

Pub 662

PRIVATE INVESTMENTS ABROAD 1998

Chapter 7

**Future Role of Merged Law and Accounting Firms*
What If ...?
The Consequences of Court Invalidation of
Lawyer-Accountant Multidisciplinary Partnership (MDP) Bans**

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7.01. Introduction.

In February 1997, the Administrative Law Section of the District Court of Amsterdam upheld two Netherlands Bar Association rulings providing that it was improper for Dutch attorneys to be in partnership with the accounting firms Price Waterhouse and Arthur Andersen, respectively.¹ Price Waterhouse, Arthur Andersen, and the affected lawyers, J.W. Savelbergh and J.C.J. Wouters, have appealed these decisions to the Dutch Council of State. Briefs are expected to be filed in 1998 and a hearing will be scheduled later in 1998.² Numerous interested parties, including the European Bar Association (called the CCBE), are closely monitoring the outcome of this case.³

Meanwhile, in the United States, the issue of the propriety of multidisciplinary partnerships between lawyers and accountants similarly may be poised to come before the courts. An administrative complaint has been filed against Arthur Andersen with the Texas Supreme Court's unauthorized practice of law committee, charging that Andersen engaged in the unauthorized practice of law by offering "attorney only" services and filing petitions in the Tax Court; the Texas State Bar apparently is also investigating a complaint filed against Andersen tax attorneys for splitting fees with nonlawyers, namely their CPA partners.⁴ Should the Texas unauthorized practice of law committee find sufficient cause, it may sue in court for an injunction against Andersen.

¹See "Inside: Accountants Lose Dutch Bar Case," *Int'l Fin. L. Rev.* 4 (March 1997). A translation of the court's opinion in *Wouters et. al. v. the General Council of the Dutch Order of Attorneys [NOVA]*, by Clasina B. Houtman Mahoney, is attached to this article as Appendix A.

²Letter from Johan Boeren, Price Waterhouse Lawyers and Legal Consultants, Amsterdam, to Laurel S. Terry (Mar. 18, 1998) and Telephone Interview with Johan Boeren (Mar. 17, 1998).

³Appendix A, N. 1 *supra* at 23-24 (the court denied the CCBE's request to participate as a party in the lawsuit, but recognized its strong interest in the case). For a discussion of the CCBE, see generally Terry, "An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct," 7 *Geo. J. Legal Ethics* 1, 11-15 (1993) [hereafter Terry, CCBE Code Part I].

⁴See Jacobs, "Texas Case Crystallizes Competitive Practice Issues for Major Firms," *Of Counsel* (Feb. 16, 1998) at 1, 6, 8; Beltran, "Turf War Between Attorneys and Accountants Becomes Nasty," 11 *Accounting Today* 5 (Nov. 24, 1997), available in NEXIS, ALLNEWS database.

This article explores the consequences that might occur if a court, such as the Dutch Council of State or the Texas Supreme Court, were to invalidate existing prohibitions on partnerships between lawyers and accountants, which are referred to here as multidisciplinary partnerships or MDPs. The article begins with an overview of the MDP phenomenon. Section 7.03 examines the responses of various bar associations to the MDP phenomenon. Section 7.04 summarizes *Wouters et. al v. The General Council of the Dutch Order of Attorneys [NOVA]*, which is one of the first cases to consider an MDP ban. The remainder of the article analyzes the effect on U.S. legal ethics rules that would occur if a court were to invalidate the current ban on multidisciplinary partnerships, as the Dutch court has been asked to do. In other words, this article seeks to answer the question: "What if a U.S. court were to invalidate an MDP ban?"

7.02. The MDP Phenomenon.

During the 1990s, the "Big Six" accounting firms began hiring more and more lawyers and offering services they previously had not. In addition to their traditional services of auditing, tax advice, and business management, the Big Six accounting firms began expanding services to include the following: estate planning; litigation support, such as dispute resolution; and front-end services, such as investigation, discovery and valuation, business planning advice (including issues of environmental compliance, labor law compliance and employee benefits issues), and financial planning.⁵ For the most part, the U.S. legal profession was relatively silent as this phenomenon developed.⁶ During 1997-1998, however, this issue received widespread attention in the United States.⁷

While the majority of U.S. lawyers did not react to the MDP phenomenon until recently, lawyers elsewhere in the world have been looking at it for some time. In 1988, for example, a CCBE working party began studying the MDP issue. Following discussions at the CCBE Plenary Sessions in 1989, 1991 and 1993, the CCBE, in November 1993, adopted a *Declaration on Multidisciplinary Partnerships*. In 1996, the CCBE unanimously confirmed its 1993 Declaration, which concludes that multidisciplinary partnerships between

⁵See, e.g., Bower, "Multidisciplinary Partnerships-The Future," (1997) at 155, *reprinted in Global Law in Practice* (Harper Ed., 1997) [hereafter Bower]; MacDonald, "Legal Beat: Accounting Firms Hire Lawyers and Other Attorneys Cry Foul," *Wall St. J.* (Aug. 22, 1997) (reporting that Coopers & Lybrand consults on tax work, human resources, benefits and stock option plans); Gibeaut, "Squeeze Play," *ABA J.* (Feb. 1998) at 42, 43-44; Arthur Andersen Web Page, <http://arthurandersen.com/homepage/html> (visited June 10, 1998).

⁶One exception was the legal consulting firm of Altman, Weil, Pensa, Inc. It began advising its law firm clients to plan for increased competition from the Big Six firms. See generally Bower, N. 5 *supra*; see also Greer, "Professional Services in the Global Economy: Implications of 'One Stop Shopping,'" *Int'l Bus. L.* (March 1996) at 132.

⁷The topic of MDPs was part of the Presidential Global Showcase at the August 1997 ABA Annual Meeting in San Francisco. One of the participants in this panel, Charles W. Wolfram, distributed his paper, "'Multi-Disciplinary Partnerships' in the Law Practice of European and American Lawyers" (1997) (on file with author). In February 1998, the ABA Journal ran a cover story on the MDP phenomenon. See Gibeaut, N. 5 *supra*. In May 1998, a plenary session at the 24th National ABA Conference on Professional Responsibility addressed the topic of lawyer-accountant MDPs. See ABA Center for Professional Responsibility, 24th Nat'l Conf. on Prof'l Resp. Course Materials (May 28, 1998) at Tab 1 [hereafter 1998 Montreal ABA Ethics Conference]. The affiliation of lawyers entitled *Lex Mundi* has devoted part of its web page to MDPs. See <http://www.hg.org/multi.html> (visited Feb. 20, 1998).

lawyers and members of nonlegal professions should not be permitted.⁸

Moreover, it appears likely that lawyers in Europe generally, rather than just upper-echelon bar leaders, were aware of this issue. In 1993, for example, the news magazine *Lawyers in Europe* covered the MDP issue in two separate issues.⁹ In 1992, a "Lawyers 2000" conference in Austria addressed the issue of accountants as likely future competitors to lawyers.¹⁰

The International Bar Association also appears to have tuned into this issue earlier than did U.S. lawyers. In 1996, the International Bar Association issued a book to commemorate its Fiftieth Anniversary, one chapter of which was devoted to the MDP phenomenon.¹¹ In 1997, the International Bar Association President appointed a committee to study the MDP issue; the IBA Council approved the Committee's Draft Position Paper in principle in June 1998.¹²

The greater sensitivity to the MDP issue by non-U.S. lawyers may result from the fact that the majority of lawyers in the Big Six Firms work outside of the United States. For example, a November 1997 International Financial Law Review article reported statistics showing the number of lawyers working for the Big Six Firms providing tax consulting services and other services:¹³

⁸See The Council of the Bars and Law Societies of the European Community [hereafter CCBE], *Declaration on Multidisciplinary Partnerships* (unanimously confirmed at the CCBE Plenary Session held in Brussels on Nov. 29, 1996) (on file with author).

⁹See Carr, "Any Other Business? Multi-Disciplinary Partnerships and All That," 25 *Law. in Europe* (Aug./Sept. 1993) at 15; Carr, "Any Other Business?" 28 *Law. in Europe* (Dec. 1993/Jan. 1994) at 18.

¹⁰See "Berichte: Rechtsanwalt 2000-der Zeitgeàe Rechtsanwalt-Tradition im Wandel," *Anwalts Blatt* (1992) at 34.

¹¹See Bower, N. 5 *supra*.

¹²See "IBA to Prepare MDP Paper," *Int'l Fin. L. Rev.* (Aug. 1997) at 5 (regarding formation of a drafting group); Letters from Ward Bower, Chair, IBA Standing Committee on Multidisciplinary Partnerships, to Laurel Terry (June 6, 1998 and June 11, 1998) (reporting approval of draft, in principle, by IBA Council).

¹³See Cannon, "The Big Six Move In," 50 *Int'l Fin. L. Rev.* 25 (Nov. 1997) [hereafter "Big Six Move In"]. The statistics for KPMG may not, in fact, be comparable to the other listings, since the article identified 1,125 as the "number of professionals spending more than 50 percent of time on legal services." *Id.* at 27-28.

Based on the figures in this article, if the planned merger between Coopers & Lybrand and Price Waterhouse is completed, the merged firm of Coopers Price Waterhouse would have 1,112 tax lawyers and 2,700 non-tax lawyers, for a total of 3,812 lawyers. The figures for Price Waterhouse and Coopers & Lybrand did not identify any "nontax" lawyers in the United States, and did not separately list the number of tax lawyers in the United States.

Firm	Tax Lawyers	Other Lawyers	Total Lawyers Worldwide	Total U.S. Lawyers
Arthur Andersen	924	700	1624	2 Nontax
Ernst & Young	—	—	1297	700
Deloitte & Touche	397	1132	1529	650 Tax 85 Nontax
KPMG Peat Marwick	—	—	1125 ¹⁴	—
Coopers & Lybrand	477	1200	1677	—
Price Waterhouse	635	1500	2135	—

As this International Financial Law Review article and other articles have pointed out, the Big Six Accounting Firms not only rank among the largest law firms worldwide, but also rank among the largest law firms in some individual countries.¹⁵

Moreover, the pace of MDP activities seems to be increasing. A recent paper by Professor Charles Wolfram summarized MDP activity up to the August 1997 ABA Annual Meeting.¹⁶ In the ten months after the 1997 ABA Annual Meeting, there were numerous reports of mergers between the Big Six firms and law firms, of preemptive action taken by bar associations or other regulatory entities to prevent such mergers, and of the likely impact of MDPs in a country. These recent reports include the following:

- Belgium: The Belgian firm Bogaert & Vandemeulebroeke, a split-off from De Backer & Associates, linked up with Price Waterhouse. Because of Belgian bar rules, the relationship was described as “informal.”¹⁷
- Canada: A January 1998 article reported, *inter alia*, that Ernst & Young recently entered the

¹⁴KPMG was the only one of the Big Six firms whose listing did not refer to “lawyers” but instead only referred to “legal advisors.” *Id.*

¹⁵See, e.g., Wigham, “Big Six Make the Running in a Tight French Field,” *Int’l Fin. L. Rev.* (Aug. 1997) at 33. See also Cannon and Preston, “Europe’s Top Tax Advisers,” *available under* “Topics/Legal Profession” at International Financial Law Review Home Page, <http://lawmoney.com> (reporting on the top tax advisers throughout Europe, including four of the Big Six among the top eight tax advice firms in Belgium and Norway, four of the Big Six among the top seven tax advice firms in Denmark, four of the Big Six among the top six tax advice firms in Finland, five of the Big Six among the top nine tax advice firms in France, five of the Big Six among the top seven tax advice firms in Spain and Switzerland, all of the Big Six among the top thirteen tax advice firms in the United Kingdom, and all of the Big Six among the top eight tax advice firms in Germany, Ireland, Sweden and the Netherlands).

¹⁶See generally Wolfram, N. 7 *supra*.

¹⁷See “Price Waterhouse Adds Polish and Belgian Law Firms,” *Int’l Fin. L. Rev.* (Feb. 1998) at 3; see also “Benelux Firms Resist International Competition,” *Int’l Fin. L. Rev.* (Apr. 1998) at 39.

Canadian legal market through its link with Toronto's Donahue & Associates. Ernst & Young reportedly is the first of the Big Six to enter the Canadian market, but few expect it to be the last.¹⁸

- Denmark: A consultant to the Danish Law Society recently predicted that unless action is taken, 500 to 600 existing law firms will disappear within the next few years, highlighting the threat posed by the Big Six. Among other developments, two partners recently left Denmark's largest law firm in order to set up their own firm in association with Arthur Andersen.¹⁹
- England: The United Kingdom law firm Wilde Sapte voted, by 90 percent, to join the Arthur Andersen legal network. After departures by some of Wilde Sapte's leading partners, however, Andersen cancelled the agreement and announced that it would look for other partners; Andersen had been searching for a partner in the United Kingdom to bolster Garrett's mid-level corporate client base. Before the Wilde Sapte/Andersen agreement fell apart, Chris Arnheim, managing partner of the Price Waterhouse affiliated firm Arnheim & Company, had said that he was pleased with the move, noting: "It is a sign that the market is moving in our direction. We are talking to a lot of firms and this will make partners think more seriously about linking with accountancy firms."²⁰
- Finland: A survey of the Finnish legal market reported that the Big Six's strong tax practices provide intense competition for law firms, but that few Finnish lawyers see the Big Six as a threat in other areas. Among other reasons, the lawyers quoted doubted that the Big Six could attract either clients or lawyers in Finland.²¹
- France: An August 1997 International Financial Law Review article explored how French firms were coping with the challenge presented by the Big Six and international competitors. Because of the 1992 merger of French *avocats* and *conseil juridiques*, the Big Six have a particularly strong position in France.²² The National Bar Council in France and the Paris Bar Association recently adopted a report recommending the conditions under which auditors and

¹⁸See Paul Lee, "Canadian Firms Prepare for Foreign Invasion," *Int'l Fin. L. Rev.* (Jan. 1998) at 33.

¹⁹See Hepburn, "End of the Line for Cosy Danish Closed Shops," *Int'l Fin. L. Rev.* (July 1997) at 45.

²⁰See "Andersen to Go on a Hiring Spree After Jilting Wilde Sapte," at <http://www.lawmoney.oyster.co.uk/public/news/hotnews/news9806/news980604.1.html> (Visited June 7, 1998) [also available by selecting "Topics" and then "Legal Profession" from the "lawmoney.com" homepage; "Wilde Sapte Links with Arthur Andersen," *Int'l Fin. L. Rev.* (Apr. 1998) at 4; see also "Andersen Law Firm Expands," *Int'l Fin. L. Rev.* (Feb. 1997) at 5 (noting that Garrett & Co., the U.K. law firm linked to Arthur Andersen, opened its sixth office in the United Kingdom, in Cambridge). An April 1997 article reported more generally on competition to U.K. firms from U.S., regional and Big-Six-linked firms. Wigham, "UK Lawyers Enjoy the Boom But Face New Competition," *Int'l Fin. L. Rev.* (Apr. 1997) at 37 (summarizing the U.K. legal market and competition from MDPs).

²¹See Hepburn, "Finnish Firms Look to Restructure," *Int'l Fin. L. Rev.* (May 1997) at 37, 38.

²²See "Big Six Move In," N. 13 *supra* at 35. See also Zach, "Competition and Conflict in Paris," *Int'l Fin. L. Rev.* (Nov. 1995) at 22 (summarizing threat to France's legal firms from the Big Six).

lawyers could be in partnership.²³

- Norway: A survey of the Norwegian legal market reported, *inter alia*, that an associate in Norway's largest law firm, who had been approved for partnership, recently left to join Arthur Andersen's law firm. Andersen has twenty-three lawyers in Norway and expects to double its size within three years. Coopers & Lybrand intends to become Norway's biggest firm.²⁴
- Poland: Price Waterhouse reportedly added the Polish law firm Krzysztof Wierzbowski to its international network. The new firm consists of Wierzbowski, who left Baker & McKenzie's Warsaw office, and five other lawyers, some recruited from Price Waterhouse's existing Polish tax and legal services department. The firm reportedly remains independent of Price Waterhouse because of Poland's regulations on MDPs.²⁵
- Portugal: A survey of the Portuguese legal market found that although the Big Six have made significant inroads into the French and Spanish legal markets, the Portuguese have managed to keep them at bay because of some very stiff regulation. One of the major accounting firms was recently hauled before the courts for giving a legal opinion and billing a client for legal advice. The case is going to trial, and the senior partner of the firm could be found criminally liable. It is a widely-held belief among Portuguese lawyers that the accountants are involved in providing legal services, usually through a captive law firm. Local lawyers also claim it is common knowledge which auditors are using which firms, but each accuses the other of being on the auditors' payroll.²⁶
- Spain: A survey of the Spanish legal market reported on defensive moves taken by Spanish law firms in response to the merger of one of Spain's leading law firms, J&A Garrigues, and the Arthur Andersen legal network. J&A Garrigues, Andersen y C'ia was created by the January 1997 merger of the Garrigues firm with Arthur Andersen Asesores Legales y Tributarios, already one of the largest law firms in Spain. The article also reported that five of the Big Six firms were among the top ten law firms in Spain, measured by the number of billings.²⁷
- Sweden: A February 1998 article reported that for the second time, the Swedish Bar Association forced Wahlin Adokatbyra to dismantle its links with the Big Six firm, KPMG. The Swedish Bar previously had ordered the firm to drop KPMG from its name. The recent action requires the Swedish lawyers to abandon the cooperation agreements between the two firms or face disbarment.²⁸

²³See Batonnier Dominique de la Garranderie, Written Remarks at the Ordre des Avocats a la Cour de Paris and The Association of the Bar of the City of New York, Conference on Multidisciplinary Legal Practice: Opportunities and Challenges for the Future (June 8, 1998) (on file with author) (hereafter Batonnier's Remarks).

²⁴See Wigham, "Norwegian Firms Await Inevitable Invasion," *Int'l Fin. L. Rev.* (July 1997) at 35, 37.

²⁵See "Inside: Price Waterhouse Adds Polish and Belgian Law Firms," *Int'l Fin. L. Rev.* (Feb. 1998) at 3.

²⁶See Ferguson, "Portugal's Lawyers Resist Accountants' Rise," *Int'l Fin. L. Rev.* (Oct. 1997) at 38.

²⁷See Ferguson, "Spanish Firms Regroup to Prepare for a Turbulent Future," *Int'l Fin. L. Rev.* (Oct. 1997) at 38.

²⁸See "Swedish Bar Forbids Link-Up," *Int'l Fin. L. Rev.* (Mar. 1998) at 3.

The increasing pace of MDP activity in Europe seems likely to migrate to the United States in the near future. In addition to unauthorized practice of law challenges such as the one in Texas, the Big Six firms may begin to accelerate the pace at which they form alliances with U.S. law firms, just as they have done in Europe. Within the last year, Price Waterhouse and the Washington D.C. "tax boutique" law firm Miller & Chevalier announced a strategic alliance.²⁹ Although Washington is the only jurisdiction that permits lawyers and nonlawyers to be partners and to split fees, some commentators assert that this was a significant step on the path the Big Six firms are taking toward offering comprehensive legal services in the United States.³⁰ Gerald Lambert, director of global tax services at Deloitte Touche Tohmatsu, was quoted recently as saying that his firm wants to offer legal services to the extent that they complement the firm's full range of professional services: "It seems inevitable that existing U.S. restrictions will be challenged. Our clients want a seamless global service."³¹ Observers speculate that Price Waterhouse is gearing up for a relaxation in the U.S. regulations that inhibit the growth of legal services in accounting firms.

Price Waterhouse is not the only firm that is the subject of such speculation.³² Ernst & Young makes much of its claim to employ more lawyers (in excess of 700) in the United States than any law firm, although the International Financial Law Review figures place the firm seventh.³³ In sum, the Big Six firms now provide services in the United States that traditionally have been considered to be legal services. Thus, it seems inevitable that U.S. courts soon will have to examine the validity of state ethics restrictions on multidisciplinary partnerships between lawyers and accountants, just as happened in the Netherlands.

7.03. Bar Association Responses to the MDP Phenomenon.

Wherever lawyer-accountant partnerships have emerged, some (but not all) lawyers have offered arguments in opposition to them. Much of the opposition to MDPs has been coordinated through bar associations—the American Bar Association (ABA), the European Bar Association (called the CCBE), and the International Bar Association (IBA). Their arguments against MDPs differ from one another with respect to their specificity, as well as to their contents and emphases. Nevertheless, despite their differences, the arguments share at least some similar premises.

[1] The ABA's Response to MDPs.

The ABA has not yet taken an official position with respect to MDPs. Indeed, it was only in February 1998 that the ABA appointed a Working Group on Accountants and the Legal Profession.³⁴ This group was commissioned to gather facts, identify the issues presented by the recent trends in the profession, and report its findings to the ABA Board of Governors at the 1998 ABA Annual Meeting.³⁵ The ABA's delay in creating an

²⁹See "Big Six Move In," N. 13 *supra* at 25.

³⁰*Ibid.* See also District of Columbia Rules of Professional Conduct, Rule 5.4 (1996).

³¹See "Big Six Move In," N. 13 *supra* at 25.

³²*Ibid.*

³³*Ibid.*

³⁴See Letter from Carol Weiss, ABA Center for Professional Responsibility, to Laurel S. Terry (June 3, 1998) (on file with author).

³⁵*Ibid.*

MDP Task Force is undoubtedly due to the fact that, as noted earlier, the MDP issue seems only recently to have hit the “radar screens” of most U.S. lawyers.

Although the ABA has no official position with respect to MDPs, some ABA leaders clearly oppose them. Perhaps not surprisingly, given the recent emergence of the issue, most U.S. lawyers opposed to MDPs have used the most general of arguments against lawyer-accountant MDPs.³⁶ For example, in a cover story in the ABA Journal, ABA President Jerome J. Shestack used the following language to announce that he would ask for a task force to study the issue:

For the legal profession it’s a matter of maintaining independence. This is something that infringes on the traditional values of the legal profession I think the profession has served this country well and I don’t want it reduced to a balance sheet.³⁷

Larry Fox, an ABA leader, asked whether lawyers were going to wait “until the Huns are at our door” to sound the alarm over MDPs.³⁸ Thus, it will not be surprising if the ABA task force comes out against lawyer-accountant MDPs.

[2] The CCBE’s Response to MDPs.

In contrast to the ABA, the CCBE has taken an official position against lawyer-accountant MDPs. The CCBE’s opposition provides a more detailed statement of reasons than does ABA President Shestack’s comment quoted above. The *CCBE Declaration on Multidisciplinary Partnerships* contains six “Whereas” clauses and then declares that multidisciplinary partnerships between lawyers and nonlawyers should not be permitted.³⁹ The Declaration continues with a “survey of the main arguments of the CCBE [in support of its] conclusion that lawyers should not be allowed to enter into multidisciplinary partnerships with accountants or other members of nonlegal professions.”⁴⁰ The CCBE argued *first* that there is no need or demand for multidisciplinary partnerships including lawyers, nor is there any real advantages to clients of such MDPs. The CCBE Declaration asserted that the “one-stop shopping” purported advantage of MDPs has been cited by accounting firms, rather than by clients themselves; that lawyers and accountants can already cooperate; and that any advantages provided by a partnership in lieu of cooperation are offset by the resulting restrictions on a lawyer’s independence.

Second, the CCBE Declaration asserted that the independence of lawyers is inconsistent with MDPs. In particular, the Declaration asserts that in order for the lawyer to be able to suppress any personal interest that might be in conflict with the client’s interest, the lawyer must be able to be in command of the personal interests of his or her law firm, or at most, share this command with law partners who are subject to the same obligations. The Declaration notes its fear that if MDPs are permitted, lawyers would lose command of the

³⁶See generally “Squeeze Play,” N. 5 *supra*.

³⁷*Id.* at 45.

³⁸See Fox, “Accountant Bosses Pose Ethical Threat,” Nat’l L.J. (Oct. 6, 1997) at A23. Although the comments in this editorial are very general in nature, at the recent Montreal ABA Ethics Conference, see N. 7 *supra*, Mr. Fox moderated a panel in which he attempted to develop in detail the differences between accountants’ conflicts of interest rules and lawyers’ conflicts of interest rules.

³⁹See CCBE Declaration, N. 8 *supra*.

⁴⁰*Id.* at 3.

law firm and thus would lose their independence. Furthermore, one cannot expect an accountant to prefer the client's interest should they conflict with the interests of the accountant or of the joint firm. The Declaration also notes that clients benefit from the cross-control of advisors resulting from separate lawyer and accountant firms. The Declaration asserts that the profession of lawyer is incompatible with that of the accountant, because the same person could not simultaneously give legal advice to a client and act as the client's accountant or auditor.

Third, the CCBE Declaration argues that clients should be guaranteed a free choice of advisers. It notes two ways in which the client's freedom of choice might be restricted in an MDP: (a) the meaning of the word "lawyer" and the concepts and values underlying the profession would become blurred, resulting in the client's not being in a position to make an informed choice; and (b) auditors may exercise their market power by insisting that clients use the MDP firm. Thus, MDP firms may eventually monopolize the legal market, leaving few choices for clients.

Fourth, the lawyer's legal privilege might be compromised unless the legal privilege is extended to accountants. On the other hand, if the privilege were extended, the client's trust in the lawyer would be harmed, because auditors are under an obligation to disclose certain information to public officials. The Declaration also asserts that Chinese Walls are no solution, because they do not effectively protect the client.

Finally, the Declaration asserts that there are numerous other problems, including the determination of the professional code that should apply in case of conflict, the appropriate disciplinary authority, the ability of a jurisdiction to reserve to lawyers the giving of legal advice, and the effect on lawyers' duties to a court.

A weakness of the CCBE Declaration is its use of seemingly self-interested arguments that tend to undermine its credibility with respect to its other arguments. For example, the CCBE seems to be on quite shaky ground when it asserts, in its very first argument, that there is no client demand for lawyer-accountant MDPs. The clearest test of such demand is the market itself; the growth in MDP activity suggests there is client demand for such services. Moreover, even if the CCBE accurately forecasts the lack of client demand for MDPs in the long run, this lack of a market-by itself-does not require the prohibition of lawyer-accountant MDPs. In short, the CCBE's first argument is not based on client protection or public interest; arguably these are the only proper bases for regulation.

The CCBE's third objection to lawyer-accountant MDPs similarly casts a shadow over the rest of the CCBE's arguments. At least part of the CCBE's third argument is that *if* MDPs are permitted, *then* MDPs will acquire a monopoly, *i.e.*, MDPs will come to dominate the legal services market. One does not have to be too cynical to believe that the CCBE's primary objection might be its own loss of market share rather than protection of clients or the public interest. This sort of argument undermines the CCBE's opposition to MDPs. If the CCBE's opposition can be dismissed as an effort to protect lawyers' turf, then the CCBE's other, more legitimate, arguments may be dismissed as well.⁴¹

[3] The IBA's Response to MDPs.

⁴¹See, e.g., "Squeeze Play," N. 5 *supra* at 45 ("Although [ABA Tax Section Chair Phillip L. Mann] is certain the section will oppose accountant privilege, Mann is scratching his head to figure out just what argument will persuade Congress. 'As long as it looks like a turf thing, I think it would make us look like greedy people when lawyers already are getting a bum rap.'")

On June 6, 1998, the International Bar Association (IBA) Council voted to approve in tone and in principle the Position Paper of the Standing Committee on Multidisciplinary Partnerships, as revised at the meeting.⁴² The IBA Council intended to pass a resolution based on the revised Position Paper⁴³ at its meeting in Vancouver, Canada, in September 1998. The IBA Position Paper discourages lawyer-accountant MDPs, but does not unequivocally reject them. Unlike the CCBE Declaration, however, the IBA Position Paper provides a framework on which lawyers could oppose lawyer-accountant MDPs without seeming to be protecting their own turf.

The revised IBA Position Paper on Multidisciplinary Partnerships begins by listing the three premises on which the policy was based. The paper continues with what are, in essence, factual determinations. It concludes with three recommendations.⁴⁴

The first premise listed in the paper asserts that any position taken by the IBA or other organization of lawyers must have as its first objective the ready access to justice and legal services for every member of society, together with the preservation of the interests of the clients and the public, rather than the economic protection of lawyers.

The second premise in the IBA Position Paper warns that the MDP concept threatens the fundamental principles embodied in the IBA International Code of Ethics, particularly lawyer independence and client privilege. These principles underlie the provision of legal services and are designed to protect the public. The IBA asserted that if law is practiced within an MDP environment, ways must be found to preserve these principles.

The IBA Position Paper identifies as its third premise the belief that the IBA should urge regulators throughout the world to consider whether their MDP policies adequately address the independence, loyalty and confidentiality principles expressed in IBA Code of Ethics. If these principles cannot be adequately addressed, then MDPs should not be permitted.

The second section of the IBA Position Paper is entitled "Further Examination of the Problem." This section asserts, *inter alia*:

- (1) The position of lawyers is conditioned on the unique function of the rule of law;
- (2) Respect for the rule of law is a universal principle;
- (3) The rule of law requires heavy emphasis on adequate access to justice, for which lawyers are an essential element;

⁴²See Letters from Ward Bower, Chair, IBA Standing Committee on Multidisciplinary Partnerships, to Laurel S. Terry (June 6, 1998 and June 11, 1998).

⁴³*Id.*, June 6, 1998 Bower letter.

⁴⁴See International Bar Association Standing Committee on Multidisciplinary Partnerships, "Position Paper for submission to the IBA Council [as revised]" (on file with author) [hereafter IBA Position Paper]. See also "American Bar Association Section of International Law and Practice Report to the House of Delegates, Model Rule for the Licensing of Legal Consultants," 28 Int'l Law. 207 (1994) [hereafter ABA Model FLC Rule].

- (4) The proper functioning of the legal profession requires that clients are able to trust their lawyers and communicate with them frankly without fear of prejudicial effect. To that end, lawyers must work under circumstances that eliminate external influences, i.e., lawyers must be independent, must avoid involvement with more than one party when the parties have conflicting interests, and must observe confidentiality;
- (5) The reasons above explain why so many jurisdictions have similar requirements in the lawyer regulations;
- (6) These issues are unique to the legal profession, which plays a pivotal role in administering justice and upholding the rule of law;
- (7) The debate about MDPs requires a balancing of the commercial interests in favor of MDPs and the public interest in maintaining the essential principles and qualities of the legal profession; and
- (8) Principles safeguarding the core functions of the legal profession (independence, avoiding conflicting interests, and confidentiality) should be applied when addressing MDPs.

The IBA Position Paper concludes with three recommendations. The first two recommendations state that (1) the IBA should establish a permanent committee on MDPs, and (2) regulators should be made aware of the factors that make the legal profession unique, the problems and risks inherent in MDPs, and the threat MDPs may pose to the upholding of the rule of law, all of which would justify regulators' decisions to ban MDPs. The third and most lengthy recommendation states that regulators should be encouraged to provide rules on MDPs, which rules must address the three essential features of lawyers. The IBA Position Paper notes that the rules could range from prohibiting MDPs to regulating MDPs in such a way as to eliminate the risk of undermining the lawyer's independence, giving rise to conflicting interests, or eroding confidentiality and client privilege. This third recommendation was revised to state that elements of the proposed rules should include the following:

- (1) A requirement to disclose clearly the manner in which integrated cooperation with nonlawyers is effected and the interests represented in the organization;
- (2) Submission of the entire organization in question, including its nonlawyers, to the regulatory and disciplinary authority for the legal profession;
- (3) A requirement to notify clients of the limitations inherent in forms of integrated cooperation and the risks attached to them;
- (4) Precise rules on the avoidance of conflicting interests (e.g., excluding the possibility of combining audit and consulting services), and clear rules on the restriction of access to confidential information; and
- (5) Rules on setting out the minimum degree of ownership and/or voting control that lawyers must hold in MDPs.

The IBA Position Paper certainly contains isolated phrases that could be criticized as appearing to be motivated by lawyers' commercial interests, rather than the protection of the public or clients. For example, if a regulator has required nonlawyer professionals to comply with the regulatory authority of the legal profession, it is not clear that a "degree of ownership" provision clearly is required. In this writer's view, the IBA Position Paper represents, despite occasional lapses, the most articulate and principled basis for opposing MDPs. One must await developments to see whether such statements and bar association efforts will be enough to overcome the MDP market forces and credibility problems.

7.04. Court Evaluation of Bar Association Responses: *Wouters v. The Netherlands Bar Association*.

The Netherlands court's decision in *Wouters et. al v. NOVA* is interesting because it is one of the first of many cases that undoubtedly will have to address the conflict between the MDP phenomenon and a bar association's response to that phenomenon. *Wouters* was a consolidated appeal, arising from the actions of the General Council of the Dutch Order of Attorneys (NOVA) with respect to multidisciplinary partnerships between lawyers and accountants in Price Waterhouse and Arthur Andersen.

Wouters examined a NOVA regulation known as SV 93, which was adopted in 1993 pursuant to a statutory delegation of authority. SV 93 permits a lawyer to form a partnership with members of another profession only if the profession has been recognized by NOVA, as provided in Article 6 of that regulation. Although NOVA has recognized a number of professions, including notaries and tax advisers, NOVA has not recognized accountants as one of the professions with whom a lawyer may form a partnership. SV 93 also contains transition provisions exempting partnerships that were proper when SV 93 was enacted.

[1] Procedural Background.

Wouters consolidated two different appeals challenging two different decisions by NOVA. The first appeal stems from a July 5, 1995 determination by the Supervisory Board of the Order of Attorneys of the District of Amsterdam that the proposed partnership between appellant Savelbergh and Price Waterhouse Tax Consultants, Inc. did not comply with SV 93. Appellants Savelbergh and Price Waterhouse appealed that decision to NOVA. On November 21, 1995, after a hearing, respondent NOVA found the appeal to be baseless. This November 21 decision is one of the decisions appealed in *Wouters*.

The second decision at issue in *Wouters* was a November 29, 1995 decision by respondent NOVA. On January 1, 1991, Mr. J.C.J. Wouters formed a partnership with Arthur Andersen & Co., Tax Consultants and opened an office in Amsterdam. Although the Supervisory Board of the District of Amsterdam initially challenged Wouters' affiliation with Arthur Andersen, the parties agreed not to pursue the matter, provided Wouters complied with certain representations made on Wouters' behalf by his lawyer. Problems arose in 1994 when Wouters attempted to open a second office in Rotterdam. By letter dated November 3, 1994, Wouters informed the Supervisory Board of the District of Rotterdam of his intent to establish himself as attorney in Rotterdam commencing November 7, 1994. On July 14, 1995, the Supervisory Board of the District of Rotterdam determined that Wouters was in a partnership that violated SV 93, and that SV 93 also prohibited appellant Wouters from participating in a partnership that had in its joint name the name "Arthur Andersen." After Wouters appealed, respondent NOVA held a hearing and decided on November 29, 1995 that Wouters' appeal was baseless. This November 29 decision by NOVA is the second decision at issue in *Wouters*.

[2] *Wouters' Rulings.*

The *Wouters* decision upheld SV 93 (NOVA's lawyer-accountant MDP ban) and upheld NOVA's decisions that the particular lawyer-accountant partnerships in question were improper. In its thirty-page opinion, the Netherlands lower court addressed not only jurisdictional and factual issues specific to these cases and arguments specific to the Dutch and European contexts of the case, but also addressed arguments that one might expect to see in future challenges to MDP bans.

Although the *Wouters* court made numerous rulings, one of the most significant actions the court took was to place the burden of proof on the accountants to show that SV 93 was invalid. In addition, the court exercised a "standard of review" in which the court deferred substantially to the bar association's judgment regarding the desirability of an MDP ban. The key rulings of the *Wouters* court include the following.

[a] **Procedural Rulings.**

(1) The court denied the CCBE's request to participate in the proceeding as a party. The court recognized that the CCBE was watching the proceeding with more than average interest because the CCBE opposes MDPs, but the court stated that it could not see how the CCBE had its own interest, different from NOVA's interest, which would be affected by the decision.⁴⁵

(2) The court decided that it had jurisdiction to consider NOVA's actions because such actions constituted a "decision" subject to administrative appeal, even though appellant *Wouters* had not requested an initial ruling by NOVA.⁴⁶

(3) The court decided that it lacked jurisdiction to consider the appeals of Arthur Andersen & Co., Tax Consultants (hereafter AAB) and Arthur Andersen & Co., Accountants (hereafter AAA) because they did not file an administrative appeal with NOVA's General Council.⁴⁷

[b] **Dutch Law Rulings.**

(4) The court rejected *Wouters'* argument that the Supervisory Board of the District of Rotterdam lacked jurisdiction over him since he had not established or altered a "partnership" as prohibited by SV 93. *Wouters* had argued that he was covered by SV 93's transition provisions because he had established his partnership with Andersen before SV 93 was enacted and before he attempted to open a Rotterdam office. The court rejected this argument, reasoning that every Supervisory Board has its own authority with regard to the establishment of a partnership in that district. The court stated that the Attorney's Code confirms this decentralized administration. Thus, in order to establish a partnership, permission is required from the authorized Supervisory Board in each district. Therefore, the Supervisory Board of the District of Rotterdam was not bound by the decisions or promises made by the Supervisory Board of the District of Amsterdam, and, consequently, *Wouters* was not exempt from SV 93, because he did not have a partnership in Rotterdam that

⁴⁵See Appendix A, N. 1 *supra* at 23-24.

⁴⁶*Id.* at 24-26.

⁴⁷*Id.* at 27. The court decided that it could exercise jurisdiction over the appeals of *Wouters*, *Savelbergh*, and *Price Waterhouse*. *Ibid.*

predated SV 93.⁴⁸

(5) The court found that Wouters' partnership with Andersen violated SV 93, notwithstanding the use of a second Andersen entity. Although Wouters and Arthur Andersen provided only limited information, the court concluded that NOVA correctly had determined that through Wouters' partnership with AAB, he also had a partnership with AAA because there was a network, in which member firms, including tax advisers and accountants, shared responsibility and control over, among other things, the joint name, policy and mutual financial arrangements. The court observed that the advertising done by Wouters confirmed NOVA's point of view on this matter.⁴⁹

(6) After finding a violation of SV 93, the court held that appellants had not been able to persuade it that SV 93 was invalid. The court began by identifying the proper standard of review. Appellants had argued that SV 93 violates the principles of "reasonableness" and "equality," because it permits partnerships between lawyers and tax advisers, notaries, and patent attorneys, but not accountants. The court held that SV 93 does not *require* NOVA to promulgate regulations recognizing all professions that meet the listed criteria; instead, SV 93 grants NOVA discretion to act. The court therefore concluded that because NOVA has discretion, the court would review the nonrecognition of accountants *only marginally*, an approach which is equivalent to the standard of abuse of discretion in the United States.⁵⁰

(7) After applying the "marginal review" standard, the court determined that the disputed decisions could withstand review. The court relied on NOVA's assertions that there are fundamental differences between the jobs and positions of attorneys and those of accountants; that the interests of the good practice of law would be damaged if lawyers and accountants practiced together in a partnership in which they faced joint risk; that an accountant's primary job is to conduct audits, for which the accountant is obligated to give an objective account of the client's financial situation; that the accountant primarily serves the interests of those other than the client; and that an accountant has a public function, in which the accountant does not have the right to refuse to testify, whereas an attorney must always ensure that the interests of the client prevail, and for that purpose has the right to refuse to testify.

Appellants had argued that these distinctions were not sufficient to justify SV 93, since some of the other professions with which a lawyer *may* form a partnership (these include notaries, patent proxies, and tax consultants) also have obligations to third parties and lack the testimonial privilege of a lawyer. Appellants argued that permitting partnerships with certain nonlawyers, but not accountants, violates the principle of equality. The court rejected that argument by stating that it did not find the position of notaries to be completely similar to that of accountants. The court observed that notaries, unlike accountants, *do* have a duty of confidentiality and the right to refuse to testify.

⁴⁸*Id.* at 27-29.

⁴⁹*Id.* at 5, 29. At the court's request, the attorney for Wouters, Andersen AAB and Andersen AAA submitted the Member Firm Interfirm Agreement (hereafter MFIA). *Id.* at 5. The court found that this MFIA only regulated the partnership between AAB and Arthur Andersen S.C. The court observed that in addition to the submitted MFIA, other MFIA's existed regulating other parts of the Arthur Andersen organization, but Appellants had not been willing to provide these MFIA's. *Id.* at 29.

By letter dated October 10, 1995, NOVA submitted six questions to Savelbergh and Price Waterhouse. By letter dated November 10, 1995, the attorney for Savelbergh and Price Waterhouse responded that the form of the intended partnership had not yet been determined. The remainder of the questions were not answered on the ground that they were not relevant to the practice of law by Savelbergh. *Id.* at 8.

⁵⁰*Id.* at 31-32.

The court continued by stating that even if one doubts the correctness of permitting partnerships with notaries, it does not follow that the nonrecognition of accountants violates the principle of equality for that reason, because it does not mean that respondent deviated from policy in an unjust manner with regard to accountants.⁵¹

(8) The court rejected appellants' arguments that SV 93 violated Articles 8 and 18 of the Netherlands Constitution, which grant the freedom of association and the right to assistance of counsel.⁵²

(9) The court rejected appellants' arguments that SV 93 violated the Netherlands' antitrust laws.⁵³

[c] European and International Law Rulings.

(10) The court rejected appellants' arguments that NOVA's mandatory membership requirements violated the freedom of association found in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the International Covenant on Civil and Political Rights.⁵⁴

(11) The court rejected appellants' arguments that SV 93 violated various provisions of the applicable European Union treaties, including antitrust and "establishment" arguments. Interestingly, appellants Arthur Andersen and Wouters took a position different from that of appellants Price Waterhouse and Savelbergh with respect to whether they wanted the Dutch court to submit these questions to the European Court of Justice. The *Wouters* court rejected Price Waterhouse's request that it submit questions to the European Court of Justice, stating:

This court will not utilize its authority to pose questions. It follows from what was stated previously,

⁵¹*Ibid.*

⁵²See Appendix A, N. 1 *supra* at 33-34.

The court concluded that the right to freedom of association provided for in Article 8 of the Constitution can be restricted by law in the interest of public order. The court began its analysis by noting that every form of cooperation between attorneys and accountants must be viewed as an "association." The court concluded that because SV 93 prohibits only partnerships but not cooperations, it was not improper.

The court similarly found that the regulation of partnerships between accountants and attorneys did not restrict the right of anyone to have the assistance of counsel at law and on administrative appeal, as provided for in Article 18 of the Constitution.

Since the court found that no partnership right existed, it did not reach the question of whether appellants had any constitutional right, under Articles 7 and 10 of the Constitution, to practice in the partnership under a specified name. *Id.* at 34.

⁵³Appellants argued that SV 93 violated the Netherlands' antitrust laws. *Id.* at 15. NOVA responded by saying that the antitrust argument failed because Dutch competition law does not apply to legislation, and because any alleged violation of Article 9b WEM can only be litigated before the Secretary of Economic Affairs, and not before an ordinary court. *Id.* at 20. The court found the Dutch antitrust laws inapplicable. *Id.* at 35.

⁵⁴Appellants contended that Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and Article 22 of the International Covenant on Civil and Political Rights (1966) prohibit the mandatory membership requirements of NOVA, since NOVA's policies and their implementation severely restrict an individual's personal and professional freedoms and are not justified by any higher interest (the so-called "negative freedom of association"). *Id.* at 32-33.

The court rejected these arguments, citing, *inter alia*, the jurisprudence of the European Court for Human Rights, which shows that the forbidden "associations" are "private law associations." The court found that NOVA was a public law association not covered by Article 11. The court relied on the fact that NOVA was established by law, that its primary aim is public interest, namely the good practice of law, and that NOVA's purpose is not to represent the interests of its individual members. *Id.* at 33.

that it is this court's opinion that it does not need further information in order to make a decision. Therefore, there is no necessity to pose questions to the Court of Justice as provided for in Art. 117⁵⁵

[3] *Wouters on Appeal.*

As noted earlier, Price Waterhouse and the other *Wouters* respondents have appealed the lower court's decision. Briefs currently are being filed, and a decision is expected later this year. The success of this appeal will depend, in part, on whether the Dutch Supreme Court (or European Court of Justice) has the same vision of the legal profession as did the lower court, and whether the court is willing to use an "abuse of discretion" standard of review and defer to the bar's judgment.

Although the Dutch lower court considered many different sources of law, most of its rulings can be traced to its acceptance of NOVA's argument that the role of a lawyer in society is fundamentally different from the role of an accountant, and that a lawyer's role will be compromised through partnership with accountants.

NOVA argued, and the court appears to have agreed, that a lawyer-accountant MDP ban is justified because attorneys should be independent of third parties, should have the right not to testify, and must always represent the interests of their clients. The court believed that in contrast to these lawyer functions, the primary function of an accountant is to perform audits, which is not compatible with the position of trust that an attorney occupies. The court also concluded that if either the reality or the name "Arthur Andersen, attorneys and tax consultants" were permitted, the objectively justifiable distinction of lawyers as impartial and independent disappears, to the detriment of citizens. In other words, the lawyer-accountant MDP ban is

⁵⁵*Id.* at 42. Appellants had relied on Articles 5, 52, 85 and 86, and the principle of proportionality in the Treaty Establishing the European Union, in order to challenge NOVA's lawyer-accountant MDP ban; the court rejected all of these arguments. *Id.* at 36-42. The court found SV 93 proportional because it promotes lawyers' impartiality and independence, and goes no further than is necessary, since it does not prohibit all types of cooperation between attorneys and accountants, but only partnerships. *Id.* at 41.

With respect to the "establishment" arguments, the court first concluded that NOVA's lawyer-accountant MDP ban did not restrict the right of establishment, because both appeals involved attorneys established in The Netherlands who wished to enter into a partnership with partnerships or corporations were also established in The Netherlands and to which Dutch law applied. *Id.* at 40. Moreover, even if establishment were involved, SV 93 did not restrict establishment because it was nondiscriminatory, as shown by the fact that SV 93 did not distinguish between partnerships established in the Netherlands and those established elsewhere.

Alternatively, the court found that even if SV 93 restricted establishment, it was justified by compelling reasons of public interest. The court cited EU Treaty Article 52, which authorizes member states to establish the conditions for admission to the bar. The court concluded that in the absence of specific EU provisions, The Netherlands was free to regulate the practice of law on its own territory, as shown, among other things, by the opinion in the *Klopp* case (Court of Justice, July 12, 1984, #107/83). Finally, the court reasoned that every member state was authorized to subject the practice of law to rules of conduct. Because SV 93 protects the principles of impartiality and independence, SV 93 is valid. The court concluded its establishment discussion by noting that SV 93 satisfies the requirement that it be justified by compelling reasons of public interest, and that it be objectively necessary and proportional. *Id.* at 42.

With respect to appellants' antitrust arguments based on Articles 5, 85 and 86, the court ruled that NOVA was not a business organization because it did not promote the interests of lawyers, even though lawyers themselves were business owners. The court concluded that NOVA is a public law organization that was established by law to serve the public interest and that exercises legislative authority properly delegated to it. The court recognized that in the pursuit of that purpose, NOVA must guarantee the impartiality and independence of attorneys. The court found that NOVA does not do this in the interest of the individual attorneys who are (mandatory) members of NOVA, but in the public interest, which requires the adequate practice of law. The court therefore concluded that NOVA had not violated the antitrust provisions in Articles 85 or 86. *Id.* at 37-39.

justifiable within the framework of the public interest, in order to achieve a fair and accessible justice system, and is not intended merely to close off the legal market to competition by accountants. In sum, the *Wouters* court accepted, almost totally, the reasoning of the Netherlands Bar Association.

In this author's view, the *Wouters* opinion is vulnerable because of the lack of specific detail to counteract the appellants' arguments. If one does not already believe that the accounting and lawyering professions are incompatible, then the court's quite general statements probably will not convince him that the two professions are incompatible. Stated another way, the court has not refuted in detail the accountants' arguments that lawyers in MDPs can practice law in a manner in which (1) they represent their clients' interests, (2) they insist on the right to exercise independent legal judgment, and (3) they preserve their legal privilege. Furthermore, the *Wouters* court did not explain how lawyer-accountant MDPs are fundamentally different from some of the other MDPs in which nonlawyers are permitted by SV 93, even though not all of the nonlawyers receive the protections of the attorney-client privilege and even though some of those other professions owe obligations to persons or institutions other than the client.⁵⁶

Thus, it is quite conceivable that the Netherlands Supreme Court or the European Court of Justice could reach a contrary result and find the Netherlands MDP ban improper.⁵⁷ And, for similar reasons, it is quite conceivable that a U.S. court might also find that an MDP ban is unjustified.⁵⁸

7.05. What If ...A U.S. Court Were to Reject a State's MDP Ban?

As *Wouters* demonstrates, the Big Six firms are willing to invest significant resources in order to invalidate existing bans on lawyer-accountant MDPs. Thus, one must expect that sooner or later, the Big Six will challenge in U.S. courts those state ethics rules prohibiting MDPs. Moreover, because one must at least contemplate the possibility that a court will accept the Big Six arguments and find the MDP bans to be overbroad and unjustified,⁵⁹ it is worthwhile to think about the effect of such a ruling on the interpretation of

⁵⁶The court responded to this argument by noting first that NOVA had discretion with respect to selecting the professions with whom lawyers could be partners. Thus, even if accountants met the statutory requirements in SV 93, they had no right to be recognized. Second, the court distinguished notaries and accountants (although it did not distinguish notaries from the other professions identified by appellants.) Third, the court indicated that at oral argument, NOVA had questioned the appropriateness of partnerships between lawyers and notaries; therefore, accountants should not rely on the notary-lawyer partnership to further their argument. Appendix A, Translation of *Wouters*, N. 1 *supra* at 31-32.

⁵⁷Some experts have predicted that the Big Six stand a fair chance of winning at the European Court of Justice. See Carr I, N. 9 *supra* at 16 (a partner in a Dutch-Belgian firm, who was asked whether an MDP ban was contrary to EC law, stated, "I understand that advice has been sought from professors of EC law and contradictory answers have been obtained If the new rule is passed [against MDPs] and an accountant and a law firm wanted to enter into a cooperation they would stand a fair chance at the Luxembourg Court.").

⁵⁸A leading treatise, for example, states that the fee-splitting prohibition "may be politically and legally vulnerable in some jurisdictions as an irrational regulation of business." See Hazard and Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, § 5.4:103 (2d ed. 1998) [hereafter Hazard & Hodes].

⁵⁹It is beyond the scope of this article to consider whether the bar associations or the Big Six have the better argument. What is clear, however, is that the arguments used by MDP proponents and opponents are quite different. In Terry's view, the MDP opponents have tended to rely on rather general statements of fundamental principles (e.g., MDPs will compromise lawyers, core values of loyalty, confidentiality and independence). The Big Six agree that these fundamental principles are important, but argue that they are not compromised in an MDP context. From Terry's perspective as a legal ethics specialist, one of the weaknesses of most of the arguments in opposition to MDPs is that they are overbroad. For example, one commentator was recently heard to

lawyers' legal ethics obligations.

[1] U.S. Ethics Rules That Would Fall.

[a] ABA Model Rule 5.4(b), (d) on MDP Partnerships.

For a U.S. court to permit lawyer-accountant MDPs, it will have to strike down certain U.S. legal ethics rules. Currently, all U.S. jurisdictions except Washington, D.C. have adopted a rule similar to that found in ABA Model Rule of Professional Conduct 5.4.⁶⁰ ABA Model Rule 5.4(b) prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.⁶¹ ABA Model Rule 5.4(d) similarly prohibits a lawyer from practicing law in an association or professional corporation that includes nonlawyers.⁶² Thus, a court would have to invalidate this ethics rule in order for a lawyer-accountant MDP in the United States to deliver legal services.⁶³

justify the MDP ban by saying that a lawyer may not disclose past wrongdoing by a client, whereas an auditor must. It simply is not true that a lawyer may never disclose past wrongdoing of a client. While not convinced that the MDP opponents are wrong, Terry has not yet found their arguments convincing because they have not responded directly to the MDP proponents' arguments that they can maintain independence, loyalty and confidentiality. The opponents have not explained how MDPs are different from the many other situations in which we permit encroachments on a lawyer's independence, loyalty and confidentiality. Thus, it is conceivable to the author that a court could accept the Big Six arguments and invalidate existing bar rules as overbroad.

⁶⁰Because not all readers may be familiar with the U.S. regulation of lawyers, a brief overview may be helpful. In general, U.S. lawyers are regulated by state rather than on a national basis. Because of constitutional "separation of powers" concerns, the regulations governing U.S. lawyers usually are issued by an individual state's supreme court, rather than the state legislature. (The state supreme court usually considers, and often relies heavily on, the recommendations made by a state bar association.)

Approximately forty of the fifty U.S. states have adopted ethical regulations that are based on the 1983 *ABA Model Rules of Professional Conduct* developed by the American Bar Association (ABA). Some states, including New York, retained regulations that are based on the ABA's 1969 *Model Code of Professional Responsibility*. (California's rules of professional conduct are not based on either the *Model Code* or the *Model Rules*.) It should be noted that unlike the *Model Code*, most states did not adopt the *Model Rules* verbatim, but instead adopted them with changes. Furthermore, many of these state variations are *significantly* different from their *Model Rule* counterpart. (Examples of these state variations are found after each Model Rule in Gillers and Simon, *Regulation of Lawyers: Statutes and Standards 1998*.)

Even in Washington, D.C., MDPs are permitted only if the organization has as its sole purpose the provision of legal services. See District of Columbia Rules of Professional Conduct, Rule 5.4(b)(1) (1996). Interestingly, accountants are permitted to participate in MDPs only if accountants maintain a supermajority ownership in terms of financial interests and voting rights. See AICPA Council Resolution Concerning Form of Organization and Name (May 23, 1994) in American Institute of Certified Public Accountants, *AICPA Professional Standards*, ET Appendix B at 5131 (1996).

⁶¹See American Bar Association, Model Rules of Professional Conduct, Rule 5.4(b) (1983). As is discussed in more detail at N. 105 *infra*, one way U.S. lawyers in Big Six firms purport to avoid this rule is by claiming they are not practicing law. See Panel Discussion at the 1998 Montreal ABA Ethics Conference, N. 7 *supra*.

⁶²See ABA Model Rules, N. 61 *supra* at Rule 5.4(d). There are certain exceptions, however, such as permitting the representative of a lawyer's estate to hold such stock during administration.

⁶³It is beyond the scope of this article to set forth the justifications a court might offer when it invalidates the MDP ban. In a nutshell, however, a court conceivably could accept the accountants' arguments that lawyers should be permitted to participate in partnerships with nonlawyers, provided the lawyers comply with their ethical obligations of loyalty, independence and confidentiality, among others. A court might find that an absolute MDP ban is not necessary in order to ensure compliance with these other obligations and that the current MDP ban is overbroad.

[b] ABA Model Rule 5.4(a) on Fee-Splitting.

If the Big Six challenge a lawyer-accountant MDP ban in the United States, they likely will also argue that the state rule equivalents to ABA Model Rule 5.4(a) are invalid. Model Rule 5.4(a) provides that, except in a few narrow situations, a “lawyer or law firm shall not share legal fees with a nonlawyer.”⁶⁴ Some proponents of lawyer-accountant MDPs have argued that MDPs do not violate this provision because the MDPs share “profits,” not “legal fees.”⁶⁵ It seems likely, however, that if one of the Big Six challenged the MDP ban in the United States, it would ask to have this related ethics provision invalidated. Lawyers in the Big Six firms might argue that this provision is unnecessary and overbroad, because an absolute ban on fee-splitting with nonlawyers is not necessary in order for lawyers to protect their core values of confidentiality and loyalty toward their clients or to exercise their independent professional judgment. In Terry’s view, if a U.S. court finds the MDP ban in Rule 5.4(b) invalid, it likely will find the fee-splitting ban in Rule 5.4(a) similarly invalid, since the same premises underlie both rules.

[2] Using the Kutak Commission’s Proposed Model Rule 5.4 as a Substitute Rule.

If a court were to invalidate a state rule equivalent to ABA Model Rule 5.4, that court (or another body at a later time) would have to determine which ethics rules *should* apply to lawyer-accountant MDPs. One of the likely sources available as a substitute rule is the original version of Model Rule 5.4 proposed by the Kutak Commission.⁶⁶ The Kutak Commission version of Rule 5.4 stated:

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:

- (a) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;
- (b) information relating to representation of a client is protected as required by Rule 1.6;
- (c) the organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and

⁶⁴See ABA Model Rules, N. 61 *supra* at Rule 5.4(a).

⁶⁵See 1998 Montreal ABA Ethics Conference, N. 7 *supra* at Tab 1 (Panel Discussion, Multidisciplinary Partnerships: Accounting Firms and the Practice of Law).

⁶⁶The Kutak Commission is the name commonly used to refer to the ABA Commission on Evaluation of Professional Standards. The Chair of this Commission was Robert J. Kutak of Omaha, Nebraska, who died shortly before the ABA Meeting at which the text of the Model Rules was approved. See Wolfram, *Modern Legal Ethics*, 61 n.72 (Prac. ed. 1986). See generally American Bar Association Center for Professional Responsibility, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* (1987).

(d) the arrangement does not result in charging a fee that violates Rule 1.5.⁶⁷

The Kutak Commission's Proposed Rule 5.4 was rejected at the February 1983 ABA Midyear Meeting when the ABA House of Delegates approved, as an amendment, a substitute rule proposed by the ABA Section of General Practice. The debate over the amendment foreshadowed much of the current debate regarding MDPs. The amendments proponents argued that nonlawyer ownership or management was potentially harmful because a nonlawyer, motivated by profit, would be unable to appreciate the ethical considerations involved in representing a client and would not be subject to any regulation or control. The amendments opponents argued that the proposed rule was constitutionally compelled. They argued that a state could show a compelling interest in preserving a lawyer's independent judgment, but that nonlawyer involvement did not necessarily give rise to interference with that judgment. They viewed the amendment as an overly restrictive means of protecting the state interest.⁶⁸

Although the ABA rejected the Kutak Commission version of Model Rule 5.4 in 1983, that rule could be revived in the context of an MDP challenge. If a court were to overturn the MDP ban found in the state equivalents to Model Rule 5.4, it is likely that, formally or informally, the court would have to apply principles similar to those found in Kutak Commission Proposed Rule 5.4.⁶⁹

[3] U.S. Ethics Rules That Will Require New Consideration if Rule 5.4 Is Revised and MDPs Are Permitted.

If lawyer-accountant MDPs are permitted in the United States, lawyers will have an entirely new context in which they must determine how to comply with their other ethical obligations. Indeed, the Kutak Commission's proposed Rule 5.4 explicitly required lawyers practicing in an MDP to ensure compliance with their other ethical obligations, as does the IBA's Position Paper on MDPs. The ethical rules that a lawyer practicing in an MDP must consider include the following.

[a] ABA Model Rule 1.6 on Confidentiality.

The basic tenet in ABA Model Rule 1.6 requires a lawyer to keep confidential all information relating

⁶⁷See Kutak Commission Proposed Rule 5.4 in *Legislative History*, N. 66 *supra* at 159-160.

⁶⁸*Id.* at 160.

⁶⁹The Kutak Commission version of Rule 5.4 seems a better model than the District of Columbia Rule 5.4 for several reasons. First, the D.C. rule is limited to MDPs whose sole purpose is to provide legal services. This clearly is not what the Big Six are interested in. Second, the D.C. rule requires lawyers to maintain the majority interest in such a firm. In Terry's view, it is likely that a court that rejected the MDP ban in Rule 5.4 would similarly reject a majority-ownership requirement, since such a court likely would have already decided to trust the lawyer to exercise independent judgment, rather than require a prophylactic rule.

There are models from outside the United States that may also be of use. The Council of the Law Society of England reportedly voted in a secret meeting to ask the profession to choose from six different models regulating MDPs; the Council established a policy committee that will draw up a consultation paper, which was to be circulated to all lawyers in England and Wales in September or October 1998. See "Law Society votes on MDP Models," *The Lawyer* (Jan. 27, 1998) at 1. The Paris Bar and National Bar Council of France recently established a policy for regulation of MDPs between lawyers and auditors; in the words of one French lawyer, other countries should look to France because France has the solution already. See Gerard Mazet, Former President, French Association of Business Lawyers, Paris, Remarks at the *Ordre des Avocats a la Cour de Paris and the Association of the Bar of the City of New York, Conference on Multidisciplinary Legal Practice: Opportunities and Challenges for the Future* (June 8, 1998).

to representation.”⁷⁰ The rule contains several exceptions, however. Moreover, because numerous states have adopted exceptions not found in the ABA Model Rules, a lawyer must be sensitive to the fact that the confidentiality obligations vary tremendously from state to state.⁷¹

A lawyer for an MDP must determine what it means to comply with these provisions in a new context. For example, may a lawyer in an MDP share client information with all members of the MDP firm? If so, what protections are available to ensure that the information remains confidential? Concerns have been expressed that because auditors have a statutory obligation to disclose certain kinds of information, clients of an MDP lawyer cannot be assured that confidential information will remain confidential.⁷² Issues also arise as to whether the attorney-client privilege is compromised when lawyers within an MDP share information with others in that MDP; many commentators would distinguish the in-house counsel situation because in-house counsel represent only one client, whereas a lawyer working in an MDP represents many clients.⁷³

[b] ABA Model Rule 1.7 on Conflicts of Interest.

ABA Model Rule 1.7 stems from the lawyer’s duty of loyalty to a client and specifies how a lawyer should act with respect to different types of conflicts of interest.⁷⁴ A lawyer engaged in an MDP must ensure that he or she complies with these obligations.

One issue that will arise is whether lawyers in a Big Six firm will be permitted to interpret the legal ethics conflicts rules in the same manner as have lawyers in traditional law firms. Anecdotal evidence suggests that lawyers in law firms traditionally viewed themselves as being disqualified in situations in which accountants would not see a conflict.⁷⁵ If so, which interpretation of conflicts should the lawyers in an MDP follow?

Another issue is whether the imputed disqualification rules found in the lawyers’ ethics rules should be applied to MDP firms in the same manner they are currently applied to law firms. Most states’ ethics rules provide that if one lawyer in a law firm could not represent a client because of a conflict of interest problem, then none of the lawyers in the firm may represent the client, regardless of their location or connection with the case. Given the small number of major accounting firms, if such a broad imputation rule were applied to all offices of that accounting firm, it might seriously reduce the number of clients the lawyers in the MDP firm

⁷⁰See ABA Model Rules, N. 61 *supra* at Rule 1.6.

⁷¹See generally Gillers and Simon, *Regulation of Lawyers: Statutes and Standards*, 74-78 (1998) (listing selected state variations in Rule 1.6).

⁷²See, e.g., Greer, N. 6 *supra* at 134; Fox, N. 38 *supra*.

⁷³See, e.g., Audience Discussion at Ordre des Avocats a la Cour de Paris and the Association of the Bar of the City of New York, Conference on Multidisciplinary Legal Practice: Opportunities and Challenges for the Future (June 8, 1998).

⁷⁴Model Rule 1.7(a) sets forth those situations in which a lawyer may represent clients who are directly adverse to one another. Model Rule 1.7(b) sets forth the conditions under which a lawyer may represent a client when the lawyer’s representation of the client may be materially limited by the interests of another client, a third party, or the lawyer’s own interests. See ABA Model Rules, N. 61 *supra* at Rule 1.7.

⁷⁵See Petersen, “When an Auditor’s Hats Clash,” N.Y. Times (Jan. 7, 1998) at C1 (describing suit against KPMG by Orange County California teachers’ pension plan); “Squeeze Play,” N. 5 *supra* at 47 (suggesting that, with the use of screens, the Big Six regularly represent both sides in a merger).

could represent. Yet, if MDP firms seek to avoid this imputed disqualification provision, they must convince regulators that the concerns behind the lawyer disqualification provision are not present.

If one of the arguments in opposition to the broad imputed disqualification rules is that the firms and professionals are separate and independent, then the MDP firms presumably will be asked to provide information on efforts taken to ensure that confidential information is not shared and that professionals are not pressured to provide less than optimal service for their clients. Some Big Six representatives recommend the use of screens, but their comments suggest they misunderstand the role of screens in law firms.⁷⁶

One response of the MDP firms (or lawyers working within such firms) might be that the imputed disqualification provisions are unnecessary because each professional has his or her own code of ethics requiring independent judgment on behalf of the client and can be trusted to follow that ethics provision. Courts and regulators will have to decide whether to trust the lawyer's judgment in this MDP situation. In the past, with respect to lawyers alone, regulators have not been willing to do so and have insisted on a prophylactic disqualification rule.

Another issue raised by the conflicts of interest provision is whether an MDP firm should be permitted simultaneously to audit a client and provide legal services. Some have argued that this constitutes an inherent conflict of interest, whereas others have argued that there is no such conflict.⁷⁷

[c] ABA Model Rule 5.4(c) on Independent Legal Judgment.

ABA Model Rule 5.4(c) provides that a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment.⁷⁸ Model Rule 1.8(f) similarly provides that a lawyer shall not accept compensation from someone other than the client unless with the lawyer's independence of professional judgment or the lawyer-client relationship.⁷⁹ If lawyer-accountant MDPs are permitted, a lawyer must make efforts to ensure compliance with this provision.

This provision raises the question of whether lawyers employed in an MDP will be pressured with respect to their independent legal judgment and, if so, how such pressures can be avoided. Some European countries have forbidden lawyers from working in certain institutional settings because of fear that the lawyer's independent judgment will be compromised. In Austria and some other European countries, for

⁷⁶See "Big Six Move In," N. 13 *supra* at 28 ("accounting firms argue that Chinese Walls protect against conflicts of interest, as they do in law firms where competing clients work with the firm."). This statement is at best an overstatement of the legal ethics screen rules. Most states permit screens only in the limited situation in which a former government lawyer or judge is involved. See Gillers and Simon, N. 71 *supra* at 115-139.

⁷⁷Compare Panel Discussion at 1998 Montreal ABA Ethics Conference, N. 7 *supra* (lawyers in MDPs argued no automatic conflict) and AICPA Rules, N. 60 *supra* (no automatic conflict) with Greer, N. 6 *supra* at 133 (should not be able to offer audit and consulting services at the same time) and French Bar Council Rule as described Gerard Mazet, Former President, French Association of Business Lawyers, Paris, in Remarks at the Ordre des Avocats a la Cour de Paris and the Association of the Bar of the City of New York, Conference on Multidisciplinary Legal Practice: Opportunities and Challenges for the Future (June 8, 1998).

⁷⁸See ABA Model Rules, N. 61 *supra* at Rule 5.4(c).

⁷⁹*Id.* at Rule 1.8(f); see also *id.* at Rule 5.4(c).

example, a licensed lawyer may not serve as counsel to a corporation.⁸⁰

In the United States, lawyer regulators typically have been willing to trust lawyers to exercise their independent legal judgment in such situations. Thus, we have permitted lawyers to function in numerous situations in which pressures may be exerted on their independence, including serving as in-house counsel, receiving payment from a third party such as an insurance company, and even accepting temporary employment.⁸¹ Indeed, we recognize that such pressures exist even in a law firm setting. Professor Robert Nelson's work, for example, suggests that although law firms may be independent of particular clients, lawyers within law firms usually rely on one or two clients for a disproportionately large portion of their billings.⁸² Thus, just as is true for in-house counsel, lawyers in traditional law firms may have difficulty exercising independent legal judgment if such judgment conflicts with the desires of certain clients. Despite these pressures, U.S. ethics rules have permitted lawyers to function in these settings. Indeed, the recent *Restatement of the Law Governing Lawyers* project proposed, and almost adopted, a provision that would have permitted a nonlawyer third-party payor, such as an insurance company, to direct a lawyer's legal judgment. The proposal permitted this to be done based on consent given by the insured in the insurance policy; it did not even require the lawyer to contact the insured.⁸³ Therefore, lawyers opposed to MDPs may have a difficult time asserting that in the MDP context, but no others, lawyers cannot be trusted to resist pressure and to exercise their independent legal judgment. In short, rather than endorse a prophylactic rule prohibiting MDPs, U.S. courts may be willing to trust the word of lawyers in MDPs who promise that they will observe the principles of independence, loyalty and confidentiality.

If U.S. courts permit such MDPs, then lawyers and scholars must begin to think about the appropriate

⁸⁰See Terry, "CCBE Code Part I," N. 3 *supra* at n.34 and accompanying text.

⁸¹See *id.* at 45-59 for an argument that U.S. and European lawyers conceptualize the role of a lawyer differently, resulting in differing interpretations of the concept of "independence." See also Johnson, "In-House Counsel Employed by Insurance Companies: A Difficult Issue Confronting the Model Code of Professional Responsibility," 57 Ohio St. L.J. 945 (1996) (staff counsel for insurance companies); Johnson and Coyle, "On the Transformation of the Legal Profession: The Advent of Temporary Lawyering," 66 Notre Dame L. Rev. 359 (1990).

⁸²See generally Nelson, *Partners with Power: The Social Transformation of the Large Law Firm*, 250-259 (1988).

⁸³On May 12, 1998, the American Law Institute approved the new *Restatement of the Law Governing Lawyers* project. See "ALI Completes Restatement on Lawyers, Gives Final Approval to All Sections," ABA/BNA Lawyers' Manual on Professional Conduct, 14 Current Rep. 211 (May 13, 1998) [hereafter "ALI Completes Restatement"].

Section 215, which would apply to the tripartite insured-insurer relationship, proved quite controversial. Section 215, as presented at the May 1998 ALI meeting, provided:

A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

- (a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
- (b) the client consents to the direction under the limitations and conditions provided in § 202.

American Law Institute, *Restatement of the Law Third, Restatement of the Law Governing Lawyers, Proposed Final Draft No. 2* § 215 (Apr. 6, 1998) [hereafter *Restatement of the Law Governing Lawyers*]. Section 215 did not require a lawyer to speak directly with the client to obtain the client's consent. The comment stated that in "insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent other than that implicit in the action of the insured in forwarding the claim to the insurer is not required." *Id.* at 205, Comment b. The reporter confirmed this understanding of Section 215 and defended the position. The ALI membership disagreed. Section 215's comment was amended by a voice vote to require the lawyer or insurer to inform the insured in writing of the general terms of the representation. The ALI also voted 166-to-118 to amend Section 215 to add the language from ABA Model Rule 1.8(f) that a lawyer may be paid by a third party only if "the direction does not interfere with the independent professional judgment of the lawyer." See ALI Completes Restatement, *supra* at 211.

role and direction for lawyers in an MDP, just as they have done when considering the appropriate role of a lawyer in the contexts of insurance defense, corporate counsel, legal services, and others that create pressures on the lawyer's ability to exercise independent legal judgment. If MDPs are inevitable, lawyers must begin to think about the mechanics that should be put in place to minimize risks in an MDP context.

[d] ABA Model Rule 1.5 Requiring Reasonable Fees.

ABA Model Rule 1.5(a) requires a lawyer to charge a client a reasonable fee. The rule lists eight factors to be considered when evaluating the reasonableness of the fee. As noted previously, the Kutak Commission's Proposed Rule 5.4 required lawyers practicing in an MDP to ensure that the arrangement did not result in charging a fee that violated Rule 1.5.

If MDPs are permitted, lawyers must consider what this rule means in the new MDP context. For example, some have suggested that MDP firms should not be able to use legal services to subsidize other services of the MDP firm, such as offering audit services as a loss leader.⁸⁴ Others have suggested that because lawyers in an MDP pay fees to the worldwide network, client fees necessarily are higher and thus improper.⁸⁵

[e] ABA Model Rule 5.3 on Supervision of Nonlegal Assistants.

ABA Model Rule 5.3 requires lawyers, *inter alia*, to make reasonable efforts to ensure that the firm has in place measures giving reasonable assurance that nonlawyer conduct is compatible with the professional obligations of a lawyer. Because MDPs historically have not been permitted, lawyers mostly have been concerned about this provision with respect to secretaries, paralegals and similar types of nonlawyers. If a court invalidates a broad MDP ban, however, lawyers will have to determine what it means to comply with this provision in the MDP context. Undoubtedly, one of the most contentious practical issues is whether nonlawyer professionals in an MDP are capable of agreeing to abide by the lawyers' ethics rules, and whether they would agree if given the chance. As noted above, nonlawyer professionals in an MDP may be especially reluctant to agree to be bound by the lawyers' ethics rules. Such reluctance might occur both because they are bound by a different, and perhaps conflicting, set of ethics rules, and because compliance with lawyers' conflicts of interest rules and lawyers' limited use of screens would limit their ability to compete. Thus, one of the most difficult issues may be the issue of how to define the term "firm" in Rule 5.3 and how to determine whether lawyers may avoid application of this provision by organizing the legal services aspect of the MDP as a separate entity.

[f] ABA Model Rule 5.5 on Unauthorized Practice of Law.

ABA Model Rule 5.5 prohibits a lawyer from assisting a nonlawyer to engage in the unauthorized practice of law. If a court strikes down Rule 5.4(b)'s MDP prohibition, a court implicitly has concluded that a lawyer practicing in an MDP is *not* assisting the MDP itself in the unauthorized practice of law (UPL).

⁸⁴See "Inside: Andersen/Garrigues Merger Is Completed," *Int'l Fin. L. Rev.* (Mar. 1997) at 3 (Arthur Levitt, Chair of the SEC, is quoted as having made this comment; although he was undoubtedly looking at the issue from the auditors' perspective, the comment raises Rule 1.5(a) issues); Ferguson, "Spanish Firms Regroup to Prepare for a Turbulent Future," *Int'l Fin. L. Rev.* (Oct. 1997) at 38.

⁸⁵See "Inside: Andersen/Garrigues Merger Is Completed," *Int'l Fin. L. Rev.* (Mar. 1997) at 3.

Despite this fact, the Rule 5.5 and UPL issues remain problematic. Lawyers will have to determine what constitutes the practice of law, in order to determine if lawyers in MDPs are unethically assisting nonlawyer members of the MDP to engage in the unauthorized practice of law. Currently, it is extremely difficult to define the parameters of the practice of law and thus the unauthorized practice of law.⁸⁶ As is discussed more fully *infra*, one of the consequences of permitting MDP firms may be a reexamination of unauthorized practice of law provisions; this reexamination would in turn affect the interpretation of Rule 5.5 in an MDP context.

[g] ABA Model Rules 7.2 and 7.3 on Advertising and Solicitation.

ABA Model Rules 7.2 and 7.3 contain the ban on solicitation. With few exceptions, a lawyer may not give anything of value to a person for recommending the lawyer's services. Nor is a lawyer permitted to solicit in person or by telephone professional employment from a prospective client with whom the lawyer has no family or prior professional relationship if a significant motive is the lawyer's pecuniary gain.⁸⁷ Furthermore, ABA Model Rule 8.4 prohibits a lawyer from violating the rule through the acts of another.

The first question a lawyer working for an MDP would have to worry about is whether the nonlawyer members of the firm ever conduct in-person or telephone solicitations of potential legal services clients. If so, this conduct appears to violate Rule 8.4.

Second, a lawyer working in an MDP probably will want to consider whether the solicitation satisfies Rule 7.3's exception. Rule 7.3 permits in-person solicitation of prospective clients with whom *the lawyer* has a prior professional relationship. Thus, a lawyer working in an MDP must be concerned with the interpretation of this language. Even if a lawyer believed that this provision permitted intra-MDP referrals, the lawyer would have to be concerned about whether clients truly realize they have a choice of counsel. A lawyer in Norway working with the Arthur Andersen-affiliated firm recently stated that 90 percent of the clients in Oslo come via the auditing side of the firm.⁸⁸ If this occurred in the United States, a lawyer would have to worry whether this referral mechanism complied with ABA Model Rules 7.3 and 8.4.

[h] ABA Model Rule 7.5 on Firm Names.

ABA Model Rule 7.5 prohibits a lawyer from using a firm name that is false or misleading.⁸⁹ The rule explicitly permits trade names, however, so long as they do not imply a connection with a government agency or with a public or charitable legal services organization, and so long as they are not false or misleading.⁹⁰ Some regulators have taken the position that it is inherently misleading for a lawyer to practice law under the

⁸⁶See, e.g., Hazard & Hodes, N. 58 *supra* at § 5.5:103 ("Defining the outer limits of the 'practice of law' is practically impossible. In our law-dominated society, almost every significant financial decision has at least some legal element to it, and legal elements predominate in many other common transactions.").

⁸⁷See ABA Model Rules, N. 61 *supra* at Rule 7.3(a).

⁸⁸See Wigham, "Norwegian Firms," N. 24 *supra*. The English firm Arnheim and Company recently estimated that 30 percent of their fees come from Arthur Andersen referrals, but they expect the percentage to increase. See "Big Six Move In," N. 13 *supra* at 27. Some commentators have expressed concern that clients will feel pressure to hire the legal operation of a Big Six firm when that firm audits the client. See "Inside: Spanish Merger Marks Watershed," *Int'l Fin. L. Rev.* (Oct. 1996) at 3.

⁸⁹ABA Model Rules, N. 61 *supra* at Rule 7.5(a).

⁹⁰*Ibid.*

name of an accounting firm.⁹¹ Thus, one of the issues facing a lawyer practicing in an MDP will be the issue of what firm names are proper. It is interesting to note that in the non-MDP crossborder legal practice arena, one of the key points for which U.S. lawyers have lobbied is the right to use trade names around the world.⁹² In response to the position of lawyer-regulators that client protection requires the firm to include the names of the local lawyers, U.S. and other lawyers have argued that this requirement is not needed as a matter of client protection. In Terry's view, this position makes it more difficult for U.S. lawyers to argue that an accounting firm tradename is inherently misleading. Just as one can argue that clients realize they will be getting local lawyers when they go to "Baker & McKenzie," one can argue that clients realize they will be getting local lawyers when they go to the MDP, one-stop shopping firm of Arthur Andersen. On the other hand, if the Big Six take the position that law firms affiliated with them are separate entities, and legal ethics provisions will be applied only within the law firm affiliate, then a court or regulator might find misleading the use of the parent firm's name as part of the law firm name.⁹³

[i] ABA Model Rule 8.5 on Disciplinary Authority and Choice of Law.

ABA Model Rule 8.5(a) provides that a lawyer is subject to discipline in the state in which the lawyer is licensed, regardless of where the conduct occurs. ABA Model Rule 8.5(b) provides a choice of law provision to cover the situations in which a lawyer is licensed in more than one jurisdiction. Although numerous commentators have critiqued Rule 8.5, it remains the operable choice of law provision for lawyers.⁹⁴ If MDPs are permitted, lawyers may have difficulty determining whether their membership in a partnership is proper. For example, if Texas were to permit MDPs, the Texas lawyers would not violate any ethics provisions by being a member of such a firm. But what if the firm wanted to open a branch office in Florida, where MDPs are not permitted? Are the Florida lawyers violating their ethics rules? Construing Rule 8.5 may not be an easy matter with respect to questions such as these.

In sum, there are numerous ethics provisions that lawyers must examine from a new perspective should MDPs be permitted.

[4] Questions to Ask Lawyers in MDP Firms Relevant to Compliance With U.S. Legal Ethics Provisions.

If a court invalidates U.S. MDP bans, then lawyers in such MDPs will have to learn how to comply with their ethical obligations in an entirely new context. It certainly will be necessary for such lawyers to

⁹¹See "Swedish Bar," N. 28 *supra*.

⁹²See ABA Model FLC Rule, § 4(g)(ii), N. 44 *supra* at 209, 229-230:

Such a requirement [against firm names] manifestly goes beyond what is objectively justified to achieve the only apparent purpose of such a requirement, namely that of ensuring that consumers of legal services can readily determine the identity of lawyers in the branch office. While a requirement for disclosure of that information is reasonably related to protection of the public, that objective can be achieved just as effectively, and possibly more so, in other ways that do not create the possibility of confusion in the public mind as to whether the firm's foreign branch offices are in fact part of the same firm or separate entities.

⁹³Cf. "Price Waterhouse Adds Polish and Belgian Law Firms," *Int'l Fin. L. Rev.* (Feb. 1998) at 3 (noting that because of the Belgian bar rules, the relationship is informal); "Andersen/Garrigues Merger Is Completed," *Int'l Fin. L. Rev.* (Mar. 1997) at 3 (noting that some of the Garrigues partners are partners of the Andersen Worldwide Organization); Rubenstein, "Big Six Poised to Enter Legal Market," *Ill. Legal Times* (Oct. 1997) at 1, 19 (citing Andersen spokesmen as stating emphatically that the Andersen affiliates are all separate partnerships); see also Greer, N. 6 *supra* at 134 (discussing ways in which MDPs are organized).

⁹⁴See generally Symposium, "Ethics and the Multijurisdictional Practice of Law," 36 *S. Tx. L. Rev.* 1 (1995).

consult a checklist of ethics rules such as that contained in the prior section. Further efforts must also be made to develop an awareness of the factual patterns arising in the MDP context that are most likely to threaten lawyers' core values of independence, loyalty and confidentiality, as well as other ethical obligations. An important step towards identifying ethical issues that can arise will be the creation of a list of questions, to be asked of lawyers already practicing in MDPs; these questions will give lawyers and regulators insight into the world of MDPs.

The list below represents a modest start at this effort. This list is limited by the fact that Terry's background is legal ethics, not accounting. She is only now beginning to learn about how accounting firms function, and the issues, concerns and pressures they face. One of the most useful sources of information in developing such a list would be the lawyers currently practicing in MDPs, as they are the ones most likely to understand the pressures placed on lawyers practicing in an MDP. Yet given the hostile tone of the lawyer-accountant debates, the cooperation necessary for creating and using this list may be difficult to obtain. However, in her view, developing a list of the context-specific concerns and issues would benefit both proponents of a total MDP ban and those who advocate permitting lawyers to practice in MDPs, but recognize that an understanding must be reached about how a lawyer's core obligations will be protected. One of the best places to start might be to ask lawyers already practicing in an MDP the following questions.

[a] Understanding the Organizational Basics.

- To what organization do you belong?
- What is the relationship of this organization to other organizations in your firm's network?
- How is compensation allocated? By whom?
- Is your firm subject to management or other review by other network entities?
- Assuming your firm uses part of the Big Six name in your firm name, what conditions are imposed on use of this name?

[b] Confidentiality Issues.

- Do you consider information received from clients to be confidential?
- With whom do you share this confidential information? Other lawyers? Secretaries? Paralegals? Other professionals? Other service providers? Firm management?
- What instructions, if any, do you give to others with whom you share confidential client information?
- Where are files containing confidential client information physically located in your firm? Who has access to these locations?
- Is confidential client information placed on a database or firm network? Who has access to this network?

- If you are relying on a screen between parts of the firm, when is that screen put in place? Who determines the necessity of using a screen? Are the clients notified of the existence of a screen?

[c] Independence Issues.

- Do you have the right to exercise your independent legal judgment on behalf of clients who have retained you to provide legal services? Is this confirmed in writing in some document?
- Who makes the determination about which clients the firm can represent?
- Who makes the determination about whether the firm should cease representing particular clients?
- Assume that you want to handle a client's matter a certain way, even though you realize that you may not be able to bill a client for all your activities. (For example, you want to have an additional lawyer advise on the case, attend a hearing, etc.) Is this decision about how to handle a client's matter subject to review within the firm? By whom?

[d] Loyalty Issues.

- Do you apply the appropriate state equivalent to ABA Model Rule 1.7 when evaluating whether a client's matter raises a conflict of interest?
- When evaluating Rule 1.7 conflicts, do you treat clients of the network as clients of your firm for conflicts purposes?
- Is your decision about whether a Rule 1.7 conflict of interest exists subject to review by anyone in the firm? By whom? If you decline to accept a potential client and matter, must you give your reasons to others in the firm? To whom?
- Assume your firm decides that a potential conflict of interest is present, such that client consent is appropriate. Who explains the conflicts issue to the client in order to obtain client consent?
- Would the nonprofessionals in your firm agree to be bound by Rule 1.7?
- How do you communicate with members of your firm or network in order to obtain the information necessary to make a conflicts of interest decision?
- If you use a screen, in what situations?
- Is there any mechanism for reviewing the financial performance of your branch of the network? If so, what are the possible consequences? For example, does management have the right to direct your actions with respect to specific clients? To cut your pay?

[e] Misleading Firm Names.

- What is the name of the firm in which you practice?
- If all or part of the name of one of the Big Six firms is contained in your firm name, what is your relationship with that firm? Do you consider yourself in a partnership with that firm, such that members of the entire firm or network are treated as members of your firm for purposes of the legal ethics rules?

[f] Advertising and Solicitation.

- Do you accept referrals of cases from other parts of your firm?
- Do other members of your firm make ``cold calls`` to individuals in which they mention the firm's legal services capability, among other things?
- Do the clients receiving the referral understand that they have the right to choose legal counsel of their choice and need not use the network law firm? How is this communicated? Are your clients ever advised that if they do not use the law firm network, they may not be able to use all of the other services of the network?
- Does all advertising by the MDP firm that mentions legal services comply with the requirements of Rule 7.5?

[g] Fees.

- Who determines how fees are set?
- With respect to fees, do all aspects of the MDP firm charge an appropriate amount? Is it possible that legal fees to clients have been increased in order to cover other services offered by the firm at less than their true cost? For example, are audits provided as ``loss leaders``? Some commentators have expressed concern that MDP firms initially may offer legal services as a ``loss leader`` in order to obtain business. This issue is not truly an ethics issue, but rather raises antitrust issues.

[h] Assisting Unauthorized Practice of Law.

- What services are provided by lawyers within the MDP firm? By nonlawyers? What supervision, if any, do lawyers provide concerning nonlawyer work?
- Who (if anyone) decides whether a particular activity involves the practice of law, requiring involvement of a lawyer?

[i] Supervision of Nonlegal Personnel.

- What efforts do lawyers make to comply with obligations in Rule 5.3 to supervise the activities of nonlawyers?
- Which firm personnel are included within the lawyer's efforts to comply with Rule 5.3?
- Which nonlawyers, if any, have signed a written agreement to act consistently with the lawyer's ethical obligations?

Use of this type of list will help lawyers and regulators determine whether MDPs truly compromise lawyers' core obligations of confidentiality, independence and loyalty and will move us closer to understanding how lawyers in an MDP would function. By refining our understanding of the specific environment of the MDP, we place ourselves in a better position to evaluate whether an absolute ban on MDPs is necessary in order to protect clients and the public, or whether MDPs should be permitted, albeit under certain restrictions.

[5] Accepting the OECD's Invitation to Study Countries Where MDPs Have Functioned Effectively.

The Working Party on Professional Services, which was formed pursuant to the General Agreement on Trade in Services (GATS), will soon be turning its attention to lawyers.⁹⁵ One of the issues facing the Working Party undoubtedly will be whether a ban on lawyer/accountant MDPs, such as is common throughout the United States, is proper under GATS. This brewing debate was highlighted in the *Report for the Rapporteur for the Professions* at the 1996 Third Workshop on Professional Services sponsored by the Organisation for Economic Co-operation and Development (OECD):

Greater differences were evident in the idea of multi-disciplinary practices combining legal and accountancy services. The argument was put that independence was critical to legal practice and hence incompatible with multi-disciplinary approaches. Nevertheless, we heard that Germany and Australia accept multi-disciplinary practices in professional partnerships This range of circumstances emphasizes the need to revisit presumptions on the desired regulatory responses. If less burdensome regulatory responses exist in some OECD members, without negative effects, but not in others, what lessons could this provide to all of us? The fact is globalisation is affecting traditional styles of supplying professional services We heard, for example, that 18 of 25 OECD members have prohibitions on incorporation in accountancy and law. It would be useful to learn how those countries without regulation have sustained protection of the public interest. Case studies could illustrate options and reflect the advantages of flexibility in country responses.⁹⁶

⁹⁵See Decision on Professional Services, 33 I.L.M. 1259 (1994); "WTO Guidelines for Recognition of Qualification in Accountancy Sector," found at WTO Webpage, <URL TYPE="http"><http://www.wto.org/wto/news/press73.htm></URL> (visited Mar. 17, 1998); Bower, N. 5 *supra* at 162 ("An October 1996 WTO briefing of IBA leaders, in Geneva, indicates that the legal profession will be next 'in a few years' (1998 or after)").

⁹⁶See <URL TYPE="http"><http://www.oecd.org/daf/cm1s/prserws3.htm></URL> (visited June 3, 1998).

As the Rapporteur observed, it is important for lawyers to learn the conditions under which MDPs function in other countries. In Terry's view, if lawyers or bar associations wish to oppose MDPs, then it would be useful for them to learn exactly how MDPs function in other countries, and be prepared to argue why the measures taken are inadequate to ensure a lawyer's confidentiality, loyalty, competence and independence. On the other hand, if MDPs are to be permitted, it is clear that lawyers need to develop a better understanding of how the ethics rules should operate in the entirely new context of an MDP. Once again, it will be useful for lawyers to look at MDPs in other countries in order to learn the steps that have been taken to ensure a lawyer's core functions and to determine problem areas. In short, this is an area in which comparative work can be extremely useful.

7.06. Other Possible Consequences of Court Invalidation of MDP Bans.

[1] The Redefinition of the Unauthorized Practice of Law.

One of the possible consequences of court invalidation of an MDP ban is that there will be an entire rethinking of the unauthorized practice of law (UPL) provisions in the United States. As a starting point, it is useful to note that not every country identifies the practice of law-and thus the unauthorized practice of law-as broadly as does the United States. In many countries, lawyers do *not* have a monopoly on the giving of legal advice.⁹⁷ Thus, anyone-butcher, baker, candlestick maker ...or accountant or an out-of-state lawyer-is free to give what we in the United States would call "legal advice." The monopoly, if any, may exist only with respect to courtroom work.

In contrast to the narrow definition of the practice of law used in some European countries, UPL statutes and cases in the United States have defined the practice of law in ways that are extremely broad and extremely vague.⁹⁸ These statutes and cases have been criticized on constitutional grounds, statutory grounds such as antitrust, and general policy grounds.⁹⁹

Another problem with UPL provisions is the pervasive manner in which they have been ignored by the mainstream bar. Among other tests, UPL cases have used definitions of the practice of law that are either geographic-based or subject-matter-based.¹⁰⁰ Under either of those definitions, however, it is clear that

⁹⁷See Terry, "A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars," 21 *Fordham Int'l L. Rev.* 501, ns. 56-58 and accompanying text (1997-1998).

⁹⁸See, e.g., *Restatement of the Law Governing Lawyers, Proposed Final Draft No. 2*, N. 83 *supra* at § 4, comment c and Reporter's Notes (Apr. 6, 1998):

The definitions and tests employed by courts to delineate unauthorized practice by non-lawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.

⁹⁹See, e.g., Fischer, "Why Can't Lawyers Split Fees? Why Ask Why, Ask When?" 6 *Geo. J. Legal Ethics* 1 (1992); Rhode, "Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions," 34 *Stanford L. Rev.* 1 (1981); Christensen, "The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors-Or Even Good Sense?" 1980 *Am. B. Fdn. Res. J.* 159.

¹⁰⁰See, e.g., *Birbrower v. Superior Court, Santa Clara County*, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 304 (Cal.), *mdf'd* 17 Cal. 4th 643a (1998), *cert. denied* _ U.S. _, 119 S. Ct. 291, 142 L. Ed. 2d 226 (1998) (court invalidated a fee agreement on UPL grounds when New York firm traveled to California to handle a California arbitration for a California client; court indicated *inter alia* that physical presence in California was relevant but not controlling); *Kennedy v. Bar Association of Montgomery County, Inc.*, 561 A.2d 200 (Md. 1989) (court upheld finding of UPL, rejecting lawyer's argument that although he had practiced from an office in

contemporary lawyers routinely violate UPL provisions because the practice of law no longer is confined to state-based, state-law advice. Professor Charles Wolfram's recent article, "Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers," provides many examples of this phenomenon, including lawyers who take depositions or advise on contracts around the country.¹⁰¹ In a similar vein, panelists at a recent conference discussed the "Unauthorized Practice of Law and In-House Counsel Admission to Practice [Rules]"; several panelists (and numerous audience members) asserted that the current UPL provisions are unworkable, that they are observed in the breach, and that disciplinary authorities and courts enforce them against mainstream lawyers sporadically, if at all.¹⁰²

A third problem with UPL enforcement is that, historically, UPL provisions appear to have been used to protect economic interests of lawyers rather than those of clients.¹⁰³ Indeed, a review of the current activity of one state's UPL committee demonstrates that their primary activity has been directed toward nonlawyers who compete with lawyers, rather than lawyers who have violated the UPL provisions.¹⁰⁴ Although such UPL committees may indeed be focused on client protection, their selection of cases, together with the history of such committees, makes their motives suspect.

Indeed, Terry predicts that the shift in thinking about the unauthorized practice of law will occur even if courts *don't* invalidate MDPs. Market forces and the MDP phenomenon will force a reexamination of UPL provisions. The recent activities of the Big Six show that they intend to practice in areas traditionally handled by lawyers regardless of UPL provisions. According to one Ernst & Young lawyer, they do not practice law, they practice "tax."¹⁰⁵ One can imagine similar arguments being made with respect to a number of substantive law areas. We may soon see practitioners of "environmental compliance," "employee benefits," "financial planning," and "trusts and estates planning."

Recent activity in Texas suggests that lawyers will not give up these areas without a fight. Lawyers may argue that all of these activities are the practice of law because they involve the giving of advice regarding

Maryland, he was not practicing Maryland law and thus was not engaged in UPL); see also Needham, "The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice," 36 S. Tx. L. Rev. 1075, 1079-83 (1995) (summarizing UPL cases).

¹⁰¹See Wolfram, "Sneaking Around in the Legal Profession," 36 S. Tx. L. Rev. 665 (1995).

¹⁰²See 1998 Montreal ABA Ethics Conference, N. 7 *supra* at Tab 14; Wolfram, "Sneaking Around," N. 101 *supra* at 686-688.

¹⁰³See, e.g., *Restatement of the Law Governing Lawyers, Proposed Final Draft No. 2*, N. 83 *supra* at Introductory Note to Title B, Authorized and Unauthorized Practice (observing that from the early part of the Twentieth Century until the 1980s, the organized bar made a concerted effort to prohibit nonlawyers from competing with them to provide any service that lawyers had traditionally provided to clients for a fee; the bar repealed various understandings with other professions in the 1980s under threat of antitrust prosecution); Hazard and Hodes, N. 58 *supra* at § 5.5:102 ("Disciplinary proceedings against lawyers for 'practicing' outside the territorial limits of their state of licensure have been relatively infrequent").

¹⁰⁴The Web page for the Pennsylvania Bar Association Unauthorized Practice of Law Committee, for example, lists seventeen opinions. Only five of these opinions involve alleged UPL by a non-Pennsylvania lawyer. The other opinions involve alleged UPL by nonlawyers. See <URL TYPE="http"><http://pabar.org/Entities/opinions.html></URL> (visited June 7, 1998).

¹⁰⁵See 1998 Montreal ABA Ethics Conference, N. 7 *supra* at Tab 1, Materials by Friedman, Ernst & Young, LLP at 7-11 (includes the heading "The Practice of Tax in a Professional Service Firm" and the conclusion: "The practice of tax is separate and distinct from the practice of law, so the Model Rules governing the practice of law do not apply."). Representatives from Deloitte & Touche have made the same points. See "Squeeze Play," N. 5 *supra* at 44.

the legal rights or obligations of others.¹⁰⁶ The problem with this definition is that virtually every activity in the United States now has some legal ramifications. If one applied this definition literally, numerous nonlawyer occupations would be improper. While some courts may be sympathetic to the lawyers' arguments, not all courts will be.¹⁰⁷

Given the market forces at work, courts may be pushed to finally come up with a definition of the practice of law that is clear and enforceable, rather than vague and overbroad. Moreover, courts may have a difficult time enforcing provisions against nonlawyers if there indeed is rampant noncompliance by lawyers licensed in other states. If a court has difficulty enforcing the UPL provisions, as Terry predicts it will, a court may be tempted to draw the "practice of law" line in the easiest and clearest manner possible, by limiting the monopoly of lawyers to courtroom work, as is done in Europe.¹⁰⁸ Several of the U.S. courts enforcing unauthorized practice of law provisions against nonlawyers have done so in a "courtroom-type" context.¹⁰⁹ Indeed, during the recent American Law Institute meeting at which the *Restatement of the Law Governing Lawyers* was adopted, an Ohio lawyer offered an amendment that would have permitted a lawyer to provide legal services in any jurisdiction, so long as the lawyer did not appear in court, establish a local practice, or solicit clients; the amendment failed by a voice vote, but many who spoke against the amendment said that they were voting against it because they did not believe the amendment was a "restatement" of existing law,

¹⁰⁶See, e.g., *ABA/BNA Lawyers' Manual on Professional Conduct*, 21:8001 ("Other statutes specify some of the activities which constitute law practice; most frequently included are: ...the provision of advice regarding the legal rights and obligations of others.").

¹⁰⁷See, e.g., *In re Florida Bar Advisory Opinion-Nonlawyer Preparation of Pension Plans*, 571 So. 2d 430 (Fla. 1990) (court refused to adopt recommendation of Florida UPL committee that it is unauthorized practice of law for nonlawyers to design and prepare pension plans, because the court was not convinced by the record that there was a public need for the protection sought by the UPL committee); see also *Application of N.J. Soc'y of Certified Public Accountants*, 102 N.J. 231, 237, 507 A. 2d 711, 714 (1986) (court noted that "in cases involving an overlap of professional disciplines we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation.").

¹⁰⁸Even the "courtroom work" line is not so clearly drawn. "Qualified representatives, including nonlawyers, have the right to appear in numerous federal forums," including the Department of the Treasury (see 31 U.S.C. § 330 and Department of Treasury Circular No. 230, §§ 101.10, 10.33); Immigration and Naturalization Service (see 8 C.F.R. § 3.1(d)(3)); the Department of Energy (see 10 C.F.R. § 205.3); the Social Security Administration (see 20 C.F.R. § 416.1400); the Drug Enforcement Agency (see 21 C.F.R. § 1316.50); the National Labor Relations Board (see 29 C.F.R. § 102.38); the Equal Employment Opportunity Commission (see 29 C.F.R. § 1601.7); Health and Human Services (see 45 C.F.R. § 205.10(a)(3)(iii)).

Moreover, some of the Big Six have been actively lobbying for additional rights of appearance in the tax context. As reported at the Montreal ABA ethics conference, there is only one professional service firm that actively represents clients before the Tax Court. Several bar associations have argued that litigation in the Tax Court by lawyers working for professional service or accounting firms constitutes the unauthorized practice of law. The Justice Department, however, has criticized the ABA for its Informal Opinion to this effect, stating that the ABA is trying to unnecessarily hinder competition. It has urged the Treasury Department to issue regulations governing this issue. See Montreal ABA Ethics Conference, N. 7 *supra* at Tab 1, Friedman Materials at 10-11.

¹⁰⁹See *Sharon Village Ltd. v. Licking County Bd. of Revision et al.*, 78 Ohio St. 3d 479, 678 N.E.2d 932 (1997) (court affirmed dismissal of tax appeals, finding Board of Revision lacked jurisdiction to hear complaints about property tax assessments filed for clients by a nonlawyer, and also finding that the nonlawyer had engaged in the unauthorized practice of law); *In re Florida Bar Advisory Opinion on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997) (Florida Supreme Court held that nonlawyer retained to represent an investor, for compensation, in securities arbitration against a broker is engaged in the unauthorized practice of law); see also cases cited in the *Restatement of the Law Governing Lawyers*, N. 83 *supra* at § 4, Report's Notes for Comment c; *Birbrower*, N. 100 *supra*, 949 P.2d at 6 (majority rejected view of dissent on grounds that it would limit the UPL provisions to out-of-state lawyers who appear in court without permission).

not because they disagreed with the substance of the amendment.¹¹⁰

Thus, in Terry's view, U.S. lawyers should at least anticipate the possibility not only that lawyer-accountant MDPs will be permitted in the United States, but also that accountants ultimately will be able to offer many of the "legal" services lawyers traditionally have provided.

[2] Effect on the Market-Lawyers Must Market Legal Ethics as Having "Value Added."

If Terry's prediction about the demise of current UPL provisions is accurate, then U.S. lawyers should anticipate having to compete against a much different market than they have in the past—a market that includes the major accounting firms. Leading consultants have suggested that these firms, which aspire to be MDPs—one-stop shopping firms, have many market advantages, including cost, leverage, and client base, among other things.¹¹¹

Thus, if U.S. and other lawyers are to compete in this new market, they must begin to convince their clients of the value of their services. And if ethics rules are interpreted differently by lawyers practicing in traditional law firms and professionals practicing in MDP firms, then those lawyers in traditional firms must convince their clients of the value of such ethics rules. In other words, lawyers must convince clients that there is "value added" by the lawyer's strict confidentiality rules, conflicts rules, and imputed disqualification rules, among others. In fact, many of the arguments offered against MDPs are essentially "marketing" arguments as to why clients should prefer lawyers in traditional firms over lawyers in MDPs, rather than arguments that support an absolute ban on MDPs.¹¹² Thus, if lawyers in traditional firms want to compete successfully against MDPs, they must come to understand (and market) the true meaning and value of lawyers' ethics provisions.

7.07. Appendix A: Translation* of *Wouters et al. v. General Council of the Dutch Order of Attorneys [NOVA]*.

Opinion of the District Court¹ of Amsterdam, Administrative Law Section, before a panel of judges (p. 1)

Decision

Reg. Nrs: 96/1283 WET 29
96/2891 WET 29

Regarding:

¹¹⁰See "ALI Completes Restatement," N. 83 *supra* at 212.

¹¹¹See generally Bower, N. 5 *supra*.

¹¹²See, e.g., James C. Moore, President, New York State Bar Association, Remarks at the Ordre des Avocats a la Cour de Paris and the Association of the Bar of the City of New York Conference on Multidisciplinary Legal Practice: Opportunities and Challenges for the Future (June 8, 1998) (in Terry's view, remarks constituted reasons why clients should select traditional law firms, rather than a justification for banning MDPs).

*Clasina B. Houtman Mahoney, Master of Laws, University of Leiden, The Netherlands (1994), J.D., The Dickinson School of Law (1997), translator.

¹The "arrondissementsrechtbank" is the trial court, which sits in every "arrondissement," or district.

1. J.W. Savelbergh, Esquire, attorney in Amsterdam;
 2. Price Waterhouse Tax Consultants, established in Amsterdam;
 3. J.C.J. Wouters, Esquire, living in Bussum;
 4. Arthur Andersen & Co. Tax Consultants, established in The Hague;
 5. Arthur Andersen & Co. Accountants, established in The Hague, together being the appellants,
- against: the General Council of the Dutch Order of Attorneys, respondent.

I. DESIGNATION OF APPEALED DECISIONS

1. Decision of November 21, 1995;
2. Decision of November 29, 1995.

II. COMMENCEMENT AND PROCEDURAL HISTORY OF THE PROCEEDING

Regarding the appeal of appellants # 1 and 2

By its decision of July 5, 1995, the Supervisory Board of the Order of Attorneys of the District of Amsterdam has determined that the partnership² between Price Waterhouse Tax Consultants, Inc. (hereafter PWB) and registered accountants who belong to the accountants' partnership Price Waterhouse The Netherlands, which Mr. J.W. Savelbergh, Esquire (hereafter Savelbergh) intends to establish, does not comply with the provisions of the Partnership Regulation of 1993 (hereafter SV93).³ The Supervisory Board has also determined that Savelbergh will not be permitted to cooperate in the establishment of such a partnership.

(p. 2) By letter dated August 9, 1995, Mr. G.J. Kemper, Esquire, attorney in Amsterdam, appealed that decision to respondent [the General Council of the Order of Attorneys] on behalf of Savelbergh and PWB.

A hearing was held on that appeal on November 21, 1995, where Savelbergh and PWB have argued their positions.

By its decision of November 21, 1995 (hereafter "decision 1"), which is being appealed here, respondent found the appeal to be baseless.

²The Dutch term "samenwerkingsverband" has been translated throughout this document as "partnership." The term "samenwerkingsverband" may also be translated as "cooperation." There does not appear to be precise equivalent in the English language for the form of cooperation or partnership as referred to in this opinion. While the Dutch language has another word for partnership, this being "maatschap" or "vennootschap," the translator feels that the term "partnership" as used in the context of this opinion, specifically because it deals with multidisciplinary partnerships, sufficiently conveys the proper meaning. However, it is merely a "term of art" chosen in this translation, and the translator is aware that other translations, such as "cooperation" and "integrated cooperation" are also in use.

³SV93 = Samenwerkings Verordening van 1993 = Partnership Regulation of 1993.

Mr. Kemper, mentioned above, and J.M. van den Berg, Esquire, attorney in Amsterdam, appealed this decision [of respondent General Council of the Order of Attorneys] by letter (with enclosures) dated February 6, 1996. This appeal is docketed under number 96/1283 WET 29.

By letter dated April 15, 1996, O.W. Brouwer, Esquire, and F.P. Louis, Esquire, attorneys in Amsterdam and Brussels, respectively, submitted a brief and copies of documents which relate to this case on behalf of respondent.

By letter dated November 14, 1996, respondent has submitted further documents.

With regard to the appeal of appellants # 3, 4 and 5.

By its decision of July 14, 1995, the Supervisory Board of the District of Rotterdam determined that J.C.J. Wouters, Esquire (hereafter Wouters), is a partner in a partnership that has a relationship of such a nature with a profession other than one which was recognized by art. 4 SV93, that such participation violates art. 4 SV93. The Supervisory Board also determined that Wouters will act in violation of art. 8 SV93 if he will be a partner in a partnership which has the name of the individual person "Arthur Andersen" in its joint name.

H.A. Groen, Esquire, attorney in The Hague, appealed this decision to respondent on behalf of Wouters by letter dated September 6, 1995.

A hearing was held on the appeal on November 29, 1995, where Wouters argued his position.

By its decision of November 29, 1995 (hereafter decision 2), which is being appealed here, respondent found the appeal to be baseless.

S.C.J. Aarts, Esquire, attorney in Rotterdam, by letter dated February 8, 1996 (with enclosures), appealed that decision [by respondent] on behalf of Wouters, as well as on behalf of Arthur Andersen & Co, Tax Consultants (hereafter AAB) and Arthur Andersen & Co., Accountants (hereafter AAA) to the District Court of Rotterdam, where the appeal was received by the clerk of court on February 9, 1996. **(p. 3)** The clerk of court of that court forwarded the appeal to the District Court of Amsterdam by letter dated March 25, 1996, which was received by the clerk of court on March 26, 1996. This appeal is docketed under number 96/2891 WET 29.

By letter dated July 3, 1996, O. Brouwer, Esquire, attorney in Amsterdam, and F.P. Louis, Esquire, attorney in Brussels, submitted copies of documents relating to this case and a brief.

By letter dated October 16, 1996, Mr. Aarts, Esquire, mentioned above, submitted a response brief, written by H.M. Williams, Esquire, attorney in Brussels.

By letter dated November 6, 1996, respondent submitted further documentation.

At the court's request, Mr. Aarts, mentioned above, submitted a copy of the so-called Member Firm Interfirm Agreement (hereafter MFIA) by letter dated November 7, 1996.

By letter dated November 8, 1996, respondent has submitted a supplemental brief (with enclosures).

By letters dated January 2 and 3, 1997, Mr. Aarts, Esq., mentioned above, submitted further documentation.

Regarding both appeal proceedings

By letter dated October 16, 1996 (with enclosures), P. Glazener, Esquire, attorney in Amsterdam, requested this court on behalf of the Council of Bars of the European Community) (Conseil des Barreaux de la Communauté Européenne, hereafter CCBE) to participate in this proceeding as a party.

By letter dated October 22, 1996, the clerk of court informed Mr. Glazener, Esq., mentioned above, that the court does not see any basis to grant his request. The clerk also informed him that this court will make a formal determination on his request when the final decision will be rendered in this proceeding and that, if he wishes-as far as it involves the decision not to permit the CCBE to participate in the proceeding as a party-he may file an appeal against that decision.

Mr. Glazener, Esq., mentioned above, submitted a writing (with enclosures) in response to that, dated October 31, 1996.

By letter dated November 6, 1996, the clerk of court has informed Mr. Glazener, Esq., mentioned above, that this court persists in its point of view set forth in the letter dated October 22, 1996.

(p. 4) By letter dated December 5, 1996, the Secretary of the Department of Administrative Law of the Council of State⁴ announced that an appeal has been filed against that letter on behalf of the CCBE.

By letter dated January 3, 1997, respondent submitted further documents.

The appeals were heard jointly on January 16, 1997; appearances were made by:

- Savelbergh, personally; and I. Damste, on behalf of PWB,

represented by Mr. Kemper, Esq., and Mr. Van den Berg, Esq., mentioned above, as well as by Mr. J.A. Endtz, Esq., attorney in Amsterdam;

- Wouters, personally; P. Maaskant, on behalf of AAB; and Chr. van Gennep, on behalf of AAA, represented by Mr. Aarts, Esq., and Mr. Gilliams, Esq., mentioned above.

On behalf of respondent, appearances were made by Mr. Brouwer, Esq., and Mr. Louis, Esq., mentioned above, as well as Prof. N.S.J. Koeman, Esq., attorney in Amsterdam, and Mr. J.L.R.A. Huydecoper, Esq., President of the Dutch Order of Attorneys (hereafter NOVA).⁵

⁴The "Afdeling Bestuursrechtspraak van de Raad van State" is a council consisting of appointed lawyers and the crown which serves as an administrative court. They hear appeals of almost all "decisions" taken by a lower government body (i.e., not the legislature) which have not been specifically excluded and for which no special appeal procedure has been established. Also see N. 20 *infra*.

⁵NOVA = Nederlandse Orde Van Advocaten = Dutch Order of Attorneys.

III. GROUNDS FOR THE DECISION

In determining the issue of whether the contested decisions can be upheld by law, this court has relied on the following facts and circumstances.

The facts

Regarding the appeal of Savelbergh and PWB

Savelbergh is an attorney established in Amsterdam. PWB is part of the international Price Waterhouse organization, in which not only tax consultants work, but also accountants and members of other professions.

By letter of May 26, 1995, Mr. Kemper, Esq., mentioned above, requested the Supervisory Board of the District of Amsterdam on behalf of Savelbergh and PWB to determine that the partnership intended by Savelbergh and PWB is not prohibited by, or at least that it does not violate the provisions of SV93. Prior to this request, a discussion between appellants, the President, and the Vice-President of the Order of Attorneys of the District of Amsterdam had taken place on April 24, 1995, about the intended partnership.

On July 5, 1995, the Supervisory Board rendered its decision as described above in section I. As mentioned above, an appeal was filed to respondent on behalf of Savelbergh and PWB pursuant to art. 10, subsection 1, SV93 (p. 5) against that decision. By letter dated October 10, 1995, respondent submitted six questions to Savelbergh and PWB. By letter dated November 10, 1995, Mr. Kemper, Esq., mentioned above, answered that the form of the intended partnership had not yet been determined. The other questions asked by respondent were not answered [by appellants] because it was the opinion of appellants that those questions were not relevant to Savelbergh's practice of law.

After a hearing on the administrative appeal was held on November 21, 1995, respondent, in its "decision 1," determined that the appeal was baseless. In reaching its decision, respondent has considered, among other things, the following:

- Art. 85 of the Treaty on the Establishment of the European Community (hereafter EGV)⁶ does not apply to SV93. NOVA cannot be considered to be a business organization in the sense of art. 85 EGV because NOVA has been established to further the public interest. Therefore, the issuance of regulations [by NOVA] cannot be qualified either as an "agreement" or a "decision" in the sense of the above mentioned provision.
- The combination of articles 3g, 5 and 85 EGV also does not apply to SV93 because the conditions as formulated in the Van Eyke and *Reiff* decisions have not been met.
- Even if the competition regulations of the EGV were applicable, which is not the case, then art. 90, subsection 2, EGV would be applicable.

⁶EGV = Europees Gemeenschapsverdrag = Verdrag tot Oprichting van de Europese Gemeenschap = Treaty on the Establishment of the European Community, established in Rome, 1957. For art. 85 see N. 33 *infra*.

- The mandatory membership of NOVA does not violate art. 11 of the European Treaty to Protect Human Rights⁷ (hereafter EVRM), because that membership does not prevent attorneys from being members of (professional) associations. Furthermore, NOVA cannot be considered to be a "private association" as is required for the applicability of the above mentioned provision.
- SV93 prohibits only cooperation in the form of partnerships as defined therein.
- The practice of attorneys differentiates so much from that of accountants, that the close cooperation between them, which is inherent in a partnership, would impose unacceptable restrictions on an attorney in the area of the free and independent representation of his clients' interests and the attorney's compliance with his duty of confidentiality.
- SV93 is able to withstand the test of proportionality, which is based on art. 3g, 5, 52, 59, and 85 EGV; art. 11 EVRM; and art. 119, subsection 3 of the Constitution.
- The argument based on the Law on Economic Competition (hereafter WEM)⁸ fails because Dutch competition regulations do not apply to legislation.

(p. 6) With regard to the appeal of Wouters, AAB and AAA

Wouters, who was then an attorney admitted to the bar of the District of Amsterdam, joined the AAB partnership on January 1, 1991. In response to this, the Supervisory Board of the District of Amsterdam decided that Wouters was not permitted to practice with AAB under a joint name. The Supervisory Board furthermore decided that there was a partnership which violated the then-existing Partnership Regulation. Wouters appealed that decision to respondent. Pending that appeal, the President of the Order of Attorneys of the District of Amsterdam sent a letter dated April 24, 1992, stating that the Supervisory Board, on its own initiative, would not take any further steps against Wouters as long as Wouters would comply with the promises made by Mr. Groen, Esq., on Wouters' behalf in the letter dated March 23, 1992. In reaction to that letter, Wouters withdrew his administrative appeal.

By letter dated November 3, 1994, Wouters informed the Supervisory Board of the District of Rotterdam of his intent to establish himself as attorney in Rotterdam commencing November 7, 1994. He also stated that he would be associated with AAB.

Upon request, Mr. Groen, Esq., mentioned above, informed the Supervisory Board of the District of Rotterdam by letter dated December 16, 1994, that the partnership between Wouters and AAB intended to practice under the name "Arthur Andersen & Co., attorneys and tax consultants."

By letter dated January 10, 1995, the Supervisory Board stated that it intended to make a finding that the intended name was not permitted by the provisions of SV93.

On February 17, 1995, Wouters was given the opportunity to argue his point of view at a meeting of all

⁷EVRM = "Europees Verdrag tot Bescherming van de Rechten van de Mens" = Convention for the Protection of Human Rights and Fundamental Freedoms (1950), entered into in Rome by the members of the European Union.

⁸WEM = Wet Economische Mededinging = Law on Economic Competition.

members of the Supervisory Board.

The Supervisory Board at its meeting on July 14, 1995, made the decision as described in section I.

After Wouters appealed the latter decision and a hearing was held on November 29, 1995, respondent, in its ``decision 2,`` found the appeal to be baseless.

In reaching its decision, respondent has considered, among other things, the following:

- Respondent is of the opinion that there is a partnership as provided in art. 1, subsection b, SV93, between the attorneys and the accountants in the organization to which Wouters belongs. Because of the framework of the provisions of the MFIA, the cooperation (Arthur Andersen & Co., Societe Cooperative in Geneva) has relevant control over the member firms.
- NOVA does not constitute a ``private association,`` which is necessary for art. 11 EVRM to apply.
- The manner in which patent representatives⁹ and notaries¹⁰ practice is so different from the practice of accountants that for that reason alone (**p. 7**) the argument based on the principle of equality must fail. Accountants only have a derivative right not to testify which exists when they work together with an attorney in the same case.
- SV93 is based on a careful balance. The restrictions provided therein do not go any further than is necessary to guarantee the independent practice of law and to require compliance with the duty of confidentiality.
- Even back on October 1, 1993, the partnership was not permitted because it violated articles 1 and 2 of the then-existing Partnership Regulation. This is not changed by the fact that the Supervisory Board of the District of Amsterdam entered into a compromise agreement with appellant.

The grounds for the appeal

On appeal, Wouters, AAB and AAA primarily have raised the following arguments:

Respondent has overlooked that articles 9 and 10 of SV93 only apply to the establishment or alteration of a partnership. In the underlying case, it involves a partnership between Wouters and AAB which has existed since January 1, 1991. The above mentioned articles do not provide a public law character to the decision at issue here, and therefore there is no ``public legal act`` nor is there a ``determination`` as defined in

⁹An ``octrooi gemachtigde`` is a ``patent representative`` or ``patent proxy.`` In The Netherlands, applications for a patent are generally not submitted by the inventors themselves, but often through experts which have made patent applications their profession. Such patent representatives must be registered with the Patent Council, which issues and enforces rules of conduct governing these patent representatives.

¹⁰In The Netherlands, notaries (``notaris``) have attended law school, but have had a different curriculum than attorneys. Notaries are the only ones authorized to draft papers such as wills, trusts, deeds, prenuptial agreements, etc.

art. 1:3, subsection 1 of the General Administrative Law Code (hereafter Awb).¹¹ Therefore, this court must find that it has no jurisdiction over this claim.

Wouters, AAB and AAA have furthermore raised the following issues, briefly stated:

- The partnership at issue in this case is not a partnership as defined in art. 1, first sentence and in subsection b, SV93. It has been argued that Wouters does not have a contractual relationship with AAA, and such relationship also does not exist by way of the Arthur Andersen & Co., Societe Cooperative, established in Geneva (hereafter Andersen S.C.). There only is a contractual relationship between Andersen S.C. and the partnership AAB, to which Wouters belongs. Wouters does not practice on joint account and risk with Andersen S.C. Within Andersen S.C. there is no practice of law at all.
- The partnership was accepted by the Order of Attorneys of the District of Amsterdam subject to the conditions as set forth in the letter dated March 23, 1992 by Mr. Groen, Esq., to the then-President of the Amsterdam Order of Attorneys. At the time SV93 became effective, the partnership already existed. Therefore, pursuant to art. 11, subsection 3 of SV93, the partnership at issue here must be permitted.
- Art. 28 of the Attorney's Code (Advw)¹² violates art. 5, second paragraph EGV, in conjunction with art. 3, first sentence and subsection g EGV, and art. 85 or 86 EGV (**p. 8**) in that the first named provision [art. 28 Advw.] authorizes NOVA, being a business organization, to issue regulations in economic areas, or in that it authorizes NOVA to act as a regulating and enforcing body in a market in which its members themselves are economically active.
- SV93 and the contested "decision 2" violate art. 86 EGV because NOVA holds a position of control on the market of legal services, and because NOVA, through SV93 and the contested "decision 2," misuses its position of control.
- SV93 and contested "decision 2" violate the right of establishment as provided in art. 52 EGV, and the freedom to render services as provided for in art. 59 EGV. SV93 makes it impossible for Arthur Andersen, and the attorneys who belong to Arthur Andersen but who are established in other member states, to establish themselves in The Netherlands as providers of legal services. SV93 makes it furthermore impossible for Arthur Andersen, and the tax consultants and/or accountants who belong to Arthur Andersen but who are established in other member states, to establish themselves as providers of legal, fiscal, and accounting services through a partnership with Wouters. There is no justification for this restriction on the free flow of services and the right of establishment.
- There is a violation of art. 1 of the Constitution and art. 26 of the International Treaty of Civil

¹¹Awb = Algemene Wet Bestuursrecht = General Administrative Code.

¹²Advw. = Advocatenwet = Attorney's Code. This Code established the NOVA and regulates the conduct of attorneys. For art. 28 Advw., see N. 21 *infra*.

and Political Rights (IVBPR)¹³ because in the underlying case an unjustified distinction is being made between accountants on the one hand, and patent representatives and notaries on the other hand.

- SV93 constitutes an unlawful restriction on the freedom of association as provided for in art. 22 IVBPR and art. 8 of the Constitution.¹⁴ Pursuant to the second sentence of the latter provision, that right can be restricted only by a formal law.¹⁵ The SV93 was not established by the legislature, but by NOVA, which is a lower government body. Therefore, SV93 as a whole is invalid because of its violation of art. 8 of the Constitution.
- Insofar as SV93 prohibits the use of the name ‘‘Arthur Andersen, attorneys and tax consultants,’’ it violates the right to freedom of expression as provided in art. 7 of the Constitution, art. 10 EVRM, and art. 19 IVBPR.
- SV93 is invalid because it violates the general principles of proper legislation (Stcrt 1992, 230)¹⁶ and with sections 3.2, 3.3, and 3.4 of Awb.
- SV93 and contested ‘‘decision 2’’ violate WEM because SV93 and ‘‘decision 2’’ were not announced to the Secretary of Economic Affairs as required by art. 2, subsection 1 WEM. Furthermore, SV93 and contested ‘‘decision 2’’ violate art. 9b and 9d WEM.

(p. 9) Appellants have furthermore raised the following, briefly stated:

- Attorneys are to be viewed as business persons as provided for in art. 85 EGV. Continuing that line of argument, NOVA must be viewed as a business organization in the sense of that provision. Furthermore, the contested decisions [1 & 2] and SV93 must be viewed as decisions by a business organization in the sense of the above mentioned provision.
- SV93 and the contested decisions have a competition-restricting purpose, or at least, they have competition-restricting consequences, and therefore violate art. 85 EGV.
- Based on the provisions in art. 8, subsection 2, EGV, both SV93 and the contested decisions are void by law. It is pointed out, in this context, that respondent has not requested an exemption based on art. 85, subsection 3, EGV.
- If NOVA is not to be viewed as a business organization but as a government body, then it must comply with the obligations which the EGV puts on its member states. It is argued that SV93 and the contested decisions violate the compelling provisions of art. 3, sub g, second paragraph, and art. 85 EGV.

¹³IVBPR = Internationaal Verdrag Inzake Burgerrechten en Politieke Rechten = International Covenant on Civil and Political Rights (1966).

¹⁴See N. 26 *infra*.

¹⁵For explanation of formal and material laws, see N. 23 *infra*.

¹⁶‘‘Stcrt’’ = Staatscourant, the official newspaper of the government in which legislation, legal notices, etc. are published.

- SV93 and the contested decisions cannot be justified based on art. 90, subsection 2, EGV, because NOVA does not manage services of general economic interest.
- SV93 and the contested decisions violate art. 11 EVRM, while the mandatory membership of NOVA, based on NOVA's policy and the implementation thereof, severely restricts personal and professional freedom which cannot [be] justified by a more important higher interest.
- The word "association" as provided for in art. 11 EVRM must be interpreted autonomously: the legal format chosen by national law and the legal consequences thereof, are not binding for the application of that provision.
- Pursuant to art. 28 Advw., regulations can be issued only in the interest of the good practice of law. The Attorneys' Code does not provide a basis for the issuance of regulations such as SV93, which serves primarily selfish interests or, at the very least, an interest other than the good practice of law. Insofar as SV93 regulates subjects which (primarily) are outside the area of the good practice of law, SV93 was issued illegally.
- The application of SV93 does not lead to a justifiable distinction between accountants on the one hand, and tax consultants, patent representatives, and notaries on the other hand. Neither tax consultants, patent representatives, nor accountants possess the right not to testify. Patent representatives do not primarily occupy themselves with the practice of law. Notaries must impartially represent the interests of the parties involved in the legal matter. Contrary to an attorney, a notary may not ignore the interests of others than his clients.
- **(p. 10)** SV93 has an incorrect starting point and must be viewed as a regulation whereby a whole category of professionals are excluded in advance from partnerships with attorneys, whereby individual circumstances of a case are not taken into account. This must be viewed as disproportionate, and as violative of the principle of equality and the prohibition of arbitrary decisions.

Wouters, AAB and AAA have further requested this court to pose pre-judicial questions to the European Court of Justice. For this purpose, they have submitted a proposal of the questions to be posed.

Savelbergh and PWB have stated that they do not find the posing of questions to the European Court of Justice to be necessary, but they have requested this court-in case this court will find it necessary to pose questions regarding the interpretation of art. 85, subsection 1, and art. 3, first sentence and subsection g EGV, read in conjunction with art. 5, second paragraph EGV, and with art. 85 EGV-to obtain an experts' report from the European Commission pursuant to art. 8:47 Awb.

Respondent's defense

Respondent has raised the following arguments, concisely stated:

- From art. 9, subsection 2, SV93, it can be deducted what the legal consequence is of the decision of the Supervisory Board regarding the permissibility of a partnership. As long as no (affirmative) decision has been made, an attorney may not cooperate in the establishment of

such a partnership. The opinion of the Supervisory Board, and the opinion of the General Council on administrative appeal regarding the permissibility of a partnership therefore must be viewed as a legal opinion that is meant to have legal consequences. It is also important to point out that pursuant to art. 29, subsection 1, Advw., the regulations are binding on the NOVA members.

- A partnership exists between Wouters and AAA. Based on the actual course of conduct at Arthur Andersen and based on the MFIA, it must be concluded that shared control and final responsibility, as well as shared accountability and risk exist between the Member Firms within the Arthur Andersen organization. Thus, the existing partnership between Wouters and AAB-through the latter named organization-constitutes a partnership in the sense of SV93 with AAA.
- It has been argued erroneously that art. 28 Advw. is not compatible with the European Union competition regulations. The authority to regulate provided for in art. 28 Advw. is not an authorization to intervene in economic matters. The authority exists to serve the public interest. Appellants have erroneously interpreted the *Reiff* case (Jurispr. 1992, I-5801) on this point. That opinion must be read in conjunction with the later case of *Delta Schifffahrts* (Jurispr. 1994, I-2517). In the underlying case there is no delegation of powers (**p. 11**) by the government to NOVA which violates art. 3, first sentence and subsection g, art. 5, second paragraph, and arts. 85 and 86 EGV.
- NOVA is not a business organization in the sense of the European Union competition regulations and it is not active as such on the market of legal services. NOVA is also not a business organization in the sense of arts. 85 and 86 EGV. Individual attorneys, however, can be considered to be business organizations in the sense of the treaty regulations.
- Appellants failed to appreciate the possible application of art. 85, subsection 3 EGV and art. 90, subsection 2, EGV. If it should be determined that art. 85 or art. 86 EGV are applicable to SV93, which is not the case, then the conclusion should be drawn that such an application would severely hinder NOVA's legislative function, which exists for the public interest, and with that, it also would affect the attorneys' function. For this reason, pursuant to art. 90, subsection 2 EGV, art. 85 and art. 86 should not be applied. Based on the decision in the *Township Almelo* case (HvJ,¹⁷ April 27, 1994, Jurispr. 1994, I-1477), the agreement or decision need not be announced in order to apply art. 90, subsection 2, EGV.
- SV93 and the contested decisions cannot be considered to be agreements or decisions which restrict competition; they are pieces of legislation. Therefore, they cannot be void pursuant to art. 85, subsection 2, EGV.
- Respondent dismisses the alleged violation of the rules of the EGV regarding the free flow of services and the right of establishment. The freedom of speech is not an issue. For this, respondent has pointed to the *Gebhard* case (HvJ November 30, 1995, unpublished), which states that the provisions regarding the free flow of services apply only if the Treaty provisions regarding the right of establishment are not applicable. Respondent has pointed to the *Keck and*

¹⁷HvJ = Hof van Justitie = Court of Appeals.

Mithouard case (HvJ November 1993, Jurispr. 1993, I-6097), which states that modalities of establishment are not within the sphere of applicability of the EGV. Respondent has furthermore pointed out that in the underlying case, there is no restriction on the right of establishment. The consequence of SV93 is not that the market is being closed or that cooperation between attorneys and accountants is made impossible. The only consequence of SV93 is that attorneys may not integrate with accountants to such an extent that they have joint responsibility for the practice of their professions or that they practice on joint account and risk.

- SV93 furthermore does not seek to stop the cross-border rendition of services, but applies only to attorneys established in The Netherlands and only deals with the permissibility of partnerships with attorneys in The Netherlands.
- Even if there was a restriction on the right of establishment or the free flow of services, which there is not, this would be justified by compelling grounds of public interest. In respondent's opinion, SV93 complies with every one of the four conditions (p. 12) stated in the *Gebhard* case.
- Respondent dismisses the alleged violation of the WEM as argued by appellants because in the underlying case, there is no competition regulation nor misuse of a position of control in the sense of that law. An alleged violation of art. 9b WEM can only be litigated before the Secretary [of Economic Affairs], not before an ordinary court.
- Respondent is of the opinion that NOVA is not an association in the sense of art. 11 EVRM. It follows from the *Lecompte* case (NJ 1982, 602), that a professional organization which was established by the government and governed by public law, and which does not only serve certain public interests of its members, but also serves to protect certain specific interests, is not an organization in the sense of the above mentioned provision of the treaty. Considered in that light, NOVA may not be considered to be an association in the sense of art. 11 EVRM. Even if art. 11 EVRM would be applicable, which it is not, then the alleged restrictions on the freedom of association could be justified by subsection 2 of that provision.
- Respondent rejects the argument that SV93 violates art. 8 of the Constitution. NOVA is a public body which may be established for purposes of appeal as provided for in art. 134 of the Constitution; therefore, art. 8 of the Constitution is not applicable to NOVA. But even if art. 8 of the Constitution were applicable, then the limitation would be justified in the interest of public order.
- An appeal to the principle of equality can succeed only if there is a distinction which is unjustifiable. Respondent is of the opinion that in the underlying case, there is a justified distinction. The arguments to prohibit partnerships between attorneys and accountants are weighty and objectively justifiable.
- Respondent has pointed out that attorneys should be independent of third parties, that they have the right not to testify and explicitly represent the interests of a party. The primary function of an accountant is his function to perform checks. This is not compatible with the position of trust which an attorney occupies. The role of an attorney in society is fundamentally different

from the role of an accountant. From this, it follows that the use of the name ‘‘Arthur Andersen, attorneys and tax consultants’’ cannot be permitted, because it must be prevented that the objectively justifiable distinction which exists in the eyes of citizens, who benefit from the partial and independent practice of law, will disappear. Respondent is also of the opinion that the freedom of expression of the established partnership has been restricted on the basis of objectively justifiable grounds and in a necessary manner.

- In the Dutch system of justice, generally binding regulations are not tested for compliance with the general principles of proper legislation. However, generally binding regulations such as SV93 may be tested for compliance with general principles of proper administration. However, there is no such violation with those principles in the underlying case. It is of importance in this matter that SV93 has been established in a proper manner. Furthermore, SV93 has been established only-in the framework of the public interest-to achieve a fair and accessible justice system in The Netherlands, and not to close off the legal market to competition by accountants.
- **(p. 13)** In the opinion of respondent, the contested decisions have been adequately motivated and have been carefully prepared and made.

Respondent has responded to the pre-judicial questions which Wouters, AAB, and AAA propose to ask the European Court of Justice. Respondent has submitted its version of proposed questions.

Respondent has also requested this court to order appellants to pay the costs of this proceeding.

*Considerations*¹⁸

Regarding the request by the CCBE

By letters dated October 16, 1996, and October 31, 1996, P. Glazener, Esq., attorney in Amsterdam, has requested this court on behalf of CCBE to be permitted to participate in this proceeding as a party. In support of this, the above mentioned letters set forth the purposes of the CCBE. Among other things, the CCBE seeks to act as a collective body of the European bars (among which NOVA) in all matters which relate to the application of European Union law and the interstate practice of law within the European Union.

Pursuant to art. 8:26 Awb this court can permit interested parties, until the end of the hearing, to participate in the proceeding.

Pursuant to art.1:2, subsection one, Awb, an interested party is one whose interest is directly affected by a decision. Pursuant to art. 1:2, subsection 3, Awb, an organization’s interests include the general and collective interests it promotes as it appears from that organization’s purposes and actual conduct.

This court has not permitted the CCBE to participate in this proceeding as a party. Because the CCBE opposes the cooperation between attorneys and accountants which is the subject of this proceeding and because the CCBE thus sides with a body of one of its members, in this case respondent [NOVA], this court cannot see how the CCBE has its *own* interest which is different from respondent’s interest, and which interest

¹⁸NOTE: the actual discussion part of the opinion begins here.

will be affected by this decision. This court realizes that the CCBE is watching this proceeding with more than average interest, but that does not mean, in this court's opinion, that the CCBE is an interested party under the Awb.

(p. 14) With regard to the question of whether there is a "decision" as defined in art. 1:3 Awb

Pursuant to art. 8:1 Awb, an interested party can appeal a "decision"¹⁹ to the court. Because the disputed orders were not taken "on exception," pursuant to art. 8:1, in conjunction with art. 7:1 Awb, this court must consider whether they were taken "on administrative appeal."²⁰

Pursuant to art. 1:5, subsection 2, Awb, an administrative appeal is defined as the use of the power provided by statute to request reconsideration of a decision by another governing body than the one who made the disputed decision. To determine whether this court has jurisdiction over this case, it must be determined whether the primary decisions of both Supervisory Boards, against which administrative appeal may be filed to respondent pursuant to art. 10, subsection 1, SV93, are "decisions" as defined in the Awb. Otherwise, it could occur that this court, because art. 8:1 Awb provides for an appeal procedure, would consider a decision which is not a "decision" as defined by the Awb.²¹

Pursuant to art. 1:3 Awb, a "decision" is a written decision of a governmental body, containing a public act with legal consequences.

Pursuant to art. 2, SV93, an attorney is not permitted to take on or keep in existence obligations which could endanger the freedom or independence of his profession, which includes the representation of his client's interests, and, related to that, the confidentiality between attorney and his client.

Pursuant to art. 3, SV93, an attorney is permitted only to enter into or keep in existence a partnership if the practice of each partner is primarily directed at the practice of law.

Pursuant to art. 4, first sentence and subsection c, SV93, an attorney is permitted only to enter into, or to keep in existence a partnership with members of other professions which have been recognized by the General Council as provided for in art. 6, SV93. Art. 6, SV93 provides which qualifications must be satisfied by a profession to be recognized by the General Council.

¹⁹A "decision" ("besluit") as used in the Awb is a decision from an administrative government body, *i.e.*, not any acts made by the legislature.

²⁰Art. 7:1, subsection 1, provides that before an appeal to an administrative judge ("beroep") may be taken of a government body, the party must first file written exceptions ("bezwaar") to the organization that made the disputed decision. Exceptions need not be filed if the decision already was made on the basis of an exception or if the decision was made on administrative appeal. Thus, if the disputed decision is one made after the written exceptions were made, or if the decision was made by the administrative judge during the administrative appeal, the party does not have to file any further written exceptions to those decisions. Here, the case did not involve a decision made on written exceptions. Thus, the court must consider whether there has been an administrative appeal on which the decisions were made.

²¹The court is pointing out that art. 8:1, which provides for an appeal to the courts, must be read together with art. 7:1, which provides that other administrative remedies must first be exhausted. The court will thus first determine whether that was done in this case.

The General Council has not recognized accountants as such a profession.

Art. 1, subsection b, SV93, defines a ``partnership'' as follows: every partnership in which the participants practice [a profession] on joint account and risk, or who share control of or final responsibility for the partnership.

Art. 9, subsection 1, SV93 provides for a duty to report to the Supervisory Boards (**p. 15**) about the form of a partnership. Pursuant to subsection 2, an attorney may not assist in the establishment or alteration of a partnership before the Supervisory Board has made a decision about whether the conditions under which the partnership will be established or altered, including the manner in which it will act towards the public, comply with the requirements of this regulation [SV93].

In the opinion of this court, a decision by the Supervisory Board based on art. 9, subsection 2, SV93 will or will not result in the lifting of the prohibitions of art. 2, art. 3 and especially art. 4, SV93, for the particular attorney involved in this case. This court finds that the failure to lift the prohibition, which has the effect of not permitting the establishment of a partnership, is a legal act at which the decision of the Supervisory Board is directed. Because the decision of the Supervisory Board meets all the requirements of a ``decision'' as defined in art. 1:3 Awb, it must be treated as a ``decision.''

Wouters' argument that he did not request permission [from the Supervisory Board to establish a partnership] does not have any effect on the question of the characterization of the decision.

Concerning the jurisdiction over AAB and AAA

Pursuant to art. 8:1, subsection 1, Awb, an interested party may appeal a decision to the court.

Pursuant to art. 7:1, subsection 1, subsection a, Awb, a person who has the right to file an administrative appeal, must first file exceptions to that decision, unless the contested decision has been made on administrative appeal.

Art. 10, subsection 1, SV93, authorizes interested parties to file an administrative appeal to the General Council against a decision of the Supervisory Board. Pursuant to art. 6:13 Awb, an interested party cannot appeal a decision made on administrative appeal to the court when this party can be blamed for not filing an administrative appeal against the original decision.

This court has ascertained that against the original decision by the Supervisory Board of the Bar of the District of Rotterdam dated July 27, 1995, an administrative appeal was filed with the General Council of NOVA by Wouters, but not by AAB and AAA.

Both AAB and AAA have not been able to convince this court that they cannot be blamed for not having filed an administrative appeal with the above mentioned General Council.

Pursuant to art. 6:13 Awb, this court therefore has no jurisdiction over AAA and AAB. (**p. 16**) Because the other jurisdiction requirements have been met, this court can exercise jurisdiction over Wouters, Savelbergh, and PWB.

Regarding the jurisdiction of the Supervisory Board of the District of Rotterdam

Wouters has argued that the General Council has made an error in not finding that the Supervisory Board of the District of Rotterdam did not have jurisdiction to make a decision on the matter, because there was no establishment or alteration of a partnership as defined in art. 9, subsection 2, SV93. Wouters, in support of his argument, has pointed to the letter dated April 24, 1992, by the President of the Bar of the District of Amsterdam, Th.R. Bremer, Esq., which states that the Supervisory Board of the District of Amsterdam will not take further action against Wouters as long as Wouters would work according to the contents of the letter dated March 23, 1992, written on behalf of Wouters by H.A. Groen, Esq., to President Bremer.

Furthermore, Wouters argues that the transitory provision set forth in art. 11, subsection 3, SV93, is applicable, which provides that "the provisions of articles 3, 5 and 6 do not apply to partnerships which were permitted at the time this regulation was enacted."

This court does not understand Wouters' arguments on this matter.

Pursuant to art. 9, subsection 4, SV93, in cases where a partnership has been established in more than one district, the Supervisory Board which was requested to make a decision [about the permissibility of the partnership] is permitted to consult with the other Supervisory Board or Boards. Those Boards can then decide that only one of them will make the decision.

It follows from this that every Supervisory Board has its own authority with regard to the establishment of a partnership in the district in which the Board manages the [local] Order of Attorneys. The Attorney's Code also provides for this decentralized structure of respondent.

This means that in order to establish a partnership, permission is required from the authorized Supervisory Board in each district, and that the Supervisory Board of the District of Rotterdam was not bound by the decisions or promises made by the Supervisory Board of the District of Amsterdam.

This also means that appellant's [Wouters] argument that the transitory provision of the law applies fails, because it is clear that he did not establish a partnership as defined in SV93 in the District of Rotterdam before the enactment of SV93.

In regard to the question of whether Wouters has established a "partnership" with accountants.

To answer this question, this court must determine whether respondent correctly supposed that Wouters, by establishing a partnership (p. 17) with AAB, also established a partnership with AAA. This would be the case if the participants practice their profession on joint account and risk, or if they share control or final responsibility. (see art. 1, first sentence and subsection b, SV93).

Respondent has concluded from the provisions in the MFIA, which was provided to respondent by appellant, that a partnership as defined in art. 1, first sentence and subsection b, SV93, exists. This court finds that the MFIA only regulates the partnership between AAB and Arthur Andersen S.C. As explained by appellant at the hearing, besides that MFIA, other MFIA's exist regulating other parts of the Arthur Andersen organization. Appellant has not been willing to provide these MFIA's [to the court]. This court finds that

respondent has correctly concluded from the submitted MFIA that appellant, through his partnership with AAB, also has a partnership with AAA, because there is a network in which member firms, including tax advisers and accountants, share responsibility and control over, among other things, the joint name, joint policy and mutual financial arrangements. The advertising done by appellant himself confirms respondent's point of view on this matter.

Regarding the lawfulness of the disputed decisions and of the SV93 on which they are based.

Pursuant to art. 28 Advw.,²² the Board of Representatives can issue regulations in the interest of the good practice of law. Appellants have not been able to persuade this court that SV93, which lies at the basis of the disputed decisions, and which aims to regulate the cooperation between attorneys amongst each other and with other professionals, in itself violates the goal which is provided for in art. 28 Advw. Pursuant to art. 4, first sentence and subsection c, SV93, an attorney may enter into or maintain a partnership with members of another profession only if the partnership has been recognized by the General Council as provided in art. 6 SV93.

It is not disputed that the General Council has not recognized accountants. As far as this is concerned, the contested decisions are in compliance with SV93.

Appellants have argued that the non-recognition of accountants violates the principles of "reasonableness" and "equality," because tax advisers, notaries, and patent representatives have been recognized. Because of this reason, appellants argue that the disputed decisions cannot remain intact.

Art. 6 SV93 provides several criteria a profession must meet to be considered for recognition. Pursuant to art. 6, subsection 1, SV93, the General Council has discretion with regard to the question of which profession will be recognized. Therefore, it is not correct to assume that a profession which meets the required criteria **(p.18)** must therefore be recognized.

Because the General Council has discretion in this matter, this court will review the non-recognition of accountants only marginally.²³

This court finds that the disputed decisions can withstand such a marginal review. Respondent has argued both in its brief and at the hearing that there is a real difference between the work and position of an attorney and that of an accountant, and that the interests of the good practice of law would be damaged to a large extent if attorneys and accountants could cooperate on joint account and risk. Respondent has pointed

²²Art. 28 Advw. provides:

- (1) The Board of Representatives can issue regulations in the interest of the good practice of law, including regulations regarding the care of the elderly attorneys and whole or partial incapacity to work and for care of the surviving relatives. The Board will furthermore issue the necessary regulations regarding the working and organization of the Dutch Order of Attorneys.
- (2) Proposals for regulations will be made to the Board of Representatives by the General Council or by at least five representatives. Before presenting a proposed regulation to the Board of Representatives, the General Council can invite the Supervisory Boards to make their position known.
- (3) After the issuance of the regulations, they must be made known to the Attorney-General and be published in the "Staatscourant."

²³A marginal review is comparable to the abuse of discretion standard by an appellate court in the United States.

out that an accountant's primary task is a verifying one, for which he is obligated to give an objective account of his client's financial situation. The accountant primarily serves the interests of others than his client. Thus, an accountant has a public function, in which he does not have the right to refuse to testify; an attorney, on the other hand, must always let the interests of his client prevail, and for that purpose has the right to refuse to testify.

Appellants have further argued that because notaries have been recognized, the non-recognition of accountants violates the principle of equality. This court does not share that point of view, because it does not find the position of notaries to be completely similar to that of accountants. This court points to the fact that notaries-contrary to accountants-have a duty of confidentiality and the right to refuse to testify. Even if the correctness of permitting partnerships with notaries is doubtful, which doubt was admitted by respondent at the hearing, that does not mean that the non-recognition of accountants violates the principle of equality for that reason, because it does not mean that respondent has deviated from policy in an unjust manner with regard to accountants.

With regard to the argument that there is a violation of art. 11 EVRM²⁴ and art. 22 IVBPR.²⁵

Appellants argue that art. 17 Advw., which provides that all attorneys who are registered in The Netherlands automatically become members of NOVA, is invalid because it violates art. 11 EVRM and art. 22 IVBPR; therefore, appellants argue that the rules issued by NOVA, including the SV93, cannot be enforced against them, and therefore that respondent has made its decision unlawfully (the so-called "negative freedom of association").

The jurisprudence of the European Court for Human Rights shows that an "association" in the above named articles [art. 11 EVRM and art. 22 IVBPR] means a "private law association." This court finds that the NOVA is an association formed on the basis of public law, and also cannot be characterized as a private law association in any other way. This court comes to this conclusion because NOVA has been established by law which has, according to the Attorney's Code (Advw.) as its primary aim a public interest-the good practice of law-(p.19) and not the representation of the interests of its individual members. Following the *Lecompte* decision (European Court for Human Rights June 23, 1981, NJ 1982, 602),²⁶ this court does not find art. 11 EVRM and art. 22 IVBPR to be applicable to NOVA. Appellants have argued that the *Frami* decision (European Court for Human Rights, June 30, 1993, NJ 1994, 223) applies. This court finds that NOVA cannot be compared to FRAMI, to which art. 11 EVRM was held to be applicable, because contrary to NOVA, FRAMI is based on private law, has complete autonomy to set its own purposes, organization and procedure, and aims to promote and protect the interests of its own members.

²⁴Art. 11 EVRM provides as follows (translated):

(1) Everyone has the right to freedom of peaceful association and the freedom of association, including the right to establish and join unions to protect one's interests.

(2) The exercise of these rights may not be restricted other than by law and which restrictions are necessary in a democratic society in the interest of national security, the public safety, the prevention of breach of the peace and criminal offenses, to protect the public health or morals, or to protect the rights and freedoms of others. This article does not prohibit lawful restrictions to these rights by members of the armed forces, police, or government.

²⁵Art. 22 IVBPR provides virtually the same as art. 11 EVRM.

²⁶NJ 1982, 602: NJ stands for "Nederlandse Jurisprudentie," or "Dutch Jurisprudence," the Dutch collection of decisions, including those by the European courts, and provides for the year and page number in that volume.

With regard to the argument that there is a violation of art. 8²⁷ and 18²⁸ of the Constitution.

Pursuant to art. 8 of the Constitution, the right to freedom of association can be restricted by law in the interest of public order. ``Law'' is to be construed as a ``formal law,''²⁹ so that it can be concluded that this civil right cannot be restricted by ``generally binding regulations'' which have not been issued by the formal legislature.³⁰ Because SV93-which is not a formal law-and the decisions which were based on it, prohibit a partnership between appellants and the accountants of Arthur Andersen and Price Waterhouse, respectively, it must be determined whether this regulation constitutes a restriction of the civil rights provided for in art. 8 of the Constitution, and if so, how much of a restriction.

This court first finds that every form of (more or less lasting) cooperation between attorneys and accountants must be viewed as an ``association'' as provided for in art. 8 of the Constitution, because according to the legal history this includes many forms of organization.

SV93 does not at all prohibit the cooperation with accountants. Respondent has stressed at the hearing that it will not do anything to hinder cooperation between the above mentioned professions. Only a partnership in the form of a practice on joint account and risk or the joint control and final responsibility is not permitted by SV93. It is this court's opinion that only one form of partnership is prohibited, a form which does not have an independent meaning to the exercise of the above mentioned right [to freedom of association]; therefore, there is no restriction on this civil right as such. For these reasons, neither SV93, nor the decisions based thereon, are invalid.

This court further cannot see how the regulation of partnerships between accountants and attorneys could restrict the right of anyone to have the assistance of counsel in proceedings at law and on administrative appeal, as provided for in art. 18 of the Constitution. This court does not find that there is a violation of a civil right which would result in the invalidity of SV93 and the decisions based on it.

(p. 20) This court will not discuss the alleged violation of art. 7 of the Constitution and art. 10 EVRM because respondent has concluded on good grounds-based on the discussion above-that a partnership which is violative of SV93 exists, and therefore that the right to exercise this partnership under the name proposed by appellants is not an issue for discussion.

With regard to the applicability of the WEM.

First, it must be reiterated that the NOVA has been established by law and serves a public interest, i.e., the good practice of law. To this it must be added that NOVA is a public law association as provided for in art. 134 of the Constitution. Additionally, the Board of Representatives of the NOVA has a regulating authority, as provided for in subsection 2 of the above named article. That authority has been provided for in art. 28

²⁷Art. 8 of the Constitution (``Grondwet'' or ``Gw'') provides: The right to freedom of association is recognized. This right can be restricted by law in the interest of public order.

²⁸Art. 18 of the Constitution provides: Everyone has the right to counsel in proceedings at law and at administrative appeal.

²⁹A ``formal law'' is a law which was passed pursuant to the established procedures by the House and Senate. ``Material laws'' are regulations, ordinances, guidelines, etc.

³⁰I.e., the House and Senate.

Advw. Regulations, including SV93, are ``material laws.’’³¹

Art. 1 of WEM provides that a competition agreement as used in that law is either an agreement, or a civil law decision. SV93 is neither an agreement under civil law, nor a civil law decision. According to the Explanatory Notes³² to the WEM, the notion ``civil law decision’’ does not include decisions with a public law nature. Therefore, the WEM also is not applicable.

With regard to European law provisions

With regards to the arguments based in the European Union Treaty (EGV), it must first be repeated that the NOVA is a public law organization which was established by law. It serves the public interest. In the pursuit of the above mentioned purpose of the good practice of law, it uses its legislative authority.

In the pursuit of that purpose, NOVA must guarantee the partiality and independence of attorneys. It does not do this in the interest of the individual attorneys who are (mandatory) members of NOVA, but, as said before, in the public interest which requires the adequate practice of law.

*With regard to the alleged violation of art. 85 EGV:*³³

Appellants argue that NOVA is a ``business organization’’ in the sense of the provisions of art. 85 EGV. Therefore, the SV93 is alleged to be a decision by a business organization which has a negative effect on the trade between member countries. Appellants have pointed to the decree of the European Commission in the so-called *Coapi* case. In that case, a public law organization has been treated as a business organization in the sense (**p. 21**) of art. 85 EGV.

These arguments fail. NOVA is not a business organization in the sense of the above mentioned provision because it does not pursue the promotion of the interests of the attorneys who together form NOVA. The fact that the attorneys, or groups of attorneys, by themselves are business persons in the sense of art. 85 EGV does not change that. After all, their interests as business persons are not being represented by NOVA.

In addition, as said before, SV93 must be treated as a law in material sense; NOVA (its Board of Representatives) has exclusive authority to issue regulations such as SV93 based on the legislative powers given to it. Thus, SV93 is a legislative regulation issued by a thereto authorized organization of a member state.

The arguments based on the *Coapi* case also fail. It is true that the *Coapi*-under Spanish law-is a public

³¹See N. 29 *supra*.

³²Memorie van Toelichting = MvT = comparable to the explanatory notes found in American statutes, provided by the lawmaker to explain the statute.

³³Subsection 1 of art. 85 EGV provides in relevant part as follows:

(1) Incompatible with the community market and prohibited are all agreements between businesses, all decisions of business organizations and all mutually decided upon factual acts which can have a negative effect on the trade between member states or which have as a consequence that the competition on the community market is hindered, restricted or falsified, and especially insofar as they consist of:

(a) ...

law organization; however, as appears from the Spanish law which deals with organizations such as the Coapi, it has, among other things, the task to represent and further the interests of the members of Coapi. To the contrary, the latter is not the case with NOVA, which serves the public interest.

With regard to the alleged violation of art. 86 EGV,³⁴ this court finds that the same reasoning applies as is set forth with regards to art. 85 EGV. This court adds to this that NOVA as legislator and as a servant of the public interest cannot be considered as a business or group of businesses to which art. 86 EGV applies. Thus, the issuance of SV93 cannot be considered to be a misuse of a position of power which has a negative effect on the trade between member states.

With regard to the alleged violation of art. 5, second paragraph EGV in conjunction with art. 3, sub g, EGV, art. 85 and 86 EGV.

Appellants argue that art. 28 Advw. provides for a delegation of powers which violates the EGV. Such delegation is said to be detrimental to the "useful effect" of the European competition rules.

Appellants have correctly stated that it follows from art. 5, subsection 2 EGV, and art. 3, subsection 3 EGV, that the member states may not take any measures which are detrimental to the above mentioned "useful effect" of articles 85 and 86 EGV. This can be the case-among other things-when a member state furthers, requires, or strengthens practices which violate articles 85 and 86 EGV, or when the public law character of government regulations is taken away by the transfer of responsibility for those regulations from the member state to private businesses.

Appellants argue that the latter case in particular has occurred here because the government has given NOVA the power to establish SV93. Insofar as appellants base their arguments on this point by (p. 22) arguing that NOVA must be considered to be a business organization, this court must refer to the conclusions stated above with regard to the direct applicability of articles 85 and 86 EGV. With regard to the delegation of authority, this court also points to the previous discussion. After all, the Dutch legislative and administrative system does not provide for the legislative authority of NOVA. In this system, NOVA (or at least the Board of Representatives) has exclusive authority to act as a legislator in the areas adjudged to it. It did not get this authority through delegation from another government body.

Appellants' argument that the members of the Board of Representatives are elected autonomously by members of NOVA and that NOVA makes its decisions completely independently does not mean that delegation exists as proposed by appellants. After all, in a case like this there is no authority that was delegated to the Board by another government body. The appellants' argument that the government does not retain any actual authority with regard to supervision and decision is no longer relevant now that the Board of Representatives of NOVA must be viewed as the exclusive authoritative government body with regard to the SV93.

³⁴Subsection 1 of art. 86 EGV provides in relevant part:

(1) It is incompatible with the community market and prohibited, as far as it can have a negative effect on the trade between the member states, that one or more businesses can make misuse of a position of power on the community market or a substantial part of that market.

...

Appellants' reliance on the above mentioned *Reiff* and *Delta Schiffahrt* cases fails. In both those cases-contrary to the underlying case-a delegation of powers by the Secretaries was involved regarding the setting of hourly rates. As has been concluded previously, there is no such delegation to NOVA. The power of the Crown, as provided for in art. 30 Advw³⁵ cannot, contrary to appellants' argument, be considered in regard to the delegation of powers. The power of the Crown is not on par with the powers of the Secretaries involved in the above named cases. The underlying case involves repressive supervision exercised by the Crown in which the standard used is a violation of the law or detriment to the public interest.

This court finds that the previous discussion shows that the competition regulations of the EGV do not apply in cases as this one, and therefore appellants' arguments based thereon must fail.

Appellants furthermore argue that SV93 cannot be reconciled with the provisions of the EGV regarding the free flow of services and the right of establishment.

As far as appellants are attorneys, they would be hindered in providing cross-border services in a partnership with accountants. As far as appellants are corporations, they argue that their right to establish themselves in a partnership with accountants is being taken away.

(p. 23) The question arises whether the provisions of European law apply to the underlying cases. After all, both cases involve attorneys who are established in The Netherlands and who wish to enter into a partnership with firms or corporations who are established in The Netherlands to which Dutch provisions of Dutch law, *i.e.* SV93, apply. In the opinion of this court, these cases do not contain a cross-border aspect. Thus, the provisions of the EGV regarding the free flow of services and the right of establishment are not applicable.

In case this may not be correct, the following is true of the free flow of services. SV93 does not prohibit an attorney to provide services from The Netherlands in other member states. The attorney is prohibited from doing so only in the partnerships denied to him on the basis of SV93.

If it were to be accepted that the latter constitutes a hindrance of the establishment right by the member state in the sense that this hindrance constitutes a limitation of the free flow of services, it must be determined whether SV93 and its prohibition on partnerships is nevertheless justified by compelling reasons of public interest, and whether it can be regarded as objectively necessary and proportional to the intended purpose.

Regarding the purpose of SV93, it has been pointed out-and it has been determined here previously-that the underlying case is about serving the public interest, this being the good practice of law. This purpose serves to protect the ``partiality and independence`` of the attorney and with that, the protection of the person who uses his services.

In the opinion of this court, these purposes protected by SV93, which have a direct influence on the competent provision of legal services which is necessary in a modern democratic constitutional state, are of such a nature that generally, a restriction on the freedom of attorneys to provide services is justified on grounds

³⁵Art. 30 Advw. provides as far as relevant:

(1) Decisions of the Council of Representatives, the General Council, or of other bodies of the Dutch Order of Attorneys can be suspended or voided by Royal Decree as far as they violate the law or public interest.

of public interest.

This court also affirmatively answers the question whether SV93 can withstand the test of proportionality. After all, SV93 serves to reach the goal of partiality³⁶ and independence of attorneys. Additionally, SV93 does not go any further than is necessary because it does not prohibit every form of cooperation between attorneys and accountants, but only partnerships as provided in art. 1 SV93.

The arguments raised by appellants regarding the right of establishment are also being rejected.

First, it is noted that SV93 does not make any distinction between partnerships which have been established in another member state than The Netherlands and those which were established in The Netherlands. Thus, the provisions of SV93 are applicable without distinction.

Secondly, according to art. 52, second paragraph, EGV, the right to establishment constitutes: the admission ``according to the provisions which have been issued by the **(p. 24)** legislature of the country of establishment for its own citizens.’’ SV93 thus complies with art. 52 EGV.

Thirdly, it is of importance that, in the absence of specific European Union provisions, The Netherlands is free to regulate the practice of law on its own territory, which is shown, among other things, by the opinion in the *Klopp* case (Court of Justice, July 12, 1984, #107/83). The issuance of the SV93 was based on that authority. Therefore, the SV93 does not violate the provisions of art. 52 EGV. Finally, it must be noted that specifically with regard to the practice of law by an attorney, every member state is authorized to subject the practice of law to rules of conduct. One of those rules of conduct is that an attorney must practice law in partiality and independence. Because SV93 protects the latter two principles, which must be enforced in the public interest, SV93 must also be determined to be valid for that reason.

With regard to the asking of pre-judicial questions.

Appellants have urged this court to pose questions to the European Court of Justice in order to be informed regarding the European law aspects of both professions.

This court will not utilize its authority to pose questions. It follows from what was stated previously, that it is this court’s opinion that it does not need further information in order to make a decision. Therefore, there is no necessity to pose questions to the Court of Justice as provided for in art. 117 EGV.

Based on everything that has been considered above and because this court has not otherwise found that respondent has made decisions which violate any principle of proper government, the above posed question must be answered in the affirmative, and the appeals must be declared to be baseless.

Based on the considerations above, this court does not see any reason to use its authority as provided by art. 8:74, subsection 2, Awb.

This court also does not see any reason to grant respondent’s request to order appellants to pay

³⁶The text says ``impartiality.’’ I presume that the word ``partiality’’ in the sense of rooting for one’s own client is meant, as it is used two paragraphs above.

attorneys' fees because in this court's opinion, it cannot be said that Wouters and Savelbergh have made apparently unreasonable use of procedural rights; and it also cannot be said that AAA, AAB, and PWB have made incorrect use of their right to appeal.

This court enters the following order:

(p. 25)

DECISION

The court

- declares to be without jurisdiction over the appeal of Arthur Andersen & Co. Tax Advisers and Arthur Andersen & Co. Accountants;
- declares the appeals to be unfounded on the remaining grounds;
- denies the request of respondent to order appellants to pay attorneys' fees in this proceeding.

Opinion was rendered by H. Troostwijk, Esquire, Chairman, R.F.B. van Zutphen, Esquire, and J.L. Bruinsma, Esquire, judges, in the presence of G.A. Versteeg, Esquire, clerk of court, and publicly pronounced on February 7, 1997, by H. Troostwijk, Esquire, in the presence of the clerk of court.

Signed by:

Clerk of court

Judge

Copy sent on February 7, 1997.

An appeal may be commenced against this decision within six weeks after the sending of this opinion with the Department of Administrative Law of the Council of State.