.Y. Code of Professional Responsibility, DR 5-104 with 17 C.F.R. § 210.2-01; American Institute of Certified Public Accountants, Code of Professional Conduct, rule 101 and Interpretation 101-1; Gary John Previts, *The Scope of CPA Services: A Study of the Development of Independence and the Profession's Role on Society* (1985); J. Gregory Jenkins, *A Declaration of Independence*, *Journal of Accounting*, May 1999, at 31.

¹⁵ In the Matter of Charles E. Falk, CPA, Securities Exchange Act of 1934 Release No. 41424, Accounting and Auditing Enforcement Release No. 1134, 1999 SEC Lexis 1013 (1999); see Independence Standards Board, Discussion Memorandum: Legal Services (Dec. 1999) (DM 99-4); U.S. General Accounting Office, *The Accounting Profession: Major Issues: Progress and Concerns* 49-52 (1996). But see American Institute of Certified Public Accountants, Code of Professional Conduct, Interpretation 101-14 (discussing the effect of alternative practice structures on independence rules).

In all these situations, multiprofessional firms can avoid violating any profession's conflicts rules by following the most restrictive rule applicable to any of its members. In most but not all cases, that will be the rule governing lawyers.¹⁶ The only questions therefore are whether all those involved are willing to accept the burdens of this solution and whether, if not, a more lenient approach would undermine unacceptably the principles that conflicts of interest rules promote.

c. Independent judgment

The law governing lawyers proceeds on the assumption that nonlawyers with the power to do so could impair a lawyer's freedom to exercise independent professional judgment in a client's behalf. The law thus bars everyone but lawyers in a firm from owning interests in the firm or having a right to share the firm's fees. For the same reason, a lawyer may accept payment for a representation only from the client, or with the client's informed consent; and the lawyer may not allow a nonclient who pays for, hires or recommends the lawyer to interfere with the lawyer's judgment. Likewise, corporate house counsel may represent the corporation but not (with minor exceptions) any outside client.¹⁷

Other professions, although expecting their members to exercise independent professional judgment, vary in the extent to which they safeguard that independence through rules like those applying to lawyers. Accountants require a C.P.A. firm to be controlled by accountants,¹⁸ in addition to mandating the safeguards for independence from clients already mentioned. Members

¹⁶ This solution would fail only if there were a rule – we know of none – obliging members of a profession to accept a case that another profession's rules forbid.

¹⁷ Model Rules, rules 1.8(f), 5.4; N.Y. Judiciary Law § 495; N.Y. Code of Professional Responsibility, DR 3-101 through 3-103, 5-107, 5-110; see Charles Wolfram, *Modern Legal Ethics* 898-917 (1986) (discussing group legal services). On lawyers employed by insurance companies, see chapter 12 below.

¹⁸ N.Y. Education Law § 7408 (all partners must be CPAs); American Institute of Certified Public Accountants and National Association of State Boards of Accountancy, *Uniform Accountancy Act* § 7(c) (1997 ed.) (accountants must constitute majority of ownership if the firm provides attest services).

of some other professions--for example, engineers and health professionals--frequently work for entities not controlled by members of their own profession while rendering services to persons who are not their employers.

Any proposal allowing nonlawyers to be principals of a firm in which lawyers practice law would require amendment of the current lawyer rules. If the nonlawyers were accountants practicing accounting, it would presumably also require amendment of current rules governing accountants. Contractual arrangements between law firms and accounting or other firms that did not affect the ownership and control structure of each firm would not require these particular changes; depending on the nature of the arrangements and the professions involved, other changes might be needed to legalize the arrangement while protecting the independent professional judgment of the lawyers and other professionals.

Because professional independence can have many meanings, depending on just what the professional seeks to be independent from, it is worth noting that lawyers do not seek to be independent from their clients in the same way as they do from nonclients who could influence their representation. On the contrary, lawyers are agents of their clients, and required to protect their interests, keep them informed, and follow their instructions as to many matters.¹⁹ These requirements are limited in various ways: lawyers owe obligations to third persons and the legal system, and must maintain independent judgment to fulfill those obligations, and indeed to represent their clients adequately.²⁰ Nevertheless, lawyers' concept of independence differs fundamentally

¹⁹ Restatement §§ 16-24; Deborah DeMott, *The Lawyer as Agent*, 67 *Fordham L. Rev.* 301 (1998).

²⁰ Model Rules, rules 1.2, 3.3-5, 4.1-4; N.Y. Code of Professional Responsibility, DR 7-101, 7-102; authorities in preceding note.

from those of accountants, at least those who conduct the attest function, for whom the basic meaning of independence is independence from clients.

d. Competence

All professions require their members to render competent services, and it is hard to see how these requirements would conflict were members of different professions to participate in the same firm. That conclusion assumes that such arrangements would protect independent professional judgment so that, for example, a nonlawyer could not overrule a lawyer's determination about his or her qualifications to undertake a representation.²¹

Professions vary in the particular skills and training they require,²² and in their ways of assuring competence, and here some conflicts could arise. Accountants, for example, rely on peer review, in which a firm is "audited" by accountants from another firm.²³ Attempts by lawyers to introduce a similar practice have been less successful, in part because they might expose a client's confidences to a reviewing lawyer outside the firm representing the client.²⁴ This problem would be more serious were an outside accountant to review the practice of accounting by the accountants of a law and accounting firm, since then the outsider learning confidences that a client reposed in a lawyer would not even be another lawyer. If, however, lawyers and others can resolve the more

²¹ Model Rules, rule 1.1; N.Y. Code of Professional Responsibility, DR 6-101.

²² See Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development--An Educational Continuum (1992).

²³ See Wallace E. Olson, *The Accounting Profession: Years of Trial: 1969-1980*, at 146-67 (1982); U.S. General Accounting Office, *The Accounting Profession: Major Issues: Progress and Concerns* 82-86 (1996).

²⁴ See *Law Practice Quality Evaluation: An Appraisal of Peer Review and Other Measures to Enhance Professional Performance* (1988); Susan R. Martyn, *Peer Review and Quality Assurance for Lawyers*, 20 U. Tol. L. Rev. 295 (1989); Mass. Rules of Prof. Conduct, rule 1.6(c) (mandating confidentiality in lawyer assistance programs).

basic problem of protecting confidential information within such a firm, it should be possible to work out a satisfactory way to handle peer review as well.

2. Duties Arising From Lawyers' Roles in the Adversary and Governmental Systems

a. **Advocacy**

Committed advocacy, with its limits, is central to what lawyers do. Its obligations, although they vary with the context, extend beyond courtrooms to areas such as alternative dispute resolution, representation before administrative agencies, legislative hearings, negotiation, and business planning. Historically, both the profession and its values grew from its role in presenting facts, framing arguments, and generally seeking to advance a client's claims against the claims of others represented by their own counsel.

Much of the law of lawyering regulates advocacy of one sort or another. "To the extent consistent with the lawyer's other legal duties . . . , a lawyer must, in matters within the scope of the representation . . . proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation . . ."²⁵ That duty is enforceable through such means as malpractice actions and professional discipline,²⁶ but the traditions and training of the profession provide its central support.

Because the law presupposes that lawyers will act as committed advocates, much of its detail works out the limits of advocacy that are necessary to protect opposing parties, the legal system, and others. This detail addresses many issues: disclosure of the lawyer's role, improper negotiating tactics and courtroom argument, direct communication with another represented party,

²⁵ Restatement § 16.

²⁶ Model Rules, rules 1.2(a), 1.3; N.Y. Code of Professional Responsibility, DR 7-101.

improper fee arrangements, limits on client control, a lawyer's right or duty to withdraw from a representation, prejudicial publicity, dealing with witnesses, and so forth.²⁷ This law is found in professional rules but also in other sources such as administrative agency and court rules and judicial precedent.²⁸ It applies not just to lawyers in litigation but, in good part, to other fields of legal practice.

Because other professions' rules deal only in the most marginal way, if at all, with advocacy and its limits,²⁹ multidisciplinary practice would be unlikely to involve conflicts between inconsistent professional rules. Rather, the difficulty would be to determine which lawyer rules should apply to members of other professions, and how to inculcate and enforce such rules. For example, should the rule against direct contact with a represented party apply to contacting a financial advisor who was the partner of a lawyer? Lawyers are forbidden to circumvent their own rules through the actions of another,³⁰ but the other is not subject to discipline, and in any event would not always be acting on behalf of a circumventing lawyer.

b. Access to legal services.

Because people and businesses often need lawyers to protect their rights, and because the legal and governmental system depends on the participation of lawyers, access to legal services is both part of that system and an emerging right of citizenship. The Legal Services Corporation,

²⁷ Model Rules, rules 3.1-9, 4.1-4; N.Y. Code of Professional Responsibility, DR 2-106, 2-110, 5-102, 5-109(A), 7-101, 7-102, 7-104, 7-105, 7-106, 7-107, 7-108, 7-109, 7-110.

²⁸ E.g., Fed. R. Civ. P. 11 (duty of lawyer who signs court pleading); *Petrillo v. Bachenberg*, 655 A.2d 1354 (N.J. 1995) (duty of lawyer who provides information to opposing party in land sale).

²⁹ E.g., American Medical Association, Code of Medical Ethics and Current Opinions, Current Opinions 5.06, 9.07 (expert witnesses); American Institute of Certified Public Accountants, Code of Professional Conduct, Interpretation 102-6 (accountant providing advocacy services must maintain integrity and objectivity).

³⁰ Model Rules, rule 8.4(a); N.Y. Code of Professional Responsibility, DR 1-102(A)(2).

among other institutions, reflects governmental recognition of the role of legal services, a role with roots in the Constitution.³¹

Although much remains to be done, the bar plays an important part in securing access to legal services. Lawyers and their organizations have worked to establish and defend legal aid organizations, the Legal Services Corporation, IOLTA programs, and other institutions.³² They have also donated much time and effort to various law reform activities. Providing legal services at no or low charges for those who cannot afford lawyers is another tradition of the bar that some are striving to expand.³³ Disciplinary rules and common law doctrine prohibiting unreasonably large lawyer fees reinforce these efforts, as do related doctrines governing such matters as the impact of discharge on a lawyer's fees.³⁴

Other professions vary in their approach to these matters. The medical professions share the bar's aspiration to provide service for all. Others such as accountants have tended to limit their services almost entirely to businesses, with access determined by the market. Establishing a firm incorporating members of the latter kind of profession along with lawyers would require deciding whether the rules that apply to lawyer fees would govern every firm fee, and if not what separate billing arrangements would be appropriate. More basically, difficulties might well arise in maintaining and increasing the commitment of lawyers in such a firm to fostering access to legal

³¹ *E.g.*, NAACP v. Button, 371 U.S. 415 (1963) (right to counsel as aspect of right to associate and petition for redress of grievances); Gideon v. Wainwright, 372 U.S. 335 (1963) (criminal defendant's right to counsel).

³² See Chapter 3, part 3, above. IOLTA (Interest on Lawyer Trust Accounts) programs collect interest on client sums in the custody of lawyers that are too small for payment of interest to the clients to be practical, and use the interest to fund legal services for the indigent and other public programs. See ABA/BNA Lawyers' Manual on Professional Conduct 45:201-05.

³³ The Law Firm and the Public Good (R.A. Katzmann ed. 1995); Deborah L. Rhode, Cultures of Commitment: Pro Bono for Lawyers and Law Students, 67 Fordham L. Rev. 2415 (1999).

³⁴ Model Rules, rule 1.5; N.Y. Code of Professional Responsibility, DR 2-106; Restatement §§ 34, 38-42.

services and providing *pro bono* representation. The traditions of the nonlawyers in the firm could only be expected to help discourage lawyers from public service.

Like other policies, the policy of promoting access to legal services collides at its limits with countervailing concerns, in this case the prevention of lawyer overreaching and unfair competition in the search for clients. Many other professions have traditionally recognized similar concerns. Sometimes professional self interest has helped shape the resulting rules. The Supreme Court and government agencies, however, have in recent decades acted to nullify many of those rules as inconsistent with the First Amendment or the Sherman Act.³⁵ For all professions, the result has been a dramatic growth in advertising and price competition.³⁶

Solicitation is one area in which significant differences between professions remain. Lawyers in almost all states may not solicit paying clients in person, a prohibition that the Supreme Court has apparently upheld against a First Amendment challenge.³⁷ The accountants abandoned a similar prohibition under government pressure, and are not constitutionally free to reinstate it.³⁸

³⁵ E.g., *Bates v. Arizona State Bar*, 433 U.S. 350 (1977) (First Amendment right to lawyer price advertising); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (antitrust bar on lawyer minimum price scales); *National Soc’y of Professional Engineers v. United States*, 435 U.S. 679 (1978) (antitrust bar on engineers’ rule prohibiting competitive bidding); Wallace E. Olson, *The Accounting Profession: Years of Trial: 1969-1980*, at 111-17 (1982) (FTC pressure resulting in repeal of accountants’ rules against competitive bidding and solicitation). Although the First Amendment applies only to governmentally imposed rules while the antitrust laws apply only to nongovernmental arrangements, the courts have construed both to promote similar procompetitive policies.

³⁶ See Chapter 2, part 3 and Chapter 3, part 4, above.

³⁷ Model Rules, rule 7.3; N.Y. Code of Professional Responsibility, DR 2-103; *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978); see *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (relating to targeted direct mail solicitation).

³⁸ Wallace B. Olson, *supra*, at 111-17; *Edenfield v. Fane*, 113 S. Ct. 1792 (1993); see American Institute of Certified Public Accountants, Code of Professional Conduct, rule 502 (prohibiting solicitation “by the use of coercion, over-reaching, or harassing conduct”).

These professions also have divergent rules governing receipt of referral fees by their members.³⁹ If lawyers and accountants were allowed to join in a single firm, it would be necessary to decide what solicitation and referral rules would govern its members. The same rule might be applied to all, because it would be pointless to forbid some members to use methods of seeking clients or fees that others in the same firm could freely employ for their benefit. Because accountants may not constitutionally be forbidden in-person solicitation, lawyers in their firms might hence also be allowed to solicit, which in turn could lead to allowing all lawyers to do so.

c. The independent legal profession and the rule of law

The American bar occupies a unique place in our legal and governmental system. It is an integral part of that system, making law in the legislatures and courts, presenting grievances to those legislatures and courts on behalf of clients, helping keep clients in compliance with the law through advice and assistance, making rights a reality through advocacy and representation, defending law and the courts against shortsighted attacks, and working through bar associations to improve the legal system.

To fulfill this role, lawyers must uphold the integrity of our legal system even if doing so may be contrary to the interests of their clients. This responsibility to society also requires a lawyer to think critically about a client's proposed course of action, and advise a client about to embark upon a lawful but immoral course of action of its effects on the interests of others, as well as possible repercussions to the client itself.

³⁹ Compare *id.*, rule 503 (accountant performing audit or similar services for client may not receive referral fee or commission; others may do so, with disclosure to client) with Model Rules, rule 1.5(e) and N.Y. Code of Professional Responsibility, DR 2-107 (lawyer may divide fee with lawyer outside his firm only if client consents and lawyers share work or responsibility). Unlike lawyers (see *id.*, DR 2-103(B); Model Rules, rule 7.2(c)), accountants apparently have no rule prohibiting payment of referral fees.

At the same time, lawyers in private practice are not part of the government, but a private or intermediary group with public concerns. They are free to represent or not represent anyone, whatever his or her deeds, so long as they remain within the limits of the law. The vindication of individual rights, especially against the state, requires that lawyers be able to assert and pursue client interests free of external controls. As Archibald Cox has written, “the rule of law depends upon a large measure of voluntary compliance; yet law can never be wholly self-enforcing, especially not against officials who are disposed to circumvent or ignore the law’s restrictions.”⁴⁰

For several reasons, the American bar is more able to fill such a role than are other professions, or even the bars of other nations. Law, in the United States, is the language in which citizens and government converse. The courts, with which lawyers are especially connected, play an exceptionally large role in shaping our constitutional and legal system. Our bar is a unified one, not divided as in many nations into several legal professions, but joined by education, practical experience, professional organizations, and a shared law of lawyering.⁴¹ Judges and many legislators and government officials are part of that bar, bringing to their functions the experience of private practice, and often bringing back to private practice the perspectives of government. And, despite a heritage of discrimination and elitism that lawyers share with other professionals, persons of many backgrounds and viewpoints have been able to join the bar.⁴²

The size, diverse roles, and unity of the bar not only ground its importance but also enable it to maintain the independence from the state that foreign bars value but do not always

⁴⁰ Archibald Cox, *Lawyer Independence*, N.Y.S. Bar J. 10-11 (May 1990).

⁴¹ See Chapter 5, above.

⁴² See Chapter 1, above.

achieve. The state does regulate lawyers, more so than it regulates most professions, but it does so largely through judges who are lawyers themselves.⁴³

Unrestricted multidisciplinary practice would pose a substantial threat to the roles and independence of the bar. The major accounting/professional service firms characterize themselves as MDPs. The rules of the accounting profession, focused on the audit function, play a relatively minor role in the regulation of those firms today. How will lawyers maintain their professional culture if many of their daily colleagues and partners come from other professions with differing functions and values? How will lawyers join as a profession if many of their professional links are with nonlawyers? How will lawyers interpret between private clients and the government if they work in firms many of whose members lack that intermediary tradition? How will they resist pressure, whether to cut ethical corners, to reduce pro bono commitments, or to relax the profession's rules, if colleagues from other professions with other standards call on them to do so? How will disciplinary bodies be able to determine whether a lawyer's independent judgment has been bent or displaced by the concerns of nonlawyer partners or stockholders? If positive answers to these questions cannot be found, the bar will enter into new forms of practice only at the cost of injury to its independence and to the rule of law.

⁴³ See Chapter 6, above.

Chapter 12

In The Public Interest, What Changes Should Be Made in the Law Governing Lawyers and Law Firms?

1. With Respect to Ancillary Services Offered by Lawyers and Law Firms
2. With Respect to Interprofessional “Strategic Alliances” and other Contractual Relationships Between Lawyers and Nonlawyers
3. With Respect to Lawyers Who Work for Organizations that Provide Consulting Services and Financial Products to the Public
4. With Respect to the Unauthorized Practice of Law
5. With Respect to Nonlawyer Investment in Entities Practicing Law
6. With Respect to Transfers to Nonlawyers of Ownership or Control Over Entities Practicing Law

Appendix A Summary of Proposed Amendments to the New York Code of Professional Responsibility

Appendix B Summary of Possible Amendments to the ABA Model Rules of Professional Conduct

Our examination of the law governing law firm structure and operation has taken us through an assessment of the legal profession to an evaluation of the challenges to maintaining a single public profession of law. The American legal profession has undergone major changes over the past century, and the frequency of those changes continues to increase. Technological advances, demographic shifts and competitive pressures from within the profession and from outside forces

have all combined to enhance in part and to complicate in part the ability and obligation of lawyers to provide efficient and effective services to their clients.

We now analyze the existing legal and ethical framework and assess the extent to which changes should be made to further the public interest.

1. With Respect to Ancillary Services Offered by Lawyers and Law Firms – As discussed in Chapter 4 above, lawyers have been providing their clients with nonlegal services for many years. In some cases, law firms have formed divisions or subsidiaries to provide ancillary business services to clients. The organized bar, however, has not always been receptive to the idea of lawyers providing such services to their clients. In fact, for many years the ABA and certain state bars were openly hostile to any affiliations between lawyers and nonlawyers. The predominant concern expressed was that lawyers would circumvent the ethical prohibition against employing the aid of nonlawyers to solicit legal clients for them by using their affiliation with, or conduct of, a nonlegal ancillary business as a “feeder.”¹ Lawyers were given a choice by ABA ethics committee opinions: either practice law or relinquish the law-related business.² State bars generally took a more moderate approach. A lawyer could engage in a law-related business as long as it was

¹ See William E. Hornsby, Jr., *MARKETING AND LEGAL ETHICS* 139-41 (3d ed. 2000) [hereinafter “Hornsby”]; ABA Formal Ethics Ops. 57 (1932) and 297 (1961); New York State Ethics Op. 557 (1984); Wisconsin Formal Ethics Op. E-84-21 (1984).

² Law related businesses included such diverse fields as accounting, debt collecting, insurance brokering, claims adjusting, real estate management and sales, stock brokering or investment counseling, labor relations or management consulting, income tax preparation or operation of a refund bureau, marriage counseling, psychotherapy, artistic or athletic management and bail bonding. Hornsby at 140. The ownership and operation of shopping centers, retail stores and manufacturing plants, were considered not to be law related, nor was the practice of medicine. *Id.*

conducted in a manner that preserved a strict separation between it and the lawyer's legal practice.³

Eventually, the ABA itself relented and condoned nonlegal businesses on this basis.⁴

The ABA's attitude softened even further with the adoption of the Model Rules of Professional Conduct in 1983. The Model Rules reflected the abandonment of the restriction that had been contained in the 1969 Model Code of Professional Responsibility against lawyers advertising that they were also engaged in another profession or business.⁵ This relaxation, coupled with the downturn in practice in regulatory and antitrust law precipitated by the Reagan Administration's de-emphasis of such activities, led to the proliferation of large-scale ancillary businesses in the District of Columbia in the 1980s, with many firms turning to nonlegal work for additional revenues.⁶ Among the businesses created were a large number of lobbying groups, a bank consulting group, a public relations agency, education consulting companies, a real estate developing consulting company and trade consulting companies.⁷

³ Hornsby at 140-41.

⁴ ABA Formal Ethics Op. 328 (1972).

⁵ See American Bar Foundation, ANNOTATED MODEL CODE OF PROFESSIONAL RESPONSIBILITY 51, 62-63 (1979) (DR 2-102(E) prohibited lawyers engaged in both the practice of law and another profession or business from so indicating on legal letterhead, office signs or business cards, or from "identify[ing] himself as a lawyer in any publication in connection with his other profession or business"); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 81:3012 (1999). DR 2-102(E) was quietly repealed by the ABA in 1980, after the Kutak Commission began its work. *Id.*

⁶ See Peter Grant, "Bottom Line Bar: The Law Isn't Enough," *Crain's New York Business*, Nov. 14, 1988, at 27; Terry Carter, "A New-Found Respectability for Lobbying," *National Law Journal*, Dec. 26, 1988/Jan. 2, 1989, at 1; Stephanie B. Goldberg, "More Than the Law: Ancillary Businesses Growth Continues," *A.B.A. J.* 54, 55 (Mar. 1992).

⁷ See Thomas F. Gibbons, "Branching Out," *A.B.A. J.* 70 (Nov. 1989).

By 1986, the ABA Commission on Professionalism declared that it was “disturbed by what it perceive[d] to be an increasing participation by lawyers in business activities.”⁸ At the Commission’s urging, a study was commenced to determine whether controls or prohibitions should be imposed on lawyers with respect to the provision of ancillary services.⁹ The Chairman of the Commission, Justin A. Stanley, explained his reasons for investigating this “new” phenomenon:

As reflected in conversations with sole practitioners, lawyers in small firms and lawyers in non-urban communities, the part-time businessman lawyer had not posed a major problem for the profession. The practice was not extensive and the occasional ethical problem that arose when enterprises turned sour were [sic] handled by settlement or disciplinary action. Recently, however, large firms in urban centers have . . . begun to engage in business activities in a major way. These activities have attracted the attention of the press, perhaps because of the break with tradition.

* * *

What is happening today is quite different from what has happened in the past. Then isolated acts of individual lawyers were involved; acts which for the most part were not driven by predetermined policy decisions. Today, in addition to isolated acts of lawyers, which may or may not be more widespread, law firms as entities are involved in business activities. These activities are not isolated or accidental, but instead, are based on prior economic policy decisions by the firms and often involve large sums of money.¹⁰

Various entities within the ABA, including the Section of Litigation, the Special Coordinating Committee on Professionalism and the Standing Committee on Ethics and Professional Responsibility, began to study the issue. All concluded that lawyers’ ancillary business activities implicated significant ethical concerns, but differed as to the approach the ABA should take. Some

⁸ ABA Commission on Professionalism, *Report of Commission on Professionalism*, 112 F.R.D. 243, 280-81 (1986).

⁹ *See id.*; *see also* ABA Section of Litigation, *Recommendation and Report on Law Firms’ Ancillary Business Activities* 4-31 (1990).

¹⁰ Justin A. Stanley, *Lawyers In Business*, 8 N. Ill. U.L. Rev. 17, 18-19, 21 (1987).

took the position that the risks of conflicts of interest, loss of confidentiality and confusion on the part of clients and nonclient customers were simply too great to justify permitting lawyers to provide ancillary services. Others viewed these concerns as too speculative to justify regulation and questioned the propriety of the ABA regulating the non-legal business activities of lawyers.¹¹

Reflecting this deep division, in August 1991 the House of Delegates of the ABA narrowly (by an 11-vote margin) adopted as Model Rule 5.7 a provision that (had any jurisdiction adopted it) would have restricted the ability of lawyers and law firms to engage in ancillary business activities. Rule 5.7(a) stated the general principle that “[a] lawyer shall not practice law in a law firm which owns a controlling interest in, or operates, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provides such ancillary non-legal services, except as provided in paragraph (b).” Rule 5.7(b) stated the four conditions under which lawyers could “practice law in a law firm which provides non-legal services which are ancillary to the practice of law”:

- (1) The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;
- (2) Such ancillary services are provided solely by employees of the law firm itself and not by a subsidiary or other affiliate of the law firm;
- (3) The law firm makes appropriate disclosure in writing to its clients; and

¹¹ See Dennis J. Block, Irwin H. Warren and George F. Meierhofer, Jr., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 Geo. J. Legal Ethics 739, 777-92 (1992) [hereinafter “Block”].

(4) The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services, as provided in this rule.¹²

The rule was controversial and the subject of widespread criticism during 1991-92. No state had adopted it, in form or substance.¹³ Thus, after only one year, the Rule was repealed by the ABA, by an even narrower vote (a margin of seven) at the 1992 Annual Meeting.¹⁴ Shortly thereafter, the ABA created a committee on ancillary businesses to study the issue further and draft an appropriate rule. The product of this effort was the current version of Model Rule 5.7, adopted in 1994 by a vote of 237-183.¹⁵ In order to allay concerns that professionalism and ethical conduct would suffer in the context of the non-legal ancillary business, the rule establishes a rebuttable presumption that the framework of attorney ethics rules apply to a lawyer who performs law-related services or controls an entity that does so. The rule provides:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

¹² The 1991 version of Model Rule 5.7 is reprinted in Block, Appendix A, at 816. Model Rule 5.7(c) and (d) were directed at preventing circumvention of the rule, either by a law firm vesting ownership of a controlling interest in an ancillary business in one or more of a firm's lawyers, or by vesting the controlling interest in the ancillary business in lawyers at two or more law firms, with the expectation that the non-legal entity would serve as a feeder operation for those firms.

¹³ See generally Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 Ariz. L. Rev. 363 (1993) [hereinafter "Schneyer"]; American Bar Association, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 473-74 (4th ed. 1999) [hereinafter "Annotated MRPC"].

¹⁴ See Schneyer at 364-65; Annotated MRPC at 473-74; James Podgers, "Ancillary Business Provision Added to Model Rules," A.B.A. J., at 117 (Apr. 1994).

¹⁵ Annotated MRPC at 474; James Podgers, "Ancillary Business Provision Added to Model Rules," A.B.A. J., at 117 (Apr. 1994).

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

This permissive approach to the conduct of ancillary business enterprises is echoed in the American Law Institute’s forthcoming “Restatement of the Law Governing Lawyers”:

So long as each enterprise bills separately and so long as the ancillary enterprise does not engage in the practice of law, involvement of both the lawyer’s law practice and the lawyer’s ancillary business enterprise in the same matter does not constitute impermissible fee-splitting with a nonlawyer, even if nonlawyers have ownership interests or exercise management powers in the ancillary enterprise.¹⁶

Notwithstanding this apparent consensus between the ABA and ALI, only six jurisdictions have adopted Model Rule 5.7 or a corresponding provision.¹⁷ New York is not one of them. This is not surprising, given that the rule did not announce anything particularly new and does

¹⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 11, cmt. g (Prop. Final Draft No. 2, Apr. 6, 1998) [hereinafter “Restatement”]. (This provision will be renumbered as Section 10 of the final Restatement when it is released later this year.)

¹⁷ Indiana, Maine, Massachusetts, North Dakota, Pennsylvania and the Virgin Islands have adopted the provision. Annotated MRPC at 475. In contrast, by 1972, within two years of the promulgation of the Model Code of Professional Responsibility, most of the states had adopted it, often verbatim, to govern lawyers in their jurisdictions. Report of the ABA Special Commission to Secure Adoption of the Code of Professional Responsibility, 97 A.B.A. Rep. 268 (1972).

not permit or prohibit anything that was not permitted or prohibited before.¹⁸ What it does, however, is remind lawyers that as a general rule they are subject to professional discipline even when the services they or their law firms are performing for clients could lawfully be rendered directly to clients by nonlawyers,¹⁹ and clarify the circumstances under which a lawyer participating in an ancillary business activity will be held subject to the full panoply of ethics rules.

Perhaps as a consequence, most states have dealt with the ethical issues associated with ancillary businesses through ethics committee opinions that interpret existing rules. For example, it is generally agreed that lawyers must disclose to clients their interest in the ancillary service-provider so that the clients can take that fact into account in evaluating whether to engage the services of the ancillary business or of the lawyer.²⁰ Likewise, the lawyer must be mindful of conflicts of interest arising out of the activities of the ancillary business, obtaining conflict waivers if necessary.²¹ The clients should also be advised that they will not have an attorney-client relationship with the ancillary service entity or with the individuals providing those services, so that they do not unknowingly risk waiver of the attorney-client privilege in their communications with ancillary business representatives.²²

¹⁸ See, e.g., New York State Ethics Op. 636 (1992). The NYSBA Special Committee to Review the Code of Professional Responsibility, which reexamined the New York Code between 1992 and 1996, did not propose the adoption of Model Rule 5.7 in words or substance, and the matter was not considered by either the NYSBA House of Delegates or the Appellate Divisions during their respective reviews of the proposed Code amendments.

¹⁹ See Restatement, § 5, cmt. b; N.Y. State Ethics Ops. 633 (1992), 557 (1984).

²⁰ See *In re Pappas*, 768 P.2d 1161 (Ariz. 1988); *In re Leaf*, 476 N.W.2d 13 (Wis. 1991); *Florida Bar v. Slater*, 512 So. 2d 191 (Fla. 1987); New York Lawyers' Code of Professional Responsibility, Disciplinary Rule ("DR") 5-101(A).

²¹ *Id.*; see also Virginia Ethics & Unauthorized Practice Op. 1564 (1995); *In re Opinion 682*, 687 A.2d 1000 (N.J. 1997).

²² See DR 4-101(C).

The current ethical landscape in New York can be summarized as follows: under the existing rules, ancillary businesses are permitted so long as (a) there is a strict division between the services provided by the lawyers and those provided by the nonlawyers, so that the nonlawyers cannot hold themselves out to clients as being able to provide legal services; (b) the lawyers do not use the nonlegal business as a feeder of clients for their law practice; (c) the lawyers do not recommend that their clients purchase the specific products being sold by the ancillary business (*e.g.*, title insurance, financial planning services); and (d) all other ethical rules (regarding confidentiality, conflicts of interest, nonlawyer partners, sharing of fees with nonlawyers, etc.) are followed.²³ The emphasis of the New York framework is on the relationship between the ancillary business entity and the client, *as seen from the perspective of the client*.

The thrust of the New York ethical framework is more consistent with the approach taken in the version of Model Rule 5.7 adopted by the Commonwealth of Pennsylvania. That rule provides:

Rule 5.7 — Responsibilities Regarding Nonlegal Services

(a) A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules of Professional Conduct with respect to the provision of both legal and nonlegal services.

(b) A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(c) A lawyer who is an owner, controlling party, employee, agent, or is otherwise affiliated with an entity providing

²³ New York State Ethics Ops. 709 (1998), 687 (1997), 636 (1992), 621 (1991), 619 (1991), 595 (1988); 557 (1984), 536 (1981); New York County Ethics Op. 693 (1992).

nonlegal services to a recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Paragraph (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.²⁴

Pennsylvania improved upon the model provided by the ABA rule and provided in its version more practical and specific guidance for lawyers who engage in what Pennsylvania calls “nonlegal” services, a category of services that is broader and arguably more susceptible to identification than the ABA’s “law-related” services. Whereas the focus of the ABA rule is on the provider of the service, *i.e.*, the lawyer, the Pennsylvania rule looks to whether the client is receiving services that are distinct from legal services. The Pennsylvania rule in its overall approach is more attuned to the public interest, or more specifically the interests of the consumers of legal services, in that it imposes on the lawyer a duty to educate the recipient of nonlegal services if there is a chance that the recipient will fail to understand the implications of the lawyer’s role in the ancillary business.²⁵

We have carefully considered whether to recommend the adoption of the ABA’s Model Rule 5.7 in New York, and have concluded that in its present form it would not add anything

²⁴ Pennsylvania Rules of Professional Conduct, Rule 5.7.

²⁵ See generally Andrew M. Goldner, *Minding Someone Else’s Businesses: Pennsylvania Rule of Professional Conduct 5.7 Leads the Way*, 11 *Geo. J. Legal Ethics* 767 (1998); Laurel S. Terry, *Pennsylvania Adopts Ancillary Business Rule*, 8 *Professional Lawyer (ABA)* 10 (Nov. 1996). The rule is also more consistent with the law governing attorney client relationships, which generally views the relationship from the perspective of the client.

of significance to our current body of law.²⁶ We believe, however, that the Pennsylvania version of Rule 5.7 has greater clarity, and focuses (as does the existing body of law in New York) more appropriately on the manageable risks to the consumer of legal services that ancillary services generate. Particularly when accompanied by a series of explanatory Ethical Considerations, we believe that a rule patterned on the Pennsylvania formulation of Rule 5.7 would be a worthwhile addition to our Code of Professional Responsibility.

But something more is required. Absent from even the Pennsylvania formulation of Rule 5.7 is any admonition regarding the not insubstantial risk that the nonlawyer constituents of an ancillary business may exercise undue influence and control over the way in which the legal practice is conducted. At present, both the Model Rules and New York Code contain provisions barring the sharing of legal fees with nonlawyers,²⁷ preventing lawyers from forming partnerships with nonlawyers,²⁸ admonishing lawyers not to allow persons who recommend, employ or pay the lawyer to direct the lawyers' professional judgment in rendering legal services,²⁹ and prohibiting lawyers from practicing law in organizations in which nonlawyers own any interest.³⁰ Not expressly addressed in this grouping of rules is the risk that a nonlawyer generating a substantial amount of revenue for a law firm through ancillary business activities may attempt to manage or control the

²⁶ The ABA's Commission on Evaluation of the Rules of Professional Conduct, also known as the "Ethics 2000" Commission, is in the process of reviewing the Model Rules and will be proposing substantial changes to many of the rules by 2001. Those changes would not take effect unless and until the ABA House of Delegates adopts them. The Ethics 2000 Commission has thus far expressed no interest in making any changes to Model Rule 5.7. See Minutes of October 15-17, 1999 Meeting of Ethics 2000 Commission, ¶ XI (suggesting that the issue might be revisited in conjunction with any revisions to Model Rule 5.4 regarding the involvement of nonlawyers in the practice of law).

²⁷ Model Rule 5.4(a); New York DR 3-102(A).

²⁸ Model Rule 5.4(b); New York DR 3-103(A).

²⁹ Model Rule 5.4(c); New York DR 5-107(B).

³⁰ Model Rule 5.4(d); New York DR 5-107(C).

overall venture and to dictate, to some extent, the way in which the legal practice is conducted. We therefore recommend an addition to the rule (reflected in proposed DR 1-106(B) below) paralleling the language of DR 5-107(B), to make clear that the lawyer must not allow nonlawyer colleagues to intrude upon the ability of the lawyer to exercise independent professional judgment on behalf of clients.³¹

The Committee, therefore, proposes that the New York Code of Professional Responsibility be amended to add the following new Disciplinary Rule and four new Ethical Considerations³²:

DR 1-106 Responsibilities Regarding Nonlegal Services

- A.** With respect to lawyers or law firms providing nonlegal services to clients or other persons:
 - 1.** A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these

³¹ The Committee has reviewed the District of Columbia version of Model Rule 5.4(b), which provides that:

A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if[, among other things,] the partnership or organization has as its sole purpose providing legal services to clients

No other jurisdiction has adopted this formulation of Model Rule 5.4, and experience under it is limited even in the District of Columbia. Notwithstanding the large number of law firms operating ancillary businesses in that jurisdiction, as discussed above, few firms availed themselves of the provisions of D.C. Rule 5.4(b) and actually gave a financial interest or managerial authority to a nonlawyer ancillary service provider. Accordingly, we do not recommend adoption of this provision in New York State. We note in this regard that a 1999 amendment to DR 3-102(A)(3) of the New York Code of Professional Responsibility now allows nonlawyer employees of a lawyer or law firm to be compensated on a profit-sharing basis, as does Model Rule 5.4(a)(3). Thus, while a nonlawyer may not have a financial interest in a law firm, he or she may share in the overall profitability of the venture.

³² A summary of all of the amendments to the New York Code of Professional Responsibility proposed in this report can be found in Appendix A to this Chapter. For purposes of information and comparison, Appendix B contains a set of corresponding amendments that this Committee believes could be adopted by jurisdictions governed by the ABA Model Rules of Professional Conduct to implement the principles set forth in this report.

Disciplinary Rules with respect to the provision of both legal and nonlegal services.

2. A lawyer or law firm that provides nonlegal services to a person that are distinct from any legal services being provided to that person is subject to these Disciplinary Rules with respect to the nonlegal services if a disinterested person would conclude that the person receiving the services could reasonably believe the services are the subject of an attorney-client relationship.
 3. A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity providing nonlegal services to a person is subject to these Disciplinary Rules with respect to the nonlegal services if a disinterested person would conclude that the person receiving the services could reasonably believe the services are the subject of an attorney-client relationship.
 4. For purposes of DR 1-106(A)(2) and DR 1-106(A)(3) above, and in the absence of circumstances requiring additional communications, it will be presumed that the person receiving nonlegal services could not reasonably believe the services to be the subject of an attorney-client relationship if the lawyer or law firm has advised the person in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services.
- B.** Notwithstanding the provisions of DR 1-106(A), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under DR 4-101(B) to maintain the confidences and secrets of a client receiving legal services.
- C.** For purposes of DR 1-106, “nonlegal services” shall mean those services that lawyers may lawfully provide and that are not prohibited as the unauthorized practice of law when provided by a nonlawyer.

* * *

Provision of Nonlegal Services

EC 1-9 For many years, lawyers have provided to their clients nonlegal services that are ancillary to the practice of law. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. Whenever a lawyer directly provides nonlegal services, the potential for ethical problems exists. Foremost among these is the possibility that the person for whom the nonlegal services are performed may fail to understand that the services may not carry with them the legal and ethical protections that ordinarily accompany an attorney-client relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services, when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, confusion by the recipient is likely to be unavoidable as to whether and when the relationship is protected as a client-lawyer relationship. Therefore, DR 1-106(A)(1) requires generally that the lawyer providing nonlegal services adhere to all of the requirements of the Code of Professional Responsibility. DR 1-106(A)(1) applies to the provision of nonlegal services by a lawyer even when the lawyer is not personally providing any legal services to the person for whom the nonlegal services are being performed if the person is also receiving legal services from another lawyer in the firm that are not distinct from the nonlegal services.

EC 1-10 Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, DR 1-106(A)(2) requires that the lawyer providing the nonlegal services adhere to the Disciplinary Rules, unless exempted by DR 1-106(A)(4). Nonlegal services also may be provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, DR 1-106(A)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all the Disciplinary Rules, unless exempted by DR 1-106(A)(4).

EC 1-11 The Disciplinary Rules will be presumed not to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal

services if the lawyer complies with DR 1-106(A)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to communicate the desired understanding. For example, while the written disclaimer set forth in DR 1-106(A)(4) will be adequate for a sophisticated user of nonlegal services, such as a publicly held corporation, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services.

EC 1-12 Although a lawyer may be exempt from the application of Disciplinary Rules on the face of DR 1-106(A), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Disciplinary Rules that are dependent upon the existence of a representation or attorney-client relationship. Other rules, such as those prohibiting lawyers from engaging in unlawful, dishonest or discriminatory conduct (DR 1-102), requiring lawyers to report certain attorney misconduct (DR 1-103), and prohibiting lawyers from misusing the confidences or secrets of a former client (DR 4-101(B)), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer otherwise exempt under DR 1-106(A).

Furthermore, we recommend that the advertising rules be amended to negate any remaining suggestion that a lawyer or law firm may not advertise the fact that it also provides nonlegal services to the public. As discussed above, ethics committee opinions in New York and other jurisdictions have expressed the concern that lawyers should not use nonlegal business operations as a “feeder” to supply them with legal business leads, and have gone so far as to prohibit lawyers from advertising the fact that they provide such services. In our view, such precautions are unnecessary and contrary to the public interest in receiving accurate and relevant information relating to the abilities, qualifications and services offered by lawyers. Any lingering concern that the public will be harmed by permitting lawyers to inform the public that they also offer nonlegal services

would be allayed through the adoption of proposed DR 1-106 and its accompanying Ethical Considerations. We therefore recommend that DR 2-101 and DR 2-102 be amended as follows³³:

DR 2-101 Publicity and Advertising.

- A. A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading.
- B. **(Repealed)**
- C. It is proper to include information, provided its dissemination does not violate the provisions of DR 2-101(A), as to:
 - 1. **legal and nonlegal** education, degrees and other scholastic distinctions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by the Code of Professional Responsibility; public offices and teaching positions held; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency;
 - 2. names of clients regularly represented, provided that the client has given prior written consent;
 - 3. bank references; credit arrangements accepted; prepaid or group legal services programs in which the attorney or firm participates; **nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer**; and
 - 4. ~~legal~~ fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by DR 2-101(L) of this section; range of fees for **legal and nonlegal** services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal **and nonlegal** services.
- D. Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that

³³ Additional amendments to these provisions are proposed in Section 2 below.

specifically authorized in DR 2-101(C) that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this Rule.

* * *

DR 2-102 Professional Notices, Letterheads, and Signs.

- A. A lawyer or law firm may use professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule, and are in accordance with DR 2-101, including the following:
1. A professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under **DR 2-101(C), DR 2-101(D) or** DR 2-105. A professional card of a law firm may also give the names of members and associates.
 2. A professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm **or of any nonlegal business conducted by the lawyer or law firm pursuant to DR 1-106.** It may state biographical data, the names of members of the firm and associates and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the **legal** practice if permitted under DR 2-105.
 3. A sign in or near the office and in the building directory identifying the law office **and any nonlegal business conducted by the lawyer or law firm pursuant to DR 1-106.** The sign may state the nature of the **legal** practice if permitted under DR 2-105.
 4. A letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under **DR 2-101(C), DR 2-101(D) or** DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of

professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

* * *

EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to select a lawyer. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Although communications involving puffery and claims that cannot be measured or verified are not specifically referred to in DR 2-101, such communications would be prohibited to the extent that they are false, deceptive or misleading. In disclosing information, by advertisements or otherwise, relating to a lawyer's **legal or nonlegal** education, experience or professional qualifications, **or to the nature or extent of any nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer**, special care should be taken to avoid the use of any statement or claim which is false, fraudulent, misleading, deceptive or unfair, or which is violative of any statute or rule of court. A lawyer who advertises in a state other than New York should comply with the advertising rules or regulations applicable to lawyers in that state.

The Committee believes that the addition of these provisions to the Code of Professional Responsibility and the other related textual amendments set forth above will facilitate the growth of ancillary business ventures through which lawyers will be able to provide integrated professional services to their clients, while protecting the public against the risks of nonlawyer involvement in the practice of law.

2. **With Respect to Interprofessional "Strategic Alliances" and other Contractual Relationships Between Lawyers and Nonlawyers** – Strategic alliances and other similar cooperative contractual arrangements have become commonplace between businesses. Generally, as discussed in Chapter 4 above, they involve a reciprocal undertaking by businesses, often those with related or synergistic products, to steer clients to each other's doorstep, thereby increasing the client base of

both firms, and to cooperate in serving the interests and needs of those mutual clients. Some of these arrangements involve detailed contracts between the allies, while others have largely been informal and even unstated understandings, a function of “one hand washing the other.” As a leading social psychologist has demonstrated, one of the most potent forces of human nature is the need to return a favor.³⁴

In the legal community, strategic alliances have generally involved non-exclusive cross-referral arrangements between law firms and other businesses, as well as the allies’ rendering of professional and other services to each other.³⁵ The first benefit of the formalization of what may have begun as “good business relations” into an “alliance” is the publicity that such an announcement often generates.³⁶ Thereafter, the benefits to the participants in the alliance are only as good as the good faith efforts of one ally to steer its clients to the other, and of the recipient ally to provide quality services to that client and generate repeat business. The client, in turn, may expect to receive the benefit of coordinated professional services from two providers that have a history and track record of working together on behalf of common clients.

Depending upon the relative economic strength of the law firm and the professional service firm, the ethical implications of these interprofessional arrangements may be of a relatively low order. One such issue that must be addressed is the propriety of a lawyer referring clients to an unrelated nonlegal service provider with the expectation or understanding that the provider will reciprocate, either by virtue of social psychology or contract, and recommend the lawyer’s services

³⁴ See generally Robert B. Cialdini, *INFLUENCE: SCIENCE AND PRACTICE* 21-57 (2d ed. 1988).

³⁵ See Marjorie Meeks, *Altering People’s Perceptions: The Challenge Facing Advocates of Ancillary Business Practices*, 66 *Ind. L.J.* 1031, 1041 (1991).

³⁶ See pages 103 to 106 above.

to others, and conversely, the propriety of the lawyer receiving those referrals in turn “compensating” the nonlawyer service provider by steering legal clients to it.

One of the well-established rules of ethics is that a lawyer may not pay or agree to pay a nonlawyer for a client referral.³⁷ As explained in the forthcoming Restatement:

Such arrangements would give the nonlawyer an incentive to refer to lawyers who will pay the highest referral fee, rather than to lawyers who can provide the most effective services. They also would give the nonlawyer referring person the power and an incentive to influence the lawyer’s representation by an explicit or implicit threat to refer no additional clients or by appealing to the lawyer’s sense of gratitude for the referral already made.³⁸

Disciplinary authorities routinely condemn lawyers who pay third party “runners” or “touters.”³⁹ Correspondingly, lawyers cannot give clients or other businesses anything of value for recommending their services, even with the informed consent of the client.⁴⁰ Moreover, it is essential that an interprofessional strategic alliance be non-exclusive. The lawyer must remain free at all times to recommend a competitor of the ally if, in the exercise of the lawyer’s independent professional judgment, the competitor is better suited to the client’s needs,⁴¹ or to recommend no one at all if, in the lawyer’s professional judgment, the client does not truly need the nonlegal services in question.

³⁷ Model Rule 7.2(c); New York DR 2-103(B). *Cf. In re VanCura*, 504 N.W.2d 610 (Wis. 1993) (improper fee-splitting agreement with client as quid pro quo for client services).

³⁸ Restatement, § 11 cmt. d.

³⁹ See Annotated MRPC at 511-12 (collecting cases).

⁴⁰ *Id.* at 513 (collecting cases); Nassau County Ethics Op. 98-10 (1998) (lawyer could not give discount coupons to real estate broker to distribute to its clients; potential benefit to broker of being able to offer discounted legal services was an impermissible *quid pro quo* for the recommendation implicit in the brokers giving the coupons to clients).

⁴¹ Indeed, a lawyer who fails to exercise the requisite standard of care in referring a client to another professional would be liable for malpractice, *see, e.g., Tormo v. Yormark*, 398 F. Supp. 1159, 1170 (D.N.J. 1975), or charged with incompetence under Model Rule 1.1 or DR 6-101(A).

In contrast, the propriety of a lawyer accepting a fee to refer clients to a nonlawyer service provider has divided ethics authorities.⁴² That this is a live debate is evidenced by three ethics opinions issued earlier this year in contiguous states. In one of these opinions,⁴³ a Michigan ethics committee opined that a lawyer could properly accept a referral fee from an investment advisory firm provided the client received full disclosure of the nature and extent of the relationship between the lawyer and the advisory firm, was given an opportunity to seek the advice of independent counsel in the transaction, and consented in writing, all in accordance with Michigan Rule of Professional Conduct 1.8(a) governing business dealings between clients and lawyers.⁴⁴ A joint opinion of the ethics committees for the Pennsylvania State Bar and the Philadelphia Bar Association similarly reached the conclusion that “a lawyer may ethically accept a referral fee from a service provider, so long as the lawyer takes great care to obtain valid client consent and the payment of the fee will not influence the attorney’s judgment or otherwise impair the attorney-client relationship.”⁴⁵

In contradistinction, the Ohio Supreme Court’s Board of Commissioners on Grievances and Discipline ruled that it is ethically improper for a lawyer to accept such a fee, and

⁴² The fact that the lawyer has a financial interest in steering the client to a particular service provider may be sufficiently significant to require disclosure and consent. See, e.g., N.Y. State Ethics Op. 687 (1997) (lawyer who is also a licensed insurance broker may not sell insurance to a client without disclosure of the lawyer’s financial interest and consent of the client); Nassau County Ethics Op. 97-8 (1997) (lawyer may refer clients to medical group that provide free services, the cost of which the lawyer would otherwise be obligated to advance on the client’s behalf); ABA Informal Ethics Op. 1482 (1982) (lawyer may recommend services of one client to another as long as lawyer fully discloses financial relationship with client whose services lawyer recommends).

⁴³ Michigan Ethics Op. RI-317 (2000).

⁴⁴ New York has incorporated the substance of Model Rule 1.8(a) into DR 5-104(A).

⁴⁵ Pennsylvania Bar Ass’n Comm. on Legal Ethics & Professional Responsibility and Philadelphia Bar Assn. Professional Guidance Comm., Joint Formal Op. 2000-100, discussed in 16 ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT, CURRENT REPORTS 149-50 (Apr. 12, 2000). *Accord*, Utah Ethics Op. 99-07; Connecticut Inf. Ethics. Op. 94-25.

that client consent could not cure the problem.⁴⁶ In so doing, however, the Board relied on Ohio precedent (not universally accepted) interpreting the prohibition in DR 3-103(A) against the formation of partnerships between lawyers and nonlawyers as being broad enough to include interprofessional business relationships and associations, not just true partnerships formed under state law. While noting that the transaction in question implicated a number of provisions of the Code of Professional Responsibility with respect to which ethical issues could be cured by informed consent of the affected client,⁴⁷ the Ohio Board concluded that in this circumstance at least consent was unavailable because DR 3-103(A), a provision regulating the unauthorized practice of law, cannot be waived by a client.⁴⁸

Ethics committee opinions within New York have divided on the issue of lawyers receiving fees for referring clients to nonlawyer service providers. One line of opinions permits lawyers to accept such fees provided the referral concerns a product or service that is fairly uniform among providers and that is required in an objectively determinable quantity incident to the legal services performed by the attorney, such as mortgages and title insurance in connection with real estate transactions,⁴⁹ or if the referral concerns a product or service that is fairly uniform among different providers and was unconnected with any particular legal services, such as certificates of

⁴⁶ Ohio Sup. Ct. Ethics Op. 2000-1.

⁴⁷ The Board also stated that the proposed arrangement implicated DR 5-101(A), DR 5-104(A) and DR 5-107(A), all of which provided for client consent.

⁴⁸ *Accord*, Arizona Ethics. Op. 98-09; Michigan Inf. Ethics Op. RI-146 (1992).

⁴⁹ N.Y. State Ethics Ops. 667 (1994), 626 (1992) and 576 (1986).

deposit.⁵⁰ Another line of authorities⁵¹ focuses on estate planning attorneys, part of whose legal services involves recommendations as to the purchase of life or long-term care insurance, and concludes that they may not accept a referral fee from an insurance company for recommending a client who ultimately purchases such coverage from the company. The conflict of interest created by this particular scenario has been declared non-consentable on the theory that the opportunity for overreaching by the lawyer is “too great to be tolerated.”⁵²

These ethical principles provide the backdrop for, but do not directly control, the interprofessional contractual arrangements that are the subject of this discussion. What the interprofessional alliance represents is the contractual formalization of a reciprocal relationship wherein two businesses mutually agree that they can serve their clients, and benefit themselves, by focusing their referrals on each other to the extent consistent with their professional obligations to their respective clients. A byproduct, but not an insignificant one for purposes of this discussion, is that the allies generally make efforts to cooperate in rendering their respective services to the mutual clients. While some might argue that such arrangements fall within the letter of the ethical prohibitions, they are not pernicious in nature because of the responsibility of each of the allies to utilize its best judgment for its clients in selecting the most appropriate “referee.” This is not to say that a rigidly structured agreement could not be viewed as violative of the restrictions on compensating nonlawyers for client referrals. Provisions such as minimum guarantees and exclusive

⁵⁰ N.Y. State Ethics Op. 107a (1969).

⁵¹ N.Y. State Ethics Ops. 711 (1999), 682 (1996), 671 (1994) and 619 (1991).

⁵² N.Y. State Ethics Op. 619 (1991). This view is by no means universally held. California Formal Ethics Op. 1995-140 concluded that an estate planning lawyer may ethically advise a client to purchase life insurance and also accept a commission from the insurance agent provided the client waives the conflict (which California law requires be in writing) and the lawyer complies with the rule governing business transactions between lawyers and clients, which includes a requirement of substantive fairness.

dealing agreements would transform a symbiotic business relationship into a creature that could have a direct negative impact on clients.

In addition to the reciprocal referral fee issue, the question arises as to the extent to which the relationship between lawyer and nonlawyer service provider gives rise to a potential conflict of interest, particularly as interprofessional contractual relationships evolve into more complex sets of commercial and structural agreements. Even under current ethical principles, depending upon the economic importance of the relationship to the lawyer, the lawyer must disclose the existence and nature of the interprofessional contractual relationship to clients so that they can make an informed judgment regarding the services of both the nonlegal ally and the lawyer. This is because, as the Restatement notes, the desire of the lawyer to perpetuate the stream of referrals from the ally, if sufficiently significant to the lawyer, may constitute a business or personal interest that could conflict impermissibly with the lawyer's duty to exercise independent professional judgment on the client's behalf.⁵³ Clearly, a law firm that subsists on referrals from a particular nonlawyer consulting firm, the loss of which would be harmful to the lawyers in the firm, has a strong interest in reciprocation that could tend to convert what would otherwise be a presumption in favor of cross-referrals to the consultants into a mandatory or automatic practice that disregards the particular needs of the client. Informed client consent to such a conflict of interest would be essential.⁵⁴

⁵³ Model Rule 1.7(b); DR 5-101(A); DR 5-107(B).

⁵⁴ Technically, the client would be consenting to a conflict of interest. In reality, the client's choice is a more practical one. The law firm recommends the allied consulting firm and discloses that a strategic alliance exists between them, *e.g.*, a relationship involving a commitment to use best efforts in making cross-referrals to steer clients to each other absent good cause to do otherwise. If the client accepts the law firm's recommendation, having been told the nature of the relationship that theoretically may have influenced the referral, the client has in effect consented to the law firm's conflict of interest. However, the client may insist that a different consulting firm be retained. If the law firm complies, the matter has been resolved. If the law firm insists that
(continued...)

Perhaps because systematic and continuous interprofessional strategic alliances and other formalized client-related contractual undertakings between lawyers and nonlawyers have only recently proliferated (or at least have only recently become a matter of significant public interest), the ethics community has issued few opinions concerning the collateral implications of such arrangements. The need for such guidance is heightened by recent developments, most notably the interprofessional agreement that resulted in the formation of the Washington, D.C. law firm known as “McKee Nelson Ernst & Young,” discussed in Chapter 7 above. The legal and nonlegal businesses involved in that firm reportedly have a complex set of interlocking commercial and financial undertakings that, notwithstanding any technical divisions, unite the two in the provision of professional services to clients that they have in common. Thus, it has become clear that there are lawyers and law firms who wish to proceed aggressively, perhaps more aggressively than the rules of legal ethics will currently allow,⁵⁵ in combining their operations through structures resembling interprofessional strategic alliances, but in reality being something dramatically different from the original concept of combining forces to provide cross-referrals and the integration of professional services.

One important ramification of these developments is that, depending upon the nature and extent of the relationship between the participants, it may be necessary and appropriate to treat the law firm and nonlegal professional service firm as a single law firm within the meaning of the Code of Professional Responsibility, just as if the nonlegal professional service firm maintained an

⁵⁴ (...continued)
its strategic ally be retained, the client has a choice: acquiesce in the law firm’s choice, reserving the right to take legal action against the law firm arising out of the “tainted” referral, or find a new law firm to represent it.

⁵⁵ Because details of the relationship between Ernst & Young and the McKee Nelson law firm are not available to the public, we cannot and do not express any opinion as to the legitimacy of the co-venture under existing ethics rules.

“of counsel” relationship with the law firm.⁵⁶ Such relationships are generally found to exist in the lawyer-lawyer context when the parties have a “close, continuing, regular and personal relationship” or when the “of counsel” attorney has a “present day-to-day working familiarity with the affairs of the law firm in question.”⁵⁷ The relationship does not exist solely by virtue of the “referral of business between firms or an occasional consulting relationship,”⁵⁸ as a result of consultation on a single matter,⁵⁹ or “occasional collaborative efforts among otherwise unrelated lawyers or firms.”⁶⁰ Once the relationship becomes ongoing, however, and particularly if it involves more than a mere cross-referral arrangement, the interprofessional alliance more closely approximates a single enterprise in its structure and operation.⁶¹

The principal implication of an of counsel relationship, which may arise in the context of a contractual relationship between the legal and nonlegal service providers, is that client relationships and conflicts of interest are imputed between the participants.⁶² Thus, the lawyer or law firm in such a relationship would be deemed, for conflict of interest purposes, to owe a duty of loyalty to each client of the nonlawyer professional or nonlawyer professional service firm, and

⁵⁶ See DR 2-102(A)(4).

⁵⁷ N.Y. City Ethics Op. 81-3 (1982); *see also* N.Y. City Ethics Ops. 1996-8, 1995-8; ABA Formal Ethics Ops. 90-357, 330 (1974).

⁵⁸ N.Y. City Ethics Op. 891 (1977); ABA Formal Ethics Ops. 90-357, 330 (1974).

⁵⁹ N.Y. State Ethics Op. 262 (1972).

⁶⁰ ABA Formal Ethics Op. 90-357.

⁶¹ If the two allies share office space, the nexus between them becomes even stronger in light of the increased risk that client confidential information will be shared. *See* N.Y. City Ethics Ops. 1995-8, 80-63; N.Y. County Ethics Ops. 692 (1993), 680 (1990).

⁶² N.Y. City Ethics Ops. 1996-8, 1995-8 (collecting authorities); *see also* Restatement, § 203, cmt. c(ii) (§ 203 is to be redesignated § 123 in the final version).

would be precluded from accepting engagements adverse to such clients without their informed consent.⁶³

In the foregoing pages, we have examined the existing provisions of the Code of Professional Responsibility that govern strategic alliances and other interprofessional contractual relationships and have concluded that many of the risks inherent in such arrangements are already addressed. In several respects, however, the current Code does not adequately deal with significant concerns that arise in this context, such as the risk that the nonlawyer professional service firm may be the dominant participant in the alliance and may possess -- and, by possessing, exert -- economic influence of a kind not adequately anticipated or prevented by DR 5-101(A) or DR 5-107(B). Likewise, the Committee is concerned that lawyers and law firms not be permitted to join alliances with nonlawyers whose standards of ethics and professionalism could dilute the lawyers' duties to clients.⁶⁴ Thus, as in the case of lawyers seeking to affiliate with foreign lawyers,⁶⁵ a lawyer entering into an interprofessional alliance must be satisfied that the nonlawyer professionals belong to a profession requiring a reasonable degree of higher education and having a set of enforceable standards of professional conduct sufficiently comparable with those of lawyers. Moreover, the Committee is concerned that in many cases it may not be possible to reconcile the standards of ethics and professionalism applicable to an association between a law firm and a nonlawyer professional

⁶³ Because of the requirement that systems be maintained by lawyers and law firms to detect and deal with conflicts of interest, *see* DR 5-105(E), lawyers or law firms in relationships of the kind permitted by new DR 1-107 would have to include clients of the nonlawyer professional or nonlawyer professional service firm in any database or other system maintained by them for conflict checking. Further complications could arise if the nonlawyer professional or nonlawyer professional service firm maintains systematic and continuous relationships with more than one law firm, in which case multiple levels of imputation are possible from one firm to another. *See* N.Y. State Ethics Op. 715 (1999).

⁶⁴ As discussed in Chapter 11 above, professions vary widely with respect to their rules of conduct.

⁶⁵ *See* N.Y. State Ethics Ops. 658 (1994), 646 (1993).

service firm, and that no single public authority has jurisdiction over the association as such. Accordingly, the determination whether lawyers should be permitted to enter into systematic and continuous interprofessional arrangements is best determined on a profession-by-profession basis, taking into account the intrinsic nature of each profession and assuring that affiliation with it will not impair lawyer professional standards to any extent.

Accordingly, we recommend the addition to the Code of Professional Responsibility of the following new Disciplinary Rule and Ethical Considerations:

DR 1-107 Contractual Relationships Between Lawyers and Nonlegal Professionals

- A.** A lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other professional services, provided that:
 - 1.** The profession of the nonlegal professional or nonlegal professional service firm is a profession listed by the Office of Court Administration pursuant to DR 1-107(B); and
 - 2.** The lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with, the practice of law by the lawyer or law firm.

- B.** For purposes of DR 1-107(A):
 - 1.** Each profession on the list maintained by the Office of Court Administration shall have been designated by it, or shall have been approved by it upon the application of an individual or firm in this State, upon a determination that the profession is composed of individuals who, with respect to their profession:
 - a.** have been awarded a Bachelor's Degree or its equivalent from an accredited college or university;

- b. are licensed by the State of New York; and
 - c. are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession.
2. The term “ownership or investment interest” shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.
- C. DR 1-107(A) shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.
- D. Notwithstanding DR 3-102(A), a lawyer or law firm may allocate costs and expenses with a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship permitted by DR 1-107(A).

* * *

Contractual Relationships Between Lawyers and Nonlegal Professionals

EC 1-13 DR 1-107 permits lawyers to enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services provided the nonlegal professional or nonlegal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm. Examples of the activities in which the nonlegal professional or nonlegal professional service firm may not play a role include the decision whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, the hiring and training of lawyers, the assignment of lawyers to handle particular matters or to provide legal services to particular clients, decisions relating to the undertaking of *pro bono publico* and other public-interest legal work, financial and budgetary matters relating to the legal practice, and the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

EC 1-14 The contractual relationship permitted by DR 1-107 may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. It may

also provide for the sharing of premises, general overhead, or administrative costs and services on an arm's length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted notwithstanding that they involve the exchange of value for client referrals and, technically, a sharing of professional fees, matters that are dealt with specifically in DR 2-103(B)(1) and DR 1-107(D). Similarly, lawyers participating in such arrangements remain subject to general ethical principles in addition to those set forth in DR 1-107 including, at a minimum, DR 2-102(B), DR 5-101(A), DR 5-107(B) and DR 5-107(C). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, or enter into formal partnerships with nonlawyers, or practice in an organization in which nonlawyers own any interest. Likewise, a law firm's interest in maintaining an advantageous relationship with a nonlegal professional service firm might, in certain circumstances, adversely affect the independent professional judgment of the law firm creating a conflict of interest subject to DR 5-101(A).

EC 1-15 Each lawyer and law firm having a contractual relationship under DR 1-107 has an ethical duty to observe these Disciplinary Rules with respect to its own conduct in the context of the contractual relationship. For example, the lawyer or law firm cannot permit its obligation to maintain client confidences as required by DR 4-101 to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in DR 1-102(A)(2) against a lawyer or law firm circumventing a Disciplinary Rule through actions of another applies generally to the lawyer or law firm in the contractual relationship.

EC 1-16 When in the context of a contractual relationship permitted under DR 1-107 a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional service firm to handle the relevant affairs and interests of the client. Referrals should only be made when requested by the client or deemed to be reasonably necessary to serve the client.

EC 1-17 To assure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under DR 1-107 only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards as regards ethics, education, training, and licensing. The Office of Court Administration maintains a public list of eligible professions. Individuals and firms in this state may

apply for the inclusion of particular professions on the list, or professions may be added to the list by the Office of Court Administration *sua sponte*. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing basis, but only to engage a nonlawyer on an *ad hoc* basis to assist in a specific matter, is not governed by DR 1-107 when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with DR 1-107. Likewise, the requirements of DR 1-107 need not be met when a lawyer retains an expert witness in a particular litigation.

EC 1-18 Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by DR 1-107 as a single law firm for purposes of these Disciplinary Rules, as would be the case if the nonlegal professional or nonlegal professional service firm were in an “of counsel” relationship with the lawyer or law firm. The principal effect of such a relationship would be that conflicts of interest would be imputed as between them pursuant to DR 5-105(D), and that the law firm would be required to maintain systems for determining whether such conflicts exist pursuant to DR 5-105(E). To the extent that the rules of ethics of the nonlegal profession conflict with these Disciplinary Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with nonlawyer professionals who are themselves subject to regulation.

Aside from the structural matters addressed by the above proposed provisions, there are a number of collateral issues that also demand attention. For example, just as we believe a lawyer should be permitted to advertise the fact that he or she provides nonlegal services, either directly or through a lawyer-owned and lawyer-controlled entity as permitted by proposed DR 1-106,⁶⁶ lawyers should be permitted to advertise their contractual relationships with nonlegal professionals or nonlegal

⁶⁶ See discussion in Section 1 above.

professional service firms assuming compliance with proposed DR 1-107. We therefore recommend that DR 2-101 and EC 2-10 be further revised⁶⁷ as follows:

DR 2-101 Publicity and Advertising.

- A. A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading.
- B. **(Repealed)**
- C. It is proper to include information, provided its dissemination does not violate the provisions of DR 2-101(A), as to:
 - 1. **legal and nonlegal** education, degrees and other scholastic distinctions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by the Code of Professional Responsibility; public offices and teaching positions held; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency;
 - 2. names of clients regularly represented, provided that the client has given prior written consent;
 - 3. bank references; credit arrangements accepted; prepaid or group legal services programs in which the attorney or firm participates; **nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by DR 1-107, and the nature and extent of services available through those contractual relationships;** and
 - 4. ~~legal~~ fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by DR 2-101(L) of this section; range of fees for **legal and nonlegal** services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal **and nonlegal** services.

⁶⁷ See proposed changes discussed at pages 340 to 342 above.

- D. Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in DR 2-101(C) that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this Rule.

* * *

EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to select a lawyer. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Although communications involving puffery and claims that cannot be measured or verified are not specifically referred to in DR 2-101, such communications would be prohibited to the extent that they are false, deceptive or misleading. In disclosing information, by advertisements or otherwise, relating to a lawyer's legal or nonlegal education, experience or professional qualifications, the nature or extent of any nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer, or the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by DR 1-107, and the nature and extent of services available through those contractual relationships, special care should be taken to avoid the use of any statement or claim which is false, fraudulent, misleading, deceptive or unfair, or which is violative of any statute or rule of court. A lawyer who advertises in a state other than New York should comply with the advertising rules or regulations applicable to lawyers in that state.

Consistent with the goal of DR 2-101 and DR 2-102 to permit lawyers to provide a wide range of information to the public so long as it is not false, deceptive or misleading, we recommend that, to ensure that the public is not misled by the use of a nonlawyers' name in the name of a law firm that has entered into an agreement with a nonlegal professional service firm, DR 2-102(B) be amended as follows:

- B. A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other

than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "P.C." or such symbols permitted by law, the name of a limited liability company or partnership shall contain "L.L.C.," "L.L.P." or such symbols permitted by law, and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like, may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. **A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to DR 1-107 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith.** A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit his or her name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

To avoid any questions regarding the propriety of cross-referrals between parties to a strategic alliance, we recommend that DR 2-103(B) be amended as follows:

- B. A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:
 - 1. **A lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to an agreement or other contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other**

**professional services on a systematic and continuing basis
as permitted by DR 1-107; or**

2. **A** ⇔ lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.

We believe that these provisions will help ensure that the public is not disserved by strategic alliances between lawyers and members of other regulated professions without unduly impinging on the ability of lawyers and law firms to enter into such relationships and to afford clients the benefits thereof.

3. **With Respect to Lawyers Who Work for Organizations that Provide Consulting Services and Financial Products to the Public** – Business corporations and other organizations employ approximately nine percent of all lawyers in the United States.⁶⁸ While some suggest that an analogy can be drawn between the status of the corporate attorney, who reports at some level of the organizational chart to a nonlawyer, and that of the lawyer working for a hypothetical multidisciplinary practice group controlled by nonlawyers, the analogy collapses when one considers the fact that the nonlawyer to whom the in-house attorney ultimately reports is the attorney's client, not a customer of the corporation. Lawyers in private practice routinely work for nonlawyer clients, some of whom provide a substantial portion of the lawyer's income. The in-house attorney is simply a lawyer with only one such client.

The analysis changes when the lawyer working for the corporation is called upon to provide legal services to clients other than the lawyer's employer. Historically, such arrangements

⁶⁸ 1995 Lawyer Statistical Report at 24.

have been prohibited on the ground that nonlawyers should not control the practice of law.⁶⁹ Section 495 of the New York Judiciary Law, for example:

states a sweeping prohibition against the practice of law by corporations and voluntary associations. Section 495(1) prohibits corporations and voluntary associations from engaging in seven overlapping activities that constitute the practice of law [including holding itself out to the public as being entitled to practice law or furnishing attorneys or counsel or assuming in any other manner to be entitled to practice law]; . . . and § 495(3) prohibits corporations and voluntary associations from accepting compensation for preparing deeds, mortgages, pleadings, and a variety of other documents.⁷⁰

Violation of this statute is a misdemeanor under New York's Penal Law.⁷¹ Similar prohibitions exist around the country.⁷²

The rationale underlying this prohibition, which we recommend be retained, is perhaps best summarized in Ethical Consideration 5-23:

A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to an individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own eco-

⁶⁹ Another rationale sometimes offered is that fictional entities cannot be disciplined and cannot satisfy the educational and moral requirements of the profession, and cannot be subjected to professional discipline. *See* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 21:8021 (1999).

⁷⁰ Roy Simon, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED (2000 EDITION) 589 (1999) [hereinafter "Simon"].

⁷¹ New York Judiciary Law § 495(2), (3).

⁷² *See* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 21:8021 (1999); Charles Wolfram, MODERN LEGAL ETHICS § 15.1 (1986): Restatement, § 4, cmt. e.

conomic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of professional freedom.

With the advent of the professional corporation and other non-partnership forms of legal practice, it has been argued that courts must look beyond the mere fact of corporate form in assessing whether a prohibition against corporate practice should be enforced. Initially, First Amendment concerns (rights to free speech, assembly and petition) gave rise to a line of cases permitting “corporate” organizations such as labor unions and public interest groups to represent their members notwithstanding their form.⁷³ Even in that context, some courts have examined the extent to which nonlawyer members of the corporation’s board of directors can interfere with the provision of legal services by the corporations’ lawyers and assured themselves of professional independence before giving their approval to the practice of law.⁷⁴ The emphasis, even in this public-interest-oriented context, remained on the extent to which nonlawyers had the right or the ability to influence the manner in which legal services are provided by lawyers to their clients. The courts looked beyond the actual or perceived demand for cost-effective legal services on the part of the members of the organizations in question.

This issue has arisen most starkly in the context of insurance companies furnishing in-house lawyers to represent their insureds. The jurisdictions are split as to whether such representation should be permitted or whether traditional principles of corporate representation and

⁷³ See *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

⁷⁴ See *In re Education Law Center, Inc.*, 429 A.2d 1051 (N.J. 1981).

unauthorized practice of law should continue to apply when an entity legally responsible for providing lawyers to its customers decides to maintain a staff of lawyers instead of retaining outside, ostensibly more independent counsel to do so.⁷⁵

The majority and dissenting opinions in a 1999 decision by the Indiana Supreme Court cogently presented the arguments on both sides of this issue.⁷⁶ The majority concluded that the insurance company does not engage in the unauthorized practice of law by appointing in-house attorneys to represent insureds, notwithstanding the traditional prohibition against practice of law by corporations. As long as licensed attorneys do the legal work, the court reasoned, a corporation that employs in-house counsel does not practice law. The potential for conflicts of interest exists regardless of whether the attorney is an employee of the insurance company or an outside attorney whose entire income stream is dependent upon continued referrals from the company.⁷⁷ Concluding that allowing insurers to use in-house counsel might result in better service at a lower cost, the majority determined to permit the practice. The dissent observed that the practice, on its face, violated the prohibitions against the practice of law by corporations and the unauthorized practice of law in general. Furthermore, the dissent argued that the conflict of interest created by this arrangement constituted a violation of the Indiana Rules of Professional Conduct.

⁷⁵ Cases permitting practice by in-house insurance company attorneys: *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999); *In re Youngblood*, 895 S.W.2d 322 (Tenn. 1995); *In re Rules Governing Conduct of Attorneys*, 220 So. 2d 6 (Fla. 1969); ABA Informal Ethics Op. 1370 (1976). Cases prohibiting insurance company lawyers from providing legal services: *Gardner v. North Carolina State Bar*, 341 N.E.2d 517 (N.C. 1986); *American Insurance Assn. v. Kentucky Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996); Ohio Board of Commissioners on Grievance & Discipline Op. 95-14 (1995).

⁷⁶ *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999).

⁷⁷ In actuality, because of the overlay of federal and state labor and employment laws, the insurance company may have *far greater* control over the manner in which the "independent contractor" or captive law firm practices law than it does over lawyers its employs.

Insurers, of course, generally have common interests with their insureds. They share an obligation to cooperate in the defense of the claim against the insured, a defense for which the insurer pays and ordinarily chooses counsel. Both want to avoid liability, and generally share in some way under the contract of insurance in the settlement decision-making process. Concerns about conflicts of interest might arguably be attenuated in the absence of a dispute between the insurer and the insured involving the scope or application of the underlying insurance policy, *e.g.*, where the lawyer is defending the insured under a reservation of rights, or where the insurer refuses the client's demand to settle the claim within the policy limits.⁷⁸ Accordingly, New York State ethics committees have concluded that it is not impermissible *per se* for lawyers employed by an insurance company to represent policy holders in litigation in which the insurance company has a duty to defend and indemnify the policyholder.⁷⁹

At bottom, this is not a situation in which a corporate entity is marketing legal services to the general public; the company is marketing insurance. While it is true that one benefit of insurance coverage may be that an attorney will be provided to a covered person (or at least paid for), the provision of counsel is ancillary to the principal indemnity contract. Thus, arguably, the circumstances of the insurance company are not functionally distinguishable from those of the labor

⁷⁸ See, *e.g.*, *State Farm v. Armstrong Extinguisher Serv.*, 791 F. Supp. 799 (D.S.D. 1992); *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993); *In re Allstate Ins. Co.*, 722 S.W.2d 947 (Mo. 1987).

⁷⁹ See N.Y. State Ethics Ops. 726 (2000), 721 (1999), 716 (1999) and 519 (1980); Nassau County Ethics Op. 95-5.

union or public interest group addressed by the Supreme Court,⁸⁰ their duty to furnish legal services arises out of a separate pre-existing relationship between them and the recipient.⁸¹

This issue is by no means limited to insurance companies and the defense of claims against insureds by in-house counsel. There are thousands of lawyers employed by lay agencies who provide legal advice directly to clients on a broad range of issues. Thousands of lawyers in the United States are employed by accounting firms and provide legal advice to clients of the firm on tax issues.⁸² On its face, New York's prohibition against the practice of law by corporations and voluntary associations⁸³ would seem to govern these activities. Enforcement of that prohibition is the responsibility of the New York State Attorney General, who has historically not made the enforcement of the corporate practice prohibition a priority.⁸⁴ At the 2000 Midyear Meeting, however, the ABA House of Delegates passed a resolution, by a vote of 305-116, urging each jurisdiction "to establish and implement effective procedures for the discovery and investigation of

⁸⁰ We cannot predict whether the Supreme Court would conclude in the case of the insurance company lawyer, as it did in the cases of the lawyers furnished by labor unions and public interest groups, that the prohibition against corporate practice of law is unenforceable. Nothing in this report should be construed as an expression of opinion on the propriety of an insurer furnishing counsel to its insureds, as that issue is beyond the scope of this Committee's charge.

⁸¹ Note that, as a technical matter, even the "furnishing" of counsel by a corporation is prohibited under New York Judiciary Law § 495(1).

⁸² Accounting firms have characterized their provision of tax law advice to clients as constituting only consulting services or the "practice of tax." See generally Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case For a Status Based Exemption from State Unauthorized Practice of Law Rules*, 11 Akron Tax J. 47 (1995).

⁸³ New York Judiciary Law § 495.

⁸⁴ New York Judiciary Law § 476-a(1)(a) (statute refers to provisions of the penal law that have been repealed, see New York Penal Law § 500.05; their substance has been transferred to sections of the New York Judiciary Law, including section 495, see Simon at 577).

any apparent violation of its laws prohibiting the unauthorized practice of law and to pursue active enforcement of those laws.”⁸⁵

Accountants, however, are legally permitted to represent taxpayers before the Internal Revenue Service,⁸⁶ even though to do so they must interpret, analyze and apply a complex body of statutory, regulatory and decisional law. It would make little sense to prohibit an accounting firm from retaining licensed attorneys to assist it in providing tax services to its clients, and even less sense to condition the propriety of such a retention on whether the attorneys are employees of the firm or independent contractors. Correspondingly, a lawyer who, behind the scenes, assists an accounting firm in connection with the firm’s rendering of tax-related services to its clients should not be disciplined for aiding the unauthorized practice of law,⁸⁷ since what the firm is doing in the federal tax arena, and thus what the attorney is aiding, is specifically authorized.⁸⁸

⁸⁵ ABA, Ohio State Bar Association Report With Recommendation to the House of Delegates, Agenda Item 8A, February 14, 2000 Meeting (co-sponsored by New York State Bar Association based on Resolution of House of Delegates on January 28, 2000).

⁸⁶ See 5 U.S.C. § 500(c). Under Tax Court Rule 200, accountants and other non-lawyers may also represent taxpayers in Tax court if they qualify by passing an examination. See Kafka & Cavanagh, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES ¶ 2.07[1] (2000).

⁸⁷ Unless the lawyer resigns from the bar, he or she would, of course, at all times remain subject to the full range of ethical and legal strictures governing lawyers.

⁸⁸ The same analysis would apply to any other corporation or voluntary association performing a legally authorized service for clients, e.g., representing clients before certain administrative agencies. See *Realty Appraisals Co. v. Astor-Broadway Holding Corp.*, 5 A.D.2d 36, 37 (1st Dep’t 1957) (non-lawyer could represent a taxpayer in an administrative proceeding before the New York City Tax Commission without running afoul of the statute governing the unauthorized practice of law); *Matter of Board of Educ. v. New York State Pub. Empl. Rels. Bd.*, 233 A.D.2d 602, 603 (3d Dep’t 1996) (practice before an administrative agency did not constitute holding oneself out as an attorney in a “court of record” within the meaning of New York Judiciary Law § 478); *Matter of Cipollone v. White Plains*, 181 A.D.2d 887, 888 (2d Dep’t 1992) (representation by non-attorneys is permitted in Small Claims Assessment Review proceedings in view of the informal nature of the hearing and the specialized nature of the expertise required). See generally Association of the Bar of the City of New York Committee on Professional Responsibility, *Prohibitions on Non-lawyer Practice: An Overview and Preliminary Assessment*, 50 THE RECORD 190 (1995); New York County Lawyers’
(continued...)

Legal and ethical difficulties would arise, however, if the lawyer rendered legal services directly to the accounting firm's clients. Among other reasons, such an arrangement would constitute the provision of legal services or the furnishing of attorneys by a corporation or voluntary association in contravention of Section 495 of the New York Judiciary Law.⁸⁹ The lawyer would also run the risk of third-party influence on independent professional judgment by permitting the nonlawyer-employer to "direct or regulate" the provision of legal services to clients, or to breach their duty of confidentiality to those clients.⁹⁰

We do not urge that the Legislature undertake any fundamental reexamination of the underlying principle that the public is best served when it obtains legal services from people who have been specially trained and are licensed to provide those services, and therefore do not propose repeal or amendment of section 495 of the New York Judiciary Law.⁹¹ To the contrary, consistent with the resolutions of the ABA and NYSBA, we urge that New York's prohibitions against the

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Association, Report of Committee on Legal Assistance (Oct. 14, 1993); 5 U.S.C. § 555(b). In this regard, recall that DR 3-103(A) prohibits lawyers and nonlawyers from forming partnerships if any of the activities of the partnership constitute the practice of law.

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DR 3-101(A).

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DR 5-107(B). With respect to confidentiality, problems may arise to the extent that the insurer employing counsel takes the position that the insured's duty to cooperate (assuming, as is typical, that such a duty exists under the governing policy) carries with it an obligation to waive the attorney-client privilege. Where the protected information would reveal a lack of coverage, for example, a conflict of interest may be created between the lawyer's duty to the client and the lawyer's financial interest in continued employment. See Simon at 366. Disputes between insurers and lawyers concerning confidentiality have recently focused on the extent to which insurers can require, and lawyers can provide, detailed information (on computer printouts or otherwise) regarding billing to outside auditors. New York has joined a long list of states that prohibit the lawyer from submitting bills to an independent audit company employed by the insurance carrier without the consent of the client after full disclosure. N.Y. State Ethics Op. 716 (1999).

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See Model Rule 5.5, Comment ("limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons").

unauthorized practice of law continue to be executed by the Attorney General, and executed vigorously. However, as discussed in the following section, this cannot be done with any degree of effectiveness until we have general agreement upon a principled and enforceable definition of the “practice of law.”

4. With Respect to the Unauthorized Practice of Law – Most states have a prohibition against the unauthorized practice of law,⁹² but few agree upon what the “practice of law” is.⁹³ There is, of course, some consensus with respect to certain activities that everyone except the most ardent anti-lawyer groups agree clearly constitute the practice of law and must continue to be performed exclusively by professionally trained lawyers. Representing others in court proceedings, preparing legal documents and advising others with respect to legal matters, for example, are at the core of the practice of law.⁹⁴ While disagreements arise outside of these core areas, the overarching factor generally used to determine whether a particular function can be performed only by licensed

⁹² In response to a 1994 ABA survey, some 35 states indicated that they have a definition of the unauthorized practice of law, while 13 (including New York) stated that they did not. Some states define the practice of law statutorily or by rule. In 28 states the definition is strictly a matter of case law. ABA Standing Committee on Lawyers’ Responsibility for Client Protection, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE 5, 15-22 (1996).

⁹³ Regulation of the bar is generally a matter of state law, *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963), and is viewed as the province of the state’s judiciary, see ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 21:8003 (1999).

⁹⁴ See ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 21:8004-07 (1999) (collecting authorities); Restatement § 4, cmt. c. Prosecutions for the unauthorized practice of law are generally directed at unlicensed individuals who provide legal services routinely or for profit. We are not aware of any cases in which the nonlawyer provider of gratuitous legal advice, such as to a friend or relative, was charged under these laws.

attorneys is whether the function requires the use of professional knowledge and judgment in advising and acting on behalf of others with respect to their legal rights and obligations.⁹⁵

Many nonlawyers function on the periphery of the practice of law, providing services that are and have traditionally been performed by licensed attorneys but that, for one reason or another, can now be lawfully performed by nonlawyers.⁹⁶ Jurisdictions differ, for example, as to whether the preparation and selection of legal documents, and the provision of advice concerning those documents, constitutes the practice of law. While the majority view appears to be that such conduct is the practice of law,⁹⁷ some states have allowed nonlawyers to complete legal forms under limited circumstances. Thus, there are states in which, for example, real estate brokers and escrow companies are permitted to fill in blanks on standardized forms, prepared and reviewed by lawyers,

⁹⁵ See, e.g., *Committee on Professional Ethics and Conduct v. Baker*, 492 N.W.2d 695 (Iowa 1992); *Somuah v. Flachs*, 721 A.2d 680 (Md. 1998); *Oregon State Bar v. Smith*, 942 P.2d 793 (Or. 1997); *State v. Buyers Service Co.*, 357 S.E.2d 15 (S.C. 1987); *Green v. Unauthorized Practice of Law Committee*, 883 S.W.2d 293 (Tex. Ct. App. 1994). In 1995, the ABA Commission on Nonlawyer Practice suggested that the determination of what constitutes the unauthorized practice of law be based on the risk of harm presented by a particular activity, an evaluation of the consumer's ability to evaluate the provider's qualifications, and a judgment of whether the net effect of regulation would be a public benefit. American Bar Association, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 136-42 (1995).

⁹⁶ One current area of debate involves the extent to which nonlawyer mediators are engaged in the practice of law, particularly those who purport to give legal advice to the participants in the mediation or who draft settlement documents. See, e.g., David A. Hoffman & Natasha A. Affolder, "Mediation and UPL," DISPUTE RESOLUTION MAGAZINE 20 (1999).

⁹⁷ See ABA/BNA LAWYERS' MANUAL ON ATTORNEY CONDUCT 21:8007-08 (1999) (collecting cases); *State v. Winder*, 42 A.D.2d 1039 (4th Dep't 1973) (sale of divorce kit coupled with advice and counsel by lay seller to individual purchasers concerning specific legal needs constitutes practice of law); *People v. Divorce Associated and Publishing Ltd.*, 95 Misc. 2d 340 (Sup. Ct. Queens Co. 1978) (same); cf. *New York County Lawyers' Ass'n v. Dacey*, 21 N.Y.2d 694 (1967), *rev'g on opinion below*, 28 A.D.2d 161 (1st Dep't) (Stevens, J., dissenting) (the publication of legal forms and texts, e.g., "How to Avoid Probate!," did not constitute the practice of law). See also N.Y. State Ethics Op. 636 (1992) (lawyer may operate "Will Store" to sell forms provided, among other things, any nonlawyer employee of the store refrains from advising individual members of the public as to the selection of the appropriate form or the adaptation of its language to their particular circumstances, because that would be the practice of law).

for use in connection with real estate transactions.⁹⁸ Many states allow nonlawyers to represent clients before administrative or quasi-judicial bodies, such as in real estate tax assessment review proceedings, unemployment compensation proceedings, and workers' compensation hearings, provided the services do not involve the application of legal principles to matters affecting the rights and obligations of the client.⁹⁹

As discussed above, tax accountants regularly deal with the interpretation and application of a body of law, and are legally authorized to appear before the Internal Revenue Service.¹⁰⁰ Whether the right of accountants to engage in tax practice should extend to the representation of clients in tax courts is an issue that has sparked disagreement.¹⁰¹ In a recent decision, for example, the South Carolina Supreme Court declared that certified public accountants should be permitted to represent clients before administrative agencies and the probate court because of "the rigorous professional training, certification and licensing procedures, continuing education

⁹⁸ See ABA/BNA LAWYERS' MANUAL ON ATTORNEY CONDUCT 21:8008-09 (1999); *Application of Duncan & Hill Realty, Inc. v. Department of State*, 62 A.D.2d 690 (4th Dep't 1978) (nonlawyer broker may complete preprinted form contract of sale by filling in blanks but not by adding new language to deal with customer's specific legal problems); 1996 N.Y. Op. Atty. Gen. 46 (nonlawyer broker may prepare contract of sale if it expressly states that documents are subject to review by the parties' attorneys, or if preprinted forms approved by bar and realtor associations are used and no material requiring legal expertise is inserted).

⁹⁹ See *id.* at 21:8009-10. See generally Association of the Bar of the City of New York Committee on Professional Responsibility, *Prohibitions on Non-lawyer Practice: An Overview and Preliminary Assessment*, 50 The Record 190 (1995); New York County Lawyers' Association, *Report of Committee on Legal Assistance* (Oct. 14, 1993); 5 U.S.C. § 555(b); *Matter of Property Valuation Analysts, Inc. v. Williams*, 164 A.D.2d 131, 134-35 (3d Dep't 1990) (duly authorized non-lawyer corporation could represent a client before a Board of Assessment Review, but could not represent the client in any ensuing judicial proceedings); *Realty Appraisals Co. v. Astor-Broadway Holding Corp.*, 5 A.D.2d 36, 37 (1st Dep't 1957) (non-lawyer could represent a taxpayer in an administrative proceeding before the New York City Tax Commission without running afoul of the statute governing the unauthorized practice of law).

¹⁰⁰ See 5 U.S.C. § 500.

¹⁰¹ See generally ABA/BNA LAWYERS' MANUAL ON ATTORNEY CONDUCT 80:8012 (1999).

requirements, and ethical code required” of them.¹⁰² On the other hand, financial planners who market “living trust” documents or who otherwise purport to advise individuals regarding the type of instrument to use in estate planning have generally been prosecuted for engaging in the unauthorized practice of law,¹⁰³ and lawyers who assist them in their efforts have been held to have aided the unauthorized practice themselves.¹⁰⁴

The reason for having prohibitions against the unauthorized practice of law is that it is in the public interest to prevent injury at the hands of people (a) who have not been duly licensed to practice law, that is, (i) who have not graduated from an accredited law school, (ii) who have not passed the bar examination or satisfied whatever other substantive screening may be required under state law and (iii) who have not had their character and fitness to practice law investigated and certified by an appropriate governmental body, (b) who are not subject to continuing legal education requirements and (c) who are not subject in general to discipline for failure to adhere to a comprehensive and well developed set of ethical precepts.¹⁰⁵

In determining whether to enforce unauthorized practice of law statutes, however, courts have often attempted to balance the need to protect the public from incompetent or unethical

¹⁰² *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 422 S.E.2d 123 (S.C. 1992).

¹⁰³ See, e.g., *In re Florida Bar Advisory Opinion, Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1992); *In re Mid-America Living Trust Associates, Inc.*, 927 S.W.2d 855 (Mo. 1996); *Committee on Professional Ethics and Conduct v. Baker*, 492 N.W.2d 695 (Iowa 1992); *Trumbull County Bar Assn. v. Hanna*, 684 N.E.2d 329 (Ohio 1997); *Oregon State Bar v. John H. Miller & Co.*, 385 P.2d 181 (Or. 1963).

¹⁰⁴ See *People v. Laden*, 893 P.2d 771 (Colo. 1995); *Committee on Professional Ethics and Conduct v. Baker*, 492 N.W.2d 695 (Iowa 1992); *Wayne County Bar Assn. v. Naumoff*, 660 N.E.2d 1177 (Ohio 1996).

¹⁰⁵ See, e.g., *Unauthorized Practice of Law Committee v. Grimes*, 654 P.2d 822 (Colo. 1982); *In re Application of R.G.S.*, 541 A.2d 922 (Md. 1988); *Hulse v. Criger*, 247 S.W.2d 855 (Mo. 1952); *Renaissance Enterprises Inc. v. Summit Teleservices Inc.*, 515 S.E.2d 257 (S.C. 1999).

representation against other important and salutary public interests, such as the need of the poor and persons of modest means for access to legal services. As the New Jersey Supreme Court recently opined:

the determination of whether someone should be permitted to engage in conduct that is arguably the practice of law is governed not by attempting to apply some definition of what constitutes that practice, but rather by asking whether the public interest is disserved by permitting such conduct. . . . [T]he public interest is weighed by analyzing the competing policies and interests.¹⁰⁶

In New York, the legal framework governing the unauthorized practice of law is in need of a substantial overhaul.¹⁰⁷ The substantive statutory scheme consists of two provisions, sections 478 and 484 of the New York Judiciary Law. Addressing the indisputable, section 478 prohibits anyone but a lawyer from appearing on behalf of a person other than himself or herself in a court of record in the state.¹⁰⁸ Section 484 adds to that prohibition the preparation of “deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents’ estates, or pleadings of any kind in any action brought before any court of record in this state”¹⁰⁹

¹⁰⁶ *Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995).

¹⁰⁷ It is not at all clear that New York actually has a definition of the “practice of law.” In 1994, the ABA Standing Committee on Lawyers’ Responsibility for Client Protection developed a survey that would, among other things, document each jurisdiction’s definition of the practice of law and yield an overview of each jurisdiction’s activity or inactivity in the unauthorized practice of law arena. The survey was sent to the agency responsible for the regulation of the unauthorized practice of law, and each jurisdiction ultimately decided who should complete the survey. New York responded that it has no definition of the practice of law, but noted that enforcement was “active” and the responsibility of the Attorney General. ABA Standing Committee on Lawyers’ Responsibility for Client Protection, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE vii-viii, 20, 28 (1996).

¹⁰⁸ New York Judiciary Law § 478.

¹⁰⁹ New York Judiciary Law § 484.

Violations of these provisions may be prosecuted as misdemeanors,¹¹⁰ and are subject to investigation and civil enforcement for injunctive relief by the Attorney General.¹¹¹

Bar associations can play a role in the process of policing the unauthorized practice of law. The Attorney General is empowered to take action either *sua sponte* or “upon the complaint of . . . a bar association organized and existing under the laws of this state” against any person involved in the “unlawful practice of the law.”¹¹² If the Attorney General fails to act upon a written request by a bar association within 20 days of its submission, the bar association is authorized to apply to a New York trial court for leave to commence an action in its own name “on good cause shown therefor.”¹¹³ While the practicality of private enforcement of unauthorized practice statutes by voluntary bar associations may be doubtful in light of federal antitrust concerns,¹¹⁴ the statutory

¹¹⁰ New York Judiciary Law § 485.

¹¹¹ New York Judiciary Law § 476-a, 476-b, 476-c. *See generally* *People v. Romero*, 91 N.Y.2d 750, 755-58 (1998) (confirming that the Attorney General lacks authority to mount a criminal prosecution for the unauthorized practice of law)..

¹¹² New York Judiciary Law § 476-a(1).

¹¹³ New York Judiciary Law § 476-a(2).

¹¹⁴ Bar associations are generally subject to the federal antitrust laws, but may be immunized from antitrust liability for action that may have anti-competitive effects if it merely solicits governmental action instead of taking its own action. *See, e.g., Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992), *cert. denied*, 510 U.S. 992 (1993) (bar association that did not itself have the power to affect changes in law immune from antitrust liability for petitioning government for changes that may have the effect of hurting competition). An association that itself adopts rules that, directly or indirectly, limit advertising, price competition or the type of goods or services that competitors may offer engenders substantial antitrust risk. *See National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912); *American Medical Association*, 94 F.T.C. 701 (1978), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982). In light of these considerations, we urge extreme caution before any bar association in New York takes action that transcends lobbying for changes in applicable legal and ethical rules.

scheme expresses a strong legislative policy to prevent nonlawyers from engaging in the practice of law, whatever that may be.

This Committee is of the view that New York State should undertake to review and revise Chapter 15 of our Judiciary Law,¹¹⁵ the group of statutes that deals generally with the regulation of attorneys and counselors at law, and specifically in various sections with the practice of law by those not subject to such regulation. A more clearly delineated and analytically supportable definition of the practice of law, rather than one that is brimming with ambiguity and stands begging for battles over its boundaries, could accomplish many worthwhile societal goals, such as establishing the extent to which nonlawyers will be permitted to provide quasilegal services to persons of modest means and providing a platform for meaningful consumer protection regulation over such services. Moreover, greater precision in defining the practice of law will enable more effective criminal prosecution of unlawful practitioners as well a eliminate uncertainty for persons working in law-related areas about the propriety of their conduct.

Recently, the Washington State Bar Association's Committee to Define the Practice of Law undertook this important task.¹¹⁶ The Committee recognized that the exercise of defining the practice of law "lies at the heart of any effort to protect the public from untrained and unregulated persons who hold themselves out as able to offer advice and counsel in matters customarily

¹¹⁵ New York Judiciary Law §§ 460-99.

¹¹⁶ Washington State Bar Association, Committee to Define the Practice of Law, "Final Report," July 13, 1999, available on the Internet at www.wsba.org/c/cdpl/report.htm (hereinafter "Washington UPL Report").

performed by lawyers that affect individuals' legal rights, property and life."¹¹⁷ Their work on this exercise resulted in a three-pronged definition. As the Committee explained:

The definition proposed by the Committee to Define the Practice of Law has three distinct parts. The first part sets out the broad definition of the practice of law. The second part identifies exceptions to the general rule that only lawyers may practice law. The third part distinguishes activities which do not constitute the practice of law, and notes that nothing in the rule shall be taken to define or affect standards for civil liability or professional responsibility.¹¹⁸

This Committee has reviewed the definition proposed by the Washington Bar and believes that it represents an excellent attempt at solving the age-old problem of identifying those services that the government and society will permit only duly licensed lawyers to provide. While this Committee has not itself attempted to reach a consensus as to each and every element of the definition, we recommend that an appropriate committee of this Association be directed to study this issue and make appropriate proposals to the New York State Legislature for the adoption of a

¹¹⁷ *Id.* at 1.

¹¹⁸ *Id.*, Part IV. The Committee continued:

The Committee had philosophical differences on the second part of the proposed rule. Whether nonlawyers should be authorized to engage in any practice of law is a controversial and complex issue, involving many important and sometimes conflicting factors, such as competence to practice, consumer protection, access to justice for the indigent, customer convenience, and others. Some members of the Committee believe that any definition of the practice of law ought to be limited to an aspirational statement defining what lawyers do. Others, the majority of Committee members, believe that the definition must reflect the reality that, in some areas, the practice of law by nonlawyers has been authorized by competent authority. . . . The Committee is unanimous that any exceptions to allow nonlawyers to engage in the practice of law must come from the Supreme Court, or must be grounded in well established historical practice which provides for protection of the public.

provision defining the practice of law. In our view, a provision along the lines of the following, adapted from the Washington Bar proposal, could form the basis for a solution:¹¹⁹

(a) The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which requires the knowledge and skill of a person trained in the law. This includes but is not limited to:

(1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.

(2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person.

(3) Representation of another entity or person in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(4) Negotiation of legal rights or responsibilities on behalf of another entity or person.

(b) Whether or not they constitute the practice of law, the following are permitted:

(1) Practicing law to the extent authorized by statute or court rule, including officers of societies for the prevention of cruelty to animals, and certain law students and law graduates pursuant to New York Judiciary Law § 478.

(2) Acting as a lay representative authorized by administrative agencies or tribunals.

(3) Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.

¹¹⁹ The definition represents a slight recasting of the Washington definition to take into account differences between the specific regulatory structure of the New York and Washington Bars.

- (4) Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.
 - (5) Acting as a legislative lobbyist.
 - (6) Sale of legal forms in any format.
 - (7) Activities the state regulation of which are preempted by Federal law.
 - (8) Such other activities that the Court of Appeals has determined do not constitute the unlicensed or unauthorized practice of law.
- (c) Nothing herein shall:
- (1) affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Disciplinary Rule 1-104;
 - (2) affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public;
 - (3) affect the ability of a governmental agency to carry out responsibilities provided by law; or
 - (4) be taken to define or affect standards for civil liability or professional responsibility.

Regardless of whether this or some other formulation of the definition of the practice of law is adopted, this Committee recommends that it be combined with meaningful enforcement mechanisms consistent with NYSBA (and ABA) policy, and that the unauthorized practice of law be policed with increased vigor, with a view toward protecting the public against injury at the hands of those who lack the professional training, governmental oversight, and ethical inculcation of duly licensed attorneys.¹²⁰

¹²⁰ To be distinguished is the growing trend toward the enforcement of unauthorized practice laws against lawyers representing clients in a state other than that of their admission. *See, e.g., Office of Disciplinary Counsel v.*
(continued...)

5. With Respect to Nonlawyer Investment in Entities Practicing Law — In the debate over allowing lawyers to participate in multidisciplinary practice groups, there has been discussion concerning the possibility of allowing nonlawyers to make financial investments in entities practicing law.¹²¹ Nonlawyer ownership and management of firms is prohibited under Model Rule 5.4(d).¹²² New York ethics rules are to the same effect.¹²³

After considering proposals to permit such investment, we have reached the following conclusions on the basis of available information. First, the arguments in favor of allowing outside equity investment in legal practice seem to be weakest in respect of the category of law firm most likely to be in a position to attract such investment,¹²⁴ while law firms facing shortfalls in revenues

¹²⁰ (...continued)
Doan, 673 N.E.2d 1272 (Ohio 1997); *In re Opinion 33 of the Committee of the Unauthorized Practice of Law*, 733 A.2d 478 (N.J. 1999); *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1 (Cal. 1998); *Chandris v. Yanakakis*, 668 So. 2d 180 (Fla. 1995). See generally Restatement § 3, cmt. e. While this issue is beyond the scope of this Committee's charge, and a matter on which we express no opinion, we recommend that it be closely analyzed by the organized bar.

¹²¹ See the reference to McKee Nelson Ernst & Young in Ch. 4 § 5; and the references in Ch. 9 § 2, to French law firms affiliated with the Big Five, and to the Nallet Report. See generally Adams and Matheson, "Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms," 86 Calif. L. Rev. 1 (1998).

¹²² See also *Florida Bar v. Hunt*, 429 So. 2d 1201 (Fla. 1983) (lawyer disbarred for designating nonlawyers as corporate officers and directors of professional corporation); South Carolina Ethics Op. 98-35 (law firm may not permit company lending it money for start-up costs to own an interest in the firm, to have any control over professional services, or to share in legal fees generated by the lawyer).

¹²³ DR 5-107(C). EC 5-24 elaborates:

To assist a lawyer in preserving professional independence, a number of courses are available. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any of its directors, officers, or shareholders is a non-lawyer. . . . Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

¹²⁴ For a contrary view, advocating outside equity investment in legal practice, see, e.g., Edward Adams & John Matheson, note 121, *supra*. See also the last section of the Nallet Report, summarized beginning at note 72 (continued...)

are not likely candidates for outside equity investment. The equity owners of a more prosperous law firm (normally, the partners) would not be likely to need such investment, or to find it an efficient way to raise working capital,¹²⁵ or, above all, to be willing to share with outside equity investors the economic rent from their legal practice.¹²⁶ Moreover, the financial problems of profitable law firms are unlikely to be long-term working capital or cash-flow related problems but tax problems relating to the funding of pension plans or the risks of professional liability (the latter being unlikely to have any attraction for outside equity investors).¹²⁷

Second and more importantly, the type of nonlawyer investor most likely to be willing to provide a legal practice with working capital in exchange for a *de jure* or *de facto* equity position in the legal practice is the nonlegal investor whose own business plan includes the practice of law.

¹²⁴ (...continued)
of Chapter 9 *supra*. For the cancellation of a proposed initial public offering of shares in the amount of approximately \$130 million by a professional services firm called Centerpiece Advisors, see "Market Roundup," THESTREET.COM, Nov. 10, 1999.

¹²⁵ The financing terms available to smaller firms and solo practitioners may vary significantly and be dependent in large part on the identity of the lawyers and their business and personal relationships.

¹²⁶ In theory, a law firm with substantial annual profits that has experienced a period of steady growth could sell 20% of its equity to outside investors at a price-earnings ratio of, for example, 10:1, and receive an amount equal to 200% of its annual profits. Because the outside investors would expect — and insist on — a future return on their investment, that investment would involve a future sharing of economic rent between the firm's partners and the outside investors. The investment could thus represent more of a benefit to the current generation of partners near retirement than to aspiring or junior partners. It could on a larger scale replicate the generational tensions in French or German law firms where junior partners buy out their seniors to finance their retirement, a phenomenon decried in those countries. See Chapter 9 above at pages 215 (France) and 235 (Germany). It could also leave to future partners the potential problem of dealing with outside shareholders dissatisfied with firm management. When creditworthy New York firms experience cash-flow problems, they typically borrow from commercial banks which, in recent decades, have been willing to lend to such firms on terms favorable to the borrowers, and the burden of repaying the loan tends to fall mainly on the partners benefitting therefrom. Anecdotal evidence suggests that large U.S. law firms want to assure the loyalty and professional efforts of junior partners and to attract business-generating lateral partners through the prospect of the firms' future economic rent, and do not want to have to deal with outside shareholders.

¹²⁷ Small financings, however, may appeal to law firms seeking to fund the start-up costs associated with entities providing nonlegal services to clients. (See Section 1 above.)

The leading examples of such nonlegal investors are the “Big Five” in respect of their affiliated law firms discussed in Chapter 9 and, in one case, in Chapter 4.¹²⁸ Here, the law firm is typically the weaker economic entity, and the affiliated nonlegal entity is financially dominant. While the terms of affiliation are rarely disclosed, it does not seem unreasonable to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership. Regulatory authorities in certain jurisdictions have called for rules that would govern affiliations of this type with a view to preserving the professional integrity of the “captive” legal practice;¹²⁹ however, the lack of transparency in respect of the affiliations has not facilitated the search for an appropriate regulatory framework.

Third, even if nonlawyer investment in a law firm were to be so widely diffused that no single investor had substantial power over the firm, the existence of outside investment would subject the principals of the firm to a duty to run it for the financial benefit of the investors. Failure to maintain and increase profits could lead to a drop in the value of the stock, impairment of the value of the lawyers’ own holdings, and stockholder litigation or efforts to change the management. Even when lawyers are upheld by the culture and traditions of their profession, with their emphasis on placing clients’ interests first, they sometimes yield that emphasis to financial pressure.¹³⁰

We share the concern that outside equity investment in a legal practice may confer ultimate control of that practice on nonlawyers. When (as mentioned above) the purpose of this

¹²⁸ See the first sentence of note 121, *supra*.

¹²⁹ See, e.g., Ch. 9 §§ 2, 3, 4, 7 (France, United Kingdom, Netherlands, Ontario).

¹³⁰ See Jerry Van Hoy, *FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES* (1997); Lisa G. Lerman, *Blue-Chip Billing: Regulation of Billing and Expense Fraud by Lawyers*, 12 *GEO. J. LEGAL ETHICS* 205 (1999).

outside investment is to further the investor's own business plan, and the outside investor is financially dominant in the relevant arrangement, there is a substantial likelihood that, should considerations of independent legal judgment or other considerations of legal ethics not coincide with the business plan of the dominant outside investor, that independence or those ethics might be subject to inappropriate tensions.¹³¹ We are of the view that this financial aspect of nonlawyer control of legal practice presents considerable risks to the legal profession and the justice system (see section 6 below) and should not be permitted in New York.

6. With Respect to Transfers to Nonlawyers of Ownership or Control Over Entities Practicing Law — The preceding sections of this chapter have analyzed the law governing lawyers with respect to the provision of nonlegal services to clients, as well as to strategic alliances and other systematic and continuing contractual relationships between lawyers and nonlawyer professionals. To reiterate, it is the view of this Committee that, subject to clarification and expansion of existing principles of legal ethics,¹³² lawyers may properly engage in such activities because, at all times, they retain unfettered control over the manner in which the legal services are rendered to clients of the enterprise. The nonlawyer participants in such ventures, whether they be the employees of a nonlegal service subsidiary of a law firm or of the marketing co-partner in a contractual affiliation, do not play a role in the management of the legal practice, and only have a

¹³¹ Not dissimilar is the concept that a lender may be liable for acquiring and exercising excessive control over the business operations of a borrower. *See generally* Melvyn L. Cantor, John J. Kerr, Jr. & Thomas C. Rice, "Lender Liability Litigation 1990: Recent Developments," *LENDER LIABILITY* 285 (Practicing Law Institute 1990).

¹³² We have proposed the addition of two new disciplinary rules and 10 new ethical considerations, and have proposed amendments to several other provisions of the New York Lawyers' Code of Professional Responsibility.

managerial say with respect to the nonlegal services being provided to the public. The lawyer remains completely responsible for his or her own independent professional judgment, for maintaining the confidences and secrets of clients, and for otherwise complying with the full panoply of legal and ethical principles governing lawyers in the United States.¹³³

Of major concern to the Committee is the risk that an association in the form of a partnership between a law firm and a nonlawyer professional service firm would exist in the absence of adequate standards of ethics and professionalism for the association as such,¹³⁴ and in the absence of a public authority having jurisdiction over the association as such. It is not inconceivable that, over time, multidisciplinary standards might be developed for such partnerships, and rules for the effective enforcement of those standards might be adopted and made the responsibility of an effective public authority. The question of what rules should be developed for lawyers and other professionals working in a single firm to ensure that all of them respect the duties of each profession raises complex issues, which vary from profession to profession. Under present circumstances, the Committee urges the greatest caution toward any association structured in a manner permitting a dominant nonlegal participant to influence the professional judgment of lawyers and to pass on matters of legal professional ethics. Dominance can be conferred by various forms of ownership or

¹³³ In contrast, it is the view of this Committee that lawyers who work for corporations or voluntary associations that provide — in addition to consulting, financial and other services — legal services to the public, could be viewed as assisting their employers in violating the New York statutes that bar such entities from carrying on a legal practice. These laws, along with the unauthorized practice statutes, cry out for prompt clarification, renewed attention and vigorous enforcement. The public should continue to be protected against those who would purport to advise them on issues of law — or to direct the conduct of lawyers providing legal services to clients — without the demanding training, judicial supervision and ethical inculcation that only duly licensed lawyers possess.

¹³⁴ Cf. DR 1-104(C) (requiring a law firm as such to “make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules,” and to supervise the work of all lawyers and nonlawyer in the firm adequately).

investment interest, as well as by management or supervisory authority. At present, only the lawyer or law firm in an alliance with nonlawyers is subject to the standards of the legal profession designed to assure lawyer independence, loyalty to clients, and an avoidance of conflicts of interest. For this reason, the Committee strongly urges that these alliances be permitted only under circumstances where the practice of law will not be exposed to control, *de jure* or *de facto*, by nonlawyers.

There are those in the legal profession who nevertheless advocate permitting lawyers to form general partnerships with nonlawyers. Several bar associations around the country, including some within New York, have issued reports approving of lawyer participation in multidisciplinary partnerships. These practitioners and organizations generally advance the argument that the consumer should have the right to choose the form of the entity that provides legal services to them.¹³⁵ This right to choose would include the right to forego traditional protections, including the evidentiary privilege that ensures the confidentiality of their communications with counsel, and the ethical framework that is designed to ensure that lawyers represent their clients with undivided loyalty and provide them with the benefit of independent professional judgment at all times. The proponents of lawyer-nonlawyer partnerships would bestow upon those in need of legal services the right to decide whether to trade off these protections for the prospect of financial savings and/or the purported efficiencies of so-called “one-stop shopping.”

But competition and the “free marketplace” are not the solution to all of society’s problems. To the contrary, society has historically needed frequent governmental intervention and

¹³⁵ Others contend that lawyers and nonlawyers are already creating multidisciplinary partnerships, in form or substance, and that the trend toward such affiliations, even if driven by nonlawyers who seek to convert the legal profession into another profit center in their organization, is inevitable and must be accepted by the legal profession. We reject this argument on the theory that a profession should not retrofit its rules to permit past violations absent a firm belief that the rules should be changed as a matter of principle in any event.

protection *against* the free marketplace. The broad range of governmental agencies that are responsible for preventing potentially injurious products from reaching the consumer stand as a testament to that proposition. The efforts of government to prohibit the sale of adulterated food, unsafe pharmaceuticals, hazardous toys and other potentially dangerous consumer products are well known. Likewise, government plays a major role in preventing fraud in the sale of securities and in other transactions.¹³⁶ Unfortunate as it may be, left to complete “freedom,” competitive forces often turn pernicious.

For many of the same reasons, government has traditionally regulated professions. It is in the public interest to ensure that the people who hold themselves out as having special skills, whether they be medical, legal, accounting or other skills, in fact possess those skills and that they comport themselves in a manner commensurate with the high degree of trust the public tends to repose in its professionals. With respect to the legal profession, it has been the judicial branch of government that has been responsible for screening those who seek admission to the profession without having established a basic level of competence, for supervising continuing legal education, for exercising continuing disciplinary authority over those who engage in the practice of law, and for terminating the licenses of those who fail to comply with minimum professional standards. The free marketplace has not been permitted to override this supervisory scheme. Additionally, states continue to enforce unauthorized practice of law restrictions to be sure that nonlawyers do not injure the public by purporting to provide clients with legal services.

¹³⁶ See generally John C. Coffee, Jr., “Privatization and Corporate Governance: The Lessons from Securities Market Failure,” 25 JOURNAL OF CORPORATION LAW 1 (1999).

Likewise, the marketplace cannot serve as the architect of the set of rules under which lawyers practice. We have never allowed the consumer of legal services to choose the rules of professional conduct governing the legal profession.¹³⁷ This sort of ethical cafeteria plan would be manifestly unwise and degenerative of societal interests. The public should not be permitted to say “I don’t care if my lawyer is tainted by outside influences” any more than it may say “I don’t care if the meat I serve my family has been adulterated.”

The rules governing the integrity of the legal profession, *i.e.*, those that require lawyers to represent clients with their undivided loyalty, unfettered by outside influences, must be preserved. Lawyers must remain free to choose which clients to represent — or not to represent — notwithstanding the popularity of their cause or their public desirability in other respects. Prohibiting nonlawyers from having any significant influence in the manner in which lawyers deliver legal services to clients (including through passive investment in entities providing legal services to the public) is a crucial attribute of the independent bar, which has traditionally played an important role in our culture.¹³⁸

To the extent that a demand exists for integration of legal services with those of other professions — and the evidence of such demand is equivocal at best¹³⁹ — that demand can be satisfied by permitting lawyers to enter into strategic alliances and other contractual relationships

¹³⁷ In limited circumstances and subject to strict prerequisites, clients are permitted to waive certain rules, but still cannot decide unilaterally whether the rules themselves are inapplicable to lawyers.

¹³⁸ See generally *Lawline v. American Bar Association*, 956 F.2d 1378, 1385 (7th Cir. 1992) (upholding disciplinary rules forbidding lawyers from assisting laypersons in unauthorized practice of law and from entering into partnerships with nonlawyers as having been “designed to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach”).

¹³⁹ See Chapter 10 above.

with nonlegal professional service providers, as well as by permitting lawyers to own and operate nonlegal businesses. Subject in both cases to some additional regulation to ensure that lawyers remain completely in control of the rendering of legal services, the purported demand for integrated services is satisfied without sacrificing the independence of the bar. The only substantive difference between this approach and that favored by those who would permit multidisciplinary partnerships is that this approach does not permit nonlawyers and lawyers to call each other “partner.”¹⁴⁰

This Committee is of the view that the lawyer’s duties of loyalty, confidentiality and independent professional judgment, even if some of these duties were originally the product of an elitist bar nearly a century ago, as some commentators have suggested,¹⁴¹ are of continuing importance to clients. In light of the ability of the legal profession to provide consumers of legal services with integrated professional services within the framework of the traditional law practice, this Committee sees no reason to imperil the essential fabric of the attorney-client relationship by vesting any measure of control over the exercise of these duties in the hands of nonlawyers. Indeed, the recent debate concerning the degree of control that various “pro-MDP” factions are willing to permit nonlawyers to maintain over the practice of law, and the inability of any of those factions to articulate a workable, reasonable and verifiable basis for measuring, monitoring or even divining the existence of such control, exemplify the hazard of opening the door even slightly to nonlawyer influence.

¹⁴⁰ Nonlawyer employees of a law firm can even be compensated on a profit sharing basis under DR 3-102(A)(3).

¹⁴¹ See, e.g., Jerold S. Auerbach, *UNEQUAL JUSTICE* 40-53, 62-101 (1976); Kermit Hall, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 211-25 (1989); Susan D. Carle, *Lawyers’ Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 *LAW & SOCIAL INQUIRY* 1 (1999); Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 *HASTINGS L.J.* 577, 600-16 (1989).

Our concerns are neither speculative nor tautological. A legal practice in which nonlawyers play a significant managerial role would be susceptible to a number of palpable dangers. At the outset, in the selection of clients and the resolution of conflicts of interest, nonlawyers would influence both the choice and the application of criteria for weighing the relative interest of the overall enterprise in serving, for example, a client that is both a legal and nonlegal client, favoring it over a client that was exclusively a legal client. It can fairly be predicted that the promotion of nonlegal profit centers will often overshadow the attorneys' rules governing conflicts of interest. Likewise, the raising and allocation of firm capital (both debt and equity) would be ultimately controlled by nonlawyers, who could thereby orient the development of the overall enterprise as between the practice of law and engagement in other pursuits, and who for these purposes might well view the practice of law less in professional terms than in terms of being but one of several profit centers. Investment in the legal profit center might thus be controlled for purposes other than maximizing legal professionalism and fostering its values.

Competing budgetary requests could also be under the ultimate control of nonlawyers, who would decide on the allocation of resources to controversial public interest cases and to *pro bono publico* work, and who might be influenced less by legal professional goals than by the net earnings of the overall business's profit centers. Indeed, the resources of the enterprise could be employed in a manner having a potential impact adverse to the public interest. Compensation and advancement of the enterprise's professionals would be controlled by nonlawyers, whose decisions on pecuniary and professional reward (or penalty) would be highly determinative of morale, efficiency and outlook affecting the legal and nonlegal activities of the enterprise, as well as the efforts and expectations of individual professionals within the organization. In sum, placing any

measure of control over the practice of law in the hands of nonlawyers would form a constant backdrop for the lawyers attempting to practice in the organization, as the financial objectives of nonlawyer management perpetually compete with considerations of professional ethics and the formulation of independent judgments in the best interests of legal clients and the legal system.

Even the so-called “lawyer-controlled MDP” endangers the fundamental nature of the attorney-client relationship. Indeed, the difficulty of detecting and preventing nonlawyer influence over the practice of law is a major inhibitor to permitting nonlawyers to participate directly in ventures that provide legal services to the public. Even the lawyers themselves may not always know whether their decisions result from independent judgment. Short of the direct order from a nonlawyer superior, lawyers are susceptible to more subtle influences betraying their duties to their clients. Hints and implicit threats could lead to a climate in which lawyers do what they think their nonlawyer managers would want them to do.

The difficulty in ensuring that lawyers maintain control over their practices is another reason leading to the rejection of nonlawyer participation. Indicia of nonlawyer influence will often be elusive. While the business world has crafted definitions of corporate control sufficient for its purposes — essentially to determine who has the decision-making power within a business enterprise or other organization — we believe that monumental would be the task of any individual or group charged with defining the point at which a nonlawyer’s role within an organization rises to the level of inappropriate interference with practice governance. We already tolerate, as discussed above, a degree of risk regarding nonlawyer influence in certain practice settings and circumstances, but it is maintained at a manageable, if not negligible, level. Given that other means exist to accomplish

the ends sought to be achieved through transfers of control to nonlawyers of legal practices, we see no reason to exacerbate those risks.

Thus, we have considered and rejected the suggestion that the rules against nonlawyer participation in the practice of law should be relaxed. We do so mindful of the fact that denying nonlawyers the ability to have a financial interest or otherwise to participate in law firm governance deprives lawyers of significant opportunities for financial gain. Nevertheless, we believe that it is in the public interest that lawyers forego this opportunity.

CHAPTER 12

APPENDIX A

SUMMARY OF PROPOSED AMENDMENTS TO THE
NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY
(MARKED TO SHOW CHANGES TO THE CURRENT CODE)

CANON 1

DISCIPLINARY RULES

* * *

DR 1-106 Responsibilities Regarding Nonlegal Services

A. With respect to lawyers or law firms providing nonlegal services to clients or other persons:

- 1. A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the provision of both legal and nonlegal services.**
- 2. A lawyer or law firm that provides nonlegal services to a person that are distinct from any legal services being provided to that person is subject to these Disciplinary Rules with respect to the nonlegal services if a disinterested person would conclude that the person receiving the services could reasonably believe the services are the subject of an attorney-client relationship.**
- 3. A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity providing nonlegal services to a person is subject to these Disciplinary Rules with respect to the nonlegal services if a disinterested person would conclude that the person receiving the services could reasonably believe the services are the subject of an attorney-client relationship.**

4. For purposes of DR 1-106(A)(2) and DR 1-106(A)(3) above, and in the absence of circumstances requiring additional communications, it will be presumed that the person receiving nonlegal services could not reasonably believe the services to be the subject of an attorney-client relationship if the lawyer or law firm has advised the person in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services.
- B. Notwithstanding the provisions of DR 1-106(A), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under DR 4-101(B) to maintain the confidences and secrets of a client receiving legal services.
- C. For purposes of DR 1-106, “nonlegal services” shall mean those services that lawyers may lawfully provide and that are not prohibited as the unauthorized practice of law when provided by a nonlawyer.

DR 1-107 Contractual Relationships Between Lawyers and Nonlegal Professionals

- A. A lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other professional services, provided that:
1. The profession of the nonlegal professional or nonlegal professional service firm is a profession listed by the Office of Court Administration pursuant to DR 1-107(B); and
 2. The lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise,

directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with, the practice of law by the lawyer or law firm.

B. For purposes of DR 1-107(A):

1. Each profession on the list maintained by the Office of Court Administration shall have been designated by it, or shall have been approved by it upon the application of an individual or firm in this State, upon a determination that the profession is composed of individuals who, with respect to their profession:

a. have been awarded a Bachelor's Degree or its equivalent from an accredited college or university;

b. are licensed by the State of New York; and

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

2. The term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

C. DR 1-107(A) shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

D. Notwithstanding DR 3-102(A), a lawyer or law firm may allocate costs and expenses with a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship permitted by DR 1-107(A).

* * *

ETHICAL CONSIDERATIONS

Provision of Nonlegal Services

EC 1-9 For many years, lawyers have provided to their clients nonlegal services that are ancillary to the practice of law. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. Whenever a lawyer directly provides nonlegal services, the potential for ethical problems exists. Foremost among these is the possibility that the person for whom the nonlegal services are performed may fail to understand that the services may not carry with them the legal and ethical protections that ordinarily accompany an attorney-client relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services, when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, confusion by the recipient is likely to be unavoidable as to whether and when the relationship is protected as a client-lawyer relationship. Therefore, DR 1-106(A)(1) requires generally that the lawyer providing nonlegal services adhere to all of the requirements of the Code of Professional Responsibility. DR 1-106(A)(1) applies to the provision of nonlegal services by a lawyer even when the lawyer is not personally providing any legal services to the person for whom the nonlegal services are being performed if the person is also receiving legal services from another lawyer in the firm that are not distinct from the nonlegal services.

EC 1-10 Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, DR 1-106(A)(2) requires that the lawyer providing the nonlegal services adhere to the Disciplinary Rules, unless exempted by DR 1-106(A)(4). Nonlegal services also may be provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of an attorney-client relationship. Therefore,

DR 1-106(A)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all the Disciplinary Rules, unless exempted by DR 1-106(A)(4).

EC 1-11 The Disciplinary Rules will be presumed not to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if the lawyer complies with DR 1-106(A)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to communicate the desired understanding. For example, while the written disclaimer set forth in DR 1-106(A)(4) will be adequate for a sophisticated user of nonlegal services, such as a publicly held corporation, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services.

EC 1-12 Although a lawyer may be exempt from the application of Disciplinary Rules on the face of DR 1-106(A), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Disciplinary Rules that are dependent upon the existence of a representation or attorney-client relationship. Other rules, such as those prohibiting lawyers from engaging in unlawful, dishonest or discriminatory conduct (DR 1-102), requiring lawyers to report certain attorney misconduct (DR 1-103), and prohibiting lawyers from misusing the confidences or secrets of a former client (DR 4-101(B)), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer otherwise exempt under DR 1-106(A).

Contractual Relationships Between Lawyers and Nonlegal Professionals

EC 1-13 DR 1-107 permits lawyers to enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services provided the nonlegal professional or nonlegal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm. Examples of the activities in which the nonlegal

professional or nonlegal professional service firm may not play a role include the decision whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, the hiring and training of lawyers, the assignment of lawyers to handle particular matters or to provide legal services to particular clients, decisions relating to the undertaking of *pro bono publico* and other public-interest legal work, financial and budgetary matters relating to the legal practice, and the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

EC 1-14 The contractual relationship permitted by DR 1-107 may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. It may also provide for the sharing of premises, general overhead, or administrative costs and services on an arm's length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted notwithstanding that they involve the exchange of value for client referrals and, technically, a sharing of professional fees, matters that are dealt with specifically in DR 2-103(B)(1) and DR 1-107(D). Similarly, lawyers participating in such arrangements remain subject to general ethical principles in addition to those set forth in DR 1-107 including, at a minimum, DR 2-102(B), DR 5-101(A), DR 5-107(B) and DR 5-107(C). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, or enter into formal partnerships with nonlawyers, or practice in an organization in which nonlawyers own any interest. Likewise, a law firm's interest in maintaining an advantageous relationship with a nonlegal professional service firm might, in certain circumstances, adversely affect the independent professional judgment of the law firm creating a conflict of interest subject to DR 5-101(A).

EC 1-15 Each lawyer and law firm having a contractual relationship under DR 1-107 has an ethical duty to observe these Disciplinary Rules with respect to its own conduct in the context of the contractual relationship. For example, the lawyer or law firm cannot permit its obligation to maintain client confidences as required by DR 4-101 to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in DR 1-102(A)(2) against a lawyer or law firm circumventing a Disciplinary Rule through actions of another applies generally to the lawyer or law firm in the contractual relationship.

EC 1-16 When in the context of a contractual relationship permitted under DR 1-107 a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional services firm to handle the relevant affairs and interests of the client. Referrals should only be made when requested by the client or deemed to be reasonably necessary to serve the client.

EC 1-17 To assure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under DR 1-107 only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards as regards ethics, education, training, and licensing. The Office of Court Administration maintains a public list of eligible professions. Individuals and firms in this state may apply for the inclusion of particular professions on the list, or professions may be added to the list by the Office of Court Administration *sua sponte*. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing basis, but only to engage a nonlawyer on an *ad hoc* basis to assist in a specific matter, is not governed by DR 1-107 when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with DR 1-107. Likewise, the requirements of DR 1-107 need not be met when a lawyer retains an expert witness in a particular litigation.

EC 1-18 Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by DR 1-107 as a single law firm for purposes of these Disciplinary Rules, as would be the case if the nonlegal professional or nonlegal professional service firm were in an "of counsel" relationship with the lawyer or law firm. The principal effect of such a relationship would be that conflicts of interest would be imputed as between them pursuant to DR 5-105(D), and that the law firm would be required to maintain systems for determining whether such conflicts exist pursuant to DR 5-105(E). To the extent that the rules of ethics of the nonlegal profession conflict with these Disciplinary Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be

subject to legal obligations arising from a relationship with nonlawyer professionals who are themselves subject to regulation.

CANON 2

DISCIPLINARY RULES

DR 2-101 Publicity and Advertising.

- A. A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading.
- B. (Repealed)
- C. It is proper to include information, provided its dissemination does not violate the provisions of DR 2-101(A), as to:
1. **legal and nonlegal** education, degrees and other scholastic distinctions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by the Code of Professional Responsibility; public offices and teaching positions held; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency;
 2. names of clients regularly represented, provided that the client has given prior written consent;
 3. bank references; credit arrangements accepted; prepaid or group legal services programs in which the attorney or firm participates; **nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by DR 1-107, and the nature and extent of services available through those contractual relationships;** and
 4. ~~legal~~ fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by DR 2-101(L) of this section; range of fees for **legal and nonlegal** services, provided that there be available to the public free of charge a written statement

clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal **and nonlegal** services.

- D. Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in DR 2-101(C) that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this Rule.

* * *

DR 2-102 Professional Notices, Letterheads, and Signs.

- A. A lawyer or law firm may use professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule, and are in accordance with DR 2-101, including the following:
1. A professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under **DR 2-101(C), DR 2-101(D) or DR 2-105.** A professional card of a law firm may also give the names of members and associates.
 2. A professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm **or of any nonlegal business conducted by the lawyer or law firm pursuant to DR 1-106.** It may state biographical data, the names of members of the firm and associates and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the **legal** practice if permitted under DR 2-105.
 3. A sign in or near the office and in the building directory identifying the law office **and any nonlegal business conducted by the lawyer or law firm pursuant to DR 1-106.** The sign may state the nature of the **legal** practice if permitted under DR 2-105.
 4. A letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under **DR 2-101(C), DR 2-101(D) or DR 2-105.** A letterhead of a law

firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

- B. A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "P.C." or such symbols permitted by law, the name of a limited liability company or partnership shall contain "L.L.C.," "L.L.P." or such symbols permitted by law, and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like, may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. **A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to DR 1-107 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith.** A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit his or her name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

DR 2-103 Solicitation and Recommendation of Professional Employment

* * *

B. A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

1. A lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to an agreement or other contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by DR 1-107; or
2. A ~~a~~ lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.

* * *

ETHICAL CONSIDERATIONS

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EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to select a lawyer. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Although communications involving puffery and claims that cannot be measured or verified are not specifically referred to in DR 2-101, such communications would be prohibited to the extent that they are false, deceptive or misleading. In disclosing information, by advertisements or otherwise, relating to a lawyer's legal or nonlegal education, experience or professional qualifications, the nature or extent of any nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer, or the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent

permitted by DR 1-107, and the nature and extent of services available through those contractual relationships, special care should be taken to avoid the use of any statement or claim which is false, fraudulent, misleading, deceptive or unfair, or which is violative of any statute or rule of court. A lawyer who advertises in a state other than New York should comply with the advertising rules or regulations applicable to lawyers in that state.

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CHAPTER 12

APPENDIX B

SUMMARY OF POSSIBLE AMENDMENTS TO THE
ABA MODEL RULES OF PROFESSIONAL CONDUCT
(MARKED TO SHOW CHANGES TO THE EXISTING RULES)

RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED NONLEGAL SERVICES

~~(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:~~

~~(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or~~

~~(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.~~

~~(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.~~

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules of Professional Conduct with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from any legal services being provided to that person is subject to these Rules of Professional Conduct with respect to the nonlegal services if a disinterested person would conclude that the person receiving the services could reasonably believe the services are the subject of an attorney-client relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity providing nonlegal services to a person is subject to these Rules of Professional Conduct with respect to the nonlegal services if a disinterested person would conclude that the person receiving the services could reasonably believe the services are the subject of an attorney-client relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3) above, and in the absence of circumstances requiring additional communications, it will be presumed that the person receiving nonlegal services could not reasonably believe the services to be the subject of an attorney-client relationship if the lawyer or law firm has advised the person in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rules 1.6(a) and 1.8(b) not to reveal information relating to the representation of a client receiving legal services.

(c) For purposes of Rule 5.7, “nonlegal services” shall mean those services that lawyers may lawfully provide and that are not prohibited as the unauthorized practice of law when provided by a nonlawyer.

Comment

[1] For many years, lawyers have provided to their clients nonlegal services that are ancillary to the practice of law. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. When a lawyer performs law-related **nonlegal** services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related **nonlegal** services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related **nonlegal** services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related **nonlegal** services when that may not be the case.

[2] The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, confusion by the recipient is likely to be unavoidable as to whether and when the relationship is protected as a client-lawyer relationship. Therefore, Rule 5.7(a)(1) requires generally that the lawyer providing nonlegal services adhere to all of the requirements of the Rules of Professional Conduct. Rule 5.7(a)(1) applies to the provision of nonlegal services by a lawyer even when the lawyer is not personally providing any legal services to the person for whom the nonlegal services are being performed if the person is also receiving legal services from another lawyer in the firm that are not distinct from the nonlegal services.

~~{2}~~ [3] Rule 5.7 applies to the provision of law-related **nonlegal** services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related **nonlegal** services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related **nonlegal** services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related **nonlegal** services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

~~{3}~~ [4] **Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, Rule 5.7(a)(2) requires that the lawyer providing the nonlegal services adhere to the Rules of Professional Conduct, unless exempted by Rule 5.7(a)(4).** When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1):

~~{4}~~ [5] Law-related **Nonlegal** services also may be provided through an entity that is distinct from that through which the lawyer provides legal services **with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, Rule 5.7(a)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all the Rules of Professional Conduct, unless exempted by Rule 5.7(a)(4).** If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case:

~~{5}~~ When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related nonlegal service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a):

[6] **The Rules of Professional Conduct will be presumed not to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if the lawyer complies with Rule 5.7(a)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to communicate the desired understanding. For example, while the written disclaimer set forth in Rule 5.7(a)(4) will be**

adequate for a sophisticated user of nonlegal services, such as a publicly held corporation, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services. In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

~~[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.~~

~~[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity which the lawyer controls complies in all respects with the Rules of Professional Conduct.~~

~~[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.~~

~~[10] [7] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(b) and 1.8(a),(b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related **nonlegal** services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.~~

~~{++}~~ [8] Although a lawyer may be exempt from the application of the Rules of Professional Conduct on the face of Rule 5.7(a), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Rules that are dependent upon the existence of a representation or attorney-client relationship. Other Rules, such as those prohibiting lawyers from engaging in unlawful or dishonest conduct (Rule 8.4), requiring lawyers to report certain attorney misconduct (Rule 8.3), and prohibiting lawyers from misusing confidential information of a former client (Rules 1.6 and 1.8(b)), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer otherwise exempt under Rule 5.7(a). When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

RULE 5.8 CONTRACTUAL RELATIONSHIPS BETWEEN LAWYERS AND NONLEGAL PROFESSIONALS

(a) A lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other professional services, provided that:

(1) The profession of the nonlegal professional or nonlegal professional service firm is a profession listed by the [high court of the state] pursuant to Rule 5.8(b); and

(2) The lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with, the practice of law by the lawyer or law firm.

(b) For purposes of Rule 5.8(a):

(1) Each profession on the list maintained by the [high court of the state] shall have been designated by it, or shall have been approved by it upon the application of an individual or firm in this State, upon a determination that the profession is composed of individuals who, with respect to their profession:

(i) have been awarded a Bachelor's Degree or its equivalent from an accredited college or university;

(ii) are licensed by this State; and

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

(2) The term “ownership or investment interest” shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) Rule 5.8(a) shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

(d) Notwithstanding Rule 5.4(a), a lawyer or law firm may allocate costs and expenses with a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship permitted by Rule 5.8(a).

Comment

[1] Rule 5.8 permits lawyers to enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services provided the nonlegal professional or nonlegal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm. Examples of the activities in which the nonlegal professional or nonlegal professional service firm may not play a role include the decision whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, the hiring and training of lawyers, the assignment of lawyers to handle particular matters or to provide legal services to particular clients, decisions relating to the undertaking of *pro bono publico* and other public-interest legal work, financial and budgetary matters relating to the legal practice, and the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

[2] The contractual relationship permitted by Rule 5.8 may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. It may also provide for the sharing of premises, general overhead, or administrative costs and services on an arm’s length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted notwithstanding that they involve the exchange of value for client referrals and, technically, a sharing of professional fees, matters that are dealt with specifically in Rules 7.2(c) and 5.8(d).

[3] Similarly, lawyers participating in such arrangements remain subject to general ethical principles in addition to those set forth in Rule 5.8 including, at a minimum, Rules 1.7(b), 5.4(c), 5.4(d) and 7.5(d). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, or enter into formal partnerships with nonlawyers, or practice in an organization in which nonlawyers own any interest. Likewise, a law firm’s interest in maintaining an advantageous relationship with a nonlegal professional service firm might, in certain

circumstances, adversely affect the independent professional judgment of the law firm creating a conflict of interest subject to Rule 1.7(b).

[4] Each lawyer and law firm having a contractual relationship under Rule 5.8 has an ethical duty to observe these Rules of Professional Conduct with respect to its own conduct in the context of the contractual relationship. For example, the lawyer or law firm cannot permit its obligation to maintain client confidences as required by Rules 1.6 and 1.8(b) to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in Rule 8.4(a) against a lawyer or law firm circumventing a Rule of Professional Conduct through actions of another applies generally to the lawyer or law firm in the contractual relationship.

[5] When in the context of a contractual relationship permitted under Rule 5.8 a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional services firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional service firm to handle the relevant affairs and interests of the client. Referrals should only be made when requested by the client or deemed to be reasonably necessary to serve the client.

[6] To assure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under Rule 5.8 only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards as regards ethics, education, training, and licensing. The [high court of the state] maintains a public list of eligible professions. Individuals and firms in this state may apply for the inclusion of particular professions on the list, or professions may be added to the list by the [high court of the state] *sua sponte*. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing basis, but only to engage a nonlawyer on an *ad hoc* basis to assist in a specific matter, is not governed by Rule 5.8 when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with Rule 5.8. Likewise, the requirements of Rule 5.8 need not be met when a lawyer retains an expert witness in a particular litigation.

[7] Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by Rule 5.8 as a single law firm for purposes of these Rules of Professional Conduct, as would be the case if the nonlegal professional or nonlegal professional service firm were in an "of counsel" relationship with the lawyer or law firm. The principal effect of such a relationship would be that conflicts of interest would be imputed as between them pursuant to Rule 1.10. To the extent that the rules of ethics of the nonlegal profession conflict with these Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal

obligations arising from a relationship with nonlawyer professionals who are themselves subject to regulation.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that

(1) a lawyer may

(i) ~~(1)~~ pay the reasonable costs of advertisements or communications permitted by this Rule;

(ii) ~~(2)~~ pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

(iii) ~~(3)~~ pay for a law practice in accordance with Rule 1.17.

(2) **a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to an agreement or other contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8.**

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment

and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; the nature or extent of any nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

[6] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

[7] Reciprocal referrals of clients by and between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm pursuant to an interprofessional contractual arrangement permitted by Rule 5.8 are excluded from the scope of Rule 7.2(c).

