

**2002 Otto L. Walter Lecture:
Multidisciplinary Practice and the European Court of Justice¹**

DEAN MATASAR*: Welcome, everyone, to the 2002 Otto L. Walter Lecture: Multidisciplinary Practice and the European Court of Justice. My name is Rick Matasar. I am the Dean of New York Law School, and I'm really pleased to welcome you here on behalf of all my colleagues at the law school.

My job is very simple today. It is to set up our conversation with a quick introduction of the panel and its topic, and then it is my great pleasure to turn things over to Terry Cone, who directs the International Law Center here at New York Law School. This series honors Dr. Otto Walter, a 1954 graduate of New York Law School, and I must say that when you look through Otto's incredible record of achievement, it suggests exactly why it is that we are so delighted to have this lecture series in his honor.

He was a lawyer in Germany and left that country at a time of great turmoil in its history and came here, and much as many people have discovered when they come to the United States with a foreign law degree, you cannot immediately practice law, and Dr. Walter came to this country and set up his own business and eventually received his law degree from New York Law School. He then had a distinguished career as a practitioner, a member of our faculty, and in his honor, this series has been created to talk about things international and, in a very particular way, to talk about things that involve international business transactions and their major impact on the world of commerce between all of us.

Our panel today are many distinguished individuals from different walks of life. We have Anthony Huydecoper, who is here from the Netherlands as our Advocate-General with the Supreme Court in the Netherlands. Bob MacCrate, who, as we know, is the senior counsel at Sullivan and Cromwell or, as we like to say, the senior counsel to all of us and all of our curious walks of life. And Deborah Schenk, who is here from NYU Law School to lend her expertise as a professor of tax law and one who has been doing a lot of thinking on these questions of multidisciplinary practice.

It goes without saying that we are facing a time when issues of multidisciplinary practice are an acute focus for all of us. One of the histories of things we can say about New York and our particular take on the question of multidisciplinary practice is the most important international center in the country, at the forefront of thinking about issues of multidisciplinary practice.

What can we say about our country at a time when we've had an interesting take on the role of lawyers and the role of accountants in providing high-level advice to their clients on how to manage their businesses, and what challenges that may lead us into thinking about the questions of multidisciplinary practice.

We could not have a more timely discussion given the recent actions of the European Court in this regard. It is with great pleasure today that I want to turn over the festivities to Terry Cone, who directs the Center for International Law at New York Law School. And before Terry gets up, it looks like he has to be embarrassed, appropriately. I want to say that it is one of our great pleasures in having Terry as our colleague here at New York Law School. He has that breadth of experience that comes from being a high-level practitioner in

1. The lecture was held in the Wellington Conference Center at New York Law School on March 7, 2002.

* Dean Richard A. Matasar is Dean and President of New York Law School and Professor of Law.

a major law firm, which never goes unmentioned here at New York Law School, Cleary, Gottlieb.

It goes without saying that Terry brings to the plate as an academic all of the skills that all of us have, but he brings that wonderful niche that comes from somebody that has done it in the trenches for a long period of time in the fields of international business transactions. We are absolutely privileged to have him as our colleague, and he always brings to us an interesting discussion and an interesting panel.

So Terry, on behalf of all of us, welcome, and lead us off.

PROFESSOR CONE*: It's always reassuring to have your Dean tell you that you are welcome. All of you are welcome.

The Dean mentioned the central place that New York occupies in the discussion of today's subject matter. I don't want to take up any more time than absolutely necessary because you came here to listen to Anthony Huydecoper, Robert MacCrate, and Deborah Schenk, and not to me.

But I would like to say just a word about New York. I am personally touched to have Mary Daly, a professor at Fordham Law School, who came today. She was the "reporter," or Reporter, on the American Bar Association's Commission on Multidisciplinary Practice, and she certainly has been a major national and international figure in the area. I am most grateful she is here. I also want to mention Steven Krane, who is with us. He is the President of the New York State Bar Association, and he has been most active in the New York State Bar Association's per curium work on the subject of multidisciplinary practice.

Joining us right this moment is Otto Walter. Otto, your chair is there, sir. Let's all greet Dr. Walter, for whom this lecture was made, by greeting him with a round of applause.

The timeliness of today's event, which the Dean mentioned, is partly fortuitous and partly the result of planning. The European Court of Justice has had before it for some time a case² relating to multidisciplinary practice, a case brought by two of the "Big Five" accounting firms³ against the Bar of the Netherlands. The European Court of Justice reached its decision two weeks and two days ago, so this is a timely conference/lecture.

The lecturer, the Otto L. Walter Lecturer, is Anthony Huydecoper. He is an Advocate-General in the Supreme Court of the Netherlands. He was the President of the Dutch Bar when the litigation started. He has also been the Chairman of the committee of the European Bar Association that has considered questions relating to multidisciplinary practice.

You came to hear him and not me. We should all be grateful that he has come here from the Netherlands to talk to us. I personally am very grateful he agreed to do this, and I am very proud and happy in presenting Anthony Huydecoper.

MR. HUYDECOPER*: Thank you, Terry, and thank you ladies and gentleman.

* Professor 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 and Of Counsel, Cleary, Gottlieb, Steen & Hamilton.

2. Case C-309/99, JCI Wouters, JW Savelbergh, Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (Council of the Bars and Law Societies of European Union, intervener) (2002).

3. The "Big Five" accounting firms are the five largest public accounting firms that practice internationally. These firms are Arthur Andersen, Deloitte & Touche, Ernst & Young, KPMG, and PricewaterhouseCoopers.

* Anthony Huydecoper is Advocate-General to the Supreme Court of the Netherlands and Former Chair of the Committee on Multidisciplinary Practice of the European Association of Bar Organizations. Mr. Huydecoper was President of the Netherlands Bar Association when it was sued by the

It is a very distinct privilege to be here today. It is my first visit to New York after September of last year, and I must say that both my wife and I – – we are both here together – – have been amazed and very much impressed by the optimism, fortitude, and determination which the city exudes when you come into it and stay in it for a few days. It is truly encouraging to see so much patriotism and so much determination to cope with this disaster, and I think I should start by complementing the people of New York, which includes I suspect most of you, on this amazing spirit of mine. It is really very comforting for a foreigner to see that and a great pleasure to be in such a place at this time.

Having said that, I'm afraid I must now begin on the subject of multidisciplinary practice, which is at a very different level and for many, it may not have that degree of fascination which it has for those who have been occupied with it and in the trenches for a number of years. It is a fascinating subject. I was confirmed of that by seeing that this lecture was announced in *Time Out*. A reason for me to be particularly pleased is that it's the first and probably only time that my name will be mentioned in *Time Out*.

I am well aware that I do not know the full ramifications of the developments in the United States on this subject, and it may therefore well be that I will say things that are either incorrect or inexplicable to you, talking from my Dutch experience or my European experience. In that case, I suggest that you interrupt vehemently and directly, correct me, or ask a question, because there is no point in me saying things that you don't understand and stand uncorrected. I expect and encourage you to leap up immediately and say, I cannot follow what you are saying, and would you please try to make sense of it. I will try when you holler, but I hope to be encouraged and corrected by you.

The subject of multidisciplinary practice is one that excites considerable emotion by those involved in it, amongst those involved in it, and the attitude of course common when disputes arise has been noted to paint pictures of good guys and bad guys and to take the opportunity to vilify the other side and the position it takes. Much though I would enjoy doing that, I think it is better to approach the problem from a less emotional standpoint. This is typically one of those legal questions where there are weighty and sensible arguments on both sides, where both sides have honorable positions to defend and where, in the end, it is the nice balance of legal argument that must decide the question and wherein, my refrain; there is no real good guy or bad guy to be painted to you. I will therefore forego the temptation of discussing the Andersen/Enron problem. I think it is totally irrelevant to today's issue. Any profession and any individual firm can make mistakes, grievous mistakes, and these are likely to influence public debate and public opinion, but they do not really have bearing on the balance of interests which is crucial to deciding the policy of MDPs.⁴ That is the position I take.

That is not a question of an unduly ethical position on my part or altruism. It is a question of putting the matter in the right perspective because it is indeed crucial to the debate on MDPs to see that the arguments on both sides are weighty and honorable and that it is precisely because they are weighty and honorable that one may well be tempted to make the wrong decision in the daily practice of the MDP that we are considering as a possibility. It is far more easy to be distracted from the right course by argument that is honorable and that is sensible than to be distracted by argument that is clearly false. To make the wrong choice on the basis of sensible and honorable arguments is therefore a bigger risk than to do it in the face of argument that is either false or evil.

plaintiffs in the case on multidisciplinary practice that went before the European Court of Justice. *See supra* note 2.

4. Multidisciplinary practices.

The problem with MDPs, I'm sure, is familiar to all of you. Nevertheless, I can hardly forgo depicting that problem, saying to begin with that although there are a variety of conceivable possibilities of multidisciplinary practice, what we are actually confronted with is a limited field of that, and that is integrated form of practice, practice where the various professionals amalgamate or merge or form some other forms of legitimate cooperation and where one of the groups of professionals involved are accountants. I realize that there are a variety of other possible forms of MDP and even some that are actually practiced, although on a more limited scale, but the debate has concentrated almost exclusively on the cooperation with accountants, and as that has its own particularities, I propose to limit myself to that, realizing meanwhile that there are various other forms of MDP that could become relevant at some future date, but it would really be going very far out to discuss them right now.

In the question whether accountants and lawyers should be allowed to practice in integrated form, that is to say in one form or another of amalgamation or merger, it is the position taken by bars in many countries of the world that there are two, or depending on where you look at it, three essential values of the legal profession that could be compromised and that need to be considered or need to be safeguarded in allowing or disallowing this kind of practice. It has come to me time and again when discussing MDP problems with non-lawyers or people who are not actually involved in the bar practice that these values are often misperceived or misunderstood or dealt with lightly by persons who are not intimately acquainted with them, which can at times create the impression that these values do not amount to much if an outsider doesn't immediately understand and appreciate their importance. The time has come for those who are involved with those values to question whether they are all that important.

I will try to present this objectively, of course, but I will not dissimulate that I have a very pronounced opinion on the subject. Yes, they are important, and yes, the bars in many countries of the world -- in fact, practically all the countries I've come across -- have a perfectly sensible position in considering, safeguarding, and defending these particular values.

What are the values we are talking about? I am sure you are familiar with them all. The key words are independence and confidentiality. Independence in this respect is a word that is widely misused because it has a number of different meanings. The meaning that is crucial to the present debate is the independence required of a lawyer in that, when defending the interests of the client, he allows no other interest whatsoever to be his guide. I am talking of course of the legitimate interests of his client. That goes without saying, but it better said nevertheless. In defending legitimate interests of the client, those interests are the only thing the lawyer should be guided by. No other interests whatsoever.

There are other meanings of the word independence, one of which we will come across presently. That is independence of the bar itself, the autonomous position taken by the bar. I mention that to avoid confusion now because in this European Court's decision, that form of independence will also play a certain role, but the independence that is central to the debate is the independence which consists of a lawyer should allow no other interests except that of his client to guide his actions and his practice.

I said at the beginning of this talk that it is particularly difficult to maintain that principle when confronted with other interests that are not dishonorable, but that are very sensible and honorable. It is particularly dangerous for a lawyer to be confronted with other interests that he feels, and rightly he may feel, that also deserve consideration and to be upheld, and then to maintain that he should not allow those interests to guide him, but should allow his client's interests alone to guide him. I said at the beginning of this talk that that is

to my point, that to my opinion, something that is often underestimated in the end of the debate. It is not -- the problem confronting us is not so much that a lawyer will do the wrong thing, knowing that he is being lead up the wrong alley. The problem is that the lawyer may well be perfectly justified in allowing other honorable interests to steer his course when in fact, he should be concentrating only on his clients interests and not, for instance, on the interests of the public at large or justice at large.

Particularly, the interests of the public at large come to mind because that is one of the interests the accountancy profession finds itself very compelled to uphold. The accountants state, and I am not contesting that that is true, state that they have the public interest at least partly to serve and not only their clients' interests. Now that, I'm sure we will all agree, is a perfectly honorable, valid interest and one that does not immediately spring to mind as one that we shouldn't be guided by, but for a lawyer it is very obvious that he shouldn't be guided by the public interest or any other similar interest when dealing in matters for his client. He shouldn't confuse the two when dealing in matters for a client. It's a client's interests alone that should be served. What is confusing and very likely to lead to problems is when you start mixing in these other, in themselves, quite honorable and valid interests, and then find yourself unable to distinguish the two.

It is that independence which is the first part of the debate. Added to that is the avoidance of conflicts of interests. Some people see that as a separate entity. I myself am inclined to think that it is merely a manifestation of the general rule that a lawyer should be guided by his client's interests alone, and he cannot be guided by his client's interests alone if he has accepted to deal with conflicting interests because obviously, you can't have it both ways there. Whether you want to see that as a separate issue or the same is a matter of taste rather than substance.

Now, in dealing with this question of independence, of course we are confronted with the argument that you cannot hope ever to achieve purity of independence of lawyers. Any lawyer, however much dedicated and motivated to do the right thing, cannot avoid being subject to some external interests: his own firm's, his own financial interests, possibly his family, political, or religious interests. It is not possible at all times to divorce the lawyer as a person completely from all these interests, and I agree with that argument. That's quite true. You can't have it 100% pure, but of course it is a fallacy to think that there is no point in trying to get as far as you can in safeguarding the lawyer from the propitious influence of other interests and his acting as such.

At a certain point at the height of the debate in Holland, someone in the audience asked me -- I had gotten carried away a bit, I must admit -- and he asked whether the bar in Holland allowed a lawyer to get married, and I had to admit that the bar has never thought about prohibiting that. We seriously discussed it after that, of course, and we're working on it, but as the matter stands now, I guess a lawyer in Holland is permitted to get married and thus enter into a possible conflict of interest, and I think most of us who have practiced law have had it first hand, haven't we? The interests of the client insisting that you stay after 9:00 in the office and the interests of the other partner in the marriage suggesting that it might be time to stop furthering the client's interests and do something about the family. Very difficult to avoid, they say, very difficult to achieve absolute purity in the observance of the client's interests, when we should try.

In another debate in my country, again on judges and their impartiality, it was a very interesting debate and there again, the participants got carried away a bit. At a certain point, one of the proper dry Dutchman said, "I suppose in the end it would be best if judges had no sex at all, and they were gender neutral." That's another example of the difficulty of

achieving absolute purity in the role, but it should only encourage us to try to get as close as possible.

This independence question clearly interferes when you merge with a profession that has, and very properly and very rightly, has other interests at heart. The accountancy profession is the one that we are dealing with, and there, the conflict that has been amply demonstrated is that accountants do not deal exclusively with their client's interests. They are not supposed to do that. They are supposed to take an objective stand and to also serve the interests of the public. To do within one organization both at the same time -- this is the argument that is made against MDPs -- is not possible. You cannot have this both ways. This is like being a little pregnant. Either you serve the client's interests or you serve the public interest, and serving both wholeheartedly at the same time, you are not going to get very far with that.

As to confidentiality, I suppose that's a much easier problem to comprehend. Lawyers are bound and are entitled to keep any information obtained from their clients, or in the course of dealing for a client, confidentially. That is a very, very essential part of the lawyer's duties and of the service that a lawyer provides to his client, and accountants in many jurisdictions -- not all of them, curiously enough -- but in many jurisdictions, they owe a duty of confidentiality up to a point, but they do not have legal privilege. The duty of confidentiality is compromised, shall I say, by their duty also to give objective information on what they report about their clients. You can hardly say you are giving a true and objective picture about your client but also keeping something behind. There is an inherent contradiction in that, and that contradiction in most jurisdictions has led to that accountants do not have full legal privilege, and there again in amalgamated forms of cooperation. You get into a hopeless controversy trying to settle what information may justifiably be kept confidential and what must be disclosed if need be. There is no proper way to actually have that both ways

Yes, we are told by the proponents of multidisciplinary amalgamations, there is such a way that is locally known as "Chinese walls." I think what we have examined of the problem so far goes a long ways in showing that that is a fallacious proposition, and if you are subject to conflicting influence as to the interests you serve, I fail to see how you can obviate that by erecting whatever kind of structure. These influences work on you, and you can't obviate that by putting a wall up, or a screen, or whatever. There is no point in saying, I'm on this side of the wall so the influence doesn't reach me. It does. It is silly to suggest that it doesn't.

As to confidentiality, I agree that a truly watertight system of Chinese walls -- not that Chinese walls, I believe, were meant to keep out water -- but such a system might conceivably work, but that would militate against the objectives of multidisciplinary cooperation, which is to create synergy and to, for instance, the accountants argue that one of the advantages of multidisciplinary amalgamations is that the accountant gets more complete information about his client, and he also receives information from the other consultants. I say that's fine. That may very well be true, but of course that goes completely against the duty confidentiality, and if you insist on having Chinese walls that actually work, this advantage goes ploey immediately.

So as to independence, the walls are simply inconceivable as a workable means, and as to confidentiality, they may theoretically be conceivable, but most bars that I have come across have made qualms about doing that in practice and also justifiably point out that the main advantages which are argued for in multidisciplinary practice -- that is to say, synergy and better information on the client -- cannot be combined with a proper system of Chinese walls.

That is the problem of multidisciplinary practice as I understand it is also understood in America, but it is certainly the way it is understood in Europe, and that is the way it came before the European Court of Justice in the case that was decided the 19th of February last.

Perhaps it helps to understand this case if I give you a bit of background information on the actual situation on the ground in Europe. I am only vaguely familiar with the structure of the legal profession in America. I do know that it is, up to a point, less completely diverse and kaleidoscopic than the European profession is.

In Europe, where we have – – or in the European Community, because this was placed in the setting of the European Community – – we have 15 Member States, each with largely differing legal traditions, a largely differing legal system, a largely differing legal practice. To confuse matters further, at least two of these Member States are federations which have differences from each federated _____. The United Kingdom, as you may be aware, has six different bars with six different rules for the three confluent parts of the United Kingdom. Germany has different systems for most of its Bundesländer⁵, which lead to a totally chaotic picture.

A few of these differences are particularly relevant when speaking of the European situation as compared with the American one. The first is that in Europe, it is not so that all countries have a legal monopoly for the bar. I believe this is different in America. Sometimes, to Americans when I speak to them, it comes as a shock that there is such a barbarous thing as countries in Northern Europe, particularly, where anyone can practice law without being admitted to the bar, but that is the case. In the Scandinavian countries, it is even so that someone without any qualifications can practice law and take cases to court, with the exception perhaps of the Supreme Court, but I stand to be corrected on that, and some other countries, including my own. Anyone can practice law, but cannot take cases to higher courts. That is reserved for the qualified and regulated bar, but in all these countries, the United Kingdom being the third and fourth group there, anyone can practice law, which means that in essence, there is nothing to stop an accountant from saying he will give legal advice. He is entitled to do that if he understands what he is talking about. There is no sensible objection you can make against his giving legal advice because the law does not prohibit that. In fact, a taxi driver or a hairdresser is entitled in my country to give legal advice, and many of them give quite sensible legal advice and at a very reasonable rate, too. Not when they dress your hair. That's expensive, but the legal advice is relatively cheap.

The various professions, as they have arisen in Europe, also tend not only to have formal difference, but also to be substantially very different in what they do, which again I think is not the same as here in the United States. In continental Europe, you have the classical tradition of advocates on the one hand and notaires, or notaries, on the other hand. That is the classical split of the profession, and each of the countries have derived their systems from Napoleon, from the French, which was true for a large part of continental Europe. The English of course have their, to us, inexplicable division between solicitors and barristers, solicitors doing something vaguely akin to what both lawyers and notaries do, and barristers doing something totally different. I think that similar divisions exist at least in Northern Ireland, and up to a point, but only up to a certain point, in Scotland.

And then we have in most European jurisdictions qualified tax advisors, except for the countries up north where anyone can practice law where we have both qualified and unqualified tax advisors, and a variety of other people doing more or less legal work, such as conveyancing, charter surveying, real estate management – – quite a kaleidoscope of different professions which could claim to be doing legal work.

5. German states.

Then in Europe, the bar organizations tend to be very different. There are countries like my own, where there is one central bar organization – well organized, if I may say so, and effective, and able to regulate and to provide disciplinary control. There are other countries where there is no such thing and where each local bar has its own fiefdom and, of course, tends to be a substantial degree of discord between various bars, which means that there are no, or practically no, national organization that sets any coherent policy, Greece being I think the most striking example, where they have 60 local bars and no national organization whatsoever. They meet for dinner once a year, and I'm told that's a pretty wild dinner.

In France, a similar situation exists. There is a National Bar, but the Paris Bar is dominating over the National Bar, and the local bars tend to be irked over the dominance of the Paris Bar, which makes for a complex circle and makes for very little effective policy.

Finally, there are market differences. Some countries have a surplus of lawyers and Spain, for instance, has five times as many lawyers per capita as Holland has, although from an ethical point of view, that should make no difference at all. Obviously, the pressure of competition on the Spanish bar is such that it finds it difficult to resist the influences of that pressure to a far greater extent than a country in a more comfortable position, like for instance Holland or Belgium.

Finally, to complete this picture in chaos, the European Community has very wisely legislated in 1998 to the effect that any lawyer from any Member State must be allowed the freedom to practice in any other Member State, so that you could have an English solicitor practicing in Germany and being subject to a totally inexplicable plethora of rules, both English, German, and perhaps in between. The in between is ourselves; we're stuck in between these two. On the whole, that makes for very difficult regulation.

You will therefore not be surprised to see that the rules on MDPs vary very substantially from country to country and that besides varying rules, the practice of observing these varying rules is also very different. It begins with the traditions of the English barristers. They are the one extreme of the spectrum. They allow no cooperation with any other profession in whatever form, and they even I think found, up to a point, do not want barristers cooperating with other barristers. They allow it, but they think it is deplorable none the same.

On the other side of the spectrum are the German advocates, who have traditionally been allowed to cooperate with almost anyone and have done so in practice. Surprisingly now, until recently, they were not allowed to cooperate with other German advocates in other länder. Why that was forbidden I have never able to understand, but they were allowed to cooperate with tax advisors, accountants, or for that matter gardening consultants, and some of them did.

In France, the striking thing is that notaires are entitled to deal in real estate, which, in the profession of notaires in my country, is absolute sin. It would be criminal. The idea of French notaries not only acting as real estate agents, but actually selling and buying real estate is found completely repulsive by notaries in the rest of Europe, but that is the way it is.

As to the kind of MDP we are considering now, that is to say the lawyer-accountant MDP, the picture is much the same. It varies from countries and professions where there is complete prohibition to countries and professions where there is complete permissibility, more or less along the lines that I showed you earlier. The English barristers allow no cooperation whatsoever. The English solicitors have a wishy-washy, in between position, and they are reconsidering that at frequent intervals so that it is always very difficult to say what their position at any given point is, but officially – I'm _____, which I will be

discussing presently – – but officially, their position is that integrated cooperation with accountants, at present, is not permitted. The French Bar has the same position.

The German Bar does permit complete integration of accountants and lawyers, but for Germany, there is a curious and I believe unique situation that accountants in that country have full legal privilege. How they managed to combine this with the obligation to objectively disclose what is going on within their clients, I cannot tell you. They must have found some intricate German way of solving this dilemma or at least fudging it over, but I have not been made privy to the trick they have found for that. Anyhow, they do have complete legal privilege, and that explains why the German situation has traditionally been dealt with differently than other countries.

Italy allows MDPs in full measure. On the other side of the Latin scale, Spain prohibits them in most rigorous form. You should be aware, of course, that Europe being Europe, the fact that MDPs are prohibited in France and in Spain does not mean that they are not there. They are there, but they are prohibited. I'm not being merely facetious. One of the reasons that MDPs are present in Spain and France may well be that many bars have suspended disciplinary action on illegal MDPs, pending the European Court's decision, because there is not much point in going up in arms against MDPs when any disciplinary body confronted with that will say, well, that's a very difficult point. Why don't we leave that in abeyance for a minute and see what the European Court does first.

I fully expect that the situation will change at least in this respect, that a number of bars will now take up enforcement far more seriously now that the European Court has given them encouragement on that subject.

Finally Holland, although I have so far spoken of the major EC countries, this you may not take al contrario as to mean that Holland is not a major EC country. It is a very small major EC country, but that situation of course is completely irrelevant except that it was this situation that was taken to the European Court by complete coincidence.

In Holland we had took, in our own perception, a very liberal view. The Dutch bar enacted a regulation in 1993 to the effect that lawyers were not permitted to cooperate in integrated form with nonlawyers, but that they were allowed to cooperate in integrated form with a wide variety of professionals that did provide legal services, including patent agents, notaries, tax advisors, and foreign lawyers. I know that you will be pleased to hear that the New York Bar is one of the bars which our Bar Council officially recognized as one with which you can cooperate without compromising your core values. In effect, that makes it possible in Holland to cooperate with other practitioners on a large scale, and this is not a hollow shell. This has happened in our country. We have very large cooperative organizations incorporating all kinds of practitioners either in the integrated form, which is allowed for legal practitioners, or in the form similar to the side-by-side form advocated by the Bar in New York. These actually exist, and they work. It is not a question of having done it on paper and sitting back with satisfaction saying that was done. No, it actually works in practice.

So, we believe we have done our job well, and we are slightly disappointed when two accountants' firms found that they wanted something different from what we thought we had so judicially regulated. The firms next took their case to the European Court.

At this point, I must introduce another player, and that is CCBE, and CCBE was the party that joined on the part of the Dutch Bar before the European Court. CCBE is an acronym, a totally misleading acronym, which stands for the Federated Organization of European Bars, the council within which the European bars cooperate and try to formulate common policy. I may have overemphasized the "try." It is not so bad as I made it sound. They do reach common positions of substance quite frequently. There is a CCBE Code of

Conduct, for instance, which was reenacted in 1998 and which does lay down rules of conduct for the entirety of the European bars. Of course, that is only a relatively small minimum of rules, and above that, all bars have enacted each a plethora of other rules causing this kaleidoscopic variety, which I spoke of earlier.

CCBE has also laid down a position on multidisciplinary practice by the proposal of the committee of which I was in Chairman at the time, so I should be modest and quiet about this. Effectively, the position taken by CCBE is surprising and not surprising at the same time. It is surprising that this very varied organization, with its very differing national systems, did reach a broad consensus on the subject, and it is not surprising that the broad consensus, in a rather verbose way, amounts to that there are two core values that MDPs compromise, and those are the core values that I have talked about already, independence and confidentiality, and that bars would be less persuaded not to permit MDPs, but where they are permitted should take due measures to ensure that independence and confidentiality are safeguarded to the maximum possible.

CCBE decided join in the litigation in support of the Dutch Bar, and because it was felt that this was a problem common to all European bars at two levels: the level of the question of MDPs and the rather higher level of the autonomy of the bars in general to be able to regulate the conduct of their members. Here again, we reach a point which may be different for Europe than for America. In most European jurisdictions, the bars have an autonomous position and are entitled to lay down recommendations for bar members bindingly without any instruments from other organizations or authorities, whereas I understand in most U.S. jurisdictions, in the end, it is either the court or some other legislative authority that approves or promulgates the rules, whereas the bar society merely advances suggestions or proposals for those rules. That is not the case in Europe. In most jurisdictions, the bar has the final say no matter what the rules shall be, and although I did make the qualification earlier that in some countries there is no properly functioning bar organization, in those countries you must expect a rather less effective system of rules than in those countries where there is an effective bar organization.

It is also a matter of both concern and principle to the bars of Europe that this autonomy of the bars should be preserved. It is felt that this, albeit maybe on a small scale, is one of the checks and balances constitutionally required to avoid the bar, in its most extreme form, being subjugated to government policies, the most extreme forms being those that we have witnessed in totalitarian regimes until fairly recent dates, but even in less extreme form. When I was Bar President, the Minister of Justice at the time, a very competent and well-meaning Minister I should add, suggested at a certain point that criminal lawyers were going too far in the defense of their clients, and that the Bar should be well advised to take steps against criminal lawyers who overstepped the limits. We reacted very sharply and said that this was the typical instance where if anyone should shut up and not involve himself or herself in the policy of the bars, it was the Minister of Justice on a matter involving criminal justice, in which she had strong political interests. This was typically something where the autonomy of the bars should be respected. So it is not a completely theoretical problem, this autonomy of the bar. It does crop up from time to time.

Why is this issue so dear to CCBE and to the Dutch Bar? Because of this case, which was brought by, effectively, PriceWaterhouse and Andersen, Arthur Andersen at the time, they argued that the regulations of the Bar that had an impact on competition were contrary to

the laws of the European Community Treaty⁶ at two levels: the level of the anticompetition provision⁷ of that treaty, which prohibits all forms of anticompetitive agreements and, within that scope also, anticompetitive decisions or understandings of groupings of undertakings. The argument went to the effect that a bar is nothing more or less than a grouping of law firms, and therefore a grouping of undertakings and that any decision that affects competition by such a bar is therefore covered by the antitrust rules of the European Treaty.

The second level was that the European Treaty has a number of rules which insist on free flow of products, services, and establishment within the Community⁸, and it was argued that the rules of the Dutch Bar in this case violated these free flow provisions, not of goods of course, but of services and of establishment.

That was the problem and if accepted, it would not only have meant that the MDP regulation⁹ of the Dutch Bar would have been found invalid, but it would effectively have meant that practically all the regulations of all the bars in Europe would be invalid because it is very difficult to think of a regulation made by a bar that does not have some significant impact on competition. I think our rule that you may not lie to the judge may possibly qualify as the only rule that does not have a significant effect on competition, unless you believe it is a competitive advantage to be allowed to lie to the judge, but most all the rules on compulsory education, on compulsory insurance, on admission to the bar, have a significant effect on competition and would be invalid if this theory had been accepted in its full scope. The same, I should add, would apply for other professional organizations, be it in the medical profession or the accountancy profession itself. For all of them, of course, it would be true of their autonomous regulations, and if struck by this rule would be impossible. That is the reason that the case was taken to be very serious indeed by the bars in general, including CCBE.

I will not go into the ramifications of the case at length. You have the decision of the European Court before you, and you will have noticed that it is a very lengthy decision. Even so, it only deals with three or four of the issues that were raised, whereas there were at least 15 issues before the Dutch court when the case began¹⁰. We could speak of this at great length, and I would love to do so, but I suggest that we forgo that and go immediately towards the decision, which has itself been reported as being fully favorable to the bars, but I think I should qualify that because on the issue most relevant, I think the decision is unfavorable to the bars, and that is the first point covered by the European Court, i.e., the question of whether a regulated bar is really considered an association of enterprises and therefore its decisions are, in principle, subject to the competition rules of the Treaty.

The answer to that question, despite vigorous argument to the contrary, was yes, bars are associations of enterprises and, in principle, their decisions are subject to the competition rules of the EC Treaty, which was a severe disappointment, I'm sure, to CCBE and the Dutch Bar and all other bars that were involved and should be a severe disappointment to other professional organizations, including, I repeat, the accountants' organizations, because it puts them in exactly the same position.

6. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992) [hereinafter EC TREATY]. This treaty is also referred to as the EC Treaty, European Community Treaty, and European Treaty.

7. EC TREATY art. 81 (prev. art. 85).

8. European Community.

9. Samenwerkingsverordening 1993 (Regulation on Joint Professional Activity 1993), adopted by the College van Afgevaardigden (College of Delegates) of the Bar of the Netherlands.

10. Prior to referral to the European Court of Justice, the case was brought in the Raad van State (Netherlands Council of State).

The second question put before the European Court was whether the regulation of 1993 on cooperation was relevant to competition, negatively relevant to competition. That is not a particularly difficult question and not surprisingly, the European Court found that yes, if you prohibit someone from cooperating with someone else to mutual benefit, that does have a negative affect on competition

At that moment, it would seem that the death knell had rung over the position defended by the Dutch bar, i.e. the rule prohibiting MDPs, because up to that point the European Court had steadfastly taken the position that where there was a decision or an agreement covered by Article 85, as it was at the time, and having a negative effect on competition, there was an end to the story. That agreement or decision or whatever was null and void, and there was an end to that. So at this point, the _____ would say, well, I can close the decision. I know I was going to go on from there. They don't stand a chance.

Then the decision, starting at paragraph 97 and following, for those who are avidly following this, takes a very, very surprising turn, surprising at least to Europeans, not I expect to many American readers. The European Court then takes up a rule of reason approach and examines whether the motives underlying the Dutch Bar's regulation are sufficient to justify this regulation, despite its anticompetitive effect. I think that is not surprising to a U.S. practitioner, where there is similar case law in America dating back a long time, but it is very surprising in the European context because so far, the European Court has steadfastly refused to apply rule of reason considerations in competition cases. There is a technical reason for that, which if you insist, I will explain to you, but I see you are not insisting, so I won't and leave it at that.

I'm not a competition law expert, but to my knowledge, this is the first time that the European Court has accepted rule of reason arguments in the context of a competition case. You will have read or you may be _____ to read the opinion of Advocate General Léger before the decision of the European Court. He sets out in paragraphs 99 and following his decision and very succinctly and completely, what the law up to that point was and explains irrefutably _____ that no, there is no possibility to apply the rule of reason argument in a way that the European Court subsequently did apply it. Reading these two side by side makes you see how relatively revolutionary the decision was in this respect.

Now in applying the rule of reason, the Court examined, as it of course was bound to do, whether the grounds for forbidding, in a very liberal form but all the same forbidding, MDPs in Holland were sufficient to justify that regulation. To the great satisfaction of the CCBE and of the bars, of course the Court did find those grounds sufficient to justify this particular infraction, which it is, upon the competition rules. It balanced the interests of independence and confidentiality, always the same. And yes, in the context where there is a well regulated bar which has taken seriously its responsibility of maintaining loyal independence and maintaining client confidentiality that is embedded in the national system of law which respected these values, then the bar is fully justified in making an anticompetitive regulation that forbids those forms of cooperation that jeopardize these two values. That of course is very heartening. It is from the highest authority in Europe that we have now heard that these values are not royal bullshit, but are values that are taken seriously also outside the intimate circle of those who have been discussing these values and getting so wrought up about them for years.

The Court actually looked at the argument advanced from the side of the accountants, which was well argued and well supported, but I do it injustice by summarizing it and saying that it boils down to, well, these lawyer arguments are nothing but veiled means of limiting competition and thus allowing weaker law firms to survive instead of us more modern vehicle to overtake them. This is an argument that has been advanced by the accountants'

side of the debate in many jurisdictions. It was advanced in the European Court at great length, and you will see that the European Court considered and rejected that argument and said, no, these are serious and respectable values which deserve to be upheld in a jurisdiction which has the means to do that. In that respect, it is justifiable – – and for a European, that seems absolutely revolutionary – – it is justifiable that an organization of enterprises makes a regulation that is anticompetitive. _____ very satisfactory.

The final argument that was put before the European Court, which I mentioned briefly, which was the free flow of services and the free flow of establishment, and not surprisingly, the Court used the same rule of reason approach there. That was less revolutionary because the Court had already accepted in earlier case law that the free flow provisions could be qualified on rule of reason grounds.

You are looking uncomfortable, Terry, with all the time I am taking.

PROFESSOR CONE: I have found you comments delightful.

MR. HUYDECOPER: Thank you. It looks like you do not. I will draw to a close.

What further, ladies and gentlemen? What is going to happen now? If I knew that, I'd be rich. What I can tell you is that the accounting firms in question have said that they intend to litigate on and to see if they can prevail before the Dutch court authority, which has returned its case to the European Court. I'm sure they do intend to try that, but my estimate on their chances on that, in view of the rather straightforward reasoning of the European Court, is that they stand very little chance indeed. The European Court has left very little latitude for a decision other than one unfavorable to the accountants.

What else will happen? The European Court has said that the bar can justifiably regulate against MDPs. It has not said that a bar must do that. It has said, in the reverse, that the fact that some bars have chosen not to regulate against MDPs does not prove that the idea of MDP regulations is unjustified. It has left the road open for doing it both ways, either regulating against them or leaving them as is.

I expect that in those countries in Europe where MDPs presently are permitted that there will be no move towards prohibiting them in the future. I also expect – – I think I already said that – – that in those countries where they are prohibited, the bars will now take more seriously their task of enforcing these regulations, which up to this point, many of them had been slow to do because they felt that it would not get them very far while this case was pending before the European Court. So I expect the Spanish and French bars, for instance, will pull up their socks and get down to business, to the extent that the Spanish and French bars do get down to business. Don't misunderstand me, they do do that, but they have their own way of doing it.

I already pointed out a serious problem in the decision, which is that it begins by stating the principle that bars are subject to the competition rule¹¹. They are organizations of enterprises, and they are subject to the competition rule. Effectively, that means that for each and every regulation enforced over the width of Europe, and whether it concerns dentists or lawyers or accountants – – it makes no difference – – it will have to be demonstrated for that regulation to be valid, that there is sufficient rule of reason substance supporting that regulation.

For myself, I am not particularly worried as to that the majority of regulations will survive that test. I do think that we will be facing a plethora of people attempting to avoid disciplinary punishment or other difficulties by raising this argument in the courts and by

11. See *supra* note 7.

fighting it. In fact, that has already started. A Dutch lawyer has taken the Dutch Bar to court and argued that the no cure, no pay rule, which is accepted in most European countries including my own, is anticompetitive, and he has found favor before the Dutch Competition Authority, and from thereon I expect a further round of litigation, presumably ending before the European Court again in a couple of years' time. But I was saying earlier, nearly every regulation made by nearly every professional body has some competitive effect, so the varieties in which this argument can now be raised and tested could be termed a lawyer's paradise perhaps, but for others, it's rather daunting.

That concludes what I would like to say to you. My advice to any lawyer wishing to get into close cooperation with an accountant remains either don't do it, or look for a charming young accountant and get married to him or her.

PROFESSOR CONE: I regret that you felt that I was trying to bring to an end a most extraordinary and most well presented exposition of what has been going on in Europe and what the European Court of Justice did two weeks and two days ago. It's wonderful that you have come here to do that, and we are grateful. Let's move right along because I suspect there will be questions for you. Before we reach that point, first, Robert MacCrate, and second, Deborah Schenk, have kindly agreed to make their own comments on your presentation.

Robert MacCrate, who needs no introduction, particularly at this law school, because he has taken up the habit of coming here on a fortnightly basis.

MR. MACCRATE*: Mr. Walter, it's a special privilege to participate in this year's Otto L. Walter Lecture and to listen to the Advocate-General's penetrating analysis of the judgment of the European Court of Justice. He has placed the decision in its largest context, highlighting its relation to ethical concerns of bar organizations throughout the world.

Two weeks ago, I was here at New York Law School -- fortnightly, yes -- and was presented with a birthday cake with ten candles. It was a program entitled, "The MacCrate Report Turns Ten." It was almost ten years since the American Bar Association's Task Force, which I had the privilege to chair, published in July 1992 its report entitled "Legal Education and Professional Development: An Educational Continuum." That report, with its focus on identifying the skills and values of the American legal profession, became the foundation for the New York State Bar Association report in the year 2000, "Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers," 400 pages.

The first 120 pages of the 1992 report provided an overview of the American Legal Profession, which was followed by another 120 pages offering a vision of the skills and values new lawyers should seek to acquire, and I should say to Professor Schenk that that could never have been written without two NYU law professors contributing.

The 2000 State Bar Report brought down to date much of that 1992 report. This later report begins with six chapters appraising the American legal profession in the year 200. It includes separate chapters on cooperative arrangements with other professionals, Chapter 4; the organization, education, and maintenance of a single American legal profession, Chapter 5; and the articulation and enforcement of professional values in that unitary profession, Chapter 6.

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Now just as the European Court of Justice has now found in its decision of February 19, the regulation of the Netherlands Bar would be justified if necessary for the proper conduct for the practice of law in the Netherlands, our State Bar Report concluded that the regulation of multidisciplinary practice of lawyers in America was necessary to preserve the core values of the legal profession. The core professional values of independence, loyalty, confidentiality, and freedom from conflicts are the foundation for the regulation of both American lawyers and Netherlands lawyers with respect to multidisciplinary practice.

Emerson, in his essay on the sovereignty of ethics declared, drawing from Deuteronomy, “Man does not live by bread alone.” This is well to remember when we are told that competition and the forces of the marketplace should be the sole regulator of the legal profession.

Philadelphia lawyer Arent Fox has aptly written in his response to Dean Daniel Fischel’s support for intertwining multiple professions, “Dan’s world: the free enterprise dream, an ethics nightmare.”

The groundbreaking empirical study by Senior Research Fellow Susan Shapiro of the American Bar Foundation entitled, “Tangled Loyalties: Conflicts of Interest in Legal Practice,” which will be published this spring probably next month, reports that none of the fields studied outside the law came even close to the legal profession in devoting resources to ferreting out and evaluating conflicts, or even became aware of potential conflicts on a day-to-day basis.

In our State Bar Report, we pointed out that multidisciplinary practice has been common among lawyers for many years, and that when such coordinating services are properly regulated by the law governing lawyers, are provided to clients, the core values of the profession are respected and the needs of the clients are fully served.

Since the early 1960’s, lawyers and social workers together, right here in lower Manhattan, have been addressing the legal needs of public employees who come to that office for help. It’s right over on Park Row. Working with other professionals is a common characteristic of law practice today. The core values of the legal profession are respected and preserved only when partnerships and other contractual arrangements that compromise the lawyer’s independence of judgment, loyalty to client, avoidance of conflicts, and maintenance of clients’ confidences are avoided. This is what the ABA House of Delegates emphatically affirmed in July 2000 when it rejected multidisciplinary partnerships and affirmed the core values in the public interest are a central concern of the America legal profession.

That’s all I have to say.

PROFESSOR CONE: Thank you, Bob.

Professor Deborah Schenk is our next commentator. I am very eager to hear what she has to say.

PROFESSOR SCHENK*: I too am delighted to participate in the Walter Lecture today, and I too enjoyed and learned a lot from the Advocate-General’s presentation.

There are three points that I would like to make. First, I ‘m struck by how closely the language of the opinion of the Advocate-General and the opinion of the Court tracks the concerns that have been expressed in the MDP debate in the United States. There was virtually nothing in either of those opinions that wasn’t familiar to me, although I must

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

confess the undertakings part was quite strange, but leaving that aside, the opinion demonstrates that the core values of lawyers, especially independence and confidentiality, do in fact cross borders. Now this should not come as a surprise to us.

The New York State Bar Association Committee on Professional Ethics, which I formerly chaired and now serve on, as well as other ethics committees, have permitted New York lawyers to form partnerships with non-U.S. lawyers in cases where they share core values and there would be no threat to the core values of U.S. lawyers, and there are a number of New York opinions that hold lawyers can form such partnerships with European lawyers.

Second, and a more important and probably more controversial point, is that the decision of the European Court of Justice deals with exactly what the United States has not dealt with, that is, the presence of lawyers in accounting firms. To take New York as an example, New York now has rules permitting some form of multidisciplinary practice. To quote Steve Krane, “So long as the nonlawyers do not own, control, supervise, or manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm.”

What New York nor any other state, to the best of my knowledge, has not dealt with is the current practice of law by lawyers in accounting firms in the United States. Unlike the Netherlands, which took steps to enforce their ban on lawyers joining in partnerships with non-lawyers – I realize that this was a reaction, but they did enforce it – the United States has done nothing to prevent this practice. Perhaps it is because to date, the practice has been almost exclusively by tax lawyers, and maybe we just don’t care what tax lawyers do, although my colleagues tell me that this practice is extending to benefits practice as well, but there is no question in my mind that the activities of tax lawyers in accounting firms in the United States would clearly be the practice of law if those lawyers did exactly the same thing at Cleary, Gottlieb or Sullivan & Cromwell. Their activities are practically identical.

To date, the accounting firms in the United States have finessed this issue by simply stating that their lawyers are not practicing law, despite the overwhelming evidence that that is exactly what they are doing. It’s so odd to me that lawyers, who are used to ignoring labels and looking at the substance of transactions, have simply ignored the substance of this practice. The most startling statement to me in the materials that we were given was a quote by Andersen Legal in the Wall Street Journal responding to the Court’s ruling.¹² The spokesman for Andersen said, “This will not stop us practicing law in the Netherlands, in Europe or anywhere else around the world.” I’m pretty sure he was referring to the United States.

My third point, and here I may have to disagree with Tony, relates to Enron, which I do think is quite relevant. My third point is that the European Court of Justice, along with Enron and Arthur Andersen, may do for the legal profession in the United States what it has been unwilling to do for itself. First, despite the statement from Andersen Legal, the ruling by the Court should be a blow to accounting firms hoping to bundle accounting and legal services in the United States. We now have a ruling from a very distinguished court that the bundling of accounting and legal services is incompatible with the core values of the legal profession. We also have a response to the traditional argument from the accounting firms that the lawyers’ position is simply turf protection, and thus anticompetitive. The Court acknowledged that a ban on bundling was anticompetitive, but reaffirmed the primacy of core values that were incompatible with bundling. In other words, competition is clearly secondary.

12. Paul Hofheinz, *European Court Rules Accounting Firms Can’t Bundle Legal and Auditing Services*, WALL ST. J., Feb. 20, 2002, at C16.

Second, it strikes me that the Enron debacle has made the whole concept of one-stop shopping much less appealing. It is not at all clear to me that firms will actually want to employ one entity for its auditing, consulting, and taxing. I recently was visited by a former student who practices law with a “Big Five” firm in Europe, and he told me that in two weeks of contracts he drafted with respect to the firm’s employment, the client specified in one that the firm that was waiting to provide audit services could not provide consulting services, and in the other the client specified that the firm that was going to provide audit services could not provide tax services. He was quite shocked that he was required to put this in the contract.

Thus, the argument that clients want to have one firm providing all services may never have been true, but it seems much less likely to me to be true today. The efficiencies or the synergy that were touted in the last decade as being so important to business clients may now seem less important than the desire to have a second set of eyes reviewing materials.

On the other hand, we now have some pretty damning evidence from Enron and other cases that are arising of what happens when there is only one set of eyes. Andersen’s predicament clearly brings to the fore questions about what I’ll call internal conflicts of interest issues. We’re quite familiar with the problems raised by the fact that the legal concept of external conflicts of interest has no application to accountants. Andersen’s involvement with Enron has spotlighted the potential disaster that can arise when the professional’s judgment and independence are colored by the fees earned by another professional in the firm.

The Enron implosion should give us pause about the ability of individuals to exercise independent judgment when involved in a multi-business partnership. It seems clear to me at least that the huge dollars that Andersen was pulling in on the consulting business affected their judgment with respect to the auditing business. Why do we have any reason to believe that if we substitute legal business for auditing business, the answer would be any different.

The attempt of the SEC to disengage consulting from auditing is premised on the assumption that the consulting business would impair an accountant’s auditing judgment. I have no reason to believe that the management of accounting firms would respect the lawyer’s judgment and independence any more than they apparently respect the auditor’s judgment and independence.

Well, the New York State rules make it clear that there is nothing per se unethical about lawyers engaging in more than one business. They also make it clear that such activity is permissible only if the mandates of the Code of Professional Responsibility are followed. A conflict arises and the activity is prohibited when those rules are not or cannot be followed. Since accountants are not required to respect the values of confidentiality, independence, or freedom from external or internal conflicts of interest, as the Enron debacle illustrates – – clearly, they do not value them – – a partnership in which accountants supervise lawyers is obviously untenable.

Well, that’s been clear to many lawyers throughout this debate, as Bob MacCrate wisely notes. The opinion of the European Court of Justice and the performance of Arthur Andersen with respect to Enron may finally make it clear to the accountants as well.

Thank you.

PROFESSOR CONE: Let’s have questions or comments from the audience.
Yes, Professor Rostain.

AUDIENCE MEMBER 1: Hi, thank you. I have a question for Professor Schenk, actually, which has to do with your second point, which is the fact that the American Legal profession has not done anything. _____. I wondered what mechanisms you thought were available because it seems that the times that the bar has attempted in an organized way to deal with unauthorized practice of law, the Justice Department rears its head and says that it's a problem demanding competitive activity here.

The other part is that, particularly in the tax area, it seems that accountants, under the IRS rules, accountants and lawyers have been able to both practice in front of the IRS, so I wondered if you thought there were other -- what legal language you thought would be available to deal with the problem of reconciling this.

PROFESSOR SCHENK: That's a good question. There are two points I want to make. First of all, it is true that accountants and nonaccountants, actually, can practice before the IRS, but that's not all that accountants are doing. Accountants are planning transactions, they are preparing documents, and engaging in more kinds of transactional work, and that is not necessarily governed by the rules at the core of our practice.

The obvious answer to your question is quite draconian, but the obvious answer is a disciplinary violation. A disciplinary committee of any state could, on any number of grounds, try to discipline a lawyer who is working at an accounting firm who is sharing fees with a nonlawyer, who is working under the supervision of a nonlawyer, who is not bound by confidentiality. I can think of a number of grounds on which these cases could be brought. To the best of my knowledge, no one has ever done that.

The bar could also be -- a first step could simply be making a statement. There is a very old ethics opinion in New York State and there are a couple of opinions in other jurisdictions that say the practice of law by a lawyer in an accounting firm is unethical, but other than that, I don't really know of any bar association to press this issue. A statement might be a good first step.

PROFESSOR CONE: Yes, ma'am.

AUDIENCE MEMBER 2: It's not clear to me why there are different sets of obligations for lawyers and accountants. In your speech, you said that with accountants, they have to think about the public interest, but lawyers only focus on clients' interests. It's not clear to me who makes these rules and why there are differing sets of criteria.

MR. HUYDECOPER: Let's get to who makes the rules because that's very different depending on what jurisdiction you are in. Maybe a way to explain it is, if you hire a lawyer, and found out after you had worked with him for a number of years and paid him substantial fees that he was not acting only in your interests but was also motivated by other interests, you'd be thoroughly disgusted.

AUDIENCE MEMBER 2: Could you answer in the abstract my question?

MR. HUYDECOPER: I thought I did.

AUDIENCE MEMBER 2: You are giving me an example. It's not really answering my question.

MR HUYDECOPER: I suppose, theoretically, you could argue that the public might be prepared to accept the lawyer who is motivated by other interests. It is to us a reprehensible idea, and it seems clear to us that both the public and the lawyer are better off with the rule as it stands, which is that the lawyer should be motivated only by his client's interests.

I suppose in a Soviet-type approach, you could say, well, a lawyer -- in fact, it was a Soviet-type approach -- the lawyer should not only have his client's interests at heart, but also have the interests of the glorious Soviet Republic before his eyes at all times. It's possible; it works. It doesn't work in ways that I would approve of, but it worked.

PROFESSOR CONE: I think maybe this -- I don't know that I can become sufficiently abstract to satisfy you, but the rules that govern lawyers in New York State are adopted by the courts. The rules that govern auditing are, in large part, adopted by the Securities and Exchange Commission, and the Appellate Division has rules for complaint about what Mr. Huydecoper has been talking about; the bar and the lawyer should be loyal to the client. The Securities and Exchange Commission wants the auditors to inform the public objectively concerning the financial condition of the audited. I hope that's helpful.

AUDIENCE MEMBER 2: Not really. I was asking more philosophically as to why these two parallel professions have different obligations. Perhaps Deborah can shed some light on this question.

PROFESSOR SCHENK: I seriously doubt that I can be abstract enough, either, but I will say, to echo something that Sydney said, the two professions are somewhat parallel, and they are business professions, they work with the same clients, but they serve very different functions, both here in the United States and in Europe.

The lawyer is an advocate for a client in a representative capacity, but quite different than the function of an accountant, who is to certify that this is true. A lawyer is never or shouldn't be ever put in the position of certifying that the facts or the materials are subject to the accounting standards or the SEC rules.

So it seems to me that the functions of the two professions are quite dissimilar, and as a result, the rules that would guide their behavior are, of necessity, quite dissimilar as well. They just are designed to do two very different things.

MR HUYDECOPER: I hate to have to be bound to the level of abstraction you seem to be insisting on. Very concretely, in the typical situation, the client coming to the lawyer is in a mess. He has made a hash of things, he is in deep problem, or the "s" word, and he has a very unfortunate tale to tell, and to get this client out of this mess, the lawyer will find himself compelled to leave a large element of what this client has told him confidential.

Now that is absolutely what an accountant cannot do. He must present a true and full picture of the position of this client. That is the core of his function. A client who comes and tells his accountant that he is deep "s" will henceforth have great difficulty in proceeding with that accountant because the accountant cannot work with that information. He'll simply have to present it.

PROFESSOR CONE: In the back.

AUDIENCE MEMBER 3: All of you had said that in some jurisdictions, people can practice law. There is no restriction, even if they are not lawyers or if they don't have any

legal training. How do they account for things such as the attorney-client privilege? If somebody seeks and accountant out and gets legal advice, is that information not privileged and protected as you were just saying earlier?

MR HUYDECOPER: To the best of my knowledge, it's not, and mind you, we have a variety of different jurisdictions where this kind of rule applies, so I'm not saying that there couldn't be an exception somewhere in the north of Finland or the south of Sweeden, but on the whole, no. The legal privilege is restricted to the genuine bar as we know it, the professionally trained and regulated lawyers, and the amateurs who operate outside that do not have client confidentiality rules and do not have legal privilege.

AUDIENCE MEMBER 3: Doesn't that just only serve to hurt the client? I mean, the unsuspecting client probably does not know these things and maybe went believing that the advice he or she was given is privileged, and may only come back to haunt the client.

MR. HUYDECOPER: I expect that that is probably true, yes, and that makes a strong argument that this is not a desirable situation, but in fact, it is the situation in most of Northern Europe.

PROFESSOR CONE: On the other hand, most knowledgeable clients in Europe, where I've practiced for ten years, will want the advice of a trained and licensed lawyer, and while the client may well be forced to listen to legal advice from the client's concierge, lest the concierge be offended and cease rendering the type of services the concierges render in Europe, the client will probably rely on the advice of a trained and licensed lawyer and will not rely on the advice of the concierge.

AUDIENCE MEMBER 3: I can certainly understand that with respect to more sophisticated clients like corporations. I guess I should have been more clear. I was more concerned with individual clients, people who have small businesses, or --

PROFESSOR CONE: You certainly describe a risk of an unsophisticated person. They may mistake a concierge for a trained and licensed lawyer, and that is the risk of the unsophisticated, even in New York.

MR. MACCRATE: Uh, Terry.

PROFESSOR CONE: Yes, Robert.

MR. MACCRATE: I think the history of the United States is very instructive on this point. We had, in the 1830's, jurisdictions -- and _____ is one that springs to mind -- where anyone could hang out a shingle saying they give advice on all legal matters, and we learned over the decades and more than a century to develop the attorney-client privilege, and you don't find canons of ethics adopted for the country by the American Bar Association until 1908. All of these things developed out of experience that the way you protect clients and protect the public is by having such rules.

PROFESSOR CONE: Yes, sir.

AUDIENCE MEMBER 4: It strikes me that kind of, in the end, the concern in various jurisdictions with protecting the values of confidentiality and independence ought to be a concern with how the protection or absence of those values impacts upon the way in which individuals, be they natural persons or business entities, conduct their relationships with each other or with the state and the coercive power of the state.

I wondered if, being closer to a variety of jurisdictions, if you have any observations as to how the differing protection or lack of protection for those core values has in fact affected the way in which individuals or businesses conduct their relationships with each other or conduct their relationships with the state. Can you point to any ways in which we can identify practical results of the differing importance of these values in different jurisdictions?

MR HUYDECOPER: Well, an extreme example which I already mentioned was the legal practice in the former Soviet Block, where it was an official canon of ethics that the lawyer not only served his client's interest, but also was held to observe the interests of the state and the people at large which, putting it bluntly, meant he had to rip off his client if he found anything nasty about his client had gone on, which effectively meant that people didn't use lawyers and resorted to consigliari-type arrangements, familiar from Mario Puzo's books, but hopefully not in practice -- far from Soviet practice, but not from practice in the West. That's putting it very extremely, but that is the way it worked in, for instance, Eastern Europe and the Soviet Union.

PROFESSOR CONE: Yes, sir.

AUDIENCE MEMBER 5: Mr. Huydecoper, how does this issue, do you think, play out in the European Union, where there is such a drive for a common set of rules applicable throughout the whole Community?

MR. HUYDECOPER: There certainly is such a drive, but it is fairly utopian and it has not had very much result so far. To take a single example, I don't think Germany will ever agree to giving up their rule that accountants have full legal privilege. The accountants' lobby will certainly put a foot before that. If accountants have full legal privilege, there is much less to be said against their being allowed to amalgamate, and there is simply not sufficient political impetus to rub away that kind of distinction. I think we're going to be faced with that perennially.

There certainly is -- the CCB, which I already mentioned, is working hard on harmonizing rules overall. It has succeeded in making a common code of ethics, which harmonizes the most important rules. That is a major achievement. It will be a long time before we get steps further towards resolving the disharmony that exists outside the scope of that code of conduct.

PROFESSOR CONE: Let me mention what Mr. Huydecoper has already mentioned. There is now an establishment directive¹³ in the European Union, adopted in 1998, giving lawyers licensed anywhere in Europe the right to practice anywhere in Europe, a very revolutionary directive.

13. Directive 98/5/EEC (1998).

Perhaps, being older than Tony Huydecoper, I am more optimistic. I am inclined to think that rather rapidly over time, the existence of the Establishment Directive will lead to what the Europeans call a _____ of the regulation of the practice of law in Europe.

AUDIENCE MEMBER 5: Do you think it comes out the way this court did, separating the two professions?

PROFESSOR CONE: On the issue of multidisciplinary practice?

AUDIENCE MEMBER 5: Yes.

PROFESSOR CONE: A lot will depend on what the solicitors do. A great deal will depend on what the solicitors do. Solicitors are very powerful in Europe. They have thus far been of two minds and, as we know, the English are very accomplished at being of two minds. I think a great deal will depend now on how the Law Society of England and Wales reacts to this decision. If they, in effect, endorse it, I think that will be -- this is my personal opinion, but you didn't come here to hear me -- I guess this is my personal opinion.

Let me quickly mention something that I never fail to point out. The Establishment Directive was drafted in such a way that U.S. citizens get no benefit from it. So you can go to Europe, qualify as a lawyer, and if you're a U.S. citizen, you get no benefit.

Yes, ma'am.

AUDIENCE MEMBER 6: This is perhaps beyond the legal framework, but I'd be interested in Mr. Huydecoper's comments.

I know that somebody commented -- one of the officials of the Court commented that although the prohibition will dismiss competition and effect cross-border business, it is compatible with EU¹⁴ law because it is necessary to protect the proper practice of the legal profession.

I know that in the case of the World Trade Organization, there is simply a question about whether competition should be, for all of us, the overriding value, or whether there are other values, in a sense, that should mitigate or influence how decisions are reached.

I'm wondering if, in the course of the discussions here, there were issues or comments around the question of the position of competition as a value in relationship to other public values associated with it that you could comment on.

MR. HUYDECOPER: Well, certainly, yes. That was a very crucial point in the debate on which, mind you, the lawyers believed that they were defending a tenable but very weak position because the European Court, in its 40 years of existence, has never budged and inch in the direction of allowing other considerations to mitigate the competition rules. I was saying that there was a technical reason for that, and maybe it is now the time to explain that.

The European Treaty provides that exemptions can be obtained from the competition rules from the European Commission, which is the governing body of the Community, and the Court has always held that there is no point in having a system of exemptions if you are also going to allow similar forms of exemptions on an unofficial basis, like qualifying the rule. That's the reason behind it, and there is some sense in that. They have maintained that position stalwartly until this decision.

14. European Union.

So yes, the point was argued vigorously. Yes, apparently because it is now accepted that competition is a good thing, but that there may be better things that offset competition occasionally.

And finally, I do not expect that they will be prepared to go a long way to doing this kind of thing again in future cases. I think they clearly found this an exceptional case and an exceptional sort of competition, a regulating organization. I fully expect their next case will be, well, this was the one exception that we did allow, and don't come asking for more exceptions.

PROFESSOR CONE: Mr. Krane.

AUDIENCE MEMBER 7: I have a question for any or all of you. This whole multidisciplinary partnership situation is taking on the earmarks of a bad movie, and by that I mean it's a kind of movie where the plot has unfolded, you've reached the critical point of the situation, the conflict has been resolved, and the movie is still going on, and you are sitting there saying to yourself, shouldn't this be over already? I say that about this debate. You have a categorical rejection of multidisciplinary partnerships by lawyers, we've had the Enron scandal that has heightened concerns among clients, and we've had this determination of the European Court of Justice upholding regulation in Europe where the multidisciplinary partnership movement had its origins. No one is clamoring for multidisciplinary partnerships except maybe the "Big Five," soon to be the "Final Four," and they have other things on their minds right now.

So my question to you is, is this movie over?

MR HUYDECOPER: Very unlikely, I am sorry to say. As Terry Cone already pointed out, the English solicitors are teetering on the verge, which they have been for many years, and they will continue to teeter and as long as they do so, there will be something to watch on your screen.

It may well be the Arthur Andersen reaction to the effect that "this is not going to alter their practice" may mean that they intend to opt for side-by-side cooperation forms in the form which has been accepted here in New York. In that case, the movie would have a happy ending with the couple strolling down the aisle and the organ playing appropriate music.

I have said I believe in part that this form of cooperation has been entered into by big firms, Ernst & Young being one of them and Deloitte & Touche, have done it in Holland successfully. So it can be done, and it works, and I expect that Arthur Andersen will choose that route in the rather insignificant jurisdiction of Holland, but they may decide to avoid problems in other jurisdictions in this form also.

PROFESSOR SCHENK: I'll just add to that, Steven. I think the bar associations and the lawyers believe that it is over. I don't think the accountants think that it is over. My sense is that the accountants believe that the lawyers think they stopped it by side-to-side rules, and they don't like accountants, so therefore they're going to go along their merry way, and I think things will continue for quite awhile.

PROFESSOR CONE: Yes, sir.

AUDIENCE MEMBER 8: Mr. Huydecoper, you mentioned that there were European countries -- Italy is one that I recall you mentioning -- that do not prohibit

multidisciplinary practices. In the plaintiffs' case, did they introduce evidence to suggest that the system worked without the kind of disastrous results of compromising confidentiality and privilege by merging them, and what kind of weight was made of those _____?

MR. HUYDECOPER: Well, the major jurisdiction where this is allowed is Germany, where they have this exceptional rule of confidentiality, allowing accountants full legal privilege. So there it is not difficult to show that that does not lead to disastrous results. The rules are significantly different.

The other major country where MDPs are allowed is Italy, and to cut a long debate short with a rather trite remark, in Italy, it is always very easy to show that nothing disastrous happened. It does not make a last impression when you have shown that.

PROFESSOR CONE: I asked the leader of the Italian bar -- I chatted with him a while when I was in Rome on one occasion -- what position the Italian bar was going to take with respect to the case before the European Court of Justice, and he said, "We're going to show solidarity with our brethren in the Netherlands as long as the case is pending before the European Court of Justice. Once the case has been decided, we will then permit multidisciplinary practice." That is a very old and sophisticated civilization.

Sir.

AUDIENCE MEMBER 9: My question is addressed to the distinguished looking gentleman. Most countries have chosen to regulate the various professions, medical and legal, for broader societal impact and need. I am intrigued by the European Court's categorization of the legal profession as a group of business, which opens it up to various other possibilities. Can you comment on that?

MR. HUYDECOPER: I did say that that was a most disappointing aspect of the decision for the bars and for professional organizations at large. I don't think I can add very much to that. The case law of the European Court had already been to the effect that the concept of an amalgamation of enterprises was taken very broadly.

To give you a rather striking example, a case in the 1970s where an opera singer was considered to be an enterprise, and a group of opera singers of course would be an amalgamation of enterprises. It takes some imagination to see that that is the case, but the Court has consistently taken the view that anything done for remunerative purposes amounts to the operation of an enterprise. Given that very broad starting point, it is understandable that yes, accountants, lawyers, and physicians are enterprises. Their logic is irrefutable.

PROFESSOR CONE: The battle was fought and lost by the CCBE of the European Bar Association in the context of the Uruguay Round of trade negotiations. If you look at the General Agreement on Trade in Services, and in particular you look at the schedules of specific commitments thereunder, you will see that there is a category of business services. Then, under that category, among the subcategories, are professional services, and that under the subcategory of professional services, there is a sub-subcategory called legal services. Now, there were many protests in the European bars in particular against that hierarchy in the Uruguay Round, and those protests fell on deaf ears. So there is now multilateral treaty authority for the proposition that legal services are a sub-subcategory of business services. Any other questions? Yes.

AUDIENCE MEMBER 9: To extend this logic, a government employee or a head of a department or even a minister is paid a salary. So everyone, for rendering any kind of service, receives a remuneration.

PROFESSOR CONE: There is an exception right at the beginning of the GATS¹⁵ for governments.

MR. HUYDECOPER: So is there in the EC Treaty. From personal experience, I can tell you the remuneration the government pays is very modest.

PROFESSOR CONE: Sir.

AUDIENCE MEMBER 10: Mr. Huydecoper, what do think the reaction of the Commission¹⁶ is to this decision, and are they going to, for example, try to establish an exception for the legal profession to sort of carve away this little ____ .

MR. HUYDECOPER: My estimate is the Commission is quite as uncomfortable with this part of the decision as professional organizations are. They have also seen that this is not a problem unique to the legal profession, but that it will prop up in all professions that have regulations, and I don't think they are looking forward to interfering with that and setting up a system to deal with that. The Commission has often been known to solve problems by shelving them and trying to keep them out of the way for a couple of years. I definitely think they would be very uncomfortable if they were compelled to set up policy and to set up regulations that are applicable to all professions Europe-wide. It would be a terrible job for them for which they are neither prepared nor particularly inclined to seek to do it.

PROFESSOR CONE: Are there any other questions?

I think that we are all greatly in the debt of Tony Huydecoper, Bob MacCrate, and Deborah Schenk. I personally am extremely grateful that you could come here. You have been so wonderfully informative and articulate, and I want to thank you.

15. General Agreement on Trade in Services.

16. European Commission.