NEW YORK LAW SCHOOL

NYLS Journal of International and Comparative Law

Volume 20 | Number 2 Article 2

2000

SYMPOSIUM: MULTIDISCIPLINARY PRACTICE

Sydney M. Cone III

Martha w. Barnett

Alison Crawley

David Gordon-Krief

L. Harold Levinson

See next page for additional authors

SYMPOSIUM: MULTIDISCIPLINARY PRACTICE

Authors

Sydney M. Cone III, Martha w. Barnett, Alison Crawley, David Gordon-Krief, L. Harold Levinson, Paul J. Sax, Jerome J. Shestack, Deborah H. Schenk, and Bernard Wolfman

SYMPOSIUM: MULTIDISCIPLINARY PRACTICE

MR. CONE*: I want to thank everybody for coming. I am very grateful to you for coming here today. We have a very good group of people here for our symposium on Multidisciplinary Practice[1]. We are quite pleased that this group is willing to be with us this afternoon. Before I introduce them, let me mention that Michael Cooper, the president of the Association of the Bar of the City of New York, is standing in the back. We are indebted to the Association for the facilities. We thank the Association very much.

I also am happy to see in the front row Otto Walter, who is a major benefactor of New York Law School. I am very pleased that Dr. Walter came here and I am flattered that he is here. As for the members of this panel, the faculty, Professor of Law Emeritus Harold Levinson of Vanderbilt University Law School—I am going from my left to right—Professor Deborah Schenk** of New York University School of Law, and Professor Bernard Wolfman, Fessenden Professor at Harvard Law School.

We also have with us the President-elect of the American Bar Association, Martha W. Barnett. She came today from Tallahassee, Florida, which is where she is from. We are, of course, delighted that she is here, particularly since the title of the symposium is "Should the ABA approve MDP?" Who better than the president elect of the ABA to share with us her views on that question.

We also have, and are quite honored to have, a past president of the American Bar Association, Jerry Shestack.*** Jerry Shestack, who is from Philadelphia, has been avidly following the issue of multidisciplinary practice. To his right is Alison Crawley, who flew in yesterday from London.

---

*. Sydney M. Cone, III is the C.V. Starr Professor of Law and Director of the Center for International Law at New York Law School.

1. The symposium was held at the House of the Association of the Bar of the City of New York on October 25, 1999. The primary issue that inspires this Symposium is the ethical considerations that surround accounting firms administering legal services.

**. Deborah H. Schenk is the Marilynn and Ronald Grossman Professor of Taxation at New York University School of Law.

***. Jerry Shestak is a Partner with Wolf, Block, Schorr & Solis-Cohen, LLP, of Philadelphia.

She is in charge of Professional Ethics of the Law Society of England and Wales. To her right is David Gordon-Krief, who has a name that pronounces perfectly either in English or French. David flew in over the weekend from Paris. He is on the governing body of the Paris Bar, and he is a member of the Paris Bar Council in Charge of International Affairs. France has had considerable experience with MDP, and we are happy that he is here to share his knowledge and views.

Paul Sax, who is a Partner with the Orrick, Herrington & Sutcliffe firm in San Francisco, came in from San Francisco for this and we are quite pleased that he took the time. He is the head of the tax section of the American Bar Association, which has taken a very strong position in favor of MDP. We are quite happy to have Paul here to share those particular views and any other views that he may want to share with us.

There could be no better way to get the discussion started than to ask Martha Barnett if she would introduce the subject of multidisciplinary practice and tell us about the work that has been done quite recently within the American Bar Association on multidiscplinary practice. Generally, what we hope to have here is a discussion of issues. We hope that issues will come out, will be analyzed and discussed, and that the members of the panel will speak back and forth among themselves. We also hope that you, who have taken the time to come here, will speak and if you want to, ask questions. Please make questions short, but please ask them. With that, I would like to ask Martha Barnett to get us started.

MS. BARNETT: Thank you very much. It is a pleasure to be here and I am very glad to see such a large turnout. I suspect you cannot tell, but there are people out in the hall. You might want to come in and move to the sides; there is at least some standing room or sitting room in the window room up here in the front, so please feel free to come in. You will be able to hear better. This gathering reminds me of something that occurred at my law firm. I am a partner in a firm of about nine hundred lawyers, and we have an annual meeting and, on the Sunday morning of our meeting, we leave free for people to have substantive programs or for groups to get together to talk about client and business development, and cutting-edge issues.

My area of expertise is in state and local tax, so I have been paying attention to some of these issues from a professional standpoint for a long time. About two years ago, I thought, "Well, I will have a meeting on multidisciplinary practice." I set it up. I had it put in our printed agenda, got some materials together and got up for an eight o'clock breakfast meeting and five people showed up. Five people showed up. I could not even fill up one table. But I never give up on things that I think are important. So, this past year, in August, we did the same thing. I set up another meeting within the

firm and this time, even though again it was eight o'clock on Sunday morning, about 150 people showed up.

This indicates the growing awareness in the legal profession and certainly in law firms about this whole question of multidisciplinary practice. I am not sure that three or four years ago we would have heard the words "multidisciplinary practice." Some had, but certainly not with the commonality that we now hear of MDP. It has even become an acronym now. Your showing up also indicates the importance of this, and I compliment Terry Cone and commend to you the materials that you have. They are very good materials; they reflect a cross-section of many opinions on this particular subject. They include the full report of the ABA Commission on Multidisciplinary Practice. I commend them to you, and I thank Terry for putting them together.

Even though MDP seems to be new to some people, in truth, the whole question that is integral to this subject has been around for a long time. When the cannons of ethics were adopted—when we first began dealing with this—was in the 1920s, when we first adopted some cannons that dealt with fee-sharing and things like non-lawyer partners and the concept of independence. Then in 1969, it first showed up in the Model Rules as a particular model rule and as a guide for lawyers. Interestingly, in the mid-70s—and I cannot remember the exact date, although I am sure some people in the room probably will remember—the ABA had another commission to look at an overview of the Model Rules and to recommend changes to them; it was called the Kutak Commission.

We have a similar activity ongoing now within the ABA; we have titled it "Ethics 2000," where we are looking at the totality of the Model Rules, including this subject. However, the Kutak Report looked at sharing fees, non-lawyer partners, and some of the issues that are integral to this discussion, and actually made recommendations to the House of Delegates of the ABA. Thus, it is not a new subject. It is also not a subject that relates just to the tax arena, although I think that is where people first felt the sensitivity more, particularly from the accounting firms, because of their audit function and their natural ability to move into other fiscal areas related to tax. We now know that this issue has a broad impact on many areas of the law, whether it be employee benefits, family law, litigation, certainly litigation consulting, and even more recently, we see a lot of involvement by non-lawyers in alternative dispute resolution.

There is a sense of urgency, I believe, certainly in the American Bar Association, and perhaps a growing sense of interest, if not urgency, within the legal profession in general. Some of that is engendered by the activities of the ABA in the commission that was created by former president Phil Andersen. Many people believe that the bar, particularly the American Bar

and the American lawyer, is getting involved in this issue too late to really have much impact. Others believe that the American legal system is the core and is the key and that without changing the way American lawyers approach some of these issues, it will never proliferate in the way that non-lawyer professional corporate entities or other professional entities would like to have it proliferate.

So there is a tension within the Bar, both internationally and nationally, on this particular subject and particularly as to whether we should do anything, and if so, what should we do? To respond to that, the ABA decided to set up a special commission. That Commission met for a year, took testimony from numerous professionals, both in this country and internationally, including non-lawyer professionals who are interested in the multidisciplinary practice, and came up with a recommendation to the House of Delegates of the ABA.

The House of Delegates, as I am sure you know, is the policy-making body of the American Bar Association. That is the body that would recommend changes to the Model Rules, and if adopted, those changes would then be recommended to the various states for the state's individual action on any of the proposed recommendations.

The Commission recommendations—and there is a very good summary in your materials—basically endorsed the concept of multidisciplinary practice, both lawyer-controlled and non-lawyer-controlled MDPs. It defines MDPs very specifically, lawyers, non-lawyers providing integrated services, both legal and non-legal, and the particular corporate structure. It recommends changes to Model Rule 5.4—and then a new rule—I cannot remember the name, Number 8? What is the number, Hal? Anyway, a new rule—I am sorry, I cannot remember the number—that allows, among other things, lawyers and non-lawyers to split fees, allows lawyers to be partners with non-lawyers, and allows lawyers to be in an organization or entity that is controlled by non-lawyers.

With regard to the non-lawyer-controlled multidisciplinary practice, a set of requirements are recommended to try to impose on the lawyers working in that environment, essentially the standards in the Model Rules of the code of professional responsibility and require the non-lawyer MDP to submit, basically, to the jurisdiction of the highest court or entity that has authority over lawyers with regard to the standards in the Model Rules.

That was presented in August. Prior to the ABA annual meeting in August, it had engendered a lot of debate and discussion among numerous bar associations, New York included, as well as my home state bar, the Florida Bar. And after considerable debate, before the House met and at the House of Delegates meeting on this particular subject, the House adopted a resolution, which is in your materials. I want to take a moment because this

is something we can use to discuss today. I want to take a moment just to read it to you. There has been some misunderstanding within the legal community as to what the House actually did. Some people say the House of Delegates and therefore the American Bar Association rejected multidisciplinary practices; others say that they simply postponed it. What the resolution that was adopted does—and this resolution was offered by the Florida Bar—is it puts the ABA on record as saying that there will be no change to the Model Rules unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.[2]

I wanted to quote that to you because those core values and the core principles that underline for the American lawyer the unique role that we have in society as a part of the judicial branch of government, as officers of the court and our obligations to our clients and to the public, before our obligations to ourselves, I think, makes this debate far more complicated than simply an economic issue and makes a resolution of it ultimately far more difficult to reach, but, perhaps, not impossible to reach.

I think I will stop there...oh, one last thing I will say. The House of Delegates expects to take this issue up again in July of 2000, at our annual meeting, which will be held in New York City.[3] So you can all come back and participate then in this debate and discussion. Right now, the Commission and other members of the profession are working with the state bars as they get fully engaged in the issues that this presents to the profession and to the public.

I do not have any real crystal ball on what might happen or what might be recommended but I believe that we will see changes that differ in some measure from the recommendations of the Commission, and those recommendations are, in full, in your materials. Particular concern focuses on non-lawyer-controlled multidisciplinary practices on the role of the Securities and Exchange Commission and on the important but sometimes elusive concept of independence of the lawyer and the independence of the profession.

MR. CONE: Martha, many, many thanks. I am sure we are going to have a lively discussion. We had a very lively discussion over lunch before

---

2. *See* Resolution by the ABA House of Delegates (August 10, 1999).

3. During the July 2000 meeting, the House of Delegates made a resolution that urged each state to revise its law governing lawyers to implement certain stated principles "preserving the core values of the legal profession." *See* Resolution by the ABA House of Delegates (July 13, 2000).

we came in here, and if we can simply replicate that, it will be extremely worthwhile. I very much appreciate Martha's calling our attention to the resolution. It is just sixty words long but it is what the House of Delegates said—and I think it is a very good point of departure because that is where we are—in early August.

I would like to ask Paul Sax if he would give us some views on these issues and if he is willing to do so, to get our discussion started.

MR. SAX: Well, the Tax Section's views are set forth in my letter of a week or so ago; it is the last document behind tab five. Multidisciplinary practice is already here. The most succinct comment was in the Washington Lawyer Magazine in the last issue when they referred to what Groucho Marx had to say when asked what he thought about sex, and he said, "I think it is definitely here to stay." We have multidisciplinary practice, and the Bar has not been a player in the development of that multidisciplinary practice. The Model Rules are antiquated. Facetiously put, they were designed for a handful of ethnically-compatible gentlemen practicing in the small town not within a hundred miles of an ocean and with a view of the river. They do not work.

Today, consumers dictate choice, and consumers have dictated what has gone on in multidisciplinary practice. There was a day when Henry Ford sold black Model A's, and we bought black Model A's. Now, if we want an orange I-Mac, we get an orange I-Mac. We do not go to the doctor and do as we are told; we go to the doctor and say, I want a prescription for such-and-such. Consumers do not want to be told where they can get their legal, financial, and accounting services, unless there is a very good reason for it that they understand.

In consequence of that, they have accepted multidisciplinary practice. Pricewaterhouse is the third largest law firm in the United States. Arthur Andersen has acquired the largest law firm in Spain. It goes on and on. People tell me—and I believe them—that each and every one of the Big Five has a business plan that has them thoroughly engaged in corporate law, real estate law, environmental law, employment law, and litigation management. Even at this date, many of them are already in those practice areas fully. They are ferocious competitors. When I came out of school, the accounting firms were the employer of last resort. Now, they are a ferocious competitor for the very best people, and they are buying the very best talent from the law firms.

When you talked about enforcing unauthorized practice of the law statutes, you can read all you want. If you credit the press accounts, what happened in Texas was that Arthur Andersen was practicing law, the Texas Bar decided to do something about it, and they were so thoroughly

out-resourced by what is rumored to have been a ten million dollar war chest from the accounting firms that not only did the Texas Bar surrender, but they did everything short of hold a press conference and apologize for suggesting such a thing.

This is about money and power. Those folks know how to use money and they know how to use power, and right now, they have it. What the Bar has to stand on is the prohibition on fee-splitting in Model Rule 5.4, which is perceived as a turf protection measure in consequence of which it is utterly unenforceable.

Not only do we now have multidisciplinary practice, but the next stage is beginning to evolve, in which they are going to set the rules for how multidisciplinary practice firms operate, the rules of confidentiality and client loyalty. Only last week, the AICPA was out explaining to the world how they have rules of confidentiality just like us, and they are very confidential people, and they can be trusted. It is that dialogue that leads them to setting the rules. Our view is this: If the Bar does not get out in front fast with something that is consumer protection-related that the public can understand and embrace, that captures the values of confidentiality and client loyalty of the Bar, such as by adoption of the recommendations of the Simmons Commission, the Commission on Multidisciplinary Practice or something very close to it, we will continue to be ignored, and they will set the rules for the future practice of the law. Is that provocative enough for you, Terry?

MR. CONE: I do not think that the purpose of this meeting is to provoke me, but I am delighted to have you try. Paul, first I want to thank you for making that effort to provoke me and also for seriously laying it out. It is a great deal of substance for us to chew on, and I was wondering if Jerry Shestack would be willing to give us some views of his own.

MR. SHESTACK: Yes, thank you. Paul said that the MDP is already here, and the argument has been made, at least by some members of the ABA Commission, that there are a lot of people in accounting firms actually practicing law, and that we have got to bring them into the tent of the law. It reminds me of a story of the time that Sherlock Holmes and Dr. Watson went camping. They put up a very nice tent and went hiking, and then they prepared dinner by the campfire. Later, they retired on their sleeping mattresses. About midnight, Holmes awoke and turned to Watson and said, "Watson, look up at the sky and those beautiful stars and tell me what thought occurs to you." And Watson says, "Well, Holmes, I think of the Majesty of the heavens and the glory of the Creator...and what thought occurs to you?" And Holmes said, "I look up at the stars, and it occurs to me that someone stole our tent." I think it is a little bit like that here. We talk

about core values, but let me ask you, will MDP enhance core values? In what way will MDP do more than be of benefit to business partners rather than the clients? Are we not really cloaking a business-enhancing plan by the Big Five, and perhaps some others, in the guise of some vague client service and development?

Let us look at our core values. Belief in core values is the reason I became a lawyer, and I suspect that is why most of you became lawyers. And they are: ethics, competence, independence, civility, obligations to a justice system, and pro bono service. How are those core values going to be helped if we form a partnership sharing fees with accountants and become controlled by accountants or other features of MDPs? Ethics—we struggle with ethics. Every lawyer struggles with ethics within one's law firm. We have a commission in the ABA to review our ethics rules and to make more appropriate rules for consumers, for arbitrators. We take ethical rules seriously. Ethics are not something you should read like you read the general accounting principles or Internal Revenue's regulations. You look at it with a view of abiding by it, not just to push the envelope. How is that going to be improved by MDP?

Or take independence. It is a simple adage that a person who controls the money controls you. If accountants or others are going to control the money rather than lawyers, your independence is going to be compromised. Elihu Root said that fifty percent of the practice of law is being able to say "No" to a client. How are you going to be able to say No when you are reporting to accounting managers as MDP governors? Or take obligations to the justice system; is that really going to be important to an MDP? We are all officers of the court; we have to deal with a limping legal structure, trying to make it straight and walk upright with respect to overburdening and underfunding and other deficiencies in the administration of justice. Are we going to seriously be concerned about the justice system when we are a part of some MDP organization? And will MDPs be concerned with pro bono service?

I took a look not long ago at brochures of several of the major accounting firms. Not one of them even mentioned pro bono service. You look at the brochure of any law firm in this city or in any major city or listen to the recruitment officers for the law firms and they certainly mention pro bono service. The whole culture of the law is at odds with MDP. We have a culture where we deal with practical wisdom with civility, with human rights, with obligations to justice, and to put it simply, remembering why we wanted to be a lawyer. That is all going to go. That will all be slighted under an MDP system. The core values—who is going to maintain them? The justices of the Supreme Court are not going to undertake that burden; disciplinary commissions cannot do it, and the accounting firms frankly

admit that what they want to do is not abide by our rules but change the rules for the sake of one-stop shopping.

What is the magic in this one-stop shopping? The fact of the matter is, I cannot get my clients to do one-stop shopping even in one law firm. If I get them in for litigation, and try to get them to our estate department or to our labor department or corporate department, they have their own lawyers in different areas. We have all had that experience. Is one-stop shopping going to save time and money as it is alleged? I guess my family spends more when they go into one Bloomingdale's store than when they go into five different boutiques. In any event, that is not a real value as far as lawyers are concerned. We have done very well. We can affiliate with real estate people when we need to. We can use environmentalists. We can get experts. We know how to do it, to provide good service for a lawyer, and I think we diminish our profession by entering into MDP arrangements.

MR. WOLFMAN: If I may just interject a couple of points at this stage. First, let me just say that I very much endorse what Jerry Shestack has just said as to why we are lawyers, why our profession is important, and why it is entrusted with molding the legal system, which benefits all of society. The only datum I want to introduce at this point, however, relates to this notion of what clients want, what they are asking for—this notion of one-stop shopping. I testified before the ABA Commission last March. The witness who preceded me was a representative of Arthur Andersen. He was asked by the Commission directly after he had said that clients—the companies out there—are demanding one-stop shopping if there is any data or any survey, any statistic to support that and he said, "No, there is none." He said there is none, and I am sure he thought there was none, and he said that he did not think you could really get one.

Well, the fact is that in England, there had been a survey undertaken—a good one. It was undertaken in 1998 by the leading London journal called the "Commercial Lawyer." They surveyed the 350 largest English corporations. They posed the question to these corporations of whether they preferred MDPs to separately organized and controlled law firms and accounting firms. They posed the question independently to two different officers of these corporations. They posed the question to the head of the legal department of the corporation, but then, fearing that there could be a bias one way or the other, they also posed the question independently to the CFOs of these corporations. The results are remarkable. Twenty-five percent of the corporations responded, which statisticians say is a very good response out of 350 corporations. Eighty-eight percent of the legal heads said they do not want MDP; they do not want so-called one-stop shopping, and precisely the same percentage of the CFOs said that they want to pick

and choose from independent law firms and independent accounting firms. They do not want MDP.

So, there is a survey; there are statistics out there, and I think that at least it would be appropriate for a debate that is going to be objectively examined and studied for people not to say, at least not to say so definitely, that the clients are demanding one-stop shopping. The only survey that exists says exactly the opposite.

MS. SCHENK: I would like to take a different angle on the core values argument and to be—just as Paul was—provocative. I have a very hard time crediting the core values argument for this reason: There are already several thousand lawyers practicing in accounting firms and I believe the recruiters that come to our campus who are telling our students that, "You are going to do exactly what you have done in a law firm just do not use the magic words 'I'm practicing law'."

We are all aware that they are, in fact, practicing law in these accounting firms without conflict checks, without confidentiality requirements, and without the pro bono requirements that our Code has. If these really are our core values, why haven't we been concerned about this? There are outstanding opinions of the ABA, the New York State Bar Association, and the Illinois Bar Association that this constitutes either the unauthorized practice of law or that there are other ethics violations, such as sharing fees or confidence problems. And yet, to the best of my knowledge, only the Texas case is a case in which any state has taken any action whatsoever to enforce these rules.

My understanding as well is that the Texas matter did not go forward for lack of funds. There was a huge war chest created by the accounting firms. If law firms and law practice—the Bar—is so concerned about this, we could have found the will and the funds to back up the Texas Bar if we wanted to. I have no information that anybody stepped forward to do that. I have no reason to believe that these rules are going to be enforced now. The result is we have a lot of lawyers, lawyers who are leaving law firms, particularly in tax practice, to go to accounting firms, who are by their own admission not following these core values. If this is so important to us as a Bar, why are we ignoring what these lawyers are doing? I personally do not think that we will ever enforce these rules. I do not think we have the will to enforce these rules, and as more of our friends and associates cross the lines, I think we will be unwilling to take them on.

Therefore, my view is that we should think of a way to work together, as opposed to sticking our heads in the sand. My view of the action of the ABA is that we did exactly that. The resolution essentially says, "There is no problem and until we are convinced there is a problem, we will do

nothing." Well, I am here to tell you that if you really believe in core values, there already is a problem. There are several thousand lawyers in the United States who are doing exactly what you object to when you say you object to MDPs not upholding our core values.

MR. CONE: Harold?

MR. LEVINSON: Thank you. We do have a problem. The ABA or the state bars or somebody should do something, whether that something is to play a kind of a gambit like Paul Sax proposed, offer deals that you expect people to really accept or reject, or whether we should just sit by and tolerate disobedience to our rules. There are other approaches to be considered. One is, if our rules are not enforceable in the present form, clarify our rules and then start enforcing them and possibly give lawyers an opportunity, within a few months, to conform to the rules as clarified.

Another possibility is to allow lawyers to put their law license in inactive status if they persist in engaging in activity which violates the lawyers' rules. Inactive status means they cannot promise clients privileged status. It means they cannot participate in governance of the legal profession. It means that they can go out and work for accounting firms if that is what they would rather do.

Other possibilities are for the legal profession to welcome the competition implied in the growth of accounting consulting, to slash law practices, and to attempt to ready ourselves as lawyers to compete with the challenge in the marketplace and in the forum of public opinion and in the political forums, and wherever else the challenge may lead. Other possibilities may be to create a small firm exception allowing MDPs only, let us say, for a firm which after the joinder will have, let us say, twenty lawyers or twenty lawyers and other professionals combined, making sure, however, that the small-firm exception is not undermined by large firms spinning off small affiliates and then trying to get around the corner in that fashion.

I agree with Paul Sax that we should do something; we, as lawyers should do something but I do not think the thing to do is to accept the Simmons Commission report as it was written. A lot more work needs to be done. One of the things we need to do, I believe, is to take a good look at the accounting profession and probe its points of weakness. There are many factions; there are many schisms in the accounting profession itself. I happen to be a member of it, and I am proud to be, but I am concerned about some things they are doing.

I do not think the Big Five are in the accounting profession. The Big Five have their own concerns. They did not become the Big Five by being nice to the small accounting firms. Accounting regulators around the country

have become increasingly concerned with some of the things which the Big Five are attempting to do. The consolidators play another significant role. Consolidators like American Express and H&R Block are buying up small accounting firms, splitting off the audit function and then arranging some kind of a contractual relationship between the holding company and the other firm, which has been severely criticized by state regulators as elevating form over substance. The time may come where there will be confrontations, either in Congress or in state legislatures, or even in state constitutional conventions between the Bar and the accounting professions.

The Bar needs to be ready for that, with its research, its public relations, and the quality of service that we can deliver to society. The core values are there and we need to emphasize more; we need to understand them, to be able to get on the Larry King Live show and explain them to the world. We can be proud of them but first we have to recognize them, talk about them and accept them.

MR. CONE: Harold, thank you. As usual, you are provocative in the best way, that is, intellectually provocative, and I thank you very much for that. I want to start getting some input from the audience but first, this so far has been an all-American show, and I do not think that is correct. We have two people from Europe here. I was wondering, particularly, since France has had so much direct experience with the Big Five accounting firms—they started off as eight and then consolidated down to five—France has had an enormous amount of experience with those firms practicing law in France, and I was wondering if we might call on David Gordon-Krief to talk to us a little bit on the basis of that experience.

MR. GORDON-KRIEF: Thank you, Terry. I will try to be provocative too, just to tell a little bit what happened in France and let you know how much France and Europe—and say a few words about England—are really concerned about what is going on in the States, in North America, and how important the decisions you are going to make are for us.

In about early 1990, we decided to merge in France the profession of lawyers and accountants, what we call "conseils juridiques," which are legal advisers or people that could give legal opinions, especially in tax and corporate law, without being lawyers and, of course, mainly for accounting firms and offer corporate structure. We merged the two professions and within seven years, we have seen the Big Eight become the Big Five. Starting from no lawyers, now they have almost ten percent of the entire lawyers' population in France—almost three thousand lawyers out of over thirty thousand lawyers in France. So it is the biggest growth rate in the lawyers profession. It is absolutely amazing the way they have expanded and

what they have been doing for the past few years. No large law firm in France has more than five or six offices in different cities and these five law firms have probably 260 offices in France.

So we have a huge network. They do not only excel in work in tax and corporate law; they also do litigation in property, family and divorce, and environmental, and absolutely everything a regular law firm does. The problem we have now is not how should we approve MDPs but can we regulate MDPs now. We have this big concern. We have been working a lot to try to see how the core values can be respected, and we have been really trying to analyze what has been going on for the past seven years—that actually the big problem is that they have totally lowered the standards of our core values.

We have huge problems that we might face down the road in five or six years, for example, with criminal judges. We have, in France, problems with judges thinking that lawyers are accomplices with laundering money and now they are saying, these judges, now that you are sharing secrets, you are lowering the standards of the client-attorney standards privilege by sharing these secrets with other professional, with other professionals that are not from regulated professions, like people working in the same network and the same Big Five, like PricewaterhouseCoopers. How do you pretend that you are going to be able to oppose that to the judge and not tell us the truth about what happened with your clients? So now they are encouraging forcing lawyers to disclose privileged information because they say, "Now you are sharing with absolutely everybody else, and there is no way you can protect these core values." So we have this very big problem that you might be facing. I am not saying stop the possibility of working with other professionals, but it is a very, very big concern of sharing.

We are not into this issue now, Terry, but this issue of whether to control or not to control MDPs and this fee-sharing agreement—we are contemplating this. Let me give you an example of independency. In France, the Big Five law firms are saying that they are absolutely independent from the network, from the rest of the accounting firms and from the auditors. Months ago, you learned that Pricewaterhouse merged with Coopers. There were two law firms in France; one was about 180 lawyers, and the other about 250 lawyers. None of the partners of these two law firms were consulted to decide whether these two law firms should merge, and somewhere in the States, the merger was decided worldwide, and for what? Accounting? Auditing? Suddenly, two French law firms merged without knowing they had merged and became just one law firm with about six hundred lawyers in France. They did not make that decision.

So, if they do not have the power to decide with whom we are going to be partners and associated, how can we consider that one of the main core

values, which is independency, can be protected? So this is just why we give you more input on the French and European experience. But, of course, MDPs are here, but you can still regulate and decide whether you want certain core values not to be diluted, and you have to decide whether you want these values to remain for the next century or not.

One last thing, from the experience we have, who needs the MDPs? You say clients need MDPs, et cetera. I don't think clients need MDPs; I think MDPs need MDPs. The Big Five, having this worldwide expansion in accounting, in computer consulting or whatever, now need law and legal services to be more efficient and to be able to expand and have a huge and complete service. We have all seen the legal services expanding, the demand for legal services expanding worldwide. We need legal input to strengthen the services all around the world. I am not sure clients need that, but when the client is working in France, all the Big Five will tell you that 85 percent of the clients come from auditing firms, from accounting firms, and from software consulting. Eighty-five percent. And the clients are no longer free to choose the lawyer that will do the merger, the acquisition, the litigation, whatever. We can see that this is not speculation; we have seen that for the past seven years.

MR. CONE: Thank you. Alison, just one minute. I want to make certain that it is clear how this situation occurred in France. David explained it but I am not sure that it is necessarily clear to everyone here. Before January 1, 1992, there was a profession of avocat[4] in France that did not include the profession of legal consulting. The Big Eight had built up their legal departments by hiring legal consultants who were in the members of the profession of avocat. On January 1, 1992, by operation of law, all of the legal consultants became avocat. They went to bed December 31st "conseils juridiques;" they woke up the next morning avocat. This meant that those who were working for the Big Eight as "conseils juridiques" were now members of the Bar, and the Big Eight therefore found that they had avocat within their network, as the French called it.

And I am sorry to have taken precious time to make this point, but I thought it important that everyone understand what had happened. Alison Crawley will now talk to us from an English perspective.

MS. CRAWLEY: I would just like to pick up on one of the last things that David said about the fact that clients in France no longer have the right to choose, and if they go to the big accountant's firm for software advice, they

4. The term "avocat" generally corresponds to "lawyer."

end up going to the in-house associated legal practice. I just wonder whether that is because they are not getting better service and they like the service they are getting; that's what the Big Five would say. In England, this debate started at least fifteen years ago, really, and it had nothing to do with the Big Five, and a lot of the talk here today has been to do with the Big Five but there are lots of opportunities for lawyers in relation to multidisciplinary practice and for clients in developing services and technologies in ways that we have not yet begun to think about that is not only related to the Big Five.

In England, the debate started when our government, which was then anti-anything that looked vaguely anti-competitive, decided it would be rather a good idea if banks and building societies who lent money to people to buy houses should be able to provide the legal work as well. Now it is an MDP controlled by somebody with a conflicting interest to the client, and that was where we started. I am not convinced that, even though we have got new governments now, that there is very much more concern in the U.K., in the government, in our office of fair trading, who really see our restrictions as being just restrictions and protections.

The Law Society spent the last fifteen years looking at the problem. We do not allow MDP officially, but we have restructured some of our ancillary practice rules and associated practice rules to allow certain developments to keep so far, and the U.K. government is not quite so far back. But they have not actually forced anything upon us yet. That is the concern in the U.K., that we will have a solution presented to us that we have not developed ourselves. As I said, the Big Five are putting some pressure on, but for years and years and years, people like the surveyors, your states' agency in England, will go right to the government saying, "Can't you do something about the Law Society's restricted practice?"

I just want to put that into the background of the Law Society's thinking on this. Very recently—just three weeks ago—the Law Society Council had the report from its working party on MDPs, which said, essentially, MDPs are here. We come from a point of view of perhaps France and what Paul was talking about. MDPs are here; we have got to find a way of regulating them properly in a way to protect the core values of the profession.

There was discussion at the counsel meeting that we needed proof, we needed evidence, we needed to go out and ask clients, "Why do you want them?" The Sony Walkman analogy comes out; we knew that we wanted a Sony Walkman before it was there. And the general view of the Law Society Council when it debated this three weeks ago was that, presumptively, this looks like a restrictive practice. We must see if we can get rid of the restrictive practice and put in place by regulation other ways of protecting the core values and core duties of lawyers. In a way, this allows them to fee

share with other people and develop their own practices with non-lawyers to find solutions for clients that we have not thought of yet.

So the ultimate goal, they decided, was that solicitors who wanted to, so that we are not forcing this upon anyone, should be able to provide legal services to anyone, provided that there was still the necessary safeguards there to protect the public interest. Now, that is a tall order, one with which I think every MDP working party or commission finds difficulty, and I suspect that in England, it will need legislation. We are putting that as our long-term goal, but we are looking to develop two interim solutions. The interim solutions do not in principle include non-lawyer-controlled solicitors' practices.

We are looking at developing one model that is similar to the Washington model, or what they are developing up in Canada at the moment, which is lawyer-controlled MDPs allowing law firms to take on some non-lawyer partners. We think that, in a way, puts a little bit of the opportunity back in the hands of the professionals or solicitor's firms to allow them to prove what they can do with that ability. The other thing that we are looking at is to regularize the position without the ancillary practices that exist, which is Garretson and Andersen's link.

MR. CONE: Excuse me, tell the people; not everyone here, I do not believe, knows about Garretson and Andersen.

MS. CRAWLEY: All right. What has developed on the continents—and France were the forerunners of this—is that you have an independent law firm that has an association with the Big Five firms so it is associated practice. But the law firm still maintains its independence; it is a partnership only of lawyers. They are regulated by the Law Society, and they comply with the Law Society rules, which prevent them from fee-sharing. They can provide joint services to clients, if clients know that they are getting joint services, and they can provide services to the clients of Arthur Andersen's or to clients who come through the door.

But, essentially, it is a solicitor's practice run independently, although some people doubt they are true independents. These are the sorts of issues that David was taking about. What these law firms are saying to us is that the fee-sharing rule is not it. It is not about control; it is not about anything. It is just rather annoying. There are other issues about branding as well that they get annoyed about. The Law Society Council decided that we would look at regulating properly these linked partnerships that allow a model to develop in the same way that David was saying developed in Paris. These happened de facto; they exist but they were not shaped by the regulation. They have just developed. We are going to have a lot of that as well, and I

would imagine those would be the first two steps that you are going to see happen in the U.K., not MDPs controlled by non-lawyers at this stage.

MR. CONE: Thank you very much, Alison. Anyone here who wants to amplify? Yes?

MR. LEVINSON: I would like to ask David to comment on the following question: Do you think, given what you have seen in France in the past ten years, is it already too late for the United States to reassert its existing standards, or is there still time if we act soon?

MR. GORDON-KRIEF: From what we have seen, not at all; it is the time to do it. Now, in France, most of the decision-makers, the CEOs of the Big Five, are waiting for the Americans to decide because they still realize that being just a continental—I mean, talking European—simply being a large French law firm or European law firm does not permit it to be involved in large corporate deals or large mergers and acquisitions or transnational deals. Now you can read papers from Deloitte and Touche, or other people saying we are big, but until we merge, or we buy, or we open law firms in the States, with the size of your large law firms, White and Case or Sherman Sterling, we are nothing on the world basis.

But you must realize that in Europe, we also have a European directive named the Free Establishment of Lawyers Directive. Within two or three or four years, the Big Five are going to be able to have thousands of lawyers in Europe. We still need to have law firms here in the United States to be internationally recognized and accepted and to be able to be hired. Now, in France, they are expanding a lot but we do not see them—this is important—we still do not see them in the very big, major deals. They are not involved in the major takeovers or privatization or stock litigation. They are still not involved the major cases. And what are we waiting for? United States, England, maybe for Europe. England is a major thing for Europe. But the United States is vital for them, so not only should you, but you have to.

MR. CONE: Bernie, then this gentleman here, then Jerry.

MR. WOLFMAN: Just two points. One, a distinction between a lawyer-controlled and a non-lawyer-controlled MDP. Under the current Model Rules, theoretically, neither is permissible because of the anti-fee-sharing rule. The Big Five—that is, the lawyers who are with them—are, in fact, violating the rule. The small law firm, many of them—I am told, and I believe—feel disadvantaged. Some of them want to be

bought out, to be captured by the Big Five, because they do not have the capital that the Big Five have to enable them to compete.

Moreover, they are more focused on the applicability of the rules, which say they cannot bring into their firms, into their law firms, their middle-sized law firms, accountants to help them with financial services. They cannot bring in, as partners, accountants to help them with their financial services. They cannot bring in social workers and family counselors in connection with their domestic relations activity and so on.

It seems to me that one can with safety as to our core values modify the anti-fee-sharing rules to permit MDPs where the lawyers own, manage, and control the institution where they, from the day of their education forward, have had the core values instilled in them, and they can be expected to enforce them far more than the Big Five will do. Moreover, one has to recognize the fact that the ABA Commission report, which wants to authorize MDPs, whether lawyer-controlled or not, nevertheless says that all MDPs will be subject to the confidentiality and loyalty rule, and with imputation firm-wide to the non-lawyers and the lawyers.

The accounting firms who have spoken out saying they reject them make clear that they do not believe in those values and say that the ABA's approval of this will do nothing for them because they do not want to abide by those rules. Now, let us suppose the ABA were to authorize what the Commission had suggested. What would that accomplish if the Big Five, assuming there is already a fait accompli, does not abide by the requirement of the confidentiality and loyalty and independence rules?

We are told that the reason we need a change is the States have not been enforcing the law. So why should we assume that if we go through the process of enacting something like the Commission's report that would say, "You may do what you're doing if you subject yourself to these rules," and they say, "We are not going to subject ourselves to these rules," why should we assume that will trigger enforcement of the rules, when they have not been triggered before? It seems to me we have to recognize that the Big Five do not want the rules and that what is needed is a rejection by the ABA and by the States of non-lawyer-controlled MDPs, and we should hope and seek to achieve a degree of enforcement of the rules that would say to these lawyers who are now there that "You must cease practicing law with those firms, return to law firms or you will be enjoined."

That would have to be the outcome if the Commission's report were enacted or not, and it seemed to me we can work towards that goal. And it may be that the discussion of MDP in groups like this and elsewhere throughout the country will heighten the concern, heighten the interest and, perhaps, bring us to a greater degree of giving more than lip service to the core values.

AUDIENCE MEMBER: I was wondering if there was any legal research that has been undertaken with respect to antitrust and trade regulation, laws of state, federal government and states, on the restrictive practices appearing in England, the tying of services, and the almost monopoly positions these multidisciplinary practice firms will represent in certain markets.

MR. CONE: As I understand the question, it is whether there have been antitrust investigations into the restrictive practices of multidisciplinary firms.

AUDIENCE MEMBER: Right, and tying of services and—

MR. CONE: And tying of services. I think that is a wonderful question because we so frequently hear the other issues raised, which is that the legal profession is itself a perambulating antitrust violation. Who would like to comment on that?

MS. CRAWLEY: Not necessarily in relation to legal services but when the PricewaterhouseCoopers merger was planned, it was an issue that was considered by the European Commission because it was put to them that this was so narrow in the market, the big major international firms, it was anti-competitive.

They allowed that one to go through, but more or less said—as I understand it, but I am being rather glib here—is that was it. There is going to be at least five, but we were not going down to four. So that when KPMG sort of did discuss whether or not another merger was on, the indication was it would get nowhere. I must say that the Federal Trade Commission wrote to the European Commission when they were looking at the PricewaterhouseCoopers merger and said that given not only the narrowing of ability are fewer and fewer large firms able to do big international audit work, but the more these firms got linked with lawyers, the more anti-competitive that was going to get as well. So it is a concern that definitely has been flagged with the European Commission.

MR. CONE: Anything else on that point before we go to Jerry Shestack on a different point? Anyone have any comments or questions on the inherent antitrust problems—on the suggestion that there are possible antitrust problems inherent in the operation of MDP? Sir?

AUDIENCE MEMBER: I would like to go back to your original point which is—I can see this developing—the accounting firms clearly as they

merged are going to make the argument that the Bar itself is restraining trade. Probably, you have already seen that in Europe extensively, and Professor Levinson has suggested as well as Mr. Shestack, that the horse is out of the barn and this is already happening.

As a practical matter for the Bar, it seems to me that we have only two choices, but we may end up with a blend of both. One is either we put together the political will and the resources to assert ourselves and be in a position where we can influence the policy and perhaps raise a war chest as necessary. It is very disheartening to hear that Texas was routed so soundly. That is like a report from the front that we have lost a major battle, which I did not even know about, frankly. But either the Bar does that or we go to the table and we cut a deal with them, if they are even disposed to negotiate. Those are the only two choices, and what is, as a practical matter, whether we have the will to do that is, in my mind, an open question from what I am hearing.

MR. LEVINSON: Just on the question as to whether the American Bar Association violates the antitrust laws. There was a Seventh Circuit decision around 1990 called LawLine v. ABA, certiori denied by the U.S. Supreme Court[5], which upheld the District Court's ruling in favor of the Bar's regulation against the challenges on antitrust and constitutional grounds. As far as I know, that is the most recent authority on that subject.

MR. CONE: Thanks.

MS. SCHENK: If I can comment on one thing you just said; your two points are related. The Bar does have leverage; it is just not willing to use that leverage. If we were to say that all lawyers practicing with the accounting firms were engaged in the unauthorized practice of law and were subject to discipline, I have no doubt they would all turn and run in the other direction. That is leverage they are apparently not willing to use.

AUDIENCE MEMBER: That is my point; it is about political will.

MR. CONE: Martha Barnett.

MS. BARNETT: To date, we have not been willing to use that leverage. I am not so sure that the rank-and-file lawyer really has ever focused on this issue in the way that it has now come to the forefront as a result of the global

5. See LawLine v. ABA, 956 F.2d 1378 (7th Cir. 1992), *cert. denied.*

economy and what the Big Five accounting firms are doing and what American Express and the consolidators are doing. I think you may well see the lawyers in America revisit the question of whether they need to enforce strongly the U.P.L. statutes, put together some type of war chest, stand shoulder to shoulder to protect values that go beyond just the business of the practice of law and that go into the professional nature of what has historically set lawyers apart as a profession.

MS. CRAWLEY: Can I just make one comment there? The war chest that will be needed, I suspect, is to pay for one of your country's best marketing consultants, to try and put your view across to the public because that is what the Big Five—I try not to get into the Big Five debate—but that is what the Big Five do.

We, as lawyers, understand core values and what we need is the public out there who are given the paint box of choice by the pro-MDP argument people need to understand—we have said this before—what the dangers are. I believe you have got to focus the public debate there because if it is simply power-housing between lawyers and the Big Five accountants in government, then I think it is going to be very difficult to get the public on your side.

MS. BARNETT: Ultimately, I think the question of sharing fees will be the most difficult for the public to understand and perhaps non-lawyer partners. I think this seems to be much more of a guild business issue than what we as lawyers might characterize in terms of the independent judgment of the lawyer in referencing the client. They are issues that the public should understand, and could understand, including those without education—issues that go to conflicts of interest. There is a very distinct difference between lawyers and accountants or others in terms of the conflict of interest, in terms of imputation of knowledge, in terms of solicitation and marketing to clients, in terms of confidentiality, although the accounting profession now does have confidentiality in some areas.

There are some things that the public can more readily understand other than some of these concepts we debate, such as independence. We should not give up on that one, either. That is something that certainly exists in a democracy, and what I have seen is the role of the lawyers in a democracy is critical, at least the lawyers as we have functioned in the American system as part of the system of justice. It goes beyond just our profession and how we make our living. It goes with our obligation to the public and to the courts and to the Constitution, which I think is a very important distinction that, hopefully, we can educate people on if, indeed, the will arises.

MR. CONE: Jerry?

MR. SHESTACK: One of the things that has puzzled me is this stampede to get on the bandwagon, that MDP is here, that it is all over Europe and the like. The statistics do not show that. It is true, Arthur Andersen acquired a big Spanish law firm; that does not mean that all or even many Spanish law firms are being acquired by accountants. If you look up the statistics as to the non-tax lawyers or take all of the lawyers in the Big Five, it comes out to 8,990 people; that was the last statistic. Now, if all of those lawyers are even engaged in unauthorized practice of law, that really is not a high or substantial percentage.

Let us think of that statistic in terms of the bandwagon or stampede argument. We have about one million lawyers in the United States. Between India and Brazil, you have over another half-million lawyers. You must have over two million lawyers around the world, and the Big Five have nine thousand lawyers—so what? The argument that we are not enforcing unauthorized practice of law seems to me a shallow argument. Maybe we should, but if a lot of people exceed the sixty mile-per-hour speed limit, should we then raise the speed limit to ninety so as to legitimize all those who are exceeding the speed limit? It does not make a lot of sense to me.

So the demand argument ought to be put into perspective. It suddenly hit a crescendo, partially because the ABA established a committee and other bar associations are addressing it. As to the point of how to address it, I think you address it through the local bar associations. The ABA may persuade people through its models, but, basically, every state has to adopt its own code. Forty-two states now have adopted the ABA-model code of professional responsibility, and it has taken a long time to persuade states to adopt that.

In Pennsylvania, for example, our Pennsylvania Bar Association right now seems opposed to multidisciplinary practice. But even if it accepts MDP, my prediction is that the Supreme Court of Pennsylvania, knowing its professional standards and its responsibility and its adherence to our values, is not going allow MDP. If Pennsylvania does not allow it and does not change Rule 5.4 of the Pennsylvania Code, then it is not going to happen in Pennsylvania.

The approach is through the various states and through the bar associations. Lawyers in New York and the State Bar in New York have taken strong positions against it. If those positions are maintained, I do not think the state Supreme Court is going deal with it in a different way.

MR. SAX: As I look at the situation and ask, "Where is it going, and what do we do?" I always harken back to the notion that whatever we choose to do has to be readily understood by the public in terms of benefit to them, not turf protection or pocketbook protection for us, and that we have to be

able to get out a clear and well-understood message in order to make a change that the public will accept. For that reason, it is absolutely necessary to jettison the prohibition on fee-sharing because you simply cannot convert the prohibition on the fee-sharing concept into an "exercise of judgment" argument in a way that the public will understand. It just does not make sense to them. At the other end of the spectrum, given the willingness and the interest in marching shoulder to shoulder to accomplish the goal of preserving core values, we probably could make those arguments with respect to both the absolute duty of client loyalty and our concept of client confidentiality. We have done an awful job of explaining to the public their interest in our maintaining those values.

In between the two extremes of what I think we cannot do and what we can do, we confront what Professor Wolfman was talking about with lawyer-controlled MDPs. Can we convince the public that there is a public interest in only lawyers owning the firms that engage in multidisciplinary practice? I think not. The reason we cannot sell that proposition is that we have already bought the opposite one in the Model Rules. The Model Rules now contemplate just that in the Model Rule paragraph that follows the prohibition on fee-sharing. In Rule 5.4(c), we say that where a non-client pays a lawyer to serve a client, the lawyer should nonetheless continue to exercise the lawyer's independent legal judgment. Implicit in that is the notion that we trust lawyers individually to exercise their independent legal judgment.

When you think about it—this idea of independence—ask what happened with the first in-house lawyer? If the purse controls the independence of the lawyer, how do you allow in-house lawyers to serve not just the company, but its joint ventures and affiliates? How do you allow public interest law firms and poverty law firms with salaried lawyers to serve individual clients? Of course, the lawyer is capable of exercising independent legal judgment on his or her own, even though compensated by another. Even though we may feel to the contrary, and think it ought to be the contrary, I do not think we can sell that distinction to the public and therefore we are remitted to professionally-owned MDPs and maybe financial service firm-owned MDPs. We are out to make our battleground—the one in which we attempt to convert Martha Barnett to Joan of Arc, leading us shoulder to shoulder marching forward—client loyalty and client confidence.

MR. CONE: As Martha had just pointed out, and I as the self-appointed historian of this group want to point out, is that I do not wish her that fate. Is there anyone who would like to comment on the point that we have in-house counsel; we have public interest groups that employ lawyers and

therefore—I am truncating what you said, Paul—that therefore, MDP is, as a matter of logic, already with us? Is there anyone who would like to comment?

AUDIENCE MEMBER: Yes.

MR. CONE: Sir? What is your name, sir?

AUDIENCE MEMBER: Ken Sax; I am a partner in a mid-sized Manhattan law firm and before that I was a CPA with, then the Big Eight, now the Big Five. I worked for two of them back in the '70s, and back then we were drafting legal documents. As an accountant, we would draft pension plans and submit them to clients. I think you know my own view of this debate. I have a somewhat stilted view of it because I do not think there is any debate. I think the MDP is here and in my world when I look at what is going on, the accounting firms are the least of our problems. Now it is the brokerage houses with their canned plans, and they have paralegals answering the operational problems. The accountants are minor competitors compared to some of the bigger ones that loom on the horizon. I do not think there is any debate anymore; it is just a matter of time.

MR. CONE: Okay, thank you.

MR. SHESTACK: In terms of Paul's point that the public will not understand the prohibition against fee-sharing, well, I do not know why. Most of the public will not even think about it very directly, but why they cannot understand the prohibition against fee-sharing, I do not know why. Suppose you say, "Do you want to share fees with an ambulance chaser? Do you want to share fees with an investigator? Do you want to merge fees of an accountant which are lower and yours which are higher, and then the accountant will be charging your fees?" There are all sorts of ways to explain it. I do not think that is any problem.

While we are at it, let's explain why Wall Street partners get a million-and-a-half dollars on average or why lawyers in tobacco cases get billions of dollars. There are many explanations that come ahead of this one that are more difficult to explain. As far as public-interest law firms, they are controlled by lawyers. They are pursuing the public good. I have never heard many complain about the meager salary the public interest firms get or feeling that they are not independent in the public interest.

Corporations are a more difficult problem. But any corporate general counsel that is worth his or her name will try and control the members of that department with ethical obligations. The CEO will understand that the

lawyer within the corporation has those obligations. It does cause some problems if you look at it as a matter of logical extension of current ancillary arrangements. But we are living with that, and it is working out all right. But that does not mean you go into fee-sharing with real estate people, environmental people, negligence experts, accountants, and the like.

MR. CONE: I might add to that, if I may. There is the distinction that in-house counsel are not held out to the public, and the that would differentiate from the MDP. Yes, sir, your name?

AUDIENCE MEMBER: My name is Tom Heights, and I am from Canada, and I am the chair of our committee on this issue for the Canadian Bar Association. I thought I would give you a little perspective from north of your border. This issue in Canada is going to turn, at least within the legal profession, on whether regulators and law societies in Canada can actually and effectively regulate MDPs? If the perception in the legal profession is that they can regulate MDPs, I think MDPs will be allowed. If the perception is that they cannot—and we have heard from David at our meeting in Edmonton that they cannot—then I think it is going to go the other way.

Our committee has recommended that MDPs be allowed with the caveat that MDPs are regulated by the law societies. The law societies have said, "We reject MDPs other than lawyer-controlled ones because we cannot regulate MDPs." They are just too large; they will carry on business in Ontario or wherever, irrespective of whether they are practicing law, so they are here whether they are practicing law or not.

Ironically, the Canadian Bar Association said they should be allowed, subject to specific regulation, and the regulators are saying, "We cannot regulate them so they should not be allowed, unless they are lawyer-controlled or primarily legal service organizations." It seems to me what I am hearing at this table is somewhat the same. Are we fooling ourselves in thinking that the legal profession can regulate MDPs or are we not? Those who think we are fooling ourselves say, "Well, let's just enjoy it and get on with it." Those who say we can regulate are saying, "Let's do so." That seems to me to be the debate.

MR. CONE: Thank you, and welcome here. I am delighted you came, and thank you very much. Any other comment that relates to what our friend from Ontario has just told us? Yes, go ahead.

MS. BARNETT: Based on some of the comments I think you have heard now, we are not able to regulate the unauthorized practice in the current set-up. I think that is one of the concerns that I have heard in the

debate among American lawyers is either the lack of the will or the lack of the ability to regulate what is currently unauthorized practice of law in the United States, and how then, particularly in a non-lawyer-controlled MDP and regardless of what documents they may or may not file with the highest regulatory authority or court, would we be able to impose those standards on a non-lawyer-controlled MDP?

MS. SCHENK: If I could point out, there are really two models of MDP and we have been focusing on only one. The lawyer-controlled MDP is not the Big Five accounting firm but at least, for example, in New York and particularly upstate, it will be a small law firm who wants to take on a broker or title insurance company or a family counselor or something of that sort. That is relatively easy to regulate, particularly in New York because we have a rule that the ethics concerns run to the law firm as well as the lawyers. I do not think that is a big step at all. That just involves the application of Rule 5.4.

The other model we are talking about would not be covered at all. The real issue here is that if we take the position that we will regulate what we can regulate, which is the first model of MDP, and we will not regulate what we cannot regulate, which is the Big Five, we have essentially left the situation status quo and brought in the small-firm MDP.

MR. CONE: Thank you. That was Professor Deborah Schenk, and I am glad to have the two different models mentioned because as you pointed out, we have not been making a differentiation and at least analytically, it can be very helpful to make that distinction.

Yes, sir, you had your hand up.

AUDIENCE MEMBER: My name is Robert Fisher. I am a solo practitioner from New Jersey but I go back and forth between New Jersey and the city and I move around the country a lot. It seems to me that you have an enormous problem here with conflicts and who is going to make decisions as to what to do for which clients. If you have in mind just the small practice, adding a little bit to its technical efficiency, that is one thing. But once you get into the other type of situation, with a mammoth-sized accounting firm or worse yet, a management consulting firm, then the problems start to arise.

We have already started to see problems at the corporate level with management consultants who come right in and tell the company how to structure their legal department. Did they fire the general counsel because he did something wrong? No. They fired him because he did a good job. They said, "This institution does not need you anymore; you did a very good

job. It is not myself, but someone else." What is to prevent them from then trying to advise the clients as to how to use the accounting firm or a non-lawyer-controlled firm as their primary source of legal activity because look how efficient it is going to be? We are, after all, the masters of efficiency. You pay us $3,000 a day per person to work for you.

I think it is a very, very dangerous situation which requires a lot of thought. If you limit it to the smaller practices with particular kinds of expert help, that is fine. But beyond that, I think you run into a lot of problems that people touch on but nobody seems to get down into the details of it in order to analyze it. The only way you can get into the details of it is to bring together people who have dealt with these characters for years back and forth who keep doing this, who can dredge out what really is happening.

There is also this, too: Many lawyers' fees are based upon referrals from accounting firms. I was in a practice with another person for two years. Most of our business came from accountants. Were we about to turn on them? It is very difficult. It is very difficult to get a state to do it. New Jersey and Illinois caved in completely on the issue of when an accountant issues a certified statement, who can rely on it? The answer in those two states is 'no one,' unless it is fraud. No one can rely on it unless the client asks the accounting firm, "Will you let my bank rely on this?" And the accounting firm responds, "Yes." How many accounting firms respond yes? Very few. We tried some of the Big Five; we got letters back saying, "Shame on you. You should know more about your client than we do." Well, the only reason that the client is getting an audited statement for $50,000 a year from a Big Five accounting firm is in order to satisfy the bank. But if the bank cannot rely on it, what is the point? These types of issues really have to be flushed out before we jump into anything. Thank you.

MR. CONE: In the back there.

AUDIENCE MEMBER: My name is Max and I am chair of the Labor and Employment Section of the ABA.

MR. CONE: Hi, Max.

AUDIENCE MEMBER: It seems to me that we are getting essentially two points of view here, both of which seem to be pronouncing the public interest. One is the Commission's point of view—the Tax Section. Paul Sax supports it. Essentially, it seems to me that is based upon the fact that it is here, and we ought to enforce core values or at least do the best we can to try to enforce core values. And those who feel that is unsatisfactory and that non-lawyer-controlled MDPs simply cannot do that kind of thing seem to be

pronouncing the public interest as based upon essentially the code of professional responsibility that we now have synonymous with the phrase "core values."

But it seems to me one of the things we are overlooking, and I think it is a very serious omission, is how the public feels about our views of the public interest. At the present time, I think the public's view of lawyers serving the public interest is a very dubious one that, unless the ABA and the various states do a lot more about enforcing the public interest in terms of the code of professional responsibility and everything it means, will simply not be credible.

MR. CONE: Thanks, Max. You, I believe, are head of a section of the ABA?

AUDIENCE MEMBER: Yes, the Labor and Employment Section.

MR. CONE: Labor and Employment. We are flattered that you came to join us. Thank you. Yes, Jerry?

MR. SHESTACK: I would like to pose a question this way: Lawyers now, I think we can all agree, are looked down upon because of a perception that they are casual with ethics, greedy and pocketbook-minded, and put the bottom line ahead of fiduciary duties or independence. That is part of the public perception that we wrestle with. Will MDP improve that perception or make it worse?

AUDIENCE MEMBER: I think MDP will certainly not improve it. That is my own personal point of view; it is not the point of view of the ABA Section that I represent. But what I am concerned about is that our view of the professional responsibilities and the public interest served by it may not be a view in which the public concurs unless we do a lot more about enforcing the public interest and the code of profession responsibility.

It seems to me now, and I think that Jerry agrees with me, the lawyers's view and the public's view is a decidedly poor one. They distinguish it, if they distinguish it at all, from the non-lawyers' behavior in a very dubious way. So we have a very difficult burden, a very heavy burden. A burden so far not properly discharged of persuading the public that the code of professional responsibility will be enforced, is enforceable, and that their interests are best served by such renewed vigorous enforcement. That is the point I am trying to make.

MR. CONE: Any other points? Yes?

AUDIENCE MEMBER: Very briefly, I completely agree, and I guess it is even more important that the clients be persuaded that these values are important because without our clients, of course, there is nothing for us to do. It seems an obvious point but a really important one. I am not sure that we will have any leverage, unless the clients are persuaded initially, and the public in general.

I think the Bar has served its clients well for the most part. I am proud of the job we have done for our clients, but this is a point that clients really have not been well educated on, and I can guarantee you that the competition will be out there saying they can do a better job, a more efficient job, that we are restraining trade, that we want our monopoly in this area and that we are not being reasonable. Those are points Mr. Sax has already made. It will be a very tough sell for those reasons.

MR. CONE: I neglected to ask you your name.

AUDIENCE MEMBER: Harry Louis; I am general counsel here in New York, and I am pleased to be here.

MR. LEVINSON: First of all, I am not convinced that the public image of lawyers is that bad. If you look on television, for example, almost every lawyer program is very sympathetic to all lawyers. Think about "JAG," "Law and Order," "Judge Judy." You do not see any great TV programs about accountants, by the way, or business consultants. That is important. There is a reservoir of goodwill out there to all lawyers. Admiration, and yes, sometimes negative feelings as well. But the best way to build our reputation is to improve ourselves, and we have a lot of work to do internally in the law schools, in the law firms, in the Bar associations in making sure that we redouble our efforts to serve the public interest.

On the question of independence, and this gets back to where someone noted that in-house counsel are not completely independent. I agree. The independent law firm itself has to be the touchstone of independence. If the independent law firm is independent, that independence will spill over to government lawyers, to in-house counsel and so on because it broadens their career opportunities and independent-minded lawyers will have some place to go if they want to be really independent, namely, to independent law firms. The independence of the independent law firms spills over and in a sense protects lawyers in other branches of practice.

Finally, independence has more to do than the micro-representation of a client. Independence is a macro matter as well—macro as to our role in society. The preamble to the ABA Model Rules of Professional Conduct refers to us as public citizens with a special concern for the administration of

justice. If you read the preamble to the American Institute of CPAs Code, you will not find that there. It says "We are information experts." Nothing wrong with that at all; we need that. But they do not perceive themselves the way that lawyers perceive ourselves. We have to understand it, to redouble it, to live up to it and to be unashamed about saying we need to protect lawyers up to a point in order to protect the courts and the public.

MS. BARNETT: When I first asked if I could respond, I was going to make the point that Professor Levinson just made, and I should give you full disclosure here. Almost thirty years ago, Professor Levinson taught me the course on independence of lawyers. So it is not surprising that I agree with him—he is brilliant.

MR. LEVINSON: That is my greatest claim to fame, and I am honored.

MS. BARNETT: We talk about the whole question of the independence of a lawyer with regard to service to the client. Service to the public is one that we have talked a lot about, that is a core value of the profession. In the last several years, an issue that the American Bar Association and I think most state bars and, indeed, I believe many lawyers have focused their attention on, the independence of the judiciary and a tax on the independence so the judge and all of the ramifications that come with that. Frankly, I do not see how you can have one without the other. I believe they go hand in hand and that it is an important part of the third branch of government in this country. Now, if somebody can find a way to accomplish that and still preserve those values, I think we need to think about it, and we certainly are thinking about it.

As I think through this issue, there is going to come a time fairly soon on behalf of the Bar that I am probably going to have to take a position on it, and it makes me nervous because it is very difficult to come to an absolute position on a subject that is so complex and so complicated and that touches on so many values. I finally have decided that what is bothering me is that I do not know the full ramifications of what will happen if, indeed, we allow non-lawyers to control the practice of law. Nothing bad might happen but it is also possible that it will forever change the nature of the practice of law. The consequences may be consequences that go to the independence and profession not just of the lawyer, but of the profession of the judiciary, and I think with consequences for clients that maybe they do not understand now but certainly they will when those changes occur.

My concern is really a lack of understanding as to what is actually going to happen if we make those changes, and I think that the debate that is taking place in the States now is critical as people think about not just the

theoretical MDP independence core value argument but say, "Okay, now how is this going to affect what I do, how I serve clients, how I serve the public, how I live up to the Constitutional oath that I have?"

MR. WOLFMAN: I agree completely with Martha's perspective on this and where fundamental tension lies. To look back at what people have done—lawyers and non-lawyers—the tax law area is one where tax lawyers, the Bar association, and the Tax Section over the years has been very much in the forefront of law reform, of improvement of the law and of saying when the law has been unduly distorted and interpreted to favor people where the legislation never intended to have such interpretation, for the benefit of such people.

The AICPA either does not participate or drags its heels long after the Bar has acted and long after the reforms are, essentially, in effect. Lawyers who have spoken out when they have been in law firms for law reform, for law improvement, as the Model Rules suggest we should, when they have gone into the accounting firms, suddenly turn silent on these subjects. That cannot just be accidental; that has to be attributable to the notion that the accounting firms—that the non-lawyers running the accounting firms—do not want them to do that.

We should also observe that—although it may sound like turf protection to say that MDPs might be okay if lawyer-controlled but not if non-lawyer-controlled—we should observe the fact that the AICPA rules require CPA control of accounting firms that perform the certification function. They are not even beginning to think about changing that. Of course, they are going to be in control; they say their rules require it. Right now, so do our rules require that we be in control, and it is just assumed that if there is to be a change, it will be a change by the lawyers because, of course, the accountants are going to keep CPAs in control of the accounting firms. They can bring in partners but the partners will never be able to be the controlling partners if they are not the CPAs.

MR. SHESTACK: The beginning of the centennial is a good time to look back as well as look ahead, and if you look at the legal profession that emerged in the 12th century, there were three professions. There was the clerical profession, which was designed to deal with the health of the soul, the medical profession dealing with the health of the body, and the legal profession dealing with the health of the body politic and the justice system. How would it look 20 years from now if there is no legal profession, and only a legal accounting profession? All are members of "LAP's", or "legal accounting professions"? Lapping up the profits, perhaps, but what about our obligation to the courts? We are officers of the courts, as Martha mentioned.

That obligation to the courts and to the justice system even rises above an obligation to a client. We have obligations as a result of that.

Our legal system has defended the rule of law, the system of liberty, our checks and balances. So, much of that is part of the legal profession that we can be proud of; pride in being lawyers. Are we going to merge all of that for the dubious privilege of maybe making more money for the Big Five. Obviously, that is what they think is going to happen or they would not be so avid to have this take place. Are we willing to sacrifice independence and not be known as the defenders of the rule of law?

I do not see the benefits of MDP as against the losses that come from it. When you are talking about what the public wants, sure we want to know what the public wants; the public may want people who will draft wills for no cost and handle divorces without fees and we would have a lot of unauthorized practice of the law if we just took what the public wants. It is not their best protection or service.

In that sense, we have developed a profession that we think protects the clients and also helps protect our system of justice, which is behind everything that we do. So, looking at it as a lawyer who has practiced law all of his life, who loves the profession, I do not want to give that up. I do not want to give up that independence. I do not see the benefits of it either to the clients, the service, the courts, the people, the public interest, or to me as a lawyer.

MS. SCHENK: I wanted to pick up on that. I agree with what both Jerry and Martha have said, but I question whether there is a uniform view within the Bar. I encourage you to look at the statement of Stef Tucker, who at the time was the chairman of the ABA Tax Section, in which he basically trashes a number of the core values and suggests that the Code ought to be amended. The statement says such things as "you cannot enforce conflicts rules." That may be right. Maybe that is the uniform view, but my point is that I am not sure we even have unanimity among the Bar as to what these core values are and what our Code should look like.

To pick up on the comment of the gentleman in the back from the Labor Law Section about public interest, it is also not clear to me the extent to which the Code actually carries out what the public sees as being in its own interest. Many clients see the conflicts rules as a way to put two lawyers on every transaction or view many of our provisions as turf protection. Another way to think about this is that many of our rules already have waiver or consent provisions in them, and there is a real tension within the Bar as to the extent to which we ought to let a client consent to anything. Why should a sophisticated client ever be in the position of not being able to consent to whatever he or she wants the lawyer to do? There are others within the

profession who believe that there are certain important values that can never be abrogated by client consent.

One way of thinking about MDP is that some clients have decided that they wish to consent to having certain things done without the protections that the Code provides. You can think of going to an accounting firm as understanding if you are a sophisticated client, that there will be no conflicts checks, that confidences and secrets will not be protected in the way mandated for the legal profession, that even if the firm says to you, "We will keep your confidences," that it might not be, and probably would not be, enforced by a court, and that the client has consented to that.

If those clients have consented to that and believe this is in their best interest, whether financial or otherwise, I think the Bar has a hard row to hoe to convince those clients that, in fact, we know better. We effectively say to the client, "That is not in your best interest, and you should not be able to consent to that kind of practice."

MR. CONE: Yes, sir.

AUDIENCE MEMBER: I am Arthur Field and I am a lawyer here in New York. It seems to me that we have looked at one side of the coin; we have looked at MDP. I feel that perhaps we ought to look at the other side of the coin, which is a legal profession as it stands officially so that we are prepared to defend its turf.

In the time that the ABA appointed a commission to look at unauthorized practice of law, which has been a backwater for the past twenty years, we have not looked at these questions, and as you talk on the panel, there is enormous disagreement about what can or cannot be done. The real question is what should be done. It seems to me, the ABA having led the way on MDP, ought to at the same time lead the way on unlawful practice. As I read it, many of the leaders of ABA have adopted as an article of faith that this is unenforceable or unworthy. If you come to that answer, of course, you are going to get to MDP. But why do you come to that answer?

MR. CONE: Thank you, Arthur. I might mention Arthur is head of the MDP Committee of the New York County Lawyers' Association.

MR. SHESTACK: Let me just answer the question, and Martha can comment on it even more knowledgeably. At one time, the ABA had a commission look at non-authorized practice of law, and they came out with a long report which really enlarged the ability of non-lawyers to practice in various areas such as legal assistants, paralegals, and other areas, and they relaxed some of the strict rules of unauthorized practice of the law. The

reaction from bar associations all over the country was so negative to the preliminary draft of that report that the ABA did not issue it. It circulated among some people, but it received a tremendous negative reaction.

The Bar association did not want a relaxation of the rules against unauthorized practice of law, even though they may not be that diligent in enforcing it for a lot of reasons, but they wanted the rules the way they are. Martha, you can bring up debate on that possibly.

MS. BARNETT: I have nothing to add at this point.

MR. CONE: Anyone else? If you do not mind, I was going to say something, and maybe this is a bit frivolous but it is not intended to be. I can tell you that there were many times as a practicing lawyer when I was very, very happy that there were rules on conflicts of interest, and the suggestion, to me—and this is just one person talking—that one could say to a client, "This is what is going to happen. Do you understand that?" and then you could rely on the client's reaction to that is not, I do not think, a very realistic suggestion in many situations. Clients change their minds as their perceptions of their interests change. I suppose I am not completely out of order here but I have personally found it not easy because the rules are not easy to deal with but I have found it most welcome that there were rules and that one was not at the mercy of the rule of a client which could change from moment to moment.

MS. SCHENK: I agree with you. I was suggesting that Stef's comment did not represent the attorneys, although it appears to represent the Tax Section.

MR. CONE: Okay, good.

MR. WOLFMAN: It represents the view of a majority of the counsel of the Tax Section. The Tax Section as a section has never been consulted.

MR. CONE: I am terribly sorry, sir.

AUDIENCE MEMBER: If I may, and I am probably at an advantage because I am not an attorney. Let me just outline some of the issues.

MR. CONE: What is your name, sir?

AUDIENCE MEMBER: My name is Irwin Eisenstein. You have many, many different issues. You have fifty different states that must pass, and

frequently do, and modify the rules associated with ABA standards. There was recently a Rule 1.6, also being considered for modification, that talks about attorney-client privilege and when an attorney may disclose when there is a continuing fraud. There have been cases in several circuits where attorneys have been brought up on charges for prospective fraud against the government. Now, there are some issues that you do not raise, and the thing I find is there are so many areas where the public mistrusts and distrusts the secretive nature of the legal process. How many lawyers have filed complaints against judges who they know are acting inappropriately? How many have filed against other attorneys who they know have violated rules of professional conduct? In New York State, there are more than ten thousand complaints filed against attorneys. Two hundred of them may result in some type of disciplinary actions. If you spoke to the people who filed those complaints, they would say it is a set-up.

California passed something called Proposition 190 which took the evaluation of complaints against attorneys outside of the legal profession because they were so disgruntled with what goes on internally. I would like to say that there are certain times I would love to be charged with the unauthorized practice of law, and let me tell you why; because I am so much more competent than most attorneys practicing in certain areas that it is disgraceful that they are allowed to practice. This is because you can move from one area in the law to another where you have no competence and still represent the client and do it poorly. And, in fact, if you wanted to look at the standards that currently exist, you have to look internally rather than at multidisciplinary procedures.

I am a computer programmer by profession, although I have had a background in accounting and self-study in law. I do not want the average attorney because most of them really do not know many areas of economics and statistics that I know and if I have to rely on an attorney, I am putting myself at a significant disadvantage. Right now, for example, I have an action which is multi-state, and it is frightening to see the responses from those states' attorney generals who do not know whether their state can effectively be brought into a federal forum. When you talk about all of the issues you raised, Rule 1.6 goes along with the multidisciplinary practice. Accountants have an obligation to the public to report when they find fraud. Attorneys look the other way when, effectively, if it is prospective fraud, they should be reporting it. But they do not.

MR. CONE: Thank you. Are there any other comments, questions? Yes?

AUDIENCE MEMBER: I am a diplomat from Japan. My question is also raised to the attorney-client privilege. The AICPA received instruction from Congress that the attorney-client privilege expanded to non-lawyers. I am wondering if that law has any impact on the discussion of the MDP, or what kind of response or position is taken by the ABA.

MR. SAX: I can speak a little bit on that. The reference was to the accountant-client privilege that the AICPA, or Big Five, procured from Congress in 1987 in the form of Section 7225 of the Internal Revenue Code, which provides a fairly limited privilege. Most observers view that exercise as an attempt by the accounting world to procure enough of a privilege that they can market themselves to clients as having the same sort of protections and privileges that lawyers had. Whatever their intention, history shows that they did not do a very good job of getting what they got because the privilege they procured does not cover work product. It does not cover criminal assertions. It does not protect corporate or tax shelter activity. It does not protect against invasion by state taxing authorities in consequence of which, and for other reasons, the Big Five have figured out that it is too perilous to use too much.

It is simply dangerous, and they have not made much of it, and in consequence of that, it has not been much of a factor in the MDP deliberations. Where I think the high relevance lies is that it tells us something about their ability to get done in Washington what they want. They understand how Washington works; they understand campaign contributions; they understand power; they understand how to get together in small groups and how to act and to achieve what they want.

As an outgrowth of that exercise, I approach the federally-regulated multidisciplinary practice with a high degree of trepidation. Because, in the final analysis, they are likely to prove better at getting what they want from the Congress than we are at getting what we want.

MR. CONE: On the other hand, they do not draft legislation very well.

MR. SAX: Right, and this exercise is close to conclusive proof.

MR. CONE: I would like to turn to one last subject, if I may, and that is—and we have touched on it a bit—the subject of ancillary business. Now, Alison Crawley, I believe, said that the ancillary business approach is one that the Law Society has under advisement to counsel. Maybe you might tell us just a bit about that, and then if there are people who want to talk about the ancillary business approach in this country, we can use that as a conclusion.

MS. CRAWLEY: As I understand it—and I think we followed the ABA on ancillary businesses—the idea is that if lawyers have got to remain independent to justify law services through their legal firm, they can have business interests in other businesses providing ancillary services that could be used in the law firm or could stand alone. So, you may have engineers, other types of consultants, and lawyers in a firm who can own or have an ownership interest in a separate business which provides these services ancillary. We went down that route in England sometime ago and then sort of expanded it a little bit more to try and show that we are not being overly-restrictive in relation to lawyer-dominated legal services.

The spin-off from that is that if the accountants' rules allowed it, what about firms of solicitors actually having ownership in or being a partner in an accounting firm and linking an independent law firm with the accounting firm in that way? That has not quite happened yet in Europe or in England where there are the links with accountancy firms. But there could be, for example, that lawyers in the English partner firms of Pricewaterhouse, for example, could become partners in the accounting network and provide a link in that way. It seems to me at the moment our rules would prevent that.

MR. CONE: Any comments on that from any point of view? Yes, sir.

AUDIENCE MEMBER: I would like to ask David Gordon-Krief why that is not working in France. I hear you say either the ancillary businesses or, as I understand it in France, the law firms are supposedly self-standing, but they carry on business under the rubric of the accounting firm. Why is the Bar not able to regulate the self-standing law firm effectively? That is the one way we might go.

MR. GORDON-KRIEF: I am not sure I know the answer to your question. Is it a question of means or will? I do not know. It is true that if you take the example of Coopers, it is a real independent law firm. In terms of what does control mean? There are only lawyers working for Coopers in Paris, probably about two hundred lawyers, but they have the name Coopers and suddenly they learn that they merged with another firm; now it is only lawyers. Of course, they are controlled by others.

We are controlling the way the conseils juridiques—the Bar counsel, I mean—trying to control the way every individual lawyer does their job, and we are not doing a bad job. They are individually not violating any substantial rules or any core values. It is just the way the network works, and we have no grab on the rest of the network.

This is why the idea—one of the suggestions from the ABA and the Commission report which was completed—like shifting the burden on the

controlling party, like having you go to an MDP and say you want to have lawyers working for you so you have to respect the controlling entity. You, PricewaterhouseCoopers, have to respect and sign in with the court that you will respect all of the core values of the law firms. Of course, the MDPs want to do it, otherwise we would not be here. It is an important expansion idea for them. So putting the burden on them might be the solution. Just control every—I heard this in Canada in Edmonton—control every individual lawyer. In France, advertisement is authorized for lawyers, but only under certain conditions.

A couple of months ago, we had this huge worldwide campaign from PricewaterhouseCoopers on ethics of law. There are poor kids in South America and they could provide a great service all around the world. We considered the Bar Counsel of Ethics, and it was not nice for lawyers to do such an advertisement. So we went to see the partners and say, "You couldn't do that," and they say, "We didn't do it. It's not us." So how do you want us to take any disciplinary action against a lawyer belonging to that law firm who did not do a thing? He did not decide.

MR. CONE: I would point out that PricewaterhouseCoopers is the only one of the Big Five that is under the jurisdiction of the Paris Bar. The other four of the Big Five are located outside of Paris, and they are not under the jurisdiction of the Paris Bar. I asked you, David, at lunch whether the recommendation of the Nallet Report[6]—and there is a summary of the Nallet Report in your materials—that the agreements and constitutive documents setting up ancillary businesses and the recommendations of those documents had to be filed with the local bar and made available to clients or else they would be null and void, whether that might be a way to go. And so, having asked you the question once, and being very careful asking only a question I know the answer to, I will ask you that question again, but in public. Why is that not the way to go?

MR. GORDON-KRIEF: I do not think it is enough. In answer to your question—I did not mention this at lunch because we were discussing other things as well—this is a rule that already exists in France. Every single

---

6. The Nallet Report, addressed to the Prime Minister of France, is entitled *Les Reseaux Plurisdisciplinaires et les Professions du Droit (Multidisciplinary Networks and the Legal Professions)*. The person responsible for preparing the Nallet Report, Henri Nallet, is a member of the French National Assembly and a former French Minister of Justice. The report deals with multidisciplinary practices in the French setting, and much of the Report relates to the profession of avocat, which generally corresponds to the American profession of lawyer. The context of the Report is existing French legislation and professional rules, and policies of the European Union.

lawyer and every single law firm is supposed to disclose all of the agreements they have—every single thing—your rental agreements, your lease, your employment; everything should be disclosed. And if it is not disclosed, it is considered void. So by having the government or the national assembly reaffirming this principle...what about if we do not disclose and we do not know about it?

MR. CONE: Well, that was the part of your answer that interested me—that it would become a non-rule.

MR. GORDON-KRIEF: Sure.

MR. CONE: It would create a non-rule. Anything else on ancillary businesses? Yes?

MR. LEVINSON: If a law firm owns an ancillary business, which is an important source of revenue and profits to the law firm, I believe the non-lawyer principals of the ancillary business are de facto partners in the law firm, insofar as they have certainly some influence on law firm policy; they have a special value to the law firm. I do not say this is bad but it is something to bear in mind. This de facto partnership is, of course, distinguishable from a de jure partnership such as an MDP. The question before us includes how to draw the line between, on the one hand, a permissible ancillary business with a de facto partner and, on the other side, an MDP with de jure partners. It may be that de facto partnerships are necessary as a means of protecting the legal profession against incursions by other disciplines. If that is the case, we need to recognize it and possibly revisit some of the regulations.

MR. CONE: One subject we did not get into at all is the subject of passive capital in law firms. The ABA's Commission on MDP very briefly came out against passive capital in law firms. Its purpose for doing so, as I understand it, is that it did not want to open up the possibility that investment banks, American Express, Sears Roebuck, Wal-Mart, and others might get into the practice of law by investing in law firms. I am not proposing that we go into that subject now, but I did, at least for purposes of the record, want to indicate that is a relevant subject. It has been raised in the Nallet Report, which comes out in favor of permitting passive investment in law firms. It is a subject that is very much related to this. Are there any other points? Yes, Paul?

MR. SAX: This is a subject that I have never seen discussed without the Big Five in the audience. The question is, what do they think, or what does the AICPA think? Do they like the report of the Commission on Multidisciplinary Practice? What do they want? From my perspective, the report of the Commission on Multidisciplinary Practice is a dagger aimed at their heart, and what they want instead is prolonged debate, quarreling, disagreement, fighting over the little points, proposals made, proposals defeated. Because while that goes on, no one will have called "time out." We talk; they act. We are debating, while they are hiring King and Spalding. That's today. Last week's news was that it was captive law firms. Three of them were already working on their own captive law firms. While we are figuring out what to do, they are taking over our profession. The things that are most unacceptable are those things having to do with the differences between the professions.

Right now, they have an advantage over us competitively because they do not have conflicts problems. The larger the law firm is, the more incredibly difficult that becomes, even nightmarish. They just do not have conflict problems, confidentiality issues, or the major straining that goes on to set up ethical walls and perfect them and maintain them and retain them. They are perfectly happy with that state of affairs. Unless we can figure out a way to coalesce and act, they will in fairly short order preempt enough of the profession that their notions of confidentiality and conflict will prevail.

MR. CONE: I have every confidence that is about as wrong as it can be. Not everything is going their way. Look at the lawyers who are leaving the Big Five disenchanted. The more of them they hire, the more of them that will leave disenchanted. Not everything is going their way. Sure, we can be frightened into thinking that this is a one-way street owned by the Big Five, but that would be ridiculous. The whole thing may collapse; this whole afternoon may be a total waste of time. It may simply collapse the way the Soviet Union did; I would not be surprised. I am sorry, Paul; you said at the beginning you were going to provoke me, and you did.

MR. SAX: The luncheon consensus was that it could not be done in one attempt.

MR. SHESTACK: I think it is true; it is not all going the way of the Big Five. In the U.K., for example, the Coopers firm has only six lawyers. In all of Australia, Arthur Andersen has about eighty-five lawyers in their many large law firms. There has been a lot of resistance. Also, it is no secret that what the Big Five want to do is not to accept our rules and core values, but to change them. The Ernst & Young statements say that if lawyers are to

work in MDPs that are controlled by non-lawyers, then the focus ought to be on the individual lawyer so that each individual lawyer is responsible for the core values and not the organization. And Ernst & Young has also said what we ought to change the imputation rules and just create fire walls, and that all professionals should accept that. They are not in it just to accept our core values; they want to have their own values and, obviously, they see some financial gains in doing so.

MR. WOLFMAN: Not only do I share the views of Terry and Jerry Shestack that Paul's prediction is wrong, but I want to make a prediction of my own which may also be wrong, but I think not. If the ABA after this current year of further study and consideration rejects non-lawyer-controlled MDPs, you will see a reversal of the movement of the lawyers. They will not stay—the important ones, the leading ones, the ones that are getting all the publicity—if they are not able to declare publicly what they have declared all their lives except for the last year or so: that they are lawyers and that they are practicing law. They have assumed that it is going to be possible, that it will be legitimated. If it is not, they are going to go back home where they can declare it to their families and to the world, show their cards that they are lawyers. It is up to the ABA not only to show that Paul's prediction is wrong, but to make clear that Terry's and Jerry's is right.

MS. SCHENK: I do not want to leave Paul out there by himself, so I will join Paul in saying that from my perspective, concerning people entering the profession now, I predict that Paul is right. Accounting firms are hiring a huge number of law students. They are making major inroads. My pet theory about this is that people cannot believe it can go beyond tax. Tax has always been a backwater. There has always been a practice in the accounting firms. The fact that they have taken that over, or will take it over, is not perceived the threat it would be if, for example, we are talking about twenty percent of our students who want to practice corporate law going from the major law firms to the accounting firms. Once they make their inroads in tax, I think they will move to other areas of the law as well. Of course, we will not know for another decade if Paul and I are right, or if Bernie is right.

MR. CONE: Well, thank you for giving us all an incentive to live.

AUDIENCE MEMBER: I would like to address a question to the professor who just spoke. What percentage of the class of 1998 from NYU Law School went into accounting firms?

MS. SCHENK: I cannot answer the question with respect to our J.D. class; I wish I knew that.

AUDIENCE MEMBER: It is now on the record. I have it on my desk and I will be happy to provide it.

MS. SCHENK: Thank you. I do know that with our tax LL.Ms last year alone it was twenty percent.

MR. WOLFMAN: I made a little inquiry also. I am told that the percentage at Georgetown Law School is high; it is about twenty percent of their graduates going into accounting firms upon graduation. I then checked with our own placement office at Harvard Law School and in 1997, one student went to an accounting firm and also in 1998, one student went to an accounting firm.

SHESTACK: Because you are teaching there.

MR. CONE: Yes.

AUDIENCE MEMBER: My name is Ellen and I work for the big, bad PricewaterhouseCoopers. I am the lone wolf here—or rather, you are the wolves and I am the lone sheep. I get suspicious when the partners say "Can you take my place?" Let me just say I have some insights—

MR. WOLFMAN: See what that says about partners?

AUDIENCE MEMBER: Let me just say that I am an attorney, and I have been with Pricewaterhouse for maybe two months. I used to work for a small practice in New Orleans, Louisiana in a plaintiff's firm. I think it depends on your perspective, the perspective of the lawyer as well as the perspective of the client. I think experience gives you wisdom and I have a lot of experience; I have four years practice, two months as a managing consultant with Pricewaterhouse. However, when I was a lawyer practicing, it was so frustrating, especially with the domestic relations clients. I could only take it so far. I think you, Ma'am, had addressed that and said I needed a real estate appraisal and also an accountant to come in and tell me what the value of the property was in divorces and other cases like that. That was frustrating, and that is a case where a multidisciplinary practice would be good.

With the corporate environment I work in, I work with more sophisticated clients. If I had the money that my clients have now, I would

want to be able to pick and choose not only my accounting firm and my professional services firm, but also the law firm that I choose. If the lawyers are better at the accounting firm, I want them. If they are better somewhere else with a big defense firm, I want to go with them. It depends on your perspective and the client's perspective; you have to consider them as well. Please do not throw tomatoes as I leave.

MR. WOLFMAN: You mentioned something in terms of the name when you changed from accounting firm to professional service firm. I should tell you that each of the Big Five when they come to law school to recruit insist that they not be referred to as accounting firms. They each insist on being referred to as a "global professional multidisciplinary service organization." You better write that down.

MR. CONE: Did you have something, sir?

AUDIENCE MEMBER: I am just asking whether the pro-actives would have some ideas for lawyers in private practice and middle-sized firms. What can we do to voice and make known our opposition to this drift into multidisciplinary practice?

MR. WOLFMAN: Write a letter to Terry.

MR. CONE: No, write a letter to Martha.

MR. SAX: I hear that question a lot: "What can I do about this drift into multidisciplinary practice?" because you can get roaring unanimity in opposition to it. There is no disagreement about that and that there is very little good about the last twenty-five years' development in this area. What we cannot seem to coalesce on is what is the most effective way to accomplish a goal that we all like. Most of the people—not most—all of the people on this panel share an almost fervent commitment to the core values. That is a shorthand reference to maintaining our concepts of client loyalty and our concepts of client confidentiality.

The only way that we can do anything useful is to coalesce around a single proposal that maintains those values, and I do not much care which one it is as long as we can coalesce around one that we can make work. Right now, the Commission report is the only one—the only proposal out there—that has any prospect, in my view, of working. The other kind of half-facetious answer is the future is either boutique or global.

MR. LEVINSON: My question, though, is the following: If the ABA and all the States adopt the Commission's report, and if an accommodation with the Big Five firms emerges, how long will it last, and what will they ask for next?

MR. SHESTACK: I think what the individual can do is work through the Bar organization. Bars are very influential. What the City Bar of New York or the State Bar of New York or a county bar says is going to be very influential as far as this state is concerned, and that is true in other states. Each individual lawyer has an opportunity to express his or her view in the Bar association.

Also, the views ought to be expressed to the Supreme Court or, in this case, not the Supreme Court, but your highest appellate court headed by Chief Justice Kagg. The Conference of Chief Justices of the States have put out what they call a legal action plan to improve professionalism among the legal profession—competence, independence, loyalty—all of those aspects. I think it incumbent upon every state court to do that. There is a responsibility in the Supreme Court or the highest appellate court of every state to regulate the profession and to see that the professional values are followed. Courts have been lax in doing that in many states. Others have been very active in doing it, such as in Massachusetts. As lawyers, you should urge the highest court in this state to take a role in this area and to further the values that you think are professional and legal values.

MR. CONE: I think that the urging of those of you who have been so kind and patient to come here and to take a role is an excellent note on which to end. I want to thank everyone who came here to participate.