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# German MDPs: Lessons to Learn

Laurel S. Terry



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## German MDPs: Lessons to Learn, 84 *Minnesota Law Review* 1547 (2000)

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## I. INTRODUCTION: WHY STUDY MDPS IN GERMANY?

During academic year 1998-99, I lived in Germany in order to study multidisciplinary partnerships (MDPs) between lawyers and accountants.<sup>1</sup> Although I made my German sabbatical plans in 1997 before the

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1. The term "MDP" is used sometimes as an abbreviation of the term *multidisciplinary partnerships* between lawyers and nonlawyers and sometimes as an abbreviation of the term *multidisciplinary practice* between lawyers and nonlawyers. Compare, e.g., Laurel S. Terry & Clasina B. Houtman Mahoney, *Future Role of Merged Law and Accounting Firms What If . . . ? The Consequences of Court Invalidation of Lawyer-Accountant Multidisciplinary Partnership (MDP) Bans*, in 41 PRIVATE INVESTMENTS ABROAD 1998 ch. 7 (Carol J. Holgren ed., 1999) (discussing multidisciplinary *partnership* bans), with the name of the commission created by American Bar Association (ABA) President Phil Anderson, see *ABA Commission on Multidisciplinary Practice* (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/multicom.html>>.

As the Reporter to the ABA MDP Commission has observed, the term *multidisciplinary practice* is a reference to an activity, whereas the term *multidisciplinary partnership* is a reference to the legal relationships among those providing the services. See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS (forthcoming May 2000) (manuscript at 10, on file with author). Unless noted otherwise, this Article uses the term MDP to refer to multidisciplinary partnerships or fee-sharing arrangements.

American Bar Association (ABA) formed its Commission on Multidisciplinary Practice,<sup>2</sup> it seemed clear even then that the issue of MDPs was destined to eventually reach the United States.<sup>3</sup>

There were two reasons why I thought it important to study the German approach to MDPs. First, it seemed useful to examine the experience of one of the few jurisdictions that expressly permits MDPs. The second reason I chose Germany is because of comments made at the OECD<sup>4</sup> Third Conference on Professional Services.<sup>5</sup>

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(Because many MDP opponents endorse the concept of multidisciplinary practice, but oppose changing the current rules on multidisciplinary partnerships and fee sharing, I believe it makes more sense to focus on multidisciplinary partnerships, i.e., the proper legal relationships that may be used to provide such services).

2. See ABA President Philip S. Anderson Appoints Commission on Multidisciplinary Practice (visited Jan. 26, 2000) <<http://www.abanet.org/cpt/newsrelease/multicom.html>> (describing the appointment of the Commission on Aug. 4, 1998).

3. I expected the MDP issue *eventually* to reach the United States because I was aware of MDP activities in Europe and the extensive discussion in Europe of MDP issues. See, e.g., Terry & Houtman Mahoney, *supra* note 1, § 7.02, at 7-4 to 7-5 & nn. 6-13 (comparing the relative lack of discussion in the United States of MDP issues with the discussion about MDPs in Europe and elsewhere, including two 1993 articles in the journal *Lawyers in Europe*). During the summer of 1997, however, I had no reason to think that within one year an ABA Commission would be studying whether to amend Rule 5.4 of the Model Rules of Professional Conduct.

4. OECD is an acronym for the Organisation for Economic Co-operation and Development. The OECD was created by a Convention signed in December 1960. In 1996, 26 countries were members of the OECD. The purposes of the OECD include fostering sustainable economic growth and expansion for member and nonmember countries, and contributing to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations. The OECD has held three conferences on reducing barriers to trade in professional services. See *generally* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTERNATIONAL TRADE IN PROFESSIONAL SERVICES: ADVANCING LIBERALISATION THROUGH REGULATORY REFORM 2 (1997) [hereinafter OECD THIRD CONFERENCE ON PROFESSIONAL SERVICES]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTERNATIONAL TRADE IN PROFESSIONAL SERVICES: ASSESSING BARRIERS AND ENCOURAGING REFORM 2 (1996) [hereinafter OECD SECOND CONFERENCE ON PROFESSIONAL SERVICES]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, LIBERALISATION OF TRADE IN PROFESSIONAL SERVICES (1995) [hereinafter OECD FIRST CONFERENCE ON PROFESSIONAL SERVICES].

These conferences have laid the groundwork for the General Agreement on Trade in Services (GATS) Working Party on Professional Services. See, e.g., *Foreword*, OECD FIRST CONFERENCE ON PROFESSIONAL SERVICES, *supra*, at 3; Ursula Knapp, *Summary and Conclusions*, in OECD SECOND CONFERENCE ON PROFESSIONAL SERVICES, *supra*, at 8 (“[These conferences’] work should continue to be complementary to and supportive of the activities of the WTO Working Party on Professional Services.”).

5. The three OECD conferences on professional services were held after the adoption of the GATS, which included legal services among the services regulated by the GATS. For a brief overview and history of the GATS and its application to lawyers, see Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT’L L.J. 1382, 1393-96 (1998) [hereinafter Terry, *Cross-Border Legal Prac-*

At the conclusion of the third OECD conference on professional services, one of the Rapporteurs observed the following:

Greater differences were evident in the idea of multi-disciplinary practices combining legal and accountancy services. The argument was put that independence was critical to legal practice and hence incompatible with multi-disciplinary approaches. Nevertheless, we heard that Germany and Australia accept multi-disciplinary practices in professional partnerships. . . .

This range of circumstances emphasises the need to revisit presumptions on the desired regulatory responses. If less burdensome regulatory response[s] exist in some OECD members, without negative effects, but not in others, what lessons could this provide to all of us? The fact is globalisation is affecting traditional styles of supplying professional services. . . .

. . . We heard, for example, that 18 of 25 OECD members have prohibitions on incorporation in accountancy and law. It would be useful to learn how those countries without regulation have sustained protection of the public interest. Case studies could illustrate *options* and reflect the advantages of *flexibility* in country responses.<sup>6</sup>

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*tice*]; Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICKINSON J. INT'L L. 1 (1999) (discussing the dissolution of the GATS Working Party on Professional Services and the creation of the GATS Working Party on Domestic Regulation).

6. Rhonda Piggott, *Report of the Rapporteur (for Member Governments)*, in OECD THIRD CONFERENCE ON PROFESSIONAL SERVICES, *supra* note 4, at 235-36.

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In my view, this statement suggests that MDP bans, such as those in the United States, might be viewed as improperly impeding trade in legal services without offering a compensating public benefit. Because the General Agreement on Trade in Services (GATS) has the potential to affect U.S. state regulation of lawyers,<sup>7</sup> I thought it important to understand the conditions under which MDPs operate in Germany. This Article summarizes the results of my research.

Part II provides background about MDPs, including an overview of common MDP regulatory issues and terminology. Part III explains Germany's current regulation of MDPs. Part IV provides a brief history of the development of MDPs in Germany. Part V sets forth the current situation in Germany, including statistics about German lawyers and information about some of the MDPs in Germany. Part VI contains the results of the interviews I conducted with German lawyers. Part VII includes both general conclusions and recommendations about German MDP rules worth emulating.

## II. BACKGROUND INFORMATION

### A. COMMON MDP REGULATORY ISSUES

The issues that any regulator might face when considering whether and how to permit MDPs fall into three categories: 1) threshold issues; 2) functional issues, including form of association, scope of practice and functional ethics issues; and 3) substantive ethics issues. This Article discusses Germany's regulation of MDPs with respect to these common regulatory issues.

#### 1. Threshold Issues

Threshold issues focus on whether a regulator will permit lawyer MDPs.<sup>8</sup> Threshold issues include: what standards to use when deciding whether to permit MDPs (e.g., client protection and public interest, including protection of the rule of law); identifying the legal profession's core values; whether there should be the same rules for large and small MDPs; determining which side has the burden of persuading the regulators—those wishing to retain the current ban or those seeking to change the current MDP ban; the extent and relevance of client demand for

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7. See generally *Symposium on the Paris Forum on the Transnational Practice for the Legal Profession*, 18 *DICKINSON J. INT'L L.* 1 (1999) (containing papers from the Paris Forum, which was designed, in part, to coordinate a response of the world legal professions to the GATS Treaty).

8. See Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 *TEMPLE L. REV.* 869, 891 (2000) (discussing the types of threshold issues in MDPs).

MDPs; evidence of harm to MDP clients; and whether there is an MDP phenomenon and the significance of any such phenomenon (e.g., the extent to which lawyers currently practicing in MDPs perform activities that would be considered law practice if done in a traditional law firm).

## 2. Functional Issues

If MDPs are permitted, three different kinds of functional issues arise: form of association, scope of practice and functional ethics.<sup>9</sup> Form of association issues include questions involving the model in which lawyers may practice in an MDP, whether to require lawyer majority control or ownership, who may join the MDP, the appropriate name for an MDP, disclosure requirements and whether to permit passive investments.

Scope of practice issues address whether there should be any limitations placed on an MDP lawyer beyond those placed on a non-MDP lawyer.<sup>10</sup> Some commentators, for example, have suggested that MDP lawyers should not be able to provide legal services to clients who also are audited by the MDP; other commentators suggest that MDP lawyers not be permitted to litigate.<sup>11</sup>

Functional ethics issues address whether, how, and by whom MDP lawyers, nonlawyers, and the MDP entity itself should be regulated.<sup>12</sup> For example, even if one concludes that MDP lawyers must abide by legal ethics, one must still determine how this obligation is triggered—by the lawyer's status in the MDP or by the particular activity in question. In addition to deciding whether MDP nonlawyers and the MDP entity itself are subject to legal ethics rules, one must ask how requirements should be enforced and what to do when the rules of different professions clash.

## 3. Substantive Ethics Issues

The third major set of issues involves substantive ethics.<sup>13</sup> Assuming an MDP lawyer is subject to the same rules as a non-MDP lawyer, one must nevertheless apply these rules in the MDP context. One of the most important decisions is how to handle imputation of conflicts of interest. The two obvious choices are to impute only among the MDP lawyers or to impute among all MDP professionals. The decision on this issue is closely related to assumptions made about confidentiality and

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9. *See id.* at 891-93.

10. *See id.* at 893-94.

11. *See infra* notes 200-09 and accompanying text.

12. *See Terry, supra* note 8, at 891-92.

13. *See id.* at 895-99 (discussing the substantive ethics issues in detail).

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whether a lawyer may share confidential client information within the MDP, as in a law firm.

Other substantive ethics issues include whether special requirements should be included to protect the lawyer's independence and whether to adopt a rule specifically tailored to MDP lawyers, as was done in ABA Model Rule of Professional Conduct 1.13 for in-house counsel.<sup>14</sup> In addition, substantive ethics issues ultimately require evaluation of the interpretation of all rules in the new MDP context. Issues that are of particular concern include applicability of various money and client protection provisions and pro bono publico requirements.

## B. GERMAN TERMINOLOGY AND BACKGROUND

In order to understand Germany's regulation of MDPs, it is useful to have background information not only about common MDP regulatory issues, but also about Germany. This section provides background information concerning three areas: 1) German lawyers and accounting professionals; 2) some of the major regulatory schemes for German lawyers; and 3) the nature of Germany's mandatory and voluntary bar associations.

### 1. Legal and Other Professionals

When describing legal professionals around the world, one cannot necessarily use a single term such as "lawyer." In some countries there may be different professions and different terminology to describe litigators, transactional lawyers, prosecutors and in-house counsel.<sup>15</sup> In Germany, the legal professionals include: the *Rechtsanwalt*, who is the traditional litigator or transactional lawyer<sup>16</sup> and includes the *Syndikusanwalt*, who is in-house counsel but is not permitted to represent his or her employer in court;<sup>17</sup> the *Patentanwalt*, who is a patent lawyer with special qualifications;<sup>18</sup> the *Rechtsbeistand*, who can give advice in certain fields

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14. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1983) (creating special rules for lawyers for organizations).

15. See, e.g., Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Looking at the Differences in Perception Between U.S. and Foreign Codes of Lawyer Conduct*, 32 VAND. J. TRANSNAT'L L. 1117, 1148-49 (1999); Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code: An Analysis of the CCBE Code of Conduct Part I*, 7 GEO. J. LEGAL ETHICS 1, 10-11 (1993) (describing legal careers in Austria and Germany).

16. See 1 CCBE, CROSS BORDER PRACTICE COMPENDIUM, Germany-9 (D.M. Donald-Little ed., 1991 & Supp. 1998) [hereinafter CCBE COMPENDIUM].

17. See *id.* at Germany-10-12.

18. See Patentanwaltsordnung, v. 7.9.1966 (Bundesgesetzblatt, Teil I [BGBl. I] S.557).



of law and represent clients in certain lower courts;<sup>19</sup> the *Assessor*, which is the academic title given to those who have legal training and have passed both state exams, but have not applied for a license as a *Rechtsanwalt* (*Assessoren* often work in the public sector for central and local governments, public bodies or as public prosecutors, which they would not be permitted to do as a licensed *Rechtsanwalt*);<sup>20</sup> the *Richter*, who is a judge and considered part of a separate branch of the legal profession;<sup>21</sup> and the *Notar*, who is viewed as exercising public authority and must witness certain documents and contracts.<sup>22</sup> Germany differs from many civil law countries in that it has several different types of notaries, including the *Notar*, who is exclusively a notary, and the *Anwaltsnotar*, who is permitted to hold dual registration as a notary and a lawyer and may practice both professions.<sup>23</sup> The decision as to which type of notary is permitted is made by each German state (*Land*).<sup>24</sup>

This Article focuses on the regulation of the German *Rechtsanwalt*, which is the title most closely analogous to the U.S. title of lawyer.<sup>25</sup> An individual becomes a *Rechtsanwalt* by majoring in law at the university, passing a state bar examination, performing an apprenticeship of approximately two years, and then passing a second bar examination.<sup>26</sup> The states regulate the bar examinations, but they must include both written and oral components.<sup>27</sup> *Rechtsanwälte* (the plural term) are regulated by their own regulatory body (*Kammer*) and have their own set of professional rules.<sup>28</sup>

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19. See CCBE COMPENDIUM, *supra* note 16, at Germany-10-12.

20. See *id.*

21. See *id.*

22. See *id.* at Germany-13.

23. Approximately one-third of Germany's sixteen states have *Anwaltsnotare*. See *Wir über Uns: Aufgaben, Mitglieder und Organe der Bundesnotarkammer* (visited Feb. 16, 2000) <<http://www2.bnotk.de/wir01.htm>> (indicating that two-thirds of notaries are *Anwaltsnotare*).

24. See *id.* (describing local option); see also *Bundesnotarkammer: German Notaries and How They Are Organised* (visited Mar. 6, 2000) <<http://www2.bnotk.de/wir01e.htm>> (listing in English the type of *Notar* for certain German *Länder*).

25. Any reference in this Article to German "lawyers" should be understood as a reference to the German *Rechtsanwalt*.

26. See CCBE COMPENDIUM, *supra* note 16, at Germany-14; Ulrike Schultz, *Legal Ethics in Germany*, 4 INT'L J. LEGAL PROF. 55, 56-57 (1997).

27. See MARTIN HENSSLER & HANS PRÜTTING, BUNDESRECHTSANWALT-SORDNUNG § 4 (1997) [hereinafter *BRAO*] (citing Gesetz über die Eignungsprüfung für die Zulassung zur Rechtsanwaltschaft, v. 6.7.1990 (BGBl. I S.1349)); see also Hilmar Fenge et al., *Legal Education and Training in Germany*, 2 INT'L J. LEGAL PROF. 95, 97 (1995).

28. See generally Schultz, *supra* note 26, at 55; *Bundesrechtsanwaltskammer Online* (visited Feb. 29, 2000) <<http://www.brak.de/>>.

In addition to the various kinds of German lawyers, there are also four different types of accounting-related professionals that are relevant to this Article: the *Wirtschaftsprüfer*, *vereidigte Buchprüfer*, *Steuerberater*, and *Steuerbevollmächtigte*. These four professions are discussed in order of difficulty of qualification, from most difficult to least difficult.

A *Wirtschaftsprüfer*, translated as an auditor, is authorized to perform certain necessary audits, although the activities are not limited to such audits.<sup>29</sup> This individual is most analogous to a certified public accountant (CPA). There are three requirements to become a *Wirtschaftsprüfer*: 1) graduation from university with a degree in law, economics, engineering, agriculture or another University degree that emphasizes economic and business matters; 2) at least four years of practice as an accountant; and 3) successful passage of the *Wirtschaftsprüfer* examination.<sup>30</sup> Recent statistics showed that more than seventy percent of *Wirtschaftsprüfer* studied business economics at a university, while only seven percent studied law.<sup>31</sup> *Wirtschaftsprüfer* (also the plural term) are regulated by their own regulatory body (*Kammer*) and have their own set of professional rules.<sup>32</sup>

A *Steuerberater* is a tax advisor but is not authorized to perform certain audit functions. An individual becomes a *Steuerberater* by working a certain number of years in the tax arena, then successfully passing the *Steuerberater* exam. For those with university training in economics, law or another economic field, the work period is three years. For those without such university training, a longer period of work experience is required.<sup>33</sup> Like the *Wirtschaftsprüfer*, *Steuerberater* are governed by

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29. See, for example, *Wirtschaftsprüferordnung* section 9, which is translated into English at <[http://www.wpk.de/800x600e/fr\\_wirt.html](http://www.wpk.de/800x600e/fr_wirt.html)> (visited Feb. 28, 2000).

30. See *id.*; cf. Ralf Rogowski, *Auditors and Lawyers in Germany: Co-evolution, Not Competition*, 1 INT'L J. LEGAL PROF. 13, 23 (1994) (stating that a candidate needs five years of practice, of which at least four years involve auditing work for a *Wirtschaftsprüfer* or a *Wirtschaftsprüfer* (limited liability) partnership known as a WPG). As the website explains, the amount of practical experience required depends on the nature of the education. Those without university training are permitted to take the *Wirtschaftsprüfer* exam after 10 years of an appropriate accounting practice.

31. See *Appropriate University Degrees* (visited Feb. 28, 2000) <<http://www.wpk.de/800x600e/wirt04.html>>.

32. See *WPK Mission* (visited Feb. 28, 2000) <<http://www.wpk.de/800x600e/auf01.html>> (explaining the nature of the WP *Kammer*); *WPK Responsibilities* (visited Feb. 28, 2000) <[http://www.wpk.de/800x600e/fr\\_inter.html](http://www.wpk.de/800x600e/fr_inter.html)> (listing duties and disciplinary roles of the WPK); *WPK Setting Rules of Professional Conduct* (visited Feb. 28, 2000) <<http://www.wpk.de/800x600e/aufg12.html>> (“The WPK is entitled by law to lay down rules on the exercise of the profession[] of *Wirtschaftsprüfer* . . .”).

33. See, e.g., *Steuerberaterkammer Niedersachsen, Ausbildung* (visited Feb. 28, 2000) <<http://www.steuerberaterkammer-nds.de/ausbildung.htm>> (describing *Steuerberater* requirements).

their own regulatory body (*Kammer*) and have their own set of professional rules.<sup>34</sup>

Many individuals have dual qualifications, having qualified as a *Steuerberater* while preparing to become a *Wirtschaftsprüfer*.<sup>35</sup> It is possible for a single individual to practice all three of these professions simultaneously.<sup>36</sup> This Article focuses on the *Wirtschaftsprüfer* and *Steuerberater*, which comprise the largest of these four groups and are the two accounting-related professions most often referred to in the MDP context.<sup>37</sup>

## 2. Lawyer Regulatory Provisions

Germany has numerous statutes regulating lawyers<sup>38</sup> but there are two main sources of regulation that address German lawyer MDPs: federal legislation called the *Bundesrechtsanwaltsordnung*, or *BRAO*, and legal ethics rules called the *Berufsordnung*.

The *BRAO* is the German federal statute regulating lawyers.<sup>39</sup> The current *BRAO* dates from August 1, 1959.<sup>40</sup> The *BRAO* was amended in 1994 to address, among other things, the invalidation of the prior ethics

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34. See *Aufgaben der Bundessteuerberaterkammer* (visited Feb. 28, 2000) <<http://www.bstbk.de/wir/aufgaben.html>> (describing *SteuerberaterGesetz* section 86 and the obligations of the *Kammer*, including the obligation to adopt rules); *The Bundessteuerberaterkammer* (visited Feb. 28, 2000) <<http://www.bstbk.de/wir/english.html>> (describing the *Kammer* in English).

35. See Rogowski, *supra* note 30, at 23 (“Regular [*Wirtschaftsprüfer*] candidates normally take the exam for tax consultants (*Steuerberater*) before entering the WP exam in order to be exempted from the tax law part of the WP exam. As a consequence most WPs hold both qualifications of an auditor and of a tax consultant.”).

36. See *generally infra* note 102 (showing statistics of such individuals).

37. The *vereidigte Buchprüfer*, which is a licensed tax accountant, see Rogowski, *supra* note 30, at 18, requires more rigorous training than does a *Steuerberater* but less rigorous training than a *Wirtschaftsprüfer*. Because there are over twice as many *Wirtschaftsprüfer* as there are *vereidigte Buchprüfer*, it would appear that if one chooses to pursue advanced qualifications, the *Wirtschaftsprüfer* is the preferred qualification. See *infra* notes 106-07 and accompanying text (indicating that in 1999, there were 9,611 *Wirtschaftsprüfer* and 4,205 *vereidigte Buchprüfer*).

The *Steuerbevollmächtigte*, which can be translated as tax assistant, is a profession for which one no longer can qualify, although those currently holding a title may continue practicing. See Interview with Professor Dr. Martin Henssler, Director, University of Köln Institut für Anwaltsrecht [Institute for the Law of Lawyering], in Cologne, Germany (Nov. 30, 1998). In 1999, there were 3,842 *Steuerbevollmächtigte*. See *infra* note 108 and accompanying text. The remainder of this Article uses both the German terms *Wirtschaftsprüfer* or *Steuerberater* and also refers to these two professions as German “auditors” and “tax advisors,” respectively.

38. See, e.g., CCBE COMPENDIUM, *supra* note 16, at Germany-32 (citing over 20 different laws or regulations relevant to German lawyers).

39. See *BRAO*, *supra* note 27.

40. See *id.* at 1.

rules, German reunification and the GATS Treaty.<sup>41</sup> The *BRAO* contains specific provisions regulating MDPs, as well as other provisions that relate to the organizational form of MDPs.<sup>42</sup>

The *Berufsordnung* has an interesting history. For many years, Germany had legal ethics guidelines called *StandesRichtlinien* that were adopted by the German *Bundesrechtsanwaltskammer (BRAK)*.<sup>43</sup> In 1987, however, the German Constitutional Court ruled that these *StandesRichtlinien*, or legal ethics rules, were not enforceable because the issuing bar association, the *BRAK*, had no authority to adopt binding rules.<sup>44</sup> After this constitutional decision, the *BRAO* was amended. The *BRAO* revision expressly established the authority of the *BRAK* to adopt legal ethics provisions, subject to approval by the Ministry of Justice.<sup>45</sup> It took almost ten years after the original constitutional court decision before replacement rules were adopted.<sup>46</sup>

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41. See *infra* note 44; SYDNEY M. CONE, III, INTERNATIONAL TRADE IN LEGAL SERVICES § 11.3, at 11:9 (1996) (“In view of the MFN provision in the GATS, the German legislature amended the *BRAO* on August 30, 1994.”); Schultz, *supra* note 26, at 66 (“The discussions came to an end in 1994 when the legislator [sic], finally passed the [*BRAO* amendments]. It had finally become necessary through the Unification Treaty which was the basis of the reunification of East and West Germany.”).

The *BRAO* was amended in 1989 to permit establishment of European Union lawyers in Germany, as required by European Union case law. See CONE, *supra*, § 11.2, at 11:6; see also Andreas G. Junius, *The German System, in RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE* 59, 61 (Mary C. Daly & Roger J. Goebel eds., 1995) (“As a consequence [of the European Court of Justice case law], we amended our domestic act. Now an EC attorney can appear in any court in Germany, and is not bound by the Localization Requirement.”). For further discussion of European Union case law relating to the establishment of lawyers, see generally Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 *FORDHAM INT’L L.J.* 556 (1992). For a brief discussion of GATS provisions related to lawyers, see Terry, *Cross-Border Legal Practice*, *supra* note 5, at 1393-96.

42. See *infra* Part III.B.

43. See *infra* notes 53-55 and accompanying text (describing the *BRAK*).

44. See *Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court]* 76, 171; see Schultz, *supra* note 26, at 64 (describing this case and stating: “In the course of time, the guidelines [*Richtlinien*], which were meant to be a sort of pure commentary to § 43 *BRAO*, had become or been treated as a quasi-act themselves which the *BRAK* plenum could not pass as it was no legislative body.”); Zuck, *Sitzungsberichtericht M x. 58 DJT, S. 27, cited in BRAO, supra* note 27, at 11 n.99. The version that was invalidated dated from 1987, the earlier version dated from 1963. See WOLFGANG HARTUNG & THOMAS HOLL, *ANWALTICHE BERUFSORDNUNG 3-4 (1997)* [hereinafter *BERUFSORDNUNG*] (describing the history of the *Richtlinien*, including the 1963 and 1973 versions).

45. See *BRAO, supra* note 27, § 59b; Schultz, *supra* note 26, at 67.

46. For a discussion of the background leading up to the adoption of the *Berufsordnung*, see Schultz, *supra* note 26, at 69 (describing adoption efforts).

Finally, however, on November 29, 1996, the *BRAK* approved the new *Berufsordnung*, which did not become effective until early 1997.<sup>47</sup> Despite the almost ten-year delay in adoption, questions arose about the effective date and the validity of the *Berufsordnung*. For example, some initially questioned whether the proper adoption procedure was followed although the validity of the *Berufsordnung* ultimately was upheld.<sup>48</sup> Subsequently, the *Berufsordnung* was amended in 1999, and became effective September 1, 1999.<sup>49</sup> Because the *BRAO* and the *Berufsordnung* are the two major sources for guidance on MDPs, this Article refers to them frequently.

### 3. Bar Associations and Lawyer Regulatory Authorities

Germany's regulatory system and mandatory and voluntary bar associations are also important to understanding its regulation of MDPs. Germany, like the United States, has a federal system of government.<sup>50</sup> In addition to passing two state bar examinations and fulfilling the requisite apprenticeship term, a *Rechtsanwalt* must be a member of the bar association (*Rechtsanwaltskammer*) in the district where the lawyer's office is located (*Oberlandergerichtsbezirk*).<sup>51</sup> Each of these regional *Rechtsanwaltskammer* has authority to discipline its member lawyers.<sup>52</sup>

In addition to the regional *Rechtsanwaltskammern*, there is a federal organization called the *Bundesrechtsanwaltskammer*, which is known by the acronym *BRAK*. The *BRAK* is statutorily established in the *BRAO*,

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47. See *BERUFSORDNUNG*, *supra* note 44.

48. See *Anwaltliche Berufsordnung—Ende oder Neuanfang?*, *NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 1998, at 2249-50 (noting that the Düsseldorf court declared that the *Berufsordnung* was ineffective because it was not reissued after the Ministry of Justice objected to two provisions); Michael Kleine Cosack, *Rechtsprechung: Die Berufsordnung der Rechtsanwälte ist spätestens am 11.3.1997 wirksam in Kraft getreten*, *ANWALTSBLATT*, Aug.-Sept. 1998, at 478 (explaining the disagreement as to whether the *Berufsordnung* became effective March 1, 1997 or March 11, 1997). The *Bundesgerichtshof* ultimately approved the adoption. See *BGH*, *NJW* 1999, 2970; Matthias Kilian, *Das Inkrafttreten der BORA*, *BRAK-MITT*, June 1999, at 247, 247-48 (discussing the case); see also Schultz, *supra* note 26, at 69 (describing adoption of *Berufsordnung* and annulment by Ministry of Justice of two provisions).

49. See *Berufsordnung* (visited Feb. 5, 2000) <<http://www.brak.de/bora99.html>> (containing new *Berufsordnung*).

50. Germany's 16 "states" are called *Länder*. See *CCBE COMPENDIUM*, *supra* note 16, at Germany-8; see also U.S. Library of Congress, *Germany*, Table 7 (visited Feb. 8, 2000) <[http://lcweb2.loc.gov/frd/cs/germany/de\\_appen.html](http://lcweb2.loc.gov/frd/cs/germany/de_appen.html)> (listing German *Länder*, with their capitals, population and other information).

51. See *BRAO*, *supra* note 27, §§ 4, 6, 8; *CCBE COMPENDIUM*, *supra* note 16, at Germany-14; see also *Rechtsanwaltskammern* (visited Feb. 15, 2000) <<http://www.rechtsanwaltskammer.de/>> (listing all such regional or local bar associations in Germany).

52. See *CCBE COMPENDIUM*, *supra* note 16, at Germany-21 to Germany-22-24.

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which is the federal legislation described earlier.<sup>53</sup> The *BRAK*'s functions include, inter alia, providing expert opinions on draft laws, representing the regional *Rechtsanwaltskammern* before governmental bodies and international institutions, and developing provisions for the conduct and practice of lawyers.<sup>54</sup> The *BRAK* has three major components: officers, the main assembly and a general assembly. The members of *BRAK*'s general assembly include the presidents of each of the regional bar associations and additional representatives elected by each regional bar association.<sup>55</sup> There is no exact U.S. counterpart to the *BRAK*. In contrast to these mandatory associations, the *Deutscher Anwaltverein* (*DAV*) is Germany's largest national *voluntary* bar association.<sup>56</sup> It is thus comparable to the ABA.

### III. GERMANY'S REGULATION OF MDPS

#### A. THE DEVELOPMENT OF MDPS

Some of Germany's leading legal ethics experts have observed that lawyer-accountant MDPs have existed in Germany for many years.<sup>57</sup> Indeed, as early as 1964, one of Germany's high courts, the *Bundesgerichtshof*, considered but did not resolve the question of whether *Rechtsanwälte* and *Steuerberater* (tax advisors) could form a firm together.<sup>58</sup> In 1968, this question was resolved when the court permitted partnerships between *Rechtsanwälte* and other professions.<sup>59</sup> In 1973, the ethics rules were amended to expressly permit MDPs among German lawyers, auditors and tax advisers.<sup>60</sup>

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53. See *BRAO*, *supra* note 27, §§ 175-176; CCBE COMPENDIUM, *supra* note 16, at Germany-20.

54. See *BRAO*, *supra* note 27, §§ 60 ff; CCBE COMPENDIUM, *supra* note 16, at Germany-20.

55. See *BRAO*, *supra* note 27, § 60.

56. See CCBE COMPENDIUM, *supra* note 16, at Germany-22-24; *DAV Homepage* (in English) (visited Feb. 5, 2000) <[http://www.anwaltverein.de/01/01/01\\_e.html](http://www.anwaltverein.de/01/01/01_e.html)>.

57. See, e.g., *BRAO*, *supra* note 27, at 603; see also WILHELM TREUE ET AL., RECHTS-, WIRTSCHAFTS- UND STEUERBERATUNG IN ZWEI JAHRHUNDERTEN, ESCHÉ SCHÜMANN COMMICHAU, ZUR GESCHICHTE EINER HAMBURGISCHEN SOZIJETÄT VON DER GRÜNDUNG DER KANZLEI IM JAJRE 1822 BIS ZUR GEGENWART 145 (1997) ("On this basis, the firm of attorneys and tax advisers Dr. Esche merged with the auditing firm Jens Schümann in 1974. At the time, this merger of the firms was unique in Hamburg both in structure and size.") [hereinafter FIRM HISTORY, ESCHÉ SCHÜMANN].

58. See *BRAO*, *supra* note 27, at 621.

59. See BUNDESGERICHTSHOF [BGH] [Supreme Court], NJW, 4.1.1968 (1968), 844.

60. See GRUNDSÄTZE DES ANWALTlichen STANDESRECHTS, RICHTLINIEN GEMÄß § 177 ABS. 2 NR. 2 BRAO, FESTGESTELLT VON DER BUNDESRECHTSANWALTSKAMMER 21 JUNI 1973 § 30 (1985) (on file with author).

Almost twenty years after MDPs first arose in the *Bundesgerichtshof*, the issue finally reached the *Bundesverfassungsgericht*—the German Constitutional Court. In 1982, the *Bundesverfassungsgericht* decided a case that did not directly address lawyer-nonlawyer MDPs but nevertheless was viewed as confirming the propriety of such firms. This case invalidated, on constitutional grounds, the regulations that limited the ability of a German tax advisor (*Steuerberater*) to join with nontax advisors.<sup>61</sup> The Court ruled that the *Steuerberater* rules prohibiting such partnerships were not necessary to ensure the independence, confidentiality and answerability of the German tax advisor and therefore violated the German constitutional guarantee of freedom of professional practice.<sup>62</sup> Based on this case, leading German authorities have asserted that a German lawyer similarly has a constitutional right to form a partnership with a nonlawyer because any limitation is not necessary to secure the independence, answerability, and confidentiality of the lawyer.<sup>63</sup>

#### B. THE REGULATION OF MDPs IN THE *BRAO*

Although the first explicit recognition of MDPs came from the German courts, German MDPs have since been codified in both the *BRAO* legislation and the *Berufsordnung* legal ethics rules. Lawyer-nonlawyer MDPs were expressly permitted in the October 1994 revisions to the *BRAO*.<sup>64</sup> Section 59a of the *BRAO* specifically governs certain lawyer-nonlawyer MDPs.<sup>65</sup> It contains two key substantive provisions

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61. See Bundesverfassungsgericht [BVerfG] [StB] (1982), 219; see also Martin Henssler, Die Interprofessionelle Zusammenarbeit von Rechtsanwälten, Steuerberaterinnen und Wirtschaftsprüfern 4 n.3, paper presented at the *Deutscher Anwaltverein Forum "Zukunft der Anwaltschaft"* (Mainz Oct. 2, 1998) (on file with author) [hereinafter Henssler, MDPs].

62. See BVerfG [StB] (1982), 219.

63. See *id.*

64. See *BRAO*, *supra* note 27, at 603.

65. *BRAO* section 59a provides as follows:

§ 59a Berufliche Zusammenarbeit

(1) Rechtsanwälte dürfen sich mit Mitgliedern einer Rechtsanwaltskammer und der Patentanwaltskammer, mit Steuerberatern, Steuerbevollmächtigten, Wirtschaftsprüfern und vereidigten Buchprüfern in einer Sozietät zur gemeinschaftlichen Berufsausübung im Rahmen der eigenen beruflichen Befugnisse verbinden. § 137 Abs. 1 Satz 2 der Strafprozeßordnung und die Bestimmungen, die die Vertretung bei Gericht betreffen, stehen nicht entgegen. Rechtsanwälte, die zugleich Notar sind, dürfen eine solche Sozietät nur bezogen auf ihre anwaltliche Berufsausübung eingehen. Im übrigen richtet sich die Verbindung mit Rechtsanwälten, die zugleich Notar sind, nach den Bestimmungen und Anforderungen des notariellen Berufsrechts.

*Id.* at 601. The *BRAO* was available on the Internet at the time this Article was written. See *Bundesrechtsanwaltsordnung—§ 59a* (visited Feb. 7, 2000) <<http://www.compuserve.de/recht/gesetze/BRAO/p59a.html>>.

regarding lawyer-nonlawyer MDPs.<sup>66</sup> The first identifies the six categories of professionals with which a lawyer may form an MDP: *Patentanwälte* (patent lawyers), *Steuerberater* (tax advisors), *Wirtschaftsprüfer* (auditors), *Steuerbevollmächtigte* (tax assistants), and *vereidigte Buchprüfer* (sworn-in accountants).<sup>67</sup> The second key provision of *BRAO* section 59a requires each branch office of the MDP to have at least one partner in residence.<sup>68</sup> In addition to *BRAO* section 59a, which expressly authorizes MDPs, other *BRAO* provisions necessarily apply to MDPs.

There is one provision of the *BRAO* that does not directly govern MDPs but is nevertheless important to the manner in which an MDP is organized. In 1999, a new German limited liability provision took effect.<sup>69</sup> This provision allows German law firms to do what is common in the United States, that is, to incorporate in order to limit the vicarious liability of the law firm partners. In Germany, one of the major methods for an organization to limit its liability is to form a *GmbH*, which is the acronym for *Gesellschaft mit beschränkter Haftung*.<sup>70</sup> For many years, German law permitted the *Wirtschaftsprüfer GmbH* and the *Steuerberater GmbH*.<sup>71</sup> Indeed, many lawyers either were members of such a *GmbH* or were members of a partnership that had an interlocking relationship with such a *GmbH*.<sup>72</sup> After criticism about the lack of recogni-

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66. In my view, the remainder of the provisions simply indicate the limitations of the statute implicit in the key provisions or existing law. For example, *BRAO* section 59a(3) provides that German lawyers may associate with lawyers and the specified nonlawyer professionals from other countries recognized pursuant to section 206, since GATS law require these provisions. *BRAO* section 59a(1) provides that the Civil Procedure Code should not be interpreted to the contrary. It further provides that lawyers may not associate with notaries acting in their notarial capacity but may associate with a lawyer-notary when that person acts in the capacity of lawyer. See *infra* note 97 and accompanying text for a further discussion of lawyer-notary MDPs.

67. See *BRAO*, *supra* note 27, at 601. The translation of the terms *Steuerbevollmächtigten* and *vereidigten Buchprüfer* are those provided by German lawyer Thomas Verhoeven to the ABA Commission on Multidisciplinary Practice (on file with author).

68. See *BRAO*, *supra* note 27, § 59a(2) (“Die Sozietät erfordert eine gemeinschaftliche Kanzlei oder mehrere Kanzleien, in denen verantwortlich zumindest ein Mitglied der Sozietät tätig ist, für das die Kanzlei den Mittelpunkt seiner beruflichen Tätigkeit bildet. § 29a bleibt unberührt.”).

69. See Gesetz zur Änderung der Bundesrechtsanwaltsordnung, der Patentanwaltsordnung und anderer Gesetze, v. 31.8.1998 (BGBl. I S.2600) [hereinafter *Rechtsanwalt GmbH* law].

70. See Heinz-Dieter Assmann et al., *The Law of Business Associations*, in INTRODUCTION TO GERMAN LAW 137, 151-52 (Werner F. Ebke & Matthew W. Finkin eds., 1996).

71. See BERUFSORDNUNG, *supra* note 44, at 721.

72. See Interviews with Professor Dr. Martin Henssler, Director, University of Köln Institut für Anwaltsrecht [Institute for the Law of Lawyering] in Cologne, Germany (Nov. 30, 1998 & Jan. 25, 1999).



tion of a *Rechtsanwalt GmbH*,<sup>73</sup> the German legislature drafted a special provision, which took effect in early 1999.<sup>74</sup>

Although the new *Rechtsanwalt GmbH* law does not directly regulate MDPs, it will affect German MDPs that choose this legal structure. In order to obtain limited liability, the *Rechtsanwalt GmbH* law requires a lawyer majority with respect to managing partners, capital and voting rights.<sup>75</sup> The policy reason for this lawyer-majority requirement apparently was to “prevent the domination of a law firm *GmbH* by accountants, or rather to prevent the transfer of profits into an accountancy firm.”<sup>76</sup> There has, however, been criticism of this requirement.<sup>77</sup> In addition to the lawyer majority control requirement, the *Rechtsanwalt GmbH* requires lawyers practicing in this form to maintain minimum malpractice insurance of 5 million Deutsch Marks (DM), which is in excess of the 500,000 DM insurance normally required.<sup>78</sup> In sum, *BRAO* section 59a is the key legislative provision regulating lawyer MDPs, and its major provision is the definition of who may join an MDP.

### C. THE REGULATION OF MDPs IN THE *BERUFSORDNUNG*

Like the *BRAO*, the *Berufsordnung* expressly authorizes lawyers to practice in an MDP. The eighth chapter of the *Berufsordnung* addresses MDPs and contains four sections.<sup>79</sup> In my view, section 30 is the most

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73. In 1991, Professor Dr. Martin Henssler, director of the University of Cologne Institute for the Law of Lawyering, suggested that lawyers were being unfairly disadvantaged because of the lack of recognition of a *Rechtsanwalt GmbH*. According to one article, “Back in 1991, [Professor Henssler’s] suggestions met only with utter incredulity. ‘In those days I was dismissed as a complete idiot,’ he remembers with a grin. But yet only three years later the Bavarian High Court followed his suggestions and declared the *GmbH* as permissible for lawyers.” Astrid Gerber, *The Law Firm Ltd.: Set in Stone*, *JUVE RECHTSMARKT*, July/Aug. 1998 (English ed.), at 17, 17; see also Bayerisches Oberstes Landesgericht [BayObLG] [Court of Appeals], *Zeitschrift für Wirtschaftsrecht* [ZIP], 23 (1994), 1868. In 1994, the high court based in Munich ruled permissible the limited liability partnership or lawyer *GmbH*. As the next note indicates, however, it took almost four more years before the legislature adopted such a limited liability partnership provision.

74. See *Rechtsanwalt GmbH* law, *supra* note 69.

75. See *id.* § 59c.

76. Gerber, *supra* note 73, at 19.

77. See *id.* (citing criticism by a lawyer practicing in a *Rechtsanwalts GmbH* and Professor Dr. Martin Henssler, Director of the University of Cologne Institute for the Law of Lawyering).

78. Compare *Rechtsanwalt GmbH* law, *supra* note 69, § 59j(2) (requiring mandatory malpractice insurance in the sum of 5 million Deutsch Mark for a *Rechtsanwalt GmbH*), with *BRAO*, *supra* note 27, § 51(4) (requiring 500,000 DM insurance). As of February 2000, 5 million DM was approximately \$2,520,000 and 500,000 DM was approximately \$252,000. See *Currency Calculator* (visited Feb. 9, 2000) <<http://www3.dynamind-llc.com/currency/calculate.cfm>>.

79. The title of Chapter (*Abschnitt*) 8 is “Besondere Berufspflichten bei beruflicher Zusammenarbeit,” which might be translated as “special professional obligations in con-

important aspect of Chapter 8 of the *Berufsordnung*. This section permits a lawyer to practice in an MDP only with those categories of individuals listed in *BRAO* section 59a and only on the condition that these nonlawyers agree to abide by the lawyer's *Berufsrecht* (i.e., the *BRAO* and the *Berufsordnung* and other law of lawyering provisions).<sup>80</sup>

Another important aspect of *Berufsordnung* Chapter 8 is section 33(2). This section requires a lawyer to ensure that the *Berufsordnung* will be upheld by the organization in which the lawyer practices.<sup>81</sup> Chapter 8 also contains provisions that set forth rights and obligations upon dissolution of an organization, including an MDP, and that explain that the *Berufsordnung* obligations apply regardless of the legal form in which the MDP is organized.<sup>82</sup>

Undoubtedly the most puzzling aspect of *Berufsordnung* Chapter 8 is section 31, which is entitled "*Sternsozietät*."<sup>83</sup> No equivalent provi-

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nection with joint practice, including MDPs." BERUFSORDNUNG, *supra* note 44, at 688. In this respect, the 1997 *Berufsordnung* is similar to the 1973 *Richtlinien*, which also permitted MDPs. The 1963 version, however, had not permitted them. See FIRM HISTORY, ESCHÉ SCHÜMANN, *supra* note 57, at 120.

The sections in Chapter 8 include the following: § 30 *Zusammenarbeit mit Angehörigen anderer Berufe*, § 31 *Sternsozietät*, § 32 *Beendigung einer beruflichen Zusammenarbeit*, and § 33 *Geltung der Berufsordnung bei beruflicher Zusammenarbeit*.

80. This is my translation. The original states:

Ein Rechtsanwalt darf sich mit Angehörigen anderer nach § 59 a Abs.1 Bundesrechtsanwaltsordnung sozietätsfähiger Berufe nur dann zu einer gemeinschaftlichen Berufsausübung in einer Sozietät, in sonstiger Weise oder in einer Bürogemeinschaft verbinden, wenn diese bei ihrer Tätigkeit auch das anwaltliche Berufsrecht beachten. Dasselbe gilt für die Verbindung mit Angehörigen anderer nach § 59 a Abs. 3 Bundesrechtsanwaltsordnung sozietätsfähiger Berufe, sofern sie in der Bundesrepublik Deutschland tätig werden.

BERUFSORDNUNG, *supra* note 44, § 30, at 749.

81. This is my translation. The original states: "Bei beruflicher Zusammenarbeit gleich in welcher Form hat jeder Rechtsanwalt zu gewährleisten, daß die Regeln dieser Berufsordnung auch von der Organisation eingehalten werden." *Id.* § 33(2), at 775. This provision ensures that the ethic rules apply, regardless of the legal form in which the lawyer practices. This provision also fulfills a similar function as ABA Model Rule 5.1 which says that a "partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (1983). The results required by this German rule appear stricter than Model Rule 5.1, although the German rule may signal less clearly than the ABA Model Rule, the need to institutionalize efforts.

82. Section 32's title is "Beendigung einer beruflichen Zusammenarbeit." BERUFSORDNUNG, *supra* note 44, § 32, at 765. Section 33's title is "Geltung der Berufsordnung bei beruflicher Zusammenarbeit." *Id.* § 33, at 775.

83. Section 31 provides:

Ein Rechtsanwalt darf sich mit Angehörigen nach § 59 a Abs.1 Bundesrechtsanwaltsordnung sozietätsfähiger Berufe nur dann zu einer Sozietät, zur gemeinschaftlichen Berufsausübung in sonstiger Weise oder in einer Bürogemeinschaft verbinden, wenn diese nicht daneben einer weiteren Sozietät, Verbindung zur

sion existed before the adoption of the 1997 *Berufsordnung*. The *Sternsozietät* provision prohibits MDP lawyers from participating in certain types of interlocking partnerships and other business forms.<sup>84</sup> According to one leading German expert, these interlocking relationships have been common in the past.<sup>85</sup> The leading treatise on the *Berufsordnung* explained that this provision was added after the committee was told about lawyers who belonged to multiple firms and had offices in different cities.<sup>86</sup> The policy reason cited for this provision was that clients might be confused if lawyers were members of different organizations and working for different offices.<sup>87</sup> Perhaps not surprisingly, some leading commentators have concluded that the *Sternsozietät* provision in section 31 is unwarranted, beyond the authority delegated, and invalid.<sup>88</sup>

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gemeinschaftlichen Berufsausübung in sonstiger Weise oder Bürogemeinschaft angehören. Dasselbe gilt für die Verbindung mit Angehörigen anderer nach § 59 a Abs. 3 Bundesrechtsanwaltsordnung sozietätsfähiger Berufe, sofern sie in der Bundesrepublik Deutschland tätig werden.

*Id.* § 31, at 757.

84. I realize that the reference to “partnerships and other business forms” may sound vague. German lawyers, like U.S. lawyers, have several different legal forms to choose from when organizing their law practice. Just as U.S. lawyers may be able to choose among sole proprietorships, partnerships and limited liability corporations, German lawyers may choose among several different legal forms. One commentator described these forms as follows:

Most of the law firms in Germany are traditionally *Sozietäten*, which are registered as civil law companies (*Gesellschaften des bürgerlichen Rechts* or *GbR*). The *GbR* is an unincorporated firm which does not carry any responsibility in civil legal terms because it is not a legal subject, although it is as far as tax law is concerned.

A second possibility for lawyers, as for other professions, is a partnership, which is an unincorporated firm with legal capacity. The reason why partnerships have not been popular amongst the legal community in Germany is to do most probably with its liability disadvantages [this is the *Partnerschaftsgesellschaft*]. In contrast to the *Sozietät*, any contract on advice is made between the client and the partnership. As such all partners are liable immediately and personally for the partnership.

The GmbH is a limited [liability] company and the only permissible incorporated company form for lawyers.

Gerber, *supra* note 73, at 19. The *GbR* is also known as a *BgB-Gesellschaft*. See BERUFSORDNUNG, *supra* note 44, at 697-726 (describing the various forms in which a law firm may be organized); Assmann et al., *supra* note 70, at 165-71 (describing the law of business associations, including the *GbR*, *Partnerschaftsgesellschaft* and *GmbH*); CLARA-ERIKA DIETL, DICTIONARY OF LEGAL, COMMERCIAL AND POLITICAL TERMS, GERMAN-ENGLISH 162 (3d ed. 1988).

85. See Interview with Professor Dr. Martin Henssler, *supra* note 37.

86. See BERUFSORDNUNG, *supra* note 44, at 758.

87. See *id.*

88. See, e.g., Martin Henssler, *Das Verbot der Sternsozietät gemäß § 31 Berufsordnung der Rechtsanwälte-Eine reformbefürftige Norm*, ZIP, 51/52 (1998), 2121 (criticizing this provision as violating the equal protection provision in the German Constitution because the *Wirtschaftsprüfer* and *Steuerberater* have no comparable limitation and because

In addition to the specific regulations found in *Berufsordnung* Chapter 8, the *Berufsordnung* contains a few provisions that expressly refer to MDPs. The most important of these is *Berufsordnung* section 3 which provides for MDP-wide imputation of conflicts of interest.<sup>89</sup> The remaining *Berufsordnung* provisions address the issue of how the MDP holds itself out to clients and the world. *Berufsordnung* section 8, for example, requires that one only hold oneself out as practicing in an MDP if there is in fact such a relationship formed in accordance with *BRAO* section 59a.<sup>90</sup> *Berufsordnung* section 9 regulates the acceptable names that the MDP may use. It requires the MDP to use the same name throughout all of its offices, permits the MDP to use the names of current or former firm members, but does not authorize a trade name per se.<sup>91</sup> *Berufsordnung* section 10 addresses the issue of letterheads. This section contains four requirements: 1) the name of all partners must be included on the letterhead, as well as the name of the firm itself; 2) there must be a designation of all individuals' professions, e.g., lawyer, accountant; 3) the letterhead must identify all offices; and 4) the names of professionals

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there are less restrictive means to avoid the danger of confusion about the relevant contracting service provider); see also AGH Nordrhein-Westfalen, NJW, 19.6.1998 (1999), 66 (finding section 31 improper insofar as it said that lawyers may not be partners with nonlawyer professionals, who themselves are members of additional partnerships; the case left open the question of whether a lawyer personally can belong to multiple, interlocking partnerships); Arndt Raupach, *Globalisierung, Full Service-Concept und Multi-Disciplinary Practices auf dem Beratungsmarkt*, in *DER FACHANWALT FÜR STEUERRECHT IM RECHTSWESEN* 13, 43 (1999) [hereinafter Raupach, *MDPs*] (writing, as a Big-5-affiliated law firm founder, that section 31 is an ongoing barrier to MDPs); Matthias Kilian, *Das Verbot der Sternsozietät-Verstoß gegen Gemeinschaftsrecht* (Apr. 2000) (manuscript on file with author) (criticizing section 31 because of the difficulty created in implementing the EU Lawyers' Establishment Directive 98/5).

89. See *BERUFSORDNUNG*, *supra* note 44, § 3(2), at 80. Section 3(2) provides:

(2) Das Verbot gilt auch, wenn ein anderer Rechtsanwalt oder (Angehöriger eines anderen Berufes im Sinne des § 59 a Bundesrechtsanwaltsordnung, mit dem der Rechtsanwalt in Sozietät, zur gemeinschaftlichen Berufsausübung in sonstiger Weise Anstellungsverhältnis, freie Mitarbeit) oder in Bürogemeinschaft verbunden ist oder war, in derselben Rechtssache, gleich in welcher Funktion, im widerstreitenden Interesse berät, vertritt, bereits beraten oder vertreten hat oder mit dieser Rechtssache in sonstiger Weise beruflich befaßt ist oder war.

*Id.*

90. Section 8 provides: "Auf eine gemeinschaftliche Berufsausübung darf nur hingewiesen werden, wenn sie in einer Sozietät, in sonstiger Weise (Anstellungsverhältnis, freie Mitarbeit) mit sozietätsfähigen Personen im Sinne des § 59 a Bundesrechtsanwaltsordnung oder in einer auf Dauer angelegten und durch tatsächliche Ausübung verfestigten Kooperation erfolgt." *Id.* § 8, at 284.

91. This title of this section is "Kurzbezeichnungen." *Id.* at 284; cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.5 (1983) (permitting trade names as long as they are not misleading). Germany has had a history of regulatory concern over firm names. See *CONE*, *supra* note 41, at 11:11-11:13 (citing complaints brought by the Düsseldorf bar against U.S. and Frankfurt law firms because of their letterhead and negotiations about firm names).

who have retired or separated from the firm may remain on the letterhead only if the nature of the relationship is clear.<sup>92</sup>

#### D. RECENT COURT DECISIONS REGARDING MDPs

Even after the adoption of the *BRAO* and *Berufsordnung* MDP provisions, the German Constitutional Court played a significant role in shaping MDPs in Germany.<sup>93</sup> In 1998, the German Constitutional Court ruled that lawyer-notaries (*Anwaltsnotare*) could form an MDP with certified public accountants (*Wirtschaftsprüfer*).<sup>94</sup> The court cited two different constitutional provisions in support of its decision. First, the court concluded that a *Wirtschaftsprüfer-Anwaltsnotar* prohibition violates the constitutional right to free exercise of one's profession because it lacks a sufficient basis to justify the restriction.<sup>95</sup> Second, the court concluded that such a ban violated the constitutional equal protection clause because it treated *Wirtschaftsprüfer* differently than *Steuerberater*, who were permitted to form such MDPs.<sup>96</sup> Commentators found this decision of great practical significance because it opened the door for partnerships among *Wirtschaftsprüfer* and the large, multi-office law firms that typically include lawyer-notaries.<sup>97</sup>

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92. BERUFSORDNUNG, *supra* note 44, § 10, at 310-11.

93. The German Constitutional Court has played a very influential role in shaping the nature of law practice and law firms in Germany. *See infra* note 97 and accompanying text.

94. *See* BVerfG, NJW, 8.4.1998 (1998), 2269 [hereinafter Notar case]; *see also* WPK Mitt. 1998, 245 mit Anm. Henssler. *See supra* notes 22-24 and accompanying text for a discussion of the distinction between the *Notar* and the *Anwaltsnotar*. This case concerned the latter type of professional.

95. *See* Notar case, *supra* note 94 (citing *GrundGesetz* Art. 12). One English translation of this constitutional provision is as follows: "Article 12 [Right to choose an occupation, prohibition of forced labor] (1) All Germans have the right to freely choose their occupation, their place of work, and their place of study or training. The practice of an occupation can be regulated by or pursuant to a statute." *Germany-Constitution* (visited Feb. 8, 2000) <[http://www.uni-wuerzburg.de/law/gm00000\\_.html](http://www.uni-wuerzburg.de/law/gm00000_.html)>.

96. *See* Notar case, *supra* note 94 (citing *GrundGesetz* Art. 3). One English translation of this provision is as follows:

Article 3 [Equality]

(1) All humans are equal before the law.

(2) Men and women are equal. The state supports the effective realization of equality of women and men and works towards abolishing present disadvantages.

(3) No one may be disadvantaged or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. No one may be disadvantaged because of his handicap.

*Germany-Constitution* (visited Feb. 8, 2000) <[http://www.uni-wuerzburg.de/law/gm00000\\_.html](http://www.uni-wuerzburg.de/law/gm00000_.html)>; *see also* Henssler, MDPs, *supra* note 61, at 17.

97. *See* Henssler, MDPs, *supra* note 61, at 17.

Although the *Anwaltsnotar* case is the most recent, significant constitutional court MDP case, the specter of judicial invalidation of ethics rules may influence lawyers' decisions about how to structure MDPs. Other legal ethics rules invalidated in recent years include the prohibition on branch offices and appearing in courts outside one's licensing jurisdiction.<sup>98</sup> Thus, the *Sternsozietät* provision described earlier apparently is ignored by at least some MDPs, in part because they anticipate that it would be unconstitutional if challenged.<sup>99</sup> In short, consideration of German MDP regulation must take into account the *BRAO*, the *Berufsordnung*, and also the German Constitution.

#### IV. GERMANY'S CURRENT MDP SITUATION

##### A. 1999 AND 2000 STATISTICS

Given the interest in the MDP issue worldwide, and Germany's express authorization of MDPs, it is useful to examine both the extent and nature of Germany's experience with MDPs. Unfortunately, although some information is available, it is difficult to find all the data that would be useful.

Germany had a population of approximately 82 million at the end of 1997.<sup>100</sup> By examining several sources, it is possible to compare the

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98. See BGH, NJW, 18.9.1989 (1989), 2890 (permitting branch offices). This branch office ban was not officially changed in the *BRAO*, however, until 1994. See Gesetz, v. 2.9.1994 (BGBl. I S.2278). The diagrams in JUVE VERLAG FÜR JURISTISCHE INFORMATION, JUVE HANDBUCH 1999/2000: WIRTSCHAFTSKANZLEIEN, RECHTSANWÄLTE FÜR UNTERNEHMEN 481-90 (1999) [hereinafter JUVE HANDBUCH 1999/2000] show the tremendous merger activity subsequent to 1989. See also Junius, *supra* note 41, at 59-63 (describing various restrictions on German law practice—including this one—many of which have since been abandoned).

Effective January 1, 2000, German lawyers are permitted to appear before all lower courts in Germany (*Landgerichte*), not just the courts in the lawyer's licensing jurisdiction. See Das Gesetz zur Änderung des Gesetzes zur Neuordnung des Berufsrechts der Rechtsanwälte und der Patentanwälte, v. 17.12.1999, (BGBl. I S.2448 ff); see also *Bundesrechtsanwaltskammer, Keine Beschränkungen mehr ab dem 1. 1. 2000!* (visited Mar. 6, 2000) <<http://www.brak.de/brakaction.html>>. This law thus changes what commentator Junius referred to as the second principle or "Single Admission Requirement." Junius, *supra* note 41, at 59. Although this represents a legislative change rather than a court invalidation of the rule, it shows the tremendous changes that are still occurring in Germany with respect to legal ethics rules.

99. See Interview with Professor Dr. Martin Henssler, *supra* note 37 (indicating that some Big 5 structures appear to violate the *Sternsozietät* provision but that he has counseled them to ignore the provision because of its unconstitutionality); see also Kilian, *supra* note 88.

100. See Statistisches Bundesamt, *Mitteilung für die Presse 30. Juli 1998 Bevölkerungszunahme 1997 abgeschwächt* (visited Feb. 10, 2000) <<http://www.statistik-bund.de/presse/deutsch/pm/p8231021.htm>>. This is in contrast to the population of the United States, which had a population of approximately 268 million in 1997 and al-

number of lawyers in Germany with the number of *Wirtschaftsprüfer* and the number of *Steuerberater* and to also determine the number of lawyers with dual qualifications. In 1999, there were:

- 97,791 German lawyers (*Rechtsanwälte*),<sup>101</sup> of which
  - 593 were also auditors (*Wirtschaftsprüfer*),<sup>102</sup>
  - 517 were also sworn-in auditors (*vereidigte Buchprüfer*),<sup>103</sup>
  - 1573 were also a type of tax advisor<sup>104</sup>
- 55,877 tax advisors (*Steuerberater*);<sup>105</sup>
- 9,611 German certified public accountants (*Wirtschaftsprüfer*);<sup>106</sup>
- 4,205 sworn-in auditors (*vereidigten Buchprüfer*),<sup>107</sup> and
- 3,842 tax assistants (*Steuerbevollmächtigte*);<sup>108</sup>

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most one million lawyers. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1998, at 8 (118th ed. 1998) (providing information on the general population of the United States); THE WORLD ALMANAC AND BOOK OF FACTS 2000, at 146 (1999) (showing 925,000 U.S. lawyers in 1997 and 951,000 U.S. lawyers in 1998).

101. See *Mitglieder der Rechtsanwaltskammern am 1. Januar 1999* (visited Feb. 10, 2000) <<http://www.brak.de/presse/pressezahlgro3.html>> (providing statistics for 1999 membership in the mandatory bar associations) [hereinafter *Rechtsanwalt Statistics*].

102. See *Statistische Übersichten zum Berufsstand (1.1.99)* (visited May 25, 1999) <<http://www.wpk.de/800x600d/info02.html>> [hereinafter *Wirtschaftsprüferkammer Statistics*]. These statistics show 116 individuals who were licensed as a *Wirtschaftsprüfer* and *Rechtsanwalt* and 477 individuals who held triple qualifications as a *Wirtschaftsprüfer*, *Rechtsanwalt* and *Steuerberater*. See *id.*

The *Wirtschaftsprüferkammer* and *Rechtsanwaltskammer* websites currently list statistics for the year 2000, rather than 1999. At the time this Article was prepared, however, the *Bundessteuerberaterkammer* still listed 1999 statistics. Therefore, in order to “compare apples to apples,” I have referred to the 1999 *Wirtschaftsprüfer* statistics, rather than the year 2000 statistics currently posted.

103. See *id.* (listing 388 individuals with double qualifications as *Rechtsanwalt* and *vereidigte Buchprüfer*, and 129 individuals with triple qualifications including *Steuerberater* to the two titles mentioned above).

104. See *Strukturdaten des steuerberatenden Berufs* (visited May 31, 1999) <<http://www.bstbk.de/beruf/struktur.html>> (including *Steuerberater* or *Steuerbevollmächtigte*; file no longer on Internet). The initial posting of 1999 *Steuerberater Statistics* stated that 1573 of *Steuerberater* and *Steuerbevollmächtigte* were also licensed as a *Rechtsanwalt*. See *id.* (“1573, also 2.8% aller Berufsangehörigen, haben die Qualifikation Steuerberater und Rechtsanwalt.”). The final version of this statistics page did not include any figures about those with dual qualifications as a *Rechtsanwalt-Steuerberater*. See *Strukturdaten des steuerberatenden Berufs zum 31.12.1998* (visited Mar. 6, 2000) <<http://www.bstbk.de/beruf/struktur.html>> [hereinafter *Steuerberater Statistics*]. The 477 triple qualification individuals, see *supra* note 102, presumably have been counted again in the 1,573 *Steuerberater* figure.

105. See *Steuerberater Statistics*, *supra* note 104.

106. See *Wirtschaftsprüferkammer Statistics*, *supra* note 102.

107. See *id.*

108. See *Steuerberater Statistics*, *supra* note 104.

In addition to statistics about individuals, there are 1999 statistics for the *Steuerberater GmbH*, *Wirtschaftsprüfer GmbH* and the new *Rechtsanwalt GmbH*. These figures included:

- 5,743 *Steuerberater GmbH*<sup>109</sup>
- 1,759 *Wirtschaftsprüfer GmbH* (of which 169 had lawyers as leaders);<sup>110</sup> and
- 78 *Rechtsanwalt GmbH*<sup>111</sup>

Although the *Rechtsanwalt GmbH* figures were relatively small, one must remember that the *Rechtsanwalt GmbH* was not officially recognized or regulated in the *BRAO* until 1999.<sup>112</sup> Moreover, the seventy-eight law firms organized as an *Rechtsanwalt GmbH* represent a fifty-percent increase from the prior year.<sup>113</sup>

While the 1999 *BRAK* data includes information beyond the mere numbers of lawyers, such as the gender of German lawyers, the number of certified specialists, and the legal form in which lawyers practice (partnership, LLP, etc.), there are no statistics indicating how many German lawyers practiced in an MDP, the average size of German MDPs, nor the proportions of different professionals.<sup>114</sup> This information apparently is not collected in any systematic fashion.

Anecdotally, it is common to hear that most German MDPs consist of small firms. For example, when German lawyer Dr. Hans-Jürgen Hellwig, who was Vice-President of the largest German voluntary bar association, the *Deutscher Anwaltsverein*, testified before the ABA Commission on Multidisciplinary Practice, he said, “there are many small MDP firms in Germany which have as partners lawyers, accountants and/or tax advisors.”<sup>115</sup> Nevertheless, comprehensive statistics are

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109. *See id.*

110. *See Wirtschaftsprüferkammer Statistics, supra* note 102.

111. *See Rechtsanwalt Statistics, supra* note 101. *But see Mitglieder der Rechtsanwaltskammern am 1. Januar 2000* (visited Apr. 16, 2000) <<http://www.brak.de/presse/presse2000zahlgro3.htm>> (showing 34 *Rechtsanwalts GmbH* as of January 1, 2000, which is a 56% decrease from the prior year and less than in 1998). At this time, I have no explanation for why the number of lawyer *GmbH* should have dropped so dramatically.

112. *See supra* notes 69-78 and accompanying text (describing the new *Rechtsanwalt GmbH* law).

113. *See Rechtsanwalt Statistics, supra* note 101.

114. *But see* Rogowski, *supra* note 30, at 29 n.48 (stating, without explanation, that “Campbell’s ‘rough estimate’ that around 10% of all German lawyers’ practices are multidisciplinary seems much too high”).

115. Hearings Before the Commission on Multidisciplinary Practice (Feb. 4, 1999) (written remarks of Dr. Hans-Jürgen Hellwig of Germany, Vice-President of the German Bar Association), *available at* <<http://www.abanet.org/cpr/hellwig1.html>> [hereinafter Hellwig Remarks].



not available to show the number or size of MDPs or to confirm that there are a number of small MDPs in Germany.

#### B. THE LARGEST LAW FIRMS IN GERMANY INCLUDE MDPs

Despite the lack of reliable data about the total number or size of German MDPs, recent reports about Germany's largest "law firms" reveal that several are true MDPs and that all of them are technically MDPs. In the 1999/2000 edition of a reference book about German law firms, each of the largest ten firms was identified as having at least one nonlawyer professional (*Berufsträger*):<sup>116</sup>

RANK	FIRM	RECHTSANWÄLTE IN GERMANY	NONLAWYERS IN GERMANY (BERUFSTÄGER)
1	Oppenhoff & Rädler Linklaters & Alliance	253	40
2	Bruckhaus Westrick Heller Löber	238	1
3	CMS Hasche Sigle Eschenlohr Peltzer	221	7
4	Pünder, Volhard, Weber & Ax- ster	205	18
5	Wessing & Berenberg-Gossler	193	5
6	Gaedertz	184	2
7	BBLP Beiten Burkhardt Mittl & Wegener	174	6
8	Boesebeck Droste	163	2
9	Feddersen Laule Ewerwahn Scherzberg et al.	151	4
10	Haarmann, Hemmelrath & Part- ner	141	81

116. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 473. "Largest" refers to firms with the greatest number of lawyers.

The German publisher called *JuVe Verlag* issued in 1998 for the first time a book that included a narrative about recent changes in the German legal market, quantitative and qualitative rankings by the book's editors of leading German law firms, together with descriptive materials about German firms and their areas of expertise. See JUVE VERLAG FÜR JURISTISCHE INFORMATION, JUVE HANDBUCH 1998/99: WIRTSCHAFTSKANZLEIEN, RECHTSANWÄLTE FÜR UNTERNEHMEN (1998) [hereinafter JUVE HANDBUCH 1998/1999]. The *JuVe Handbuch 1999/2000* is the second edition of this reference book. In addition to these books, *JuVe* publishes a monthly magazine called *JuVe Rechtsmarkt*, which carries stories about the German legal market.

2000]

## GERMAN MDPS

1571

19	Rödl & Partner <sup>117</sup>	86	180
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117. I have included data for Rödl & Partner, ranked 19th, because it was one of the firms I interviewed. See *JUVE HANDBUCH 1999/2000*, *supra* note 98, at 473-74 (listing Rödl & Partner with 86 lawyers and 180 further *Berufsträger*); cf. Dr. Nikolaus Weber, *The Threats and Opportunities of Multi-Disciplinary Practices to the Legal Profession and How to Prepare Your Firm* (June 20, 1999) (conference materials, on file with author) (listing 115 lawyers out of a total of 249 professionals, which included 60 lawyers in Germany and 118 nonlawyers in Germany).

This information is interesting because the data from one year earlier showed many of these firms as having no nonlawyers.<sup>118</sup> For example, a 1999 article in the periodical *Handelsblatt* identified the same ten firms as the largest in Germany and reported approximately the same figures for the nonlawyer *Berufsträger*, but the article listed two firms as having nonlawyers.<sup>119</sup> The only law firm among the twenty largest firms that was listed as having a nonlawyer majority was Rödl & Partner.<sup>120</sup>

One reason for the shift is that the German legal market has changed dramatically within the past twelve months. There has been a flurry of mergers among German firms and between German and non-German firms.<sup>121</sup> There also has been a flurry of lateral hires from other firms, which appears much more pervasive than in prior years.<sup>122</sup>

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118. The “top ten” firms listed in the 1999/2000 *JuVe Handbuch* were different than the “top ten” firms listed in the 1998/1999 edition. The earlier edition showed six of the ten firms as having no nonlawyers: Bruckhaus Westrick Heller Löber; Boesebeck Droste; Schürmann & Partner; Hengeler Mueller Weitzel Wirtz; Gleiss Lutz Hootz & Hirsch; Wessing & Berenberg Gossler. See JUVE HANDBUCH 1998/1999, *supra* note 116, at 428. By April 1999, however, *JuVe* had updated its article to reflect only four of the top ten firms without any nonlawyers. See E-mail from *JuVe-Redaktion* to author (May 31, 1999) (on file with author) [hereinafter *JuVe E-mail*]. Similar statistics were found in an article that appeared in the *Handelsblatt* at approximately the same time. See *Trends: Recht und Steuern: Die 10 Grössten Anwaltssozietäten*, HANDELSBLATT, May 8-9, 1999 [hereinafter HANDELSBLATT]. This article listed two firms as having no nonlawyers (Gaedertz and Beiten Burkhardt Mittl & Wegener). See *id.*

The anecdotal nature of these statistics is obvious when one compares the *JuVe*'s Spring 1999 figures with the *Handelsblatt* article figures, which were also distributed during the Spring 1999. For example, *JuVe* listed no nonlawyer professionals at CMS Hasche Sigle Eschenlohr Peltzer, whereas the *Handelsblatt* listed five *Berufsträger*; *JuVe* listed ten nonlawyers at Wessing & Berenberg-Gossler, whereas the *Handelsblatt* listed five nonlawyers; *JuVe* listed no nonlawyers at Bosebeck Droste, whereas the *Handelsblatt* listed two.

Although there are some disparities in these numbers, it seems fair to conclude that several of Germany's largest “law firms” in 1999 could be considered true MDPs and that most if not all of the ten largest firms were technically MDPs by the end of 1999. Moreover, even a firm such as Beiten Burkhardt Mittl & Wegener, which was listed in the *JuVe Handbuch* 1998/1999 as having no nonlawyers, has an affiliated tax firm. See Interview with Dr. Dirk-Reiner Martens, lawyer with Beiten Burkhardt Mittl & Wegener [BBLP], in Munich, Germany (June 24, 1999) (explaining that lawyers in his firm work with nonlawyers in the affiliated tax arm).

119. See HANDELSBLATT, *supra* note 118.

120. See *supra* note 117 for the number of nonlawyers at Rödl & Partner. My statement in the text must be clarified, however. I believe that Rödl & Partner is the only firm among the 20 largest that has a nonlawyer majority. The 1999/2000 *JuVe Handbuch*, however, lists Andersen Freihalter as having 130 lawyers and 130 nonlawyers. I have ignored this statement on the assumption that it is a mistake, a conclusion confirmed by the managing partner at the firm, now called Andersen Luther Rechtsanwalts GmbH. See E-mail from Dr. Stefan Kraus, Managing Partner, Andersen Luther Rechtsanwalts GmbH to author (Apr. 12, 2000) (on file with author). Thus, the *JuVe Handbuch* statistic is either an editorial mistake or a mistake on Andersen's part when providing information.

121. See, e.g., JUVE HANDBUCH 1999/2000, *supra* note 98, at 3-9, 481-94 (beginning

There are at least two reasons for the activity in the German legal market. First, this German activity reflects a trend towards worldwide consolidation of law firms.<sup>123</sup> Second, because of unusually restrictive

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the summary of law firm developments during the prior year with a sentence saying that hardly a month went by in 1999 without news of larger mergers and international alliances with German law firms; the 1999/2000 *Handbuch*, like the earlier edition, also contained charts diagramming the firms that merged to become Germany's current large firms); *see also Best Friends Hengeler, Davis Polk and Slaughters Get Serious*, INT'L FIN. L. REV., Nov. 1999, at 4 (discussing the "integrated team concept" between U.S., German and U.K. firms); *Cameron McKenna Confirms New European Alliance*, INT'L FIN. L. REV., June 1999, at 3 (noting the alliance formed with firms from Germany, Denmark, Austria, Sweden, Belgium, Netherlands and the U.K.); *Continental Firms Merge*, INT'L FIN. L. REV., July 1999, at 5 (reporting that German, French, Italian and Swiss firms merge); Nick Ferguson, *Merger Fever Grips German Market*, INT'L FIN. L. REV., Sept. 1999, at 35 ("The nineties has produced more law firm mergers in Germany than anywhere else in the world."); *Freshfields, Clifford Chance Seal German Mergers*, INT'L FIN. L. REV., Oct. 1999, at 6 (recognizing German-UK firm mergers); *Linklaters & Alliance Gains Italian Member*, INT'L FIN. L. REV., Aug. 1999, at 5 (noting that the second largest Italian firm joined the Linklaters alliance); *Lovell White Durrant, Boesbecke Droste Announces European Merger*, INT'L FIN. L. REV., Oct. 1999, at 4 (noting that UK and German firms voted to merge); *UK Firm Forges New European Alliance 24/01/00*, (visited Mar. 1, 2000) <[http://www.lawmoney.com/homepage/Display\\_story/PreviewStory.asp?StoryNum=3700](http://www.lawmoney.com/homepage/Display_story/PreviewStory.asp?StoryNum=3700)> (describing German firm Graf von Westphalen's alliance with firms from the U.K., Denmark, Holland, France and Spain). The first merger of German and non-German law firms took place in 1997 when German firm Bruckhaus Westrick Stegemann merged with Austrian firm Heller, Löber, Bahn & Partner to form Bruckhaus Westrick Heller Löber. *See Merger Creates Bruckhaus Westrick Heller Löber*, INT'L FIN. L. REV., Dec. 1997, at 16.

122. *See Allen & Overy Hires in Frankfurt*, INT'L FIN. L. REV., Sept. 1998, at 5 (reporting "poached partners" from rival firms); *Bruckhaus Opens in Munich* (visited Dec. 14, 1999) <[http://www.lawmoney.com/homepage/Display\\_story/Previewstory.asp?StoryNum=3551](http://www.lawmoney.com/homepage/Display_story/Previewstory.asp?StoryNum=3551)> (noting that Bruckhaus hired four Boesebeck partners); *Haarmann Poaches Lovells Partner* (visited Jan. 26, 2000) <[http://www.lawmoney.com/homepage/Display\\_story/Previewstory.asp?StoryNum=3707](http://www.lawmoney.com/homepage/Display_story/Previewstory.asp?StoryNum=3707)> (noting that a Frankfurt lawyer was hired from rival German firm); *Haarmann to Open in London* (visited Dec. 14, 1999) <[http://www.lawmoney.com/homepage/Display\\_story/Previewstory.asp?StoryNumb=3532](http://www.lawmoney.com/homepage/Display_story/Previewstory.asp?StoryNumb=3532)> (noting that German firm to hire lawyers from leading U.K. firms); *Heard at the Bar*, INT'L FIN. L. REV., June 1999, at 4 (reporting that U.K. firm Ashurst Morris hired lawyers from two German firms); *Heard at the Bar*, INT'L FIN. L. REV., Apr. 1999, at 4 (reporting that U.S. firm hired treasurer of Germany's CDU political party and former government minister); *Hemmelrath Announces London Partners* (visited Jan. 24, 2000) <[http://www.lawmoney.com/homepage/Display\\_story/Previewstory.asp?StoryNum=3687](http://www.lawmoney.com/homepage/Display_story/Previewstory.asp?StoryNum=3687)> (reporting that Hemmelrath hired from U.K. firms); *Shearman & Sterling Bolsters Dusseldorf Practice* (visited Jan. 20, 2000) <[http://www.lawmoney.com/homepage/Display\\_story/Previewstory.asp?StoryNum=3675](http://www.lawmoney.com/homepage/Display_story/Previewstory.asp?StoryNum=3675)> (hiring from rival Oppenhoff); *Shearman Steals Punder Partner* (visited Jan. 20, 2000) <[http://www.lawmoney.com/homepage/Display\\_story/Previewstory.asp?StoryNum=3615](http://www.lawmoney.com/homepage/Display_story/Previewstory.asp?StoryNum=3615)>.

123. *See, e.g., COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, UPDATED BACKGROUND REPORT AND REQUEST FOR COMMENTS n. 14 (1999)*,

professional rules, large multi-office law firms were slow to arrive in Germany. For example, the *BRAO* previously contained provisions that prohibited branch offices or national law firms consisting of lawyers admitted in different parts of the country.<sup>124</sup> Although one court invalidated these *BRAO* provisions in a highly-publicized 1987 decision,<sup>125</sup> the *BRAO* was not explicitly amended until 1994. In short, I predict that the trend of German firms with both German and non-German partners will continue, and I also predict a continued, if not increased, presence of nonlawyers in large German firms as global clients request expertise that lawyers alone may not have.

### C. THE LEGAL ARMS OF THE BIG 5 DEVELOPED RELATIVELY LATE IN GERMANY

#### 1. An Overview

In the context of the MDP debate, U.S. commentators often refer (in one breath, as if they were synonymous), to both the Big 5<sup>126</sup>-affiliated law firms in Europe and to the much longer European experience with

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available at <<http://www.abanet.org/cpr/febmdp.html>> [hereinafter UPDATE] (citing John E. Morris, *The New World Order: Clifford Chance and Rogers & Wells Are About to Pull Off the First Large-Scale Transatlantic Merger. Did the Eat-What-You-Kill Americans Ever Come to Terms with the Lockstep Brits? And, More Importantly, What Will It Mean for the Competition?*, AM. LAW., Aug. 1999 (describing the three-way merger of U.S. firm Rogers & Wells, U.K. firm Clifford Chance, and German firm Pünder, Volhard, Weber & Aster)); Anna Snider, *Paris-New York Merger Breaks New Ground*, N.Y. L.J., Sept. 18, 1998, at 1 (describing the merger of Christy & Viener in New York and Salans Hertzfeld & Heilbronn in Paris); *Today's News Update*, N.Y. L.J., Sept. 28, 1999, at 1 (describing the two recent, separate mergers of Coudert Brothers with an Australian and a Belgian law firm); *Today's News Update*, N.Y. L.J., June 17, 1999, at 1 (describing the "strategic affiliation" between Holland & Knight and Haim Samet, Steinmetz, Haring & Co., an Israeli law firm, noting that the two firms did not formally merge because Israeli law prohibits profit-sharing between Israeli and foreign law firms, and that the Haim firm was being treated "as part of Holland & Knight").

124. This was *BRAO* section 28 (*Zweigstellenverbot*) (branch offices) and *BRAO* section 177 (national offices). See *BRAO*, *supra* note 27, §§ 28, 177, at 237-38; see also Junius, *supra* note 41, at 60.

125. See *supra* note 44 and accompanying text (describing invalidation of Germany's *Richtlinien*).

126. The term "Big Five" refers to Arthur Andersen L.L.P. (Andersen), Deloitte & Touche L.L.P. (Deloitte & Touche), Ernest & Young L.L.P. (Ernst & Young), KPMG Peat Marwick L.L.P. (KPMG), and PricewaterhouseCoopers L.L.P. (PwC). This Article will refer to these five firms as the "Big 5" firms. Opponents of the MDP phenomenon tend to refer to these firms as the "Big 5 accounting firms." The firms refer to themselves as "professional services" firms.

MDPs.<sup>127</sup> In my view, these concepts do not conflate if one intends to suggest that Europe has had a long experience in *regulating* MDPs, including the Big 5. In fact, most of the European countries that have a large MDP presence, such as France, Spain, and Britain, have not had regulations expressly permitting MDPs.<sup>128</sup> And although Germany has a history of permitting MDPs, it has a much shorter history than do many other European countries with respect to the Big 5-affiliated firms offering legal services.<sup>129</sup>

In a 1999 article, Dr. Arndt Raupach, founder of Germany's Deloitte & Touche's affiliated law firm, identified three models in which Germany's Big 5-affiliated law firms have developed.<sup>130</sup> He cited KPMG as an example of the first model, in which legal advice is offered through the legal arm or department of an accounting firm (*Wirtschaftsprüfungsgesellschaft*).<sup>131</sup> He cited his firm and the Arthur Andersen- and PricewaterhouseCoopers-affiliated firms as examples of the second model, in which legal advice is offered through a *Rechtsanwaltsgesellschaft mbH* that cooperates with a related accounting firm.<sup>132</sup> The third model was a law firm with its own standing in the market, for which he

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127. See, e.g., Dario Navarro, *The Case in Favor of MDP* (visited Mar. 10, 2000) <<http://www.massbar.org/board/messages/8.html>> ("These issues can be addressed in special rules of professional conduct for MDPs. They pose no inherent ethical barrier. The experience of lawyers in multidisciplinary practices in Europe bears this out. Arthur Andersen's Dusseldorf venture capital group is being run as an MDP with great success."); see also Hearings Before the Commission on Multidisciplinary Practice (Mar. 11, 1999) (written remarks of Irwin L. Treiger & William J. Lipton, Co-chairs, National Conference of Lawyers and Certified Public Accountants), available at <<http://www.abanet.org/cpr/treiger1.html>>. Treiger and Lipton wrote:

At present, mandatory rules of professional conduct—the most significant of which are discussed below—present significant barriers to lawyers in the United States who wish to practice across boundaries and outside a traditional law firm. By contrast, the trend internationally is to permit new forms of practice. With the changes abroad, questions are being raised as to how long the barriers in the United States can remain.

*Id.*

128. See Phillipa Cannon, *The Big Six Move In*, INT'L FIN. L. REV., Nov. 1997, at 25 (providing a country-by-country breakdown of the number of lawyers working in the Big 5); Terry, *supra* note 8, at 882-89 (providing a general overview of European developments); Terry & Houtman Mahoney, *supra* note 1, at 7-6 to 7-11 & nn.13-32 (identifying, country-by-country, some then-recent MDP developments); Charles W. Wolfram, *Multidisciplinary Partnerships in the Law Practice of European and American Lawyers*, in LAWYERS' PRACTICE AND IDEALS: A COMPARATIVE VIEW 311, 311-16 (1999) (summarizing pre-1997 MDP developments in Europe and Australia).

129. As discussed in more detail in the next section, two of the Big 5-affiliated law firms in German were founded in 1998, a third changed its name in 1998 for consistency with the name of its affiliated Big 5 firm, and a fourth was established in 1999. See *infra* notes 142-80 and accompanying text for a discussion about each of these firms.

130. See Raupach, *MDPs*, *supra* note 88, at 40.

131. See *id.*

132. See *id.* There may be some differences within this second model, however. Ac-

law firm with its own standing in the market, for which he cited Menold Herrlinger, noting that there is no integrated or interlocking relationship between Menold Herrlinger and Schitag Ernst & Young.<sup>133</sup>

From an outsider's perspective, it appears that the Big 5 firms have had at least some success in attracting high-prestige lawyers to their firms. PricewaterhouseCoopers Veltins was founded by Dr. Michael Veltins, who came from Wessing & Berenberg-Gossler, one of Germany's largest law firms.<sup>134</sup> The founder of the Deloitte & Touche-affiliated firm Raupach & Wollert Elmendorff was formerly a name partner in one of the firms that merged into what is now Germany's largest firm, Oppenhoff & Rädler, Linklaters & Alliance.<sup>135</sup> The Arthur Andersen-affiliated firm recently merged with a well-regarded traditional firm.<sup>136</sup>

Although Germany's Big 5-affiliated law firms were established relatively late compared to other Big 5-affiliated firms in Europe, these German firms are clearly ambitious<sup>137</sup> and have shown strong growth potential. PricewaterhouseCoopers Veltins, for example, grew from five lawyers to forty lawyers in less than one year and now has over eighty lawyers less than two years after its founding.<sup>138</sup> Andersen Luther had 101 lawyers in 1998, 130 lawyers in 1999, and 170 lawyers in early 2000.<sup>139</sup> Although none of the Big 5-affiliated firms was listed among Germany's ten largest law firms in 1998 or 1999, that changed on Janu-

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cording to the founder of the PricewaterhouseCoopers-affiliated firm, his law firm is less integrated with PricewaterhouseCoopers than is Raupach & Wollert-Elmendorff with Deloitte & Touche. See Interview with Professor Dr. Michael A. Veltins, founding partner of PricewaterhouseCoopers Veltins, in Frankfurt am Main, Germany (July 9, 1999).

133. See Raupach, *MDPs*, *supra* note 88, at 40 ("die Institutionalisierung der Rechtsberatung mit eigenem Standing am Markt (so z. B. die Zusammenarbeit von Schitag Ernst & Young mit Menold Herrlinger, die personell nicht miteinander verflochten sind)"); see also Falk Schornstheimer, *Multi-Disciplinary Partnerships in Germany: Fighting a Different Battle*, *JUVE RECHTSMARKT*, Oct. 1998, at 23, 25 (English ed.) (distinguishing Menold from the other Big 5-affiliated firms because of the lack of cross-staff links and the principle that law firm partners may not be partners in the accounting arm).

134. See *infra* notes 161-74 for a discussion of PricewaterhouseCoopers Veltins.

135. See *infra* notes 148-53 for a discussion of Raupach & Wollert Elmendorff.

136. See *infra* notes 143-47 for a discussion of Andersen Luther Rechtsanwalts-gesellschaft mbH.

137. See, e.g., Volker Tausch, *Weidmann und Wilderer: Positionen der Big-Five-Kanzleien*, *JUVE RECHTSMARKT*, Feb. 2000, at 4, 12 [hereinafter *Positionen der Big-Five*]. Among the comments showing interest in further growth and doing "Big Ticket" work, the PricewaterhouseCoopers Veltins founder said that they compare themselves to the five most important firms in Germany and that they want to grow further. See *id.*

138. See *infra* notes 164-70 and accompanying text.

139. Compare *JUVE HANDBUCH 1998/1999*, *supra* note 116, at 428, with *JUVE HANDBUCH 1999/2000*, *supra* note 98, at 473, and *Positionen der Big-Five*, *supra* note 137, at 6.

ary 1, 2000 when the Arthur Andersen-affiliated firm Andersen Freihalter merged with the Hamburg law firm Luther & Partner to form the tenth largest law firm in Germany.<sup>140</sup> PricewaterhouseCoopers Veltins also merged with a traditional law firm in 1999.<sup>141</sup> Nevertheless, despite the rapid growth of some of these Big 5-affiliated law firms, one cannot say that these law firms have a long history in Germany.

## 2. Specific Information About Big 5-Affiliated German Firms

Because of the frequent reference to the role of the Big 5 in Europe and to Germany's unusual position of expressly permitting MDPs, it is useful to understand the history and situation of the Big 5-affiliated law firms in Germany. This section provides such information for each of the major Big-5 affiliated law firms in Germany.<sup>142</sup>

The Arthur Andersen-affiliated law firm in Germany was founded in 1995 and is called Andersen Luther Rechtsanwaltsgesellschaft mbH, which is the third name it has used in three years.<sup>143</sup> The firm actively markets its relationship to the Arthur Andersen network, which it describes as having over 2,700 lawyers working in ninety-four offices in thirty-four countries.<sup>144</sup> The firm has grown quickly<sup>145</sup> and it now adver-

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140. Compare JUVE HANDBUCH 1998/1999, *supra* note 116, at 428 (listing Andersen as the largest Big 5 firm in Germany, ranking 17th), with JUVE HANDBUCH 1999/2000, *supra* note 98, at 473 (listing Andersen as the largest Big 5 firm in Germany, ranking 12th). According to the Andersen Luther website, it is now the 10th largest law firm in Germany. See *infra* note 146 and accompanying text.

141. See *infra* note 170 and accompanying text.

142. Readers who are not interested in detail about these firms may wish to proceed to Part V, *infra* p. 1584.

143. Until 1998, this firm was known as Freihalter Krüger. In 1998 the firm was able to change its name to Andersen Freihalter when a partner called Andersen joined the firm. See Gerber, *supra* note 73, at 17; *Positionen der Big-Five*, *supra* note 137, at 6. In November 1999, Andersen Freihalter agreed to merge with the Hamburg firm Luther & Partner effective January 1, 2000 and the firm changed its name at that time to Andersen Luther Rechtsanwaltsgesellschaft mbH. See *Andersen Freihalter Und Luther & Partner Schließen Sich Zusammen* (visited Mar. 10, 2000) <[http://www.andersenlegal.de/fusion\\_luther\\_ru.html](http://www.andersenlegal.de/fusion_luther_ru.html)> [hereinafter Andersen Press Release] (this page is also available in English as a PDF file linked to this website); *Andersen Legal Merges in Germany*, (visited Mar. 10, 2000) <[http://www.lawmoney.com/homepage/Display\\_Story/PreviewStory.asp?StoryNum=3516](http://www.lawmoney.com/homepage/Display_Story/PreviewStory.asp?StoryNum=3516)>.

144. In a display ad in the 1999/2000 *JuVe Handbuch*, Andersen Freihalter advertised that it belongs to the Andersen Worldwide International Network of Law Firms with 92 offices in 34 countries. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 504. Andersen's website expands on this by referring to 2,700 lawyers in 94 offices in 34 countries. See Andersen Press Release, *supra* note 143.

145. The firm's website states that it has 170 lawyers. See Andersen Press Release, *supra* note 143. In contrast, the 1999/2000 *JuVe Handbuch* listed Andersen Freihalter as



tises that it is the tenth largest firm in Germany.<sup>146</sup> The firm consists entirely of lawyers.<sup>147</sup>

The Deloitte & Touche-affiliated law firm in Germany is Raupach & Wollert-Elmendorff Rechtsanwalts-gesellschaft mbH. The firm was founded on January 1, 1998 by one of Germany's leading lawyers and has attracted other lawyers that appear to be well-credentialed.<sup>148</sup> According to one German commentator, the advantage to the Big 5 of hiring established, well-known lawyers such as Dr. Raupach was their ability to bring clients with them.<sup>149</sup> Similar to the Arthur Andersen-firm, Rau-

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the twelfth largest German law firm, with 130 German lawyers. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 473. The *JuVe Handbuch* from the prior year showed Andersen Freihalter as the 17th largest firm with 101 lawyers. See JUVE HANDBUCH 1998/1999, *supra* note 116, at 428.

146. See Andersen Press Release, *supra* note 143 (stating that in early 2000, the Andersen Luther firm had more than 170 lawyers in 11 cities and was among the 10 largest German law firms).

147. See E-mail from Dr. Stefan Kraus, *supra* note 120. Although Andersen is listed as having 130 lawyers and 130 *additional* professionals in the 1999/2000 *JuVe Handbuch*, it was listed as having 101 lawyers out of a total of 101 professionals in the prior edition. Compare JUVE HANDBUCH 1999/2000, *supra* note 98, at 473, with JUVE HANDBUCH 1998/1999, *supra* note 116, at 428. (The *JuVe Handbuch* mistake may be due to the fact that the categories of information were different in the 1999/2000 and 1998/1999 *JuVe Handbuchs*.) The Andersen Luther website does not identify the names or qualifications of its lawyers. See generally *Andersen Luther Rechtsanwalts-gesellschaft mbH* (visited Mar. 15, 2000) <<http://www.andersenlegal.de/home.html>>. By way of illustration, of the 70 lawyers listed on Andersen's letterhead in mid-1999, 18 had dual qualifications as a lawyer and tax advisor; two had dual qualifications as a lawyer and auditor; three had dual qualifications as a lawyer and a foreign (U.S.) lawyer; and four had dual qualifications as a lawyer, auditor and tax advisor.

148. One of the firm's founders was Professor Dr. Arndt Raupach, who had been a name partner in one of the two firms that merged to form what is now Germany's largest firm, Oppenhoff & Rädler Linklaters & Alliance. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 482 (showing that Rädler Raupach Bezenberger was one of the two firms that merged in 1995 to form the firm Oppenhoff & Rädler, which in 1999 became Oppenhoff & Rädler Linklaters Alliance); Gerber, *supra* note 73, at 20 ("Ex-Oppenhoff & Rädler Partner Professor Arndt Raupach recently set up the limited liability law firm of Raupach & Wollert Elmendorff . . .").

The firm also advertises that the Hamburg office includes the former head of the tax department of Unilever-Germany and that the Frankfurt office is headed by a lawyer who formerly practiced in several leading law firms and then headed the corporate law department of Daimler-Benz. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 594. (The two leading firms were Linklaters & Alliance and Hengeler Mueller Weitzel Wirtz, which the *JuVe Handbuch* lists qualitatively as one of the top two law firms in Germany. See *id.* at 13.)

149. See Schornstheimer, *supra* note 133, at 26. Schornstheimer stated:

In the last few months, we have seen just how the strategy of the . . . Big Five works in Germany. Deloitte Touche Tohmatsu and PricewaterhouseCoopers Veltins decided to seek established, well-known lawyers in this country to be able [to] profit from the international transactions which were hoped to result from the activities of the global network of law firms. . . . The advantage of their strategy was that both were able to bring clients with them . . . .

pach & Wollert Elmendorff advertises its Big 5 affiliation.<sup>150</sup> This firm is the smallest of the Big 5-affiliated firms<sup>151</sup> and virtually all of its professionals are lawyers.<sup>152</sup> Dr. Raupach distinguishes his firm from the other Big 5-affiliated law firms, among other reasons, because it specializes in tax advice instead of leaving that work for the tax department of the affiliated accounting firm.<sup>153</sup>

The Ernst & Young-affiliated law firm in Germany is called Menold Herrlinger Rechtsanwälte and was founded in 1992.<sup>154</sup> Menold Herrlinger recently ranked as the twenty-third largest German law firm, with sixty German lawyers in six offices.<sup>155</sup> Similar to the other Big 5-affiliated firms, this firm consists overwhelming of lawyers.<sup>156</sup> Unlike

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*Id.*

150. For example, the firm advertises that it belongs to the Germany WEDIT network, which has subsidiaries or affiliated firms in Germany in seventeen locations, employing 2,200 and that it is a member of the international network of Deloitte & Touche, which has 600 locations in 130 countries. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 594.

In early 2000, Raupach & Wollert Elmendorff apparently did not have a website of its own. The “structure” link from the Deloitte & Touche-Germany website listed the affiliated entities. Among other things, this website has an item that might be translated as “tax-specialized legal advice is offered through our cooperation partner Raupach & Wollert-Elmendorff Rechtsanwaltsgesellschaft mbH.” Raupach & Wollert Elmendorff is the only entity identified as a “cooperation” partner; all other entities are described as “Tochtergesellschaften” [literally daughter companies; this could be translated as either subsidiary or affiliated companies]. *Unsere Struktur* (visited Feb. 29, 2000) <<http://www.wedit.de/Profil/prof-p3.htm>>. The law firm is one of several entities on this page that does not have a “hotlink” to its own website. See *id.* Nor could I find a website for the firm using the search engine <[www.yahoo.de](http://www.yahoo.de)>.

151. The 1999/2000 *JuVe Handbuch* listed Raupach & Wollert Elmendorff as the 40th largest German law firm, with 33 German lawyers in five offices. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 474. A February 2000 *JuVe* article listed 38 lawyers at Raupach. See *Positionen der Big-Five*, *supra* note 137, at 6.

152. By way of illustration, a law firm brochure I received in mid-1999 identified 28 professionals. Of these, 21 were licensed solely as lawyers, four held dual qualifications as lawyers and tax advisors (*Rechtsanwälte* and *Steuerberater*), two held dual qualifications as tax advisors and auditors, but not lawyers (*Steuerberater* and *Wirtschaftsprüfer*) and one held a triple qualification as a lawyer, tax advisor, and auditor. See RAUPACH & WOLLERT-ELMENDORFF, RECHTSANWALTSGESELLSCHAFT MBH, KANZLEIBROSCHÜRE (May 1999) (on file with author).

153. See Raupach, *MDPs*, *supra* note 88, at 40.

154. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 572. Prior to the founding of Menold Herrlinger, Schitag Ernst & Young, the tax and audit partnership had an extensive legal department. See Schornstheimer, *supra* note 133, at 25.

155. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 473. A February 2000 *JuVe* article showed 65 lawyers, an increase of five lawyers since the 1999/2000 *Handbuch*. See *Positionen der Big-Five*, *supra* note 137, at 6. For comparison purposes, the prior edition of the *JuVe Handbuch* showed Menold Herrlinger with 49 lawyers. See JUVE HANDBUCH 1998/1999, *supra* note 116, at 428; see also *infra* note 156.

156. By way of illustration, a law firm brochure I received in mid-1999 listed 41 professionals. Of these, 38 were solely lawyers, one had dual qualifications as a lawyer and tax advisor (*Rechtsanwalt* and *Steuerberater*) and two were foreign-qualified lawyers,

the other Big 5-affiliated law firms, Menold Herrlinger is the only German Big 5-affiliated law firm that is *not* organized as a limited liability partnership or *Rechtsanwaltsgesellschaft mbH*.<sup>157</sup> Another difference between Menold Herrlinger and some of the other Big 5-affiliated law firms is that partners of Menold Herrlinger reportedly cannot simultaneously be partners of the law firm and partners of the accounting firm, i.e., there are no cross-staff links.<sup>158</sup> This deliberate separation of the law firm from the other arms of Ernst & Young apparently has been recognized in the marketplace. A recent analysis, for example, stated that Menold Herrlinger had been especially effective during the past year in presenting itself as an independent law firm.<sup>159</sup> Indeed, Menold Herrlinger is rather restrained in its marketing of its connection with Ernst & Young, having declined on occasion to mention Ernst & Young by name.<sup>160</sup>

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rather than *Rechtsanwälte* (one licensed in France and one licensed in the United States). See MENOLD HERRLINGER RECHTSANWÄLTE (n.d.) (on file with author).

157. See *id.*; see also Interview with Dr. Arno Frings, Menold Herrlinger lawyer, in Düsseldorf, Germany (June 21, 1999). Instead, the law firm is organized in the legal form known as a BGB partnership or *GbR*. See *id.*

158. See Schornsteimer, *supra* note 133, at 25 (“This includes the principle that partners of *Menold Herrlinger* cannot simultaneously be partners of *Schitag* [the Ernst & Young tax and audit entity], i.e. that no cross-staff links exist, as is the case with other members of the Big Five.”); cf. *Positionen der Big-Five*, *supra* note 137, at 12 (observing that the relationship of the KPMG-affiliated firm is particularly close, noting that every partner of the law firm is a partner of KPMG).

159. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 25 (“Von allen Kanzleien mit einer besonders engen Beziehung zu einer Wirtschaftsprüfungsgesellschaft . . . konnte Menold Herrlinger sich im vergangenen Jahr Beobachtern zufolge besonders effektiv präsentieren und überzeugte dabei v.a. auch als eigenständige Anwaltskanzlei.”).

160. For example, of the four Big 5-affiliated law firms that ran display ads in the 1998/1999 *JuVe Handbuch*, Menold Herrlinger was the only law firm that did not mention by name the Big 5 firm with which it was affiliated. Instead, it simply said that it was a member of an international network with representatives in nearly every industrialized country. See JUVE HANDBUCH 1998/1999, *supra* note 116, at 505 (“Menold Herrlinger ist Mitglied eines internationalen Netzwerkes mit einer Vertretung in nahezu allen Industrieländern.”). Although Menold Herrlinger’s ad in the current *JuVe Handbuch* mentions Ernst & Young by name, it does so in a very restrained manner, saying that it can rely upon the support of law firms with which it is on friendly terms and the Ernst & Young International Network. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 572 (“Im internationalen Bereich können wir auf die Unterstützung befreundeter Anwaltskanzleien und des weltweiten Netzwerkes von Ernst & Young International zurückgreifen.”). Moreover, this sentence immediately follows a sentence which says that Menold Herrlinger works closely with many tax advice and auditing companies, including Ernst & Young. See *id.* (“Wir arbeiten daher mit namhaften Wirtschaftsprüfungs- und Steuerberatungsgesellschaften, insbesondere mit der Ernst & Young Gruppe, zusammen.”).

Nor does Menold Herrlinger currently market on the Internet its connection to Ernst & Young. Unlike several of the other German Big 5-affiliated law firms, I could not locate either a website for Menold Herrlinger or an easy cross reference to the firm from either the German Ernst & Young website or the international website. See, e.g., *Ernst & Young Deutschland* (visited Mar. 10, 2000) <<http://www.sey.de/>> (listing no legal service providers in Germany); *Ernst & Young* (visited Mar. 10, 2000)

The primary PricewaterhouseCoopers-affiliated law firm in Germany is called PricewaterhouseCoopers Veltins Rechtsanwalts-gesellschaft mbH and was founded on June 1, 1998.<sup>161</sup> (Another law firm, Schultze & Braun Rechtsanwalts-gesellschaft mbH, also affiliated with PricewaterhouseCoopers in mid-1998. Because Schultze & Braun is an insolvency firm rather than a full service law firm, this Article focuses on PricewaterhouseCoopers Veltins.)<sup>162</sup> PricewaterhouseCoopers Veltins was founded by Professor Dr. Michael Veltins, who had been a leader in one of Germany's largest law firms.<sup>163</sup>

This firm has grown very fast. It began in June 1998 with approximately five lawyers.<sup>164</sup> Within three months, it had grown to over forty lawyers.<sup>165</sup> Within thirteen months of its founding, the firm had grown to seventy-five lawyers in eight offices.<sup>166</sup> Although the firm was not

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<[http://www.ey.com/global/gcr.nsf/International/International\\_Home](http://www.ey.com/global/gcr.nsf/International/International_Home)>. I was able to locate eight references to Menold Herrlinger by doing a "search" within the Ernst & Young Germany website. In the context of a particular issue of law, Menold was sometimes referred to as the cooperating law firm. But there was no listing of legal services per se or Menold Herrlinger's office addresses and phone numbers. Nor could I find a website for Menold Herrlinger by using <[www.yahoo.de](http://www.yahoo.de)>.

161. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 588; *Price Waterhouse Coopers Sets Up Own Law Firm and Insolvency Arm in Germany*, JUVE RECHTSMARKT, July/Aug. 1998, at 3, 3.

162. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 609. Schultze & Braun was founded in 1949 as a tax advisor practice. In 1975, it became a multidisciplinary practice of tax advisors and lawyers. They began advising on their current specialty of insolvency in 1980. See *id.* The *JuVe Rechtsmarkt* periodical described Schultze & Braun as follows: "A strongly interdisciplinary law firm, *Schultze & Braun* set up the partnership as a holding company, under which a tax advisory and accountancy firm exists side by side with an *Anwalts GmbH*. *Schultze & Braun* had already opted for this transformation as early as 1995 and pursued the right to make this decision through the courts in Baden." Gerber, *supra* note 73, at 20. Schultze & Braun affiliated with PricewaterhouseCoopers in July 1998. See JUVE HANDBUCH 1999/2000, *supra* note 98; see also Schultze & Braun GmbH, *Das Unternehmen* (visited Mar. 5, 2000) <<http://www.schubra.de/deutsch/index.htm>>.

163. Michael Veltins was formerly head of the Leipzig office of Wessing & Berenberg-Gossler and on the management team of the firm. See Gerber, *supra* note 73, at 20. Wessing is the fifth largest German firm listed in the JUVE HANDBUCH 1999/2000, *supra* note 98, at 473.

164. The reports differ as to whether the firm started with five or six lawyers. Compare *Price Waterhouse Coopers Sets Up Own Law Firm and Insolvency Arm in Germany*, *supra* note 161, at 3 ("Veltins will start at the new Frankfurt office of his firm on 1 June this year with five other lawyers . . ."), with *Price Waterhouse eröffnet Anwaltskanzlei in Deutschland*, JUVE RECHTSMARKT, Juni 1998, at 6 ("Sein neues Frankfurter Büro hat am 1. Juni mit fünf Rechtsanwälten die Arbeit aufgenommen . . .").

165. See *Nachrichten, Jetzt 40 Anwälte bei PricewaterhouseCoopers Veltins*, JUVE RECHTSMARKT, Aug. 1998.

166. See *id.* Elsewhere in the ad, however, it states that there are 62 lawyers working for the firm, but a total of 75 professionals, which would include German auditors and tax advisors. A February 2000 article listed 80 lawyers, an increase of five over the 1999/2000 figures. See *Positionen der Big-Five*, *supra* note 137, at 6.

listed among the largest forty-four firms in a 1998 ranking, it ranked twenty-fourth in a 1999 ranking.<sup>167</sup> While some of this growth is attributable to the firm's merger with two other PricewaterhouseCoopers-related firms,<sup>168</sup> the firm reportedly has been able to hire laterally as well.<sup>169</sup> In addition, the firm apparently was the first of the Big 5-affiliated law firms to merge with an independent law firm, which occurred in July 1999.<sup>170</sup> Similar to all of the other Big 5-affiliated firms, PricewaterhouseCoopers Veltins consists primarily of lawyers.<sup>171</sup>

PricewaterhouseCoopers Veltins actively markets its connection to its affiliated Big 5 network.<sup>172</sup> Although PricewaterhouseCoopers announced in October 1999 that it had adopted the brand name "Landwell" for its law firms,<sup>173</sup> that name is not currently used by the German law

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167. Compare JUVE HANDBUCH 1999/2000, *supra* note 98, at 474, with JUVE HANDBUCH 1998/1999, *supra* note 116, at 428-29.

168. At the time PricewaterhouseCoopers Veltins was formed, it absorbed some lawyers of Nehm & Co. and C&L Rechtsberatung GmbH, which formerly had been associated with Price Waterhouse and Coopers & Lybrand, respectively. See *Price Waterhouse Coopers Sets Up Own Law Firm and Insolvency Arm in Germany*, *supra* note 161, at 3; see also Schornsteimer, *supra* note 133, at 25 (stating that PricewaterhouseCoopers Veltins, C & L and Nehm & Co. were expected to merge).

169. See, e.g., Schornsteimer, *supra* note 133, at 26 (reporting that law firm founder Professor Veltins stated "the response to a recently published job advertisement as 'excellent' with numerous 'experienced lawyers' applying").

170. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 588 (stating that the firm merged with the well-regarded law firm Mütze & Partner, which was the first merger of an independent firm with a German Big 5 firm).

171. By way of illustration, a law firm brochure I received in mid-1999 shows 52 professionals, of which 47 were lawyers, three held dual qualifications as German lawyers and foreign lawyers; one was solely a foreign lawyer, and one was a nonlawyer. See PRICEWATERHOUSECOOPERS VELTINS, RECHTSANWALTSGESELLSCHAFT GMBH: A DIFFERENT LAW FIRM FOR A CHANGING WORLD (1998) (brochure with inserts for individual lawyers, on file with author).

172. In a display ad in the 1999/2000 *JuVe Handbuch*, PricewaterhouseCoopers Veltins advertised that it was a member of the Global Legal Services Network of PricewaterhouseCoopers, which has more than 50 offices in 38 countries, with over 1,300 lawyers. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 588.

PricewaterhouseCoopers Veltins has a website, although it provides relatively little specific detail and does not, for example, list the number of lawyers. See *PricewaterhouseCoopers Veltins* (visited Mar. 10, 2000) <<http://www.pwcglobal.com/de/ger/about/main/veltins.html>>. Unlike some of the other Big 5 firms, legal services do not readily appear on the PricewaterhouseCoopers International website, but a search by country includes PricewaterhouseCoopers Veltins among the German PwC firms. See *PricewaterhouseCoopers Germany* (visited Mar. 10, 2000) <<http://www.pwcglobal.com/de/eng/main/home/index.html>>.

173. On October 11, 1999, PricewaterhouseCoopers announced that its network of lawyers would be associated into a single firm called Landwell and that it plans to be one of the world's top five global law firms within five years. See *PricewaterhouseCoopers Unifies Law Firm Branding* (visited Mar. 10, 2000) <[http://www.lawmoney.com/homepage/display\\_story/previewstory.asp?](http://www.lawmoney.com/homepage/display_story/previewstory.asp?)

firm PricewaterhouseCoopers Veltins, because of regulatory reasons, although the firm will hold itself out as being a member of Landwell and Dr. Veltins has cited the benefits of such “branding.”<sup>174</sup>

The KPMG-affiliated law firm in Germany is KPMG Treuhand & Goerdeler GmbH Steuerberatungsgesellschaft Rechtsanwalts-gesellschaft; it was established in 1999 by combining the various KPMG-affiliated regional law firms that had been formed approximately three years earlier.<sup>175</sup> This law firm has a less visible presence than do the other Big 5-affiliated law firms. For example, KPMG Treuhand & Goerdeler is not listed in the *JuVe Handbuch* law firm rankings, nor has it run a display ad in that book.<sup>176</sup> Although some KPMG-affiliated law firms elsewhere in the world recently have recruited high-profile lawyers to start a new law firm,<sup>177</sup> no such high-profile recruiting appears to have occurred in Ger-

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storyNum=3137>; see also *Landwell Adds South African Firm* (visited Mar. 10, 2000) <[http://www.lawmoney.com/homepage/Display\\_Story/Previewstory.asp?StoryNum=3482](http://www.lawmoney.com/homepage/Display_Story/Previewstory.asp?StoryNum=3482)>; *PricewaterhouseCoopers Explains Its Law Firm Branding* (visited Mar. 10, 2000) <<http://www.lawmoney.com/public/search/preview-story.asp?StoryNum=3164>>.

174. See *Positionen der Big-Five*, *supra* note 137, at 11 (quoting Dr. Veltins as being convinced about the success of worldwide branding); Letter from Professor Dr. Michael Veltins, founding partner of PricewaterhouseCoopers Veltins, to author (Mar. 29, 2000) (on file with author); see also *infra* notes 194-96 and accompanying text for a discussion of Germany’s regulation of law firm names and PricewaterhouseCoopers Veltins’ response to this regulation.

175. See *Positionen der Big-Five*, *supra* note 137, at 6 (showing establishment as a *GmbH* at the end of 1999); Raupach, *MDPs*, *supra* note 88, at 40, 42; Interview with Jürgen Hartmann, formerly practicing with the KPMG Düsseldorf Legal Services Office staffed by Tönjes, Niermann, and Hartmann, in Dusseldorf, Germany (May 19, 1999 & July 9, 1999). In a 1999 article on German MDPs, Professor Raupach cited KPMG as the only example of an MDP in which legal advice is provided within the context of a department of an auditing company (*Wirtschaftsprüfungsgesellschaft*), stating that until now, this has been the direction in which KPMG has developed. See Raupach, *MDPs*, *supra* note 88, at 40. Two pages later he stated that, presently, KPMG works together with different regional offices, but that it plans to establish a country-wide *Rechtsanwalts-gesellschaft mbH*. See *id.*

176. See generally *JUVE HANDBUCH 1999/2000*, *supra* note 98; *JUVE HANDBUCH 1998/1999*, *supra* note 116. KPMG Treuhand & Goerdeler has a low profile on the Internet. Although the law firm is mentioned briefly in some KPMG sites, it is not consistently listed nor does it appear to have its own website. Cf. *KPMG Tax & Legal* (visited Mar. 2, 2000) <[http://www.kpmg.de/forum/g\\_tax\\_legal.htm](http://www.kpmg.de/forum/g_tax_legal.htm)> (mentioning that legal services are offered by the law firm KPMG Treuhand & Goerdeler and stating: “[e]s besteht ein internationales Netzwerk von KPMG Rechtsanwalts-gesellschaften. In Deutschland wird Rechtsberatung verantwortlich durch die Gesellschaft KPMG Treuhand & Goerdeler GmbH erbracht”). On the other hand, the KPMG Europe website includes a legal services category, but does not include Germany among the countries for which it provides law firm information. See *KPMG Europe Legal Services* (visited Mar. 10, 2000) <<http://www.eu.kpmg.net/tmpl/services/6z0.htm>>. Similarly, I could not locate a separate website for the law firm after searching in <[www.yahoo.de](http://www.yahoo.de)>.

177. In late 1999, for example, KPMG recruited several lawyers from the United Kingdom PricewaterhouseCoopers-affiliated law firm Arnheim, Tite & Lewis in order to

many. Statistics for the law firm are difficult to come by, but it appears to be the second-largest of the Big 5-affiliated law firms, ranking just below Andersen Luther.<sup>178</sup> Similar to the other Big 5-affiliated firms in Germany, the vast majority of professionals working in KPMG Treuhand & Goerdeler are lawyers.<sup>179</sup> KPMG Treuhand & Goerdeler differs from the other Big 5-affiliated law firms in that it is the only one of the five that does not have the name of a lawyer in the law firm's name.<sup>180</sup>

## V. RESULTS OF INTERVIEWS WITH GERMAN MDP LAWYERS

During my stay in Germany, I attempted to learn not only how German MDPs operated in theory (i.e., according to their regulations), but how they operated in practice. Accordingly, I conducted interviews with lawyers practicing in fourteen firms.<sup>181</sup> These included large Ger-

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start KLegal in England. See *KLegal Poaches Arnheim Tite & Lewis Lawyers* (visited Mar. 10, 2000) <[http://www.lawmoney.com/home/page/Display\\_Story/PreviewStory.asp?StoryNum=3097](http://www.lawmoney.com/home/page/Display_Story/PreviewStory.asp?StoryNum=3097)> (explaining that three more lawyers had left the U.K. PricewaterhouseCoopers-affiliated firm Arnheim, Tite & Lewis to join the six lawyers that previously left that firm to found KLegal; also indicating that KLegal was ready to integrate with KPMG as soon as the rules permitted).

178. Although I did not find a law firm website and the *JuVe Handbuch* does not list any statistics for KPMG Treuhand & Goerdeler, a June 1999 KPMG Germany press release indicated that 70 lawyers worked for KPMG Treuhand & Goerdeler. See *Presseinformation vom 16. Juni 1999, KPMG mit starkem Wachstum* (visited Mar. 10, 2000) <[http://www.kpmg.de/forum/press\\_16\\_06\\_99.htm](http://www.kpmg.de/forum/press_16_06_99.htm)> (“In Deutschland wird Rechtsberatung durch die nahestehende KPMG Treuhand & Goerdeler GmbH Steuerberatungsgesellschaft und Rechtsanwalts-gesellschaft angeboten. In der KPMG Treuhand & Goerdeler GmbH sind an neun Standorten zur Zeit 70 Rechtsanwälte tätig.”). A February 2000 *JuVe* article on the position of the Big 5-affiliated firms stated that KPMG Treuhand & Goerdeler employed 115 lawyers. See *Positionen der Big-Five*, *supra* note 137, at 6.

179. The stationary this firm was using in mid-1999 identified 71 professionals working in nine offices. All were lawyers, 19 held dual qualifications as lawyers and tax advisors, two held dual qualifications as lawyers and foreign lawyers, and seven held triple qualifications, most of which were lawyers, tax advisors and auditors. See Letterhead of KPMG Treuhand & Goerdeler GmbH StBer GmbH RA GmbH (on file with author).

180. *Treuhand* is a generic name for a trust company and *Goerdeler*, which is the “G” in KPMG, was the name of the German accounting firm that merged to become part of KPMG. See KPMG International, *About KPMG* (visited Mar. 15, 2000) <<http://www.kpmg.com>> (“G” stands for Goerdeler. Dr. Reinhard Goerdeler was for many years chairman of the German firm Deutsche Treuhand-Gesellschaft.”).

181. See Interview with Mr. Alfred Herda, R.A., Dr. Thomas Stohlmeier, R.A., LL.M., & Mr. Tobias Geerling, R.A., StBer, practicing at Clifford Chance Pünder, in Düsseldorf, Germany (May 19, 1999); Interview with Mr. Hans-Dieter Schulz-Gebeltzig, R.A. & Dr. Florian Schultz, Dipl.-Kfm, WP, StBer, practicing at Oppenhoff & Rädler Linklaters & Alliance, in Frankfurt am Main, Germany (July 8, 1999); Interview with Dr. Matthias Schüppen, R.A., StBer, WP, lawyer at Haarmann, Hemmelrath & Partner, in Munich, Germany (June 24, 1999); Interview with Dr. Dirk-Reiner Martens, *supra* note 118; Interview with Dr. Nikolaus Weber, R.A., ver. BP, attorney at law, & Dr. Christian Rödl, R.A., LL.M., Rödl & Partner, Nürnberg, Germany, in London, England (June 29-30, 1999); Telephone Interview with Dr. Stefan Kraus, managing partner at Andersen

man law firms,<sup>182</sup> lawyers practicing in the Big 5-affiliated law firms,<sup>183</sup> and lawyers practicing in small and medium-size MDPs.<sup>184</sup> I asked these MDP lawyers various questions about how their firms were organized and administered, as well as questions about their familiarity and compliance with the *BRAO* and *Berufsordnung*.<sup>185</sup> While my sample was small

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Freihalter (now Andersen Luther), in Frankfurt am Main, Germany (Aug. 5, 1999); Interview with Professor Dr. Michael A. Veltins, *supra* note 132; Interview with Dr. Dirk Pohl, lawyer at Raupach & Wollert-Elmendorff (Deloitte & Touche-affiliated firm), in Munich, Germany (June 25, 1999); Interview with Dr. Arno Frings, Dr. Joachim Drude, Mr. Konstantin Günther, practicing at Menold Herrlinger Rechtsanwälte (Ernst & Young-affiliated firm), in Düsseldorf, Germany (June 21, 1999); Telephone Interview with Christoph D. Backes, R.A., LL.M., lawyer in Backes, Kröger, Steffen, Voß and Werner GbR, Flensburg, Germany (July 14 & July 23, 1999); Telephone Interview with Mr. Axel Riecke, lawyer at Esche Schumann Commichau, Hamburg, Germany (Aug. 9, 1999); Interview with Dr. Richard Seidemann, lawyer at Kessler & Partner, in Bremen, Germany (July 30, 1999); Telephone Interview with Mr. Wayne Carroll, Attorney at Law & Dr. Friedrich Kösters, R.A., lawyers with Rotthege, Wassermann & Partner, Düsseldorf, Germany (July 19, 1999); Interview with Dr. Jürgen Hartmann, formerly practicing with the KPMG Düsseldorf Legal Services Office staffed by Tönjes, Niermann, and Hartmann, in Düsseldorf, Germany (May 19 & July 9, 1999) (although Dr. Erhard Tönjes and Michael Niermann joined KPMG Treuhand & Goerdeler GmbH, the lawyer I interviewed, Dr. Hartmann, did not join the new KPMG national law firm KPMG Treuhand & Goerdeler, Rechtsanwalts GmbH) [hereinafter Terry Interviews].

182. See Terry Interviews, *supra* note 181. These included lawyers from the following five large German law firms that are also MDPs: Oppenhoff & Rädler (#1); Pünder, Volhard Weber & Axster (#4); BBLP Beiten Burkhardt Mittl & Wegener (#7); Haarmann, Hemmelrath & Partner (#10); and Rödl & Partner (#19). The numbers in parenthesis refer to the firm's ranking by size in the *JuVe 1999/2000 Handbuch* and are included to provide context. See *supra* note 116 and accompanying text.

183. See Terry Interviews, *supra* note 181. These included lawyers from the Big 5-affiliated firms: Andersen Freihalter (now Andersen Luther); PricewaterhouseCoopers Veltins; Raupach & Wollert-Elmendorff, which is the Deloitte & Touche-affiliated firm; Menold Herrlinger, which is the Ernst & Young-affiliated firm; and KPMG. My interview at KPMG, however, was with a lawyer who is not a partner in the new German-wide firm of KPMG Treuhand and Goerdeler, StBerGmbH, RA GmbH, although he was previously designated as providing legal services for KPMG and participated in the efforts to establish a separate KPMG affiliated law firm. See Interview with Dr. Jürgen Hartmann, *supra* note 181. Therefore, my information about KPMG may be less accurate than my information about the other Big 5-affiliated firms.

184. See Terry Interviews, *supra* note 181. These included lawyers from the following three small firms: Backes, Kröger, Steffen, Voß and Werner GbR, located in Flensburg; Kessler & Partner, located in Bremen; and Rotthege, Wassermann & Partner, located in Düsseldorf. It also included an interview with a lawyer from Esche Schumann Commichau, located in Hamburg, which I consider a medium-size firm. Esche Schumann Commichau was listed as the 28th largest German law firm in the *1998/1999 JuVe Handbuch*, with 31 lawyers and 25 nonlawyers. See *JUVE HANDBUCH 1998/1999, supra* note 116, at 429. (For some unknown reason, the firm was not included in the size ranking in the *1999/2000 JuVe Handbuch*. See *JUVE HANDBUCH 1999/2000, supra* note 98, at 473-75.)

185. My interview methodology was as follows: Prior to beginning my interviews, I prepared a standardized, 11-page document that listed the questions in which I was interested. I entered my interview notes directly onto these forms, with two exceptions. Dur-



and my results necessarily anecdotal, these interviews nevertheless provide a useful start for an analysis of the German MDP experience and provide some insight into how the United States should respond to the MDP phenomenon.<sup>186</sup> In addition to these interviews, I conducted several interviews with one of the leading legal ethics experts in Germany, who has written recently on MDPs, and is director of one of the leading institutes for the law of lawyering.<sup>187</sup> I also gave thirteen talks about MDPs to German audiences; the question and answer sessions following these talks influenced my thinking about German MDPs.<sup>188</sup> While some of the audiences for these lectures were lay people or law students unfamiliar with the issues, audience members also included sophisticated

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ing my first interview, I placed the answers on a separate piece of paper, rather than directly on my questionnaire. Also, for one set of interviews, I entered my notes onto the written materials these lawyers had prepared for conference talks they gave on MDPs.

The organization of my questionnaire followed, for the most part, the organization contained in the Issue Checklist I submitted to the ABA Commission on Multidisciplinary Practice, as modified by the German situation. In none of the interviews did I ask every question on the questionnaire. Because the length of the interviews varied tremendously, I obtained more information from some MDP firms than from others. Also, I did not tape-record my interviews. (My reasoning, perhaps flawed, was that I wanted cooperation, sensed some reluctance, and did not want to chill the discussion by having a tape recorder present. Since I was seeking an overall impression of how German MDPs functioned, I viewed it less critical to tape-record the interviews than in other situations, especially since I promised to send a pre-publication copy of my article to those I interviewed so that they could advise me if they thought I had made mistakes.)

186. There are now significant numbers of U.S. lawyers working in nontraditional settings (i.e., sharing fees or partnerships with nonlawyers) and doing work that if done in a traditional law firm setting would be considered legal work. See Terry, *supra* note 8, at 878-82.

187. See Interviews with Professor Dr. Martin Henssler, *supra* note 72. Professor Dr. Martin Henssler is co-author of one of the leading treatises on the *BRAO* and is a leading German expert on MDPs. See *BRAO*, *supra* note 27; Henssler, MDPs, *supra* note 61.

188. Before I arrived in Germany, the Fulbright Commission put me in touch with the German-American Lawyers Association (DAJV). As a result of this DAJV contact, I gave nine lectures for the DAJV, including lectures in Hamburg, Hannover, Düsseldorf, Frankfurt, Stuttgart, Augsburg, Berlin, Cologne and Freiburg. These lectures were held at places as diverse as universities, law firm offices, cultural centers and the Amerika Haus. The lectures led to additional contacts, including a lecture at Ludwig Maximilian University Institut für Anwaltsrecht in Munich, the University of Cologne's Institut für Anwaltsrecht and for the European Law Students Association (ELSA) in Hannover. I also gave lectures at my host institution—the University of Bremen [hereinafter Terry Lectures]. Outside of Germany, I gave a lecture at the University of Groningen in the Netherlands and at a conference in London entitled *The Threats and Opportunities of Multi-Disciplinary Practices* (June 30, 1999) (the panelists included the head of the Arthur Andersen-affiliated firm in Scotland (Dundas & Wilson), a lawyer from a German MDP—Rödl & Partner, the head of PricewaterhouseCoopers' international legal development department, the head of the London Law Society MDP Working Party, and the head of ethics for the Law Society of England and Wales).

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German lawyers.<sup>189</sup> All of these contacts form the basis for the material that follows.<sup>190</sup>

#### A. FORM OF ASSOCIATION ISSUES

Given the German regulation of MDPs, the form of association issues I inquired about included: identifying the ABA model and German legal form under which the firm was organized, identifying the firm name, confirming statistics about the firm and composition of professionals, and finding out whether the firm had ever been asked by the *Rechtsanaltskammer* to share its agreement. (The regulations themselves establish the individuals with whom the lawyer may practice and prohibit passive investment.)

With the exception of one law firm, all of the non Big 5-affiliated firms with which I spoke were organized as Model 5, fully integrated MDPs.<sup>191</sup> These non Big 5-affiliated MDPs, both large and small, were organized in the legal form of *GbR* or the *Partnerschaftsgesellschaft*, not as limited liability or *Rechtsanwalt GmbH* firms.<sup>192</sup> In contrast, four of the Big 5-affiliated firms were organized as a *Rechtsanwalts GmbH*; the exception is the Ernst & Young-affiliated firm Menold Herrlinger, organized as a *GbR*.<sup>193</sup>

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189. The degree of sophistication often varied with the venue of the talk. In Stuttgart, for example, I spoke to a small audience of mostly nonlawyers at the Deutsch-Amerikanisches Zentrum. In Frankfurt, however, I spoke at the offices of Heuking Kühn Lüer Heussen Wojtek, which is one of Germany's largest firms and is affiliated with the British firm Denton Hall and a member of the Denton International Group of law firms. Not surprisingly, the latter audience was mostly lawyers and much more sophisticated about MDP issues.

190. In Part V of this Article, I have not included a footnote after every sentence. The support for this section is found in Terry Interviews, *supra* note 181, and the reactions to Terry Lectures, *supra* note 188. Where I am comfortable attributing a particular statement to one specific lawyer, I have noted the subject and interview date.

191. "Model 5" refers to the model numbers used by the Commission, which were set forth in a document called Hypotheticals & Models. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, HYPOTHETICALS AND MODELS (1999), available at <<http://www.abanet.org/cpr/multicomhypos.html>> [hereinafter HYPOTHETICALS AND MODELS]; see also Daly, *supra* note 1, (manuscript at Part I.C) (explaining the models). Model 5 MDPs are fully integrated MDPs, where lawyers and nonlawyers may share fees and be partners. See Daly, *supra* note 1, (manuscript at 15). At the time of my interviews, the law firm BBLP (Beiten Burkhardt Mittl & Wegener), was not fully integrated with its related *Wirtschaftsprüfer GmbH* or *Steuerberater GmbH*, but they were considering such a move. See Interview with Dr. Dirk-Reiner Martens, *supra* note 118.

192. See *supra* note 84 (describing major forms in which a law firm may organize). Pünder Volhard Weber & Axster's merger with Clifford Chance and Rogers and Wells, see *supra* note 123, created a New York L.L.P., which operates in Germany through a German *Gbr*.

193. See *Positionen der Big-Five*, *supra* note 137, at 13. Given the complexity of *Berufsordnung* section 31, the *Sternsozietät* provision, its questionable constitutionality,

One of Germany's regulations governs the names by which an MDP may be known and requires the MDP to use the name of current or former MDP members, as opposed to a trade name. In 1998, the Arthur Andersen-affiliated law firm hired a lawyer named Andersen and promptly changed its name to Andersen Freihalter.<sup>194</sup> Dr. Michael Veltins advised me that because his firm's name of PricewaterhouseCoopers Veltins was properly registered with the commercial register [*HandelsRegister*] before the new *RechtsanwaltsGmbH* law took effect, PricewaterhouseCoopers Veltins was and is entitled to continue using that name even after adoption of the new *RechtsanwaltsGmbH* law.<sup>195</sup> He also said that if the bar objected to the use of the firm name, which it has not, he was prepared to take the issue to the constitutional court.<sup>196</sup>

With respect to statistics, I found the data for small and medium firms significantly different than the statistics for the large firms. Whereas all the large firms other than Rödl & Partner were dominated by lawyers,<sup>197</sup> that was not true of the small and medium firms. Of the four firms I randomly selected for interviews, two had lawyer majorities and two did not.<sup>198</sup> Finally, with respect to the second type of possible dis-

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and the general lack of familiarity with this provision on the part of the lawyers I interviewed, I have chosen not to go into detail about the firms' compliance with this provision.

194. See Gerber, *supra* note 73, at 17.

195. See Interview with Professor Dr. Michael A. Veltins, *supra* note 132; Letter from Professor Dr. Michael Veltins, founding partner of PricewaterhouseCoopers Veltins, to author (Mar. 29, 2000) (on file with author); see also *BRAO*, *supra* note 27, § 59k (requiring a *RechtsanwaltsGmbH* to have in its name, the name of a lawyer and only such other names as are permitted by law). *BRAO* section 59k, which became effective in 1999, is thus consistent with the 1997 and 1999 versions of *Berufsordnung* section 9, which identify the names that may be used in a firm name and do not include trade names. See *BERUFSORDNUNG*, *supra* note 44, § 9.

196. See Interview with Professor Dr. Michael A. Veltins, *supra* note 132; Letter from Professor Dr. Michael Veltins, *supra* note 195.

197. See *supra* chart accompanying notes 116-17 (containing firm statistics).

198. I did not intentionally select these four firms in order to obtain balance on the issue of lawyer control. At the time of our interview, Backes, Kröger, Steffen, Voß and Werner GbR employed eight professionals in four offices. Of the five partners, two were lawyers and three were nonlawyers. Two of the three employees were nonlawyers. See Telephone Interview with Christoph D. Backes, R.A., LL.M., lawyer at Backes, Kröger, Steffen, Voß and Werner GbR, Flensburg, Germany (July 23, 1999).

At the time of our interview, Kessler & Partner employed 12 professionals, of whom eight were lawyers (six of whom were partners) and four were tax advisors (three of whom were partners). See Interview with Dr. Richard Seidemann, *supra* note 181.

At the time of our interview, Rotthege, Wassermann & Partner employed 15 professionals, which included nine lawyers, four tax advisors (two of whom were also auditors) and two foreign lawyers. See Telephone Interview with Mr. Wayne Carroll & Dr. Friedrich Kösters, *supra* note 181.

At the time of our interview, Esche Schumann Commichau estimated that about 40% of their employees were lawyers. Although the majority of the professional employees were nonlawyers, the majority of the firm's partners were lawyers. See Telephone Inter-

closure,<sup>199</sup> few MDPs had been asked to show their agreements to their *Rechtsanwaltskammer*. No one reported having refused such a request.

#### B. SCOPE OF PRACTICE LIMITATIONS

Although some commentators have suggested that MDP lawyers should not be permitted to litigate, there is no such limitation in Germany in either the regulations or in practice.<sup>200</sup> Indeed, several German MDPs specifically mention litigation services in their firm brochures.<sup>201</sup> The closest anyone came to endorsing such a limitation was Christoph Backes, who gave a lecture on German MDPs to the Chicago Bar Association.<sup>202</sup> He advised me that he was quite surprised by the hostility of his audience to the concept of MDPs. One point he took away from the discussions was that MDPs might not work in the United States because of our pretrial discovery system, which is quite different than the system in Germany.<sup>203</sup>

Nor do German regulations contain the second “scope of practice” ban, which would prohibit MDP lawyers from providing legal services to

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view with Mr. Axel Riecke, *supra* note 181; Letter from Mr. Axel Riecke to author (Apr. 11, 2000) (on file with author); *cf.* JUVE HANDBUCH 1998/1999, *supra* note 116 (listing Esche Schumann Commichau as having 31 lawyers and 25 additional nonlawyers). A 1997 firm history listed 24 partners, of whom 16 were lawyers (three with double or triple qualifications) and eight nonlawyers. *See* FIRM HISTORY, ESCHE SCHÜMANN, *supra* note 57, at 151-52.

199. *See infra* note 277.

200. Compare BRAO, *supra* note 27, and BERUFSORDNUNG, *supra* note 44, and Terry Interviews, *supra* note 181, with Hearings Before the Commission on Multidisciplinary Practice (Feb. 5, 1999) (testimony of John Dzienkowski, Professor, University of Texas School of Law), available at <<http://www.abanet.org/cpr/dzienkowski.html>> (suggesting that integrated MDPs should not be able to litigate, but Model 4 contract or affiliated MDPs should be permitted to do so), and Hearings Before the Commission on Multidisciplinary Practice (Apr. 8, 1999) (statement of John Dzienkowski, Professor, University of Texas School of Law), available at <<http://www.abanet.org/cpr/dzienkowski.html>> (including written remarks, which were filed subsequently; they again referred to the litigation ban, but did not elaborate on the comments presented orally), and Peter C. Kostant, Remarks at the University of Minnesota, Future of the Profession: A Symposium on Multidisciplinary Practice (Feb. 26, 2000) (videotape on file with the *Minnesota Law Review*) (suggesting that MDPs should be able to provide simultaneous legal and audit services to the same client, but he also argued that MDPs should be prohibited from providing litigation services).

201. *See, e.g.*, JUVE HANDBUCH 1999/2000, *supra* note 98, at 441, 511, 514 (listing litigation in the ads of Andersen Freihalter, Oppenhoff & Rädler, and Pricewaterhouse-Coopers Veltins). This list is not exhaustive and other firms I interviewed included litigation in their ads in the *JuVe Handbuch*, in their firm brochures, or on their websites.

202. *See generally* Christoph D. Backes, A German Corporate Lawyer’s Experience in a Combined Law and Accounting Partnership, Conference Materials for Remarks Before the Chicago Bar Association (May 20, 1999) (on file with author).

203. *See* Telephone Interview with Christoph D. Backes, R.A., LL.M., lawyer in Backes, Kröger, Steffen, Voß and Werner GbR, Flensburg, Germany (July 14, 1999).

a client that is simultaneously receiving audit services from the same firm.<sup>204</sup> Despite this lack of a legal-audit regulatory ban, German lawyers Thomas Verhoeven and Hans-Jürgen Hellwig endorsed such a ban in their testimony to the ABA Commission.<sup>205</sup> Indeed, Thomas Verhoeven stated that his firm used this type of ban on a voluntarily basis.<sup>206</sup>

In contrast to Mr. Verhoeven's testimony, the German law firms I interviewed had not adopted a similar ban. Indeed, my discussions with other lawyers practicing at Thomas Verhoeven's firm of Oppenhoff & Rädler made me question the uniformity of such a ban within Oppenhoff & Rädler.<sup>207</sup> Moreover, during my encounters with lawyers throughout Germany, I always raised the issue of whether a legal-audit ban was used routinely throughout Germany and whether it was appropriate. The vast majority of lawyers who responded to my inquiries expressed no support for such a legal-audit ban. One point I never clearly resolved to my satisfaction is *why* there is less concern in Germany about simultaneous legal and audit services. One explanation might be that German law requires less disclosure of auditors than does U.S. law.<sup>208</sup> An alternative explanation is that commentators from the United States generally focus on the dissimilarities between lawyers and auditors, whereas Germans focus on the similarities between the two professions.<sup>209</sup>

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204. See generally *BRAO*, *supra* note 27; *BERUFSORDNUNG*, *supra* note 44.

205. See Hearings Before the Commission on Multidisciplinary Practice (Nov. 13, 1998) (testimony Thomas O. Verhoeven, lawyer at Oppenhoff & Radler), available at <<http://www.abanet.org/cpr/verhoeven1198.html>> [hereinafter Verhoeven Testimony]; Hellwig Remarks, *supra* note 115 (noting that although German auditors do not have the disclosure obligations of U.S. auditors, there is concern about the independence of auditors if legal services are provided, which was the basis for the German Bar Association's comments to the EC Commission in connection with the Pricewaterhouse and Coopers & Lybrand merger).

206. See Verhoeven Testimony, *supra* note 205.

207. See Interview with Mr. Hans-Dieter Schulz-Gebeltzig & Dr. Florian Schultz, *supra* note 181. The Oppenhoff firm will not prepare the financial statements for a client and then audit that client as well. Nor will the firm act as a legal or tax advisor and also a notary in the same transaction. See Letter from Dr. Florian Schultz, Dipl.-Kfm, WP, StBer at Oppenhoff & Rädler Linklaters & Alliance to author (Mar. 27, 2000) (on file with author).

208. See, e.g., Hellwig Remarks, *supra* note 115. He stated:

Lawyers, accountants and tax advisors in Germany are subject to basically the same obligation of confidentiality and enjoy the same right to refuse testimony. Unlike the situation in other countries, auditors in Germany are not under the obligation to disclose to the authorities certain matters that they find during an audit. Therefore we do not have a conflict between [the] confidentiality obligation of one profession and [the] disclosure obligation of the other profession.

*Id.*

209. For example, when I asked a leading German legal ethics expert about the conflict between a lawyer's confidentiality obligations on the one hand, and an auditor's disclosure obligations on the other hand, he emphasized that in Germany both lawyers and auditors were subject to confidentiality obligations. When pressed, however, he conceded

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## C. FUNCTIONAL ETHICS WITHIN THE MDP

As explained earlier, *Berufsordnung* section 30 permits a German lawyer to join an MDP only if the nonlawyers agree to abide by the lawyers' rules.<sup>210</sup> The German MDP lawyers I interviewed appeared to be personally satisfied with this provision, and none of them acknowledged any resistance to it from the nonlawyers in their firms. These lawyers' acceptance of such a functional ethics rule may be due to the fact that they view themselves as sharing common values and similar regulations with accountants. The reaction I heard on many occasions was a variation of the statement "MDPs are not a problem because we lawyers and accountants have similar training and the same obligations."<sup>211</sup> Although I question whether this perception is completely accurate, it may explain why this broad provision has not caused consternation in Germany.<sup>212</sup> Moreover, because the German rules severely limit the types of professionals with which a lawyer may form an MDP, there are only a few professions whose rules must be integrated.

On the other hand, although I found acceptance by lawyers of the principle that nonlawyers must abide by the lawyers' rules, I found little evidence that compliance efforts had been institutionalized. The overwhelming majority of lawyers I interviewed seemed unfamiliar with *Berufsordnung* section 30 and were unaware of whether or how such an obligation might have been memorialized in writing or otherwise implemented. It certainly is possible that I may not have been talking to the correct people; there might have been individuals in the firms I talked to who could have answered my questions about implementation of section 30. Nonetheless, the fact remains that most MDP lawyers with whom I spoke seemed unfamiliar with section 30 and unsure how it was formally

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that auditors might have some disclosure obligations during certain mandatory year-end audits. See Interview with Professor Dr. Martin Henssler, *supra* note 37. Despite this concession, he strongly affirmed that MDPs should be permitted and again referred to the similar obligations and values of lawyers, tax advisors and auditors. See *id.*

210. See BERUFSORDNUNG, *supra* note 44, § 30; see also *supra* text accompanying note 80.

211. Although I was not particularly surprised to hear this reaction from lawyers practicing in an MDP, I was surprised that Professor Henssler, a leading ethics expert, also seemed similarly unconcerned about this issue. He expressed the same sentiment to me as did many of the lawyers, i.e., there is no conflict because the training, values and obligations of lawyers and accountants are so similar. See Terry Interviews, *supra* note 181. One factor stressed by several different individuals was that it was extremely difficult and time consuming to become a *Wirtschaftsprüfer* and that numerically there were far fewer *Wirtschaftsprüfer* than *Rechtsanwälte*.

212. See *supra* notes 204-09 and accompanying text for a discussion of whether the obligations of U.S. and German auditors differ from one another, or whether U.S. commentators tend to emphasize the exceptional situations in which one must disclose, whereas German lawyers tend to emphasize the normal situation of confidentiality.

implemented, if at all. On the other hand, these German MDP lawyers did not seem particularly concerned when I pointed out section 30 because they perceived little or no difference in the applicable rules or culture of lawyers and accountants, and because they assumed that the nonlawyers were following the legal ethics rules anyway. Indeed, no one acknowledged ever having seen a conflict arise between the lawyer's rules and any of the various rules applicable to the MDP's nonlawyers.

I also asked whether the different professionals within an MDP should be regulated by a single regulator or *Kammer*. I received mixed responses to this question, with some favoring the current situation in which each profession is regulated by its own *Kammer*, and others favoring a joint *Kammer*, as Professor Henssler has recommended.<sup>213</sup>

#### D. SUBSTANTIVE ETHICS WITHIN THE MDP

My interviews revealed both similarities and differences in the approach to key substantive ethics issues. I found a consistent approach among the fully integrated, "traditional" law firms with respect to the issues of confidentiality, loyalty and independence. I also found a similar approach to these issues among Big 5-affiliated law firms that are organized as Model 4 MDPs.<sup>214</sup> I found some differences, however, with respect to the manner in which these Model 4 and Model 5 MDPs approached these issues.

In the fully integrated MDPs, the lawyers indicated that confidential information may be, and indeed is, shared among all professionals in the MDP. Thus, a lawyer representing a client will feel free to consult a tax advisor or auditor in the firm, if necessary, without first obtaining the client's consent. Not surprisingly, given this assumption, these fully integrated MDPs indicated that imputation of conflicts of interest is made on an MDP-wide basis, rather than just among the lawyers in the MDP. These Model 5 MDP lawyers also told me that they had no special meas-

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213. For example, when I asked this question during my interview at Oppenhoff & Rädler, I received two different answers from the two individuals with whom I was speaking. See Interview with Hans-Dieter Schulz-Gebeltzig & Dr. Florian Schultz, *supra* note 181. Hans-Dieter Schulz-Gebeltzig favored one *Kammer* if it were similar to the existing lawyers' *Kammer*, and Dr. Florian Schultz opposed one *Kammer* because of the differences in the professions. See *id.* For an explanation of Professor Henssler's suggestion, see Henssler, MDPs, *supra* note 61, at 25 (suggesting the possibility of a single *Kammer* that would have power to harmonize differences in the rules of the different professions that may participate in a German MDP: "Zum anderen bedarf es einer Beaufsichtigung aller sozietätsfähigen Berufe durch eine Berufskammer."); see also Hellwig Remarks, *supra* note 115 (recommending harmonization of the ethics rules of the different professions in an MDP; this presumably requires a single regulator).

214. See *supra* note 191 for a discussion of the ABA's Models. As explained earlier, Model 4 MDPs are a contract or affiliation model. In this model, lawyers and nonlawyers do not share fees nor may they be in partnership. Model 5 MDPs are fully integrated.

ures in place to guarantee their independence of judgment, but they did not view this as a problem.<sup>215</sup>

I found the answers somewhat less consistent and less clear with respect to Model 4 MDPs. I was told that there was no sharing of confidential information among the Model 4, Big 5-affiliated law firms and the other components of the Big 5. Many of these law firms were in either a separate building or a separate section of the building with its own entrance; all of the interviewees described measures to ensure that legal information remains confidential from the Big 5 firm. No one, for example, admitted to a shared database of clients with the parent firm, a question I specifically asked.

I also was told that the mandatory analysis of legal conflicts, as opposed to business conflicts, for these Model 4, Big 5-affiliated firms is done on a law-firm-wide basis, rather than a Big 5 basis.<sup>216</sup> With respect to PricewaterhouseCoopers Veltins, for example, conflicts were imputed only within that law firm and not within the other PricewaterhouseCoopers-affiliated law firms in Germany.<sup>217</sup> I was told that because the law firms were separate entities, no pressure was placed on their independence of judgment.<sup>218</sup>

On the other hand, the Model 4, Big 5-affiliated German firms seem to differ from one another in some significant respects. The Ernst & Young-affiliated firm, for example, has gone out of its way to publicize that none of its partners are partners in any other organization.<sup>219</sup> In contrast, other Big 5-affiliated law firms have some overlapping partnerships; in other words, partners in the law firm are also partners in the Big 5 firm.<sup>220</sup> I was told by at least one firm that these dual partners would

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215. The lawyers often did not even understand my concern, requiring a lengthy elaboration to find out what was of such concern in the United States.

216. See Terry Interviews, *supra* note 181. Germany's conflict of interest provision has no consent exception. See *infra* note 247 and accompanying text. Therefore, if a situation presents a "legal conflict," a lawyer is precluded from beginning or continuing the representation. See BERUFSORDNUNG, *supra* note 44, § 30, at 80; accord Terry Interviews, *supra* note 181. In addition, violation of Germany's conflict provision subjects a lawyer to criminal penalties. See *infra* note 248. Consequently, German lawyers will refer to a "business conflict," as distinct from a "legal conflict," in situations that a U.S. lawyer might refer to simply as a conflict of interest that triggers the disclosure obligations in ABA Model Rule of Professional Conduct 1.7. See *infra* notes 247-50 and accompanying text for an expanded discussion of Germany's conflict of interest rules and MDPs' use of these rules.

217. See Interview with Professor Dr. Michael A. Veltins, *supra* note 132.

218. See Terry Interviews, *supra* note 181; see also *Positionen der Big-Five*, *supra* note 137, at 8, 12 (quoting various Big 5-affiliated firms' statements about their independence from the "sister" firms).

219. See, e.g., *Positionen der Big-Five*, *supra* note 137, at 8 ("Es gibt keinerlei gesellschaftsrechtliche und personelle Verflechtung zu Ernst & Young.").

220. See *id.* at 12 ("Die Steuerpartner der WEDIT [Ernst & Young] sind gleichzeitig



sometimes be in a position to check the Big 5 client database to learn whether accepting a certain new client would create a “business conflict” for the law firm, if not a legal conflict. Other firms seem to have some mechanism—not clearly defined to me—for determining when representation might constitute a business conflict with the affiliated firm.<sup>221</sup> In short, I believe that Germany’s Model 4 MDPs do not routinely impute conflicts of interest among the entire Big 5 entity nor do they routinely share law firm information with the Big 5 entity. Nevertheless, based on my research, I am not confident in saying that information is never shared and conflicts are never imputed, even in Model 4 German MDPs.

With respect to other substantive ethics issues, some lawyers from both the fully integrated MDPs and the Model 4, Big 5-affiliated MDPs indicated that they felt free to offer a “lump sum” price to clients in which legal fees might not be segregated from nonlegal fees. None of the lawyers expressed any concern about difficulty in obtaining adequate malpractice coverage for all professionals, although I read conference materials suggesting that MDPs may have difficulty obtaining adequate policies with all necessary coverages.<sup>222</sup> One lawyer advised me, however, that after carefully researching this issue, his firm found one policy that covered all three types of professions, although premiums were set according to the professions involved and the differing evaluations of risks.<sup>223</sup> I heard several lawyers cite, as a benefit of MDPs (to both clients and lawyers), the ability to “cross-sell” the MDP’s services.<sup>224</sup>

#### E. THRESHOLD ISSUES<sup>225</sup>

Because Germany already permits MDPs, my interviews did not, for the most part, begin with the issues that I have labeled “threshold issues.” Nevertheless, during some of my interviews, I attempted to elicit information about three threshold issues: 1) the lawyers’ views about whether

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Gesellschafter der Rechtsanwalts-GmbH. . . . Jeder Partner der Rechtsanwalts-gesellschaft ist gleichzeitig Partner der KPMG.”)

221. See *supra* note 216 (explaining the difference between business conflicts and legal conflicts).

222. See, e.g., Erich Hartmann, Risikogerechte Versicherungslösungen bei der interprofessionellen Sozietät, Conference Materials in “Rechtsanwälte, Steuerberater und Wirtschaftsprüfer Kooperieren” Symposium 26 (Nov. 12, 1998) (on file with author).

223. See Telephone Interview with Wayne Carroll & Dr. Friedrich Kösters, *supra* note 181.

224. See Dr. Nikolaus Weber, Remarks and Conference Materials at the Conference on the Threats and Opportunities of Multi-Disciplinary Practices (June 20, 1999) (on file with author).

225. Normally, one would expect a “Threshold Issues” discussion to come first. However, because Germany already has decided to permit MDPs—which is normally the question to be answered in the “Threshold Issues” analysis—and because this section provides a segue to the subsequent Part, I have included this subsection last rather than first.

a single set of rules was sufficient for large and small MDPs or whether they should have separate rules; 2) the extent of client interest in, and demand for, MDPs; and 3) any problems that have arisen in an MDP context.

On the first point, I found no ringing endorsement of separate rules (the most I heard was one lukewarm consideration that it was perhaps an idea worth considering). With respect to client demand, all the MDP lawyers I spoke with about this issue indicated—not surprisingly—that their clients valued multidisciplinary services and that there was a strong demand for them. Christoph Backes, for example, explained that when he told one of his clients that he was going to Chicago to give a talk on MDPs, his client asked him to be sure to tell the U.S. audience how much this client and other clients appreciated MDPs.<sup>226</sup> In short, although commentators assert that the German Big 5-affiliated firms are not getting the “Big Ticket” or “high end” legal work, there is no question that many clients embrace the MDP model.<sup>227</sup>

I also heard very little information about problems caused by MDPs, although I attempted to ask this question directly and indirectly, and in a non-threatening manner. Two concerns that were expressed were: 1) whether the *Anwaltsnotar* should indeed be permitted to join an MDP because of the independent role of the *Notar*, and 2) the possibility of a conflict arising in an MDP that performed both legal services and mandatory audits where there is a disclosure duty.<sup>228</sup> For the most part, however, there was little concern expressed about problems within an MDP created by having multiple professionals working together. My general impression is that many of the lawyers I interviewed and the lawyers in my lecture audiences did not recognize the U.S. concerns; I often spent significant time explaining them. Even after my explanations, the overwhelming majority of lawyers did not share concerns about the pressures MDPs might place on the duties of independence, loyalty and confidentiality. When I pressed these lawyers, the typical answer was that these issues were not a problem because German lawyers, tax advisors and auditors share similar values, training and rules.<sup>229</sup>

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226. See Telephone Interview with Christoph D. Backes, *supra* note 198.

227. See, e.g., *Postitionen der Big-Five*, *supra* note 137, at 8.

228. See, e.g., Interview with Dr. Richard Seidemann, *supra* note 181; Interview with Mr. Alfred Herda, Dr. Thomas Stohlmeier, & Mr. Tobias Geerling, *supra* note 181 (indicating that there might be some problems in an MDP if certain tasks were mixed, such as a mandatory audits and notaries); see also Verhoeven Testimony, *supra* note 205 (stating that he believes there should be a prophylactic rule against doing legal work in connection with an audit engagement and “the government should step in to assure that a firm that gives a certificate that protects the public should be prohibited from doing anything else for that client”).

229. See generally Terry Interviews, *supra* note 181.

My conclusions thus stand in stark contrast to the comments of one of the two German lawyers who testified before the Commission. The two were Mr. Thomas Verhoeven, who practices in the New York office of Oppenhoff & Rädler Linklaters & Alliance<sup>230</sup> and Dr. Hans-Jürgen Hellwig, whose positions include Vice-President of the German voluntary bar association and partner in the German law firm Hengeler Mueller Weitzel Wirtz.<sup>231</sup> Thomas Verhoeven expressed general satisfaction with the German system, other than the ability of an MDP to provide both legal and audit services, which he thought should be prohibited.<sup>232</sup> Dr. Hellwig agreed that there had not been any problems in Germany with small MDPs.<sup>233</sup> In his view, however, MDP “problems have come out in reality and in the eyes of the beholder only with the ever growing trend of accountants, in particular the Big Five, to expand into other activities, including in particular legal advice.”<sup>234</sup> He explained the reason why there were no problems with small MDPs, whereas there were problems with the Big 5 MDPs:

The reasons for this difference in my view are various. Many of the small MDP firms are run by consensus among the partners who in quite a few cases belong to the same family. Thus, the issue of who dominates whom . . . does not come up. Most notably, the aspect of influence from the outside which is typical in the case of the large MDP firms which in fact are members of the Big Five international networks, is missing in the case of the small MDP firms.

To demonstrate the size of the problem factually: The number of lawyers employed by or associated with the accounting firm and doing legal work for clients make the Big Five rank among the biggest law firms in Germany.<sup>235</sup>

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230. See Verhoeven Testimony, *supra* note 205.

231. See Hellwig Remarks, *supra* note 115; Hearings Before the Commission on Multidisciplinary Practice (Feb. 4, 1999) (testimony of Dr. Hans-Jürgen Hellwig of Germany, Vice-President of the German Bar Association), available at <<http://www.abanet.org/cpr/hellwig2.html>>; *id.* (Aug. 8, 1999) (testimony of Dr. Hans-Jürgen Hellwig of Germany, Vice-President of the German Bar Association), available at <<http://www.abanet.org/cpr/hellwig3.html>> [hereinafter Hellwig Testimony]. The editors of the *JuVe Handbuch* have rated Dr. Hellwig's law firm as one of the best two law firms in Germany. See JUVE HANDBUCH 1999/2000, *supra* note 98, at 11, 13.

232. See Verhoeven Testimony, *supra* note 205; see also Hearings Before the Commission on Multidisciplinary Practice (Mar. 12, 1999) (Appendix B1 to testimony of Professor Laurel S. Terry, Penn State Dickinson School of Law), available at <<http://www.abanet.org/cpr/terryb1.html>> (summarizing testimony of Thomas Verhoeven before the ABA Commission).

233. See Hellwig Remarks, *supra* note 115. Dr. Hellwig stated:

In fact there are many small MDP firms in Germany which have as partners lawyers, accountants and/or tax advisors. By experience these small MDPs do not seem to have shown any of the problems which today are being discussed in our context, such as protection of independence, confidentiality and avoidance of conflicts.

*Id.*

234. *Id.*

235. *Id.* As Dr. Hellwig's comments make clear, he was addressing both the situation

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Although Dr. Hellwig complained generally about the lack of transparency in the Big 5-affiliated firms,<sup>236</sup> he also set forth specific problems that have arisen in the Big 5 MDP context:

I am now turning to the internal relationship between the accounting firm and the associated law firm.

In some cases both firms share offices, telephone lines and staff. I know of one case where the law firm had no staff of its own at all. The accounting firm, whenever necessary, would use the stationary of the law firm.

Quite often, enquiry letters from clients addressed to the accounting firm are replied to by the law firm when, given the nature of the question, the involvement of the law firm seems appropriate. The client is usually not asked for his consent before his letter of enquiry is passed on to the law firm.

In beauty contests for new assignments the accounting firm often includes legal services in the package, offering either a package price or a discount on one of the two parts of the package.

I know of cases where the accounting firm has suggested that the client should retain the legal department or the associated law firm for a legal opinion on a specific question, in order to ease the unqualified opinion on the financials. Vice-versa, I know of client companies who for that particular purpose, namely to prejudice the audit work, have given the accounting firm a legal assignment on a particular question with balance sheet relevance.<sup>237</sup>

Among his most damning testimony were two examples of Big 5 firms using screens to represent parties with actually or potentially conflicting interests:

It happens occasionally in Germany that in a M&A transaction one and the same accounting firm is acting for both the seller and the purchaser. A partner in the German member firm of one of the Big Five when we recently had lunch together prided himself that his firm in a large M&A bidding process had done the

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of an MDP-affiliated law firm and lawyers, be they licensed *Rechtsanwälte* or not, employed "in-house" at the Big 5 who are able to provide limited legal advice because of the limited exception granted to accounting firms under Germany's legal advice monopoly statute. *See id.*

236. *See id.* Dr. Hellwig testified:

Basically nothing is known about the legal relationship between accounting firm[s] and associated law firm[s]. However one should be rather safe [in] assum[ing] that the structure of this relationship is very similar to the structure between the various national companies within the international network of the Big Five. This would mean that there is at least [some] profit sharing in the form of referral fees, service fees and other intra-group charges the level of which is fixed from time to time so as to obtain the desired result. According to the Professional Rules of Conduct for Lawyers (§ 27 BORA) third parties must not share in the economic results of the work of a lawyer unless they exercise their profession jointly with the lawyer. Reality, I am afraid, is different.

Similarly, the top lawyers in the associated law firm (or in the legal department of the accounting firm) are also partners in whatever international organization is used by the respective Big Five firm in order to jump national boundaries and to bring all partners under one roof.

*Id.*

237. *Id.*

legal and financial due diligence for a total of three bidders, using, of course, for the different clients different teams from different offices. While all of this seems almost unthinkable for a lawyer the explanation is quite simple for an accountant: The clients have waived the conflict rules based on the promise of Chinese Walls.

There is nothing that ruins good morals as fast as bad examples. I am presently advising the German government in a privatization transaction. There were two bidders in the bidding process that were represented for all legal work (documentation and due diligence) by the same law firm. This conflicting representation was based on Chinese Walls and the consent of the clients. It would be a nightmare to figure out what would happen if in such a situation one of these clients were to challenge in court or before the anti-trust authorities the victory of the other in the bidding process!<sup>238</sup>

Dr. Hellwig felt so strongly about the problems of Big 5 MDPs that he testified twice before the ABA Commission. On the second occasion, six months after his first appearance, he stated that the German experience with MDPs had been a "negative one." He complained that one of the problems caused by Big 5 MDPs is that their use of Chinese Walls has resulted in an increased use of screens in their law firms.<sup>239</sup> He also stated that the German experience shows the inefficacy of the Commission's Recommendation 10,<sup>240</sup> which requires a lawyer in an MDP to

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238. *Id.*

239. Hellwig Testimony, *supra* note 231. The Commission summarized part of his testimony as follows:

[Hellwig] said the practical experience in Germany is quite a negative one. That is, law firms, pure law firms, start using Chinese walls because MDP firms work on that basis with the consent of clients. As he said in his presentation in Los Angeles, bad examples start ruining good morals. The law firm does not know the internals, and, therefore, it simply follows the same pattern as an MDP, completely forgetting the fact that for a law firm, the consent of the client in the case of conflict rules is not sufficient. Consent of the client can never justify violation of the conflict rules because lawyers are an organ of justice.

*Id.*

240. Dr. Hellwig's citation of Commission Recommendation 10 refers to the Recommendation issued on June 8, 1999 for consideration at the ABA Annual Meeting in August 1999 in Atlanta. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, RECOMMENDATION Recommendation 10 (1999), available at <<http://www.abanet.org/cpr/mdprecommendation.html>> [hereinafter RECOMMENDATION]. This Recommendation was one of several documents included in the Commission's Report to the ABA House of Delegates. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORT (1999) <<http://www.abanet.org/cpr/mdpreport.html>> [hereinafter REPORT]. The Report contained a 15-paragraph Recommendation, a Report, and three appendices, including a list of those testifying before the Commission, draft changes to the ABA Model Rules of Professional Conduct and Reporter's Notes. During the ABA Annual Meeting, the House of Delegates adopted a revised version of a Florida Bar Resolution, which provided:

RESOLVED, That the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest with-

make reasonable efforts to ensure that the MDP has safeguards in place to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.<sup>241</sup> He similarly dismissed as ineffective the audit and certification procedure contained in the Commission's Recommendation 14.<sup>242</sup>

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out sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.

Florida Bar Recommendation Before the House of Delegates at the Am. Bar Ass'n Annual Meeting in Atlanta (Aug. 10, 1999), *available at* <<http://www.abanet.org/cpr/flbarrec.html>>. For a discussion of the June 1999 ABA Report and Recommendation, see generally Terry, *supra* note 8. On March 22, 2000, the Commission posted a Draft Recommendation to the ABA House of Delegates. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, DRAFT RECOMMENDATION (Mar. 2000), *available at* <<http://www.abanet.org/cpr/marchrec.html>> [hereinafter MARCH 2000 DRAFT RECOMMENDATION]. Instead of a 15-paragraph Recommendation, the March 2000 Draft Recommendation contains only four paragraphs. These paragraphs are quite general. In my view, this Draft Recommendation asks the House of Delegates to focus on the issue of *whether* there should be MDPs under any circumstances, while delegating to the states the decision about *how* to regulate MDPs. For a discussion of this Draft Recommendation, see generally Terry, *supra* note 8.

241. The Commission summarized Dr. Hellwig's testimony as follows:

Based on the German experience with the Big Five (an experience of quite some time) he dares to bet that this is simply not going to work. Is it realistic to assume that a junior lawyer who is employed by an MDP or who has just been admitted as a junior partner and who has no chance of finding a comparable position with a law firm will have the audacity and strength and power to bring nonlawyers in the entity alongside the professional obligations of the lawyer? How can a weak lawyer in the Big Five context bring the nonlawyers in line if the Bars, at least in Europe, have failed to do so? . . . He asked what would be the consequence if the written undertaking were to be breached? This is an issue they've discussed fervently in Germany and to which they have not come up with a solution. Would the consequence be the dissolution of the MDP? That would not be in the power of the authority that is supervising the lawyers, in the case of this country, the courts. Would the consequence be the disbarment of the lawyer members in the MDP? He left it to the Commission whether that would be progress or not. In his opinion, discrepancies in the professional rules of the various professions cannot be resolved, at least in the case of the Big Five, simply by expecting lawyers in the MDP to bring the rest of the MDP up to the higher level of the lawyer's professional rules. That's tantamount to requesting that the last few hairs of the tail should wag the dog.

Hellwig Testimony, *supra* note 231.

242. The Commission summarized Dr. Hellwig's comments as follows:

Referring to the Commission's Recommendation 14, the written undertaking by the MDP not controlled by lawyers (he wondered what that term means), he said it would not work in real life. Compliance with the undertaking is simply not auditable unless the lawyers concerned are prepared to talk. Would any Commission member in such an MDP situation be prepared to talk and to risk their job? The experience in Germany clearly says no. Put under this obligation, the majority of lawyers in an MDP situation will prefer the job security to the pureness of the legal profession.

*Id.*; see also RECOMMENDATION, *supra* note 240, Recommendation 14 (containing the audit and certification requirement); MARCH 2000 DRAFT RECOMMENDATION, *supra* note 240 (omitting any reference to an audit and certification procedure).

I found some of Dr. Hellwig's observations less troubling than he did. For example, I was not convinced that Germany's experience shows the inefficacy of Recommendation 10, which requires a lawyer to make reasonable efforts to ensure that the MDP has in effect measures to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. It is true that *Berufsordnung* section 33(2) requires a lawyer to ensure that the MDP will comply with the *Berufsordnung* and section 30 permits lawyers to join an MDP only if the nonlawyers are bound by the lawyers' ethics rules.<sup>243</sup> On the other hand, my interview results suggest that German lawyers have not clearly focused on their obligations to *institutionalize* measures to ensure nonlawyer compliance with ethics rules and were not familiar with the *Berufsordnung* requirements.<sup>244</sup> One explanation for this failure is that a system such as Recommendation 10 never will work.

An alternative explanation is that the *Berufsordnung* is not as clear as it could be in expressing the requirement that firms institutionalize a "process" as well as achieve a particular "result" and that better education is needed about such a requirement. Lawyers may respond differently to an ethics rule that requires a certain "process" than they do to an ethics rule that requires a certain "result." For example, a rule that requires law firms to have in place a "process" to check conflicts of interest may result in different lawyer behavior than if there were only a rule that focuses on the "result" and tells lawyers not to represent conflicting interests. In my view Recommendations 10 and 14 signal more clearly than does the *Berufsordnung* the obligation of a firm to institutionalize a process to ensure ethical compliance by lawyers and nonlawyers. Therefore, unlike Dr. Hellwig, the German experience does not convince me of the inefficacy of the Commission's Recommendations 10 and 14, which require MDPs to institutionalize efforts to ensure ethical compliance.

According to the Commission's summary of his August 1999 testimony, Dr. Hellwig pointed to the increased use of screens by law firms as an example of the invidious and unhealthy influence of Big 5 MDPs:

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243. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1983), and RECOMMENDATION, *supra* note 240, Recommendations 10, 14 (1999), with BERUFSORDNUNG, *supra* note 44, §§ 30, 33(2).

244. See *supra* pp. 1591-96.

That is, law firms, pure law firms, start using Chinese walls because MDP firms work on that basis with the consent of clients. As he said in his presentation in Los Angeles, bad examples start ruining good morals. The law firm does not know the internals, and, therefore, it simply follows the same pattern as an MDP, completely forgetting the fact that for a law firm, the consent of the client in the case of conflict rules is not sufficient. Consent of the client can never justify violation of the conflict rules because lawyers are an organ of justice.<sup>245</sup>

Assuming there is indeed an increased use of screens in Germany, I do not find this increase sufficient justification for banning MDPs.

My reasoning is as follows. As a preliminary point, none of the lawyers I interviewed admitted to using screens if there was a legal conflict, rather than a business conflict.<sup>246</sup> Moreover, if a German or United States law firm uses a screen in a matter involving a nonconsentable conflict (a "legal conflict" in German terms<sup>247</sup>), this use would be improper and remedies (civil and disciplinary) could be pursued.<sup>248</sup> If the problem

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245. Hellwig Remarks, *supra* note 115.

246. See generally Terry Interviews, *supra* note 181.

247. Dr. Hellwig advises me that his testimony was directed towards law firms that use screens for legal conflicts, rather than business conflicts. See Letter from Dr. Hans-Jürgen Hellwig, Hengeler Mueller Weitzel Wirtz to author (Apr. 10, 2000) (on file with author). Under German law, clients may not consent to "legal conflicts" and thus any use of screens for legal conflicts would appear to be clearly improper. See, e.g., BERUFSORDNUNG, *supra* note 44, § 3(1); BRAO, *supra* note 27, § 43a(4). Hellwig stated:

A lawyer is forbidden to represent conflicting interests. This prohibition is laid down in the Lawyers Act (§ 43a para. 4 BRAO), in the Professional Rules of Conduct (§ 3 para. 1) and in Criminal Law (§ 156 Criminal Code). This prohibition applies to the entire firm, i.e., no lawyer within the same firm may work against the other. The term conflict of interest according to the majority view means an actual conflict and not a potential conflict. The clients cannot waive compliance with these conflict of interest rules, due to the fact that these rules exist not only in the interest of the clients but also in the interest of the public at large which a lawyer through his work for a client is serving on the basis of his function as an "organ of the administration of justice" (§ 3 German Lawyers Act). The interest of the public at large so protected pertain[s] to the independence of the individual lawyer and to the integrity of the bar as [an] indispensable part of a fair system of justice. It is only possible for the clients either to give a joint mandate or to exclude the area of conflict from the mandate. As lawyers we all know that taking this avenue in order to avoid a conflict of interest in reality often leads to even greater practical problems.

Hellwig Remarks, *supra* note 115.

One of the major reasons for the different interpretations of U.S. and German conflicts of interest law is because conflicts are regulated by the criminal law in Germany. Disqualification due to a conflict of interest subjects a German lawyer to potential criminal prosecution. Consequently, the German courts have been more restrained in their interpretation of conflicts law than U.S. courts. See, e.g., Interview with Claus Hinrich Hartmann about his thesis, in Bremen, Germany (May 10, 1999).

248. See, e.g., CENTER FOR PROF'L RESPONSIBILITY, AMERICAN BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 157-71 (4th ed. 1999) [hereinafter ANNOTATED MODEL RULES] (summarizing imputation case law, including screening cases); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 204 (Proposed Final Draft No. 1, May 1996); *supra* notes 216, 238 and accompanying text (observing that



is that German lawyers disagree about what constitutes a legal conflict for which screens are unavailable, then I am not willing to attribute this disagreement solely to the Big 5 MDPs because, even in the absence of MDPs, significant disagreement exists in the United States about the scope of nonconsentable conflicts and the desirability of screens.<sup>249</sup> Therefore, because a remedy exists if screens are used for “legal conflicts” and because I do not believe the Big 5 are responsible for the debate about the parameters of a “legal conflict,” I am not willing to rely on any increased use of screens in Germany as a basis for rejecting MDPs, especially if such use is limited to “business conflicts.” As explained below, I believe the better approach is to address directly the issue of how conflicts of interest and imputation should be handled.

On the other hand, some of Dr. Hellwig’s comments about conflicts of interest were quite troubling. His examples included situations that many U.S. lawyers would label as directly adverse conflicts that are non-consentable and for which screens are unavailable.<sup>250</sup> As discussed *infra* in Part VI.B.4, I think these conflict of interest concerns must be addressed.

Although I have serious concerns about the conflicts of interest and some of the problems Dr. Hellwig described, I would go so far as to say that Dr. Hellwig’s testimony about MDP problems and the “failure” of the German Big 5 MDP experience stands in stark contrast to what I heard about MDPs while in Germany. During my interviews and my talks throughout Germany, Dr. Hellwig was the only person I recall who offered extensive negative comments about MDPs and those comments were limited to the Big 5, accounting-dominated MDPs.<sup>251</sup> Moreover, although one might expect self-serving, self-laudatory reactions from lawyers currently practicing in MDPs, I did not hear contrary views from one of the leading German legal ethics academics nor from those who attended my talks throughout Germany. In short, although my sample size was small, and my perceptions and people’s willingness to talk openly to me may have been limited because of my status as an outsider, my inter-

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Germany’s conflict of interest provision is a criminal provision, subjecting a lawyer to criminal penalties and citing Dr. Hellwig’s speculation about the possible civil law consequences of a privatization bidder who is represented by a lawyer with a conflict of interest). I recognize that more U.S. lawyers use screens than the relevant ethics rules might suggest. Because some courts will deny a disqualification motion when a screen is in place, a lawyer might decide that the risk of disciplinary prosecution is small and use screens, even though the ethics rule does not permit it. Nevertheless, it appears to me that both civil and disciplinary sanctions exist in the United States, as well as Germany, for lawyers who use screens for nonconsentable conflicts.

249. See, e.g., *Minutes of ABA Ethics 2000—Commission on the Evaluation of the Rules of Professional Conduct Discussions About Screens* (visited Mar. 4, 2000) <<http://www.abanet.org/cpr/ethics2k.html>> (revealing debates about the scope of nonconsentable conflicts and desirability of screens).

view results on the “threshold” issues stand in stark contrast to the views of Dr. Hellwig.

## VI. LESSONS TO LEARN

### A. GENERAL CONCLUSION: THE GERMAN EXPERIENCE PROVES NEITHER THE ACCEPTABILITY OF MDPS NOR THEIR UNACCEPTABILITY

The OECD Rapporteur observed that Germany permits MDPS but still manages to protect the public interest.<sup>252</sup> In the future, some individuals may point to Germany as a case study to “prove” that MDPS are acceptable and that bans on MDPS are restraints against trade. Therefore, it is important to summarize exactly what lessons one should and should not take away from the German MDP experience.

In my view, the German experience does not “prove” that MDPS pose no risk to the public interest. Nor does it suggest that MDP bans, such as those found in the United States and elsewhere, are inappropriate restraints on trade. The bases for my conclusion are twofold. First, the factual contexts of German MDPS, on the one hand, and the worldwide Big 5 law firm phenomenon, on the other hand, are significantly different from each other. The majority of large MDPS in Germany are dominated by lawyers and lawyers have a significant majority in those firms.<sup>253</sup> Because this lawyer-dominated context may be very different from the Big 5-affiliated firm situation, the German experience does not “prove” that Big 5 MDPS will not impair the public interest. In my view, the types of problems and pressures likely to emerge in lawyer-dominated MDPS and

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250. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201, at 544 illus. 1 (Proposed Final Draft No. 1, May 1996) (concluding that in most instances, consent will not cure the conflict of representing two parties competing for the same license). See generally HYPOTHETICALS AND MODELS, *supra* note 191 (concluding that representing the buyer and seller or two entities competing for the same license involves representation of parties who are directly adverse and have an actual conflict).

251. Dr. Hellwig attended the German-American Lawyers Association talk I gave in Frankfurt am Main on December 3, 1998 at the offices of Heuking Kühn Lüer Heussen Wojtek. Although he commented negatively about MDPS in the question-and-answer period after my talk, his comments were not as extensive or negative as his comments before the ABA Commission. Therefore, one can safely rely on Dr. Hellwig’s ABA testimony as an accurate summary of his concerns. Interestingly, the only other negative reactions to MDPS that I recall were at a talk I gave at the University of Freiburg. I recall no comparable examples being given, however. Moreover, most of the hostility toward MDPS was directed toward the inclusion of *Notars* in an MDP.

252. See *supra* note 6 and accompanying text.

253. See *supra* notes 116-17 and accompanying text (stating that 19 of Germany’s 20 largest firms are dominated by lawyers. Of the three firms among the 10 largest that had more than a token number of nonlawyers, the percentage of nonlawyers was 8% for Pünder, 14% for Oppenhoff, and 36% for Haarman Hemmelrath).

nonlawyer-dominated MDPs are different enough that one cannot necessarily extrapolate from one experience to the other.

The second reason underlying my conclusion is that Germany's regulation of MDPs is much less developed than the longevity of MDPs in Germany suggests. Although Germany has had MDPs for over thirty years, Germany's *regulation of MDPs is of quite recent origin*: the *BRAO* provision is less than six years old, there was a gap in the legal ethics rules for almost ten years, and the more detailed regulation of MDPs found in the *Berufsordnung* is less than three years old.<sup>254</sup> Furthermore, German lawyers seem relatively unfamiliar with these provisions.<sup>255</sup> Moreover, even this recent regulation is very much in flux; some provisions recently have been struck down,<sup>256</sup> while others currently are ignored because of beliefs about their constitutional infirmity.<sup>257</sup> In short, as the United States debates the issue of how to respond to the MDP phenomenon, it is appropriate to look to Germany. However, because the Big 5-affiliated law firms have existed for a relatively short period of time,<sup>258</sup> one cannot conclude, based on the German experience, that Big 5-affiliated law firms are problem-free and must be permitted.

The German experience likewise fails to prove that MDPs are unacceptable. Thirty years of MDPs have not caused an obvious erosion of the "rule of law" in Germany, hurt clients, or undermined the public interest,<sup>259</sup> although the short lifetimes of German Big 5-affiliated law firms is not a sufficiently long period from which one can conclude that Big 5 MDPs will not present any problems.<sup>260</sup> Clear problems *could*

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254. See *supra* notes 45-47 and accompanying text (describing the *BRAO*, the 10-year gap, and the *Berufsordnung*).

255. See *supra* notes 212-13 and accompanying text (summarizing interview results regarding unfamiliarity with certain *Berufsordnung* provisions).

256. See *supra* notes 94-96 and accompanying text (summarizing the *Anwaltsnotar* case).

257. See *supra* notes 83-88 and accompanying text (summarizing resistance to *Berufsordnung* section 31, the *Sternsozietät* provision).

258. See *supra* note 129 and accompanying text.

259. Cf. Hellwig Remarks, *supra* note 115 (agreeing that German MDPs, prior to the emergence of the Big 5-affiliated firms, had not created problems of independence, loyalty or confidentiality but finding Big 5 MDPs to have been a failure).

260. I thus disagree with Dr. Hellwig's description of "the German experience with the Big Five [as] an experience of quite some time." *Id.* In my view, three of the Big 5-affiliated firms should be considered less than two and a half years old. (These three firms are the firms associated with Deloitte & Touche, KPMG and PricewaterhouseCoopers which are described *supra* notes 148-53, 161-80 and accompanying text.) The fourth such firm, which is affiliated with Ernst & Young, is less than 10 years old, does not stress its affiliation, and has apparently succeeded in its efforts to be viewed as an independent law firm. See *supra* notes 154-60 and accompanying text. The fifth such firm, affiliated with Arthur Andersen, has undergone such significant changes recently that it has been treated in the German legal press as having been founded in 1995, but admitted as a *Rechtsan-*

have emerged in such a short period of time. Unlike Dr. Hellwig, however, I did not find clear evidence of such problems. Many of Dr. Hellwig's comments are typical of those who oppose Big 5 MDPs: he believes that such lawyers will be subject to pressure from their bosses and cannot realistically be expected to resist such pressures.<sup>261</sup> Such comments do not *prove* that German MDPs already have failed in this regard. Moreover, while two specific examples he cited are quite troubling, I see no evidence that such examples are widespread. Many U.S. disqualification cases reveal actions that, in hindsight, are clear failures to apply the U.S. conflicts rules.<sup>262</sup> Nonetheless, I do not think it fair to extrapolate from the "bad apple" examples the conclusion that our system does not work. Similarly, while I think the problems Dr. Hellwig described must be addressed, I am not willing to rely on these "bad apple" examples to conclude that German MDPs have failed.

#### B. SPECIFIC CONCLUSIONS: GERMAN MDP RULES TO EMULATE AND TO AVOID

Even if the German experience does not unequivocally "prove" the acceptability or unacceptability of MDPs, lawyers and regulators outside Germany would be wise to look to Germany's experience with MDPs in an effort to learn which German rules have worked well and which have shortcomings. The subsequent sections contain my recommendations about the German rules to emulate and to avoid.<sup>263</sup>

##### 1. Rules About the MDP's Form of Association

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*waltsgesellschaft* at the end of 1999. See *Positionen der Big-Five*, *supra* note 137, at 6. Although many of the Big 5 may have had lawyers working "in-house" providing legal services to the Big 5 and even clients, the phenomenon of the Big 5-affiliated law firm in Germany is relatively new and much more recent than in other countries such as France or England. Indeed, a recent German article describing the history and current situation of the German Big 5-affiliated law firms said that all five firms were less than 10 years old. See *id.* at 11.

261. Cf. Hearings Before the Commission on Multidisciplinary Practice (written remarks of Lawrence J. Fox, Drinker Biddle & Reath, LLP), available at <<http://www.abanet.org/cpr/fox1.html>>; *id.* Written Comments from Sydney M. Cone, III, Counsel, Cleary, Gottlieb, Steen & Hamilton & C.V. Starr Professor of Law, New York Law School to the Commission on Multidisciplinary Practice (June 22, 1999), available at <<http://www.abanet.org/cpr/cone3.html>>.

262. See generally ANNOTATED MODEL RULES, *supra* note 248, at 95-96 (citing examples of conflicts cases); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 201-202, at 556-56, 584-86 (Proposed Final Draft No. 1, May 1996) (discussing nonconsentable conflicts).

263. Because of space limitations, I have not fully expanded on my reasoning in this Article, although I have attempted to summarize the bases for my opinions. I have more fully explained some of my positions in Terry, *supra* note 8, at 915-42.

I recommend that U.S. states and other regulators adopt the German rule that permits fully integrated MDPs without any requirement of lawyer-majority ownership or control or limitation of the MDP to the provision of legal services.<sup>264</sup> In other words, of the five MDP models identified by the ABA, I recommend adoption of Model 5.<sup>265</sup>

With the exception of the Big 5-affiliated firms, all the German MDPs I interviewed practiced in a fully integrated model.<sup>266</sup> My research thus confirms my gut instinct that the fully integrated Model 5 is the most practical and realistic method for a small group of individuals to use to deliver multidisciplinary services. I endorse MDPs not because I think MDPs are useful, but because I think *clients* should be the ones to make that choice, absent a showing of problems sufficient to require a prophylactic ban.<sup>267</sup> A number of German clients, particularly clients of small MDPs, enthusiastically embrace and welcome this MDP choice.<sup>268</sup> This German experience thus confirms the predictions of several of the consumer representatives and others who testified before the Commission that MDPs will benefit small "Main Street" clients, as much as "Wall Street" clients.<sup>269</sup> In sum, I favor Model 5 because I think U.S.

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264. See Hearings Before the Commission on Multidisciplinary Practice (Mar. 12, 1999) (testimony of Laurel S. Terry, Professor, Penn State Dickinson School of Law), available at <<http://www.abanet.org/cpr/terryremarks.html>> [hereinafter Terry Remarks].

265. See *supra* note 191. The ABA Commission originally endorsed Model 5 but has backed away from that position in its March 2000 Draft Recommendation. Compare RECOMMENDATION, *supra* note 240, Recommendation 3, with MARCH 2000 DRAFT RECOMMENDATION, *supra* note 240, Principle 1 (including a requirement that might be interpreted as a lawyer-majority requirement).

266. See *supra* note 191 and accompanying text.

267. See generally Terry Remarks, *supra* note 264; Terry, *supra* note 8.

268. See *supra* text accompanying note 226.

269. See, e.g., Hearings Before the Commission on Multidisciplinary Practice (Nov. 12, 1998) (testimony of M. Peter Moser, chair of the ABA Standing Committee on Ethics and Professional Responsibility), available at <<http://www.abanet.org/cpr/moser1198.html>> (stating that MDPs are an issue for all, not just big firm lawyers); *id.* (Nov. 12, 1998) (testimony of Ward Bower, principal at Altman Weil), available at <<http://www.abanet.org/cpr/bower1198.html>> (stating that, in England, Main Street lawyers like the idea of MDPs); *id.* (Feb. 4, 1999) (oral remarks of Neil Cochran, partner at Dundas & Wilson C.S.), available at <<http://www.abanet.org/cpr/cochran2.html>> (stating that MDPs are of value to Main Street clients); *id.* (Feb. 5, 1999) (written remarks of Lynda Shely, Ethics Counsel for the State Bar of Arizona), available at <<http://www.abanet.org/cpr/shely2.html>>; *id.* (Feb. 5, 1999) (written remarks of James Turner, Executive Director, H.A.L.T.), available at <<http://www.abanet.org/cpr/turner2.html>>; *id.* (Feb. 5, 1999) (written remarks of John Dzienkowski, Professor of Law, University of Texas School of Law), available at <<http://www.abanet.org/cpr/dzienkowski.html>>; *id.* (Feb. 6, 1999) (testimony of Larry Ramirez, chair of the General Practice, Solo and Small Firm Section of the ABA), available at <<http://www.abanet.org/cpr/ramiriz1.html>>; *id.* (Mar. 11, 1999) (testimony of Wayne Moore, Director of the Legal Advocacy Group of AARP), available at <<http://www.abanet.org/cpr/moore1.html>>; *id.* (Mar. 11, 1999) (testimony of Lora H.

small firm clients, like German clients, should have the choice of MDPs and because Model 5 appears to be the only practical way to organize an MDP in a small firm setting.

On the flip side of this issue, my German research also convinced me of the weaknesses underlying the reasoning of those commentators who advocate a lawyer-majority requirement or advocate that MDPs only be permitted under Model 4, the Contract Model.<sup>270</sup> These commentators often cite lawyer independence to support their calls for Model 4 or lawyer majority or control requirements.<sup>271</sup>

The German experience shows that neither a lawyer majority nor a lawyer control requirement will alleviate the concerns about lawyer independence. One of the legal forms in which German firms may be organized is the *Rechtsanwalt GmbH*, which requires a lawyer majority and lawyer control.<sup>272</sup> Interestingly, the *only firms* I interviewed that were organized in this legal form were the Big 5-affiliated firms. In other words, Germany's Big 5-affiliated law firms are Model 4 firms.<sup>273</sup> Despite the overwhelming lawyer majority in Germany's Big 5-affiliated law firms, Dr. Hellwig has labeled Germany's experience with Big 5 MDPs as negative.<sup>274</sup> Similarly, the fact that McKee Nelson Ernst & Young arguably is organized according to Model 4 and not Model 5 does not appear to have alleviated concerns about the lawyers' independence.<sup>275</sup> Moreover, in my view, a lawyer-control or Model 4 requirement

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Weber, President and Executive Director of the Consumers Alliance of the Southeast), available at <<http://www.abanet.org/cpr/weber2.html>>; *id.* (Feb. 12, 2000) (testimony of Theodore Debro, Board Chairman of Consumers for Affordable and Reliable Services of Alabama), available at <<http://www.abanet.org/cpr/debro2.html>>; *id.* (Feb. 12, 2000) (testimony of George Abbott, Owner of Aras Enterprises), available at <<http://www.abanet.org/cpr/abbott.html>>; Written Comments of John S. Skilton, Chair of the ABA Standing Committee on the Delivery of Legal Services, to the Commission on Multidisciplinary Practice (Aug. 8, 1999), available at <<http://www.abanet.org/cpr/skilton.html>>.

270. *See, e.g.*, Hearings Before the Commission on Multidisciplinary Practice (Mar. 4, 2000) (testimony of Bernard Wolfman, Fessenden Professor of Law, Harvard Law School), available at <<http://www.abanet.org/cpr/wolfman4.html>> (requesting a lawyer majority or control requirement); *id.* (Mar. 12, 1999) (written remarks of Sydney M. Cone, III, Counsel, Cleary, Gottlieb, Steen & Hamilton & C.V. Starr Professor of Law, New York Law School), available at <<http://www.abanet.org/cpr/cone1.html>> (requesting that the Commission avoid adoption of Model 5 and indicating an ability to live with Model 4).

271. *See supra* note 270.

272. *See supra* note 75 and accompanying text.

273. *Cf. supra* note 157 and accompanying text.

274. *See supra* note 238 and accompanying text.

275. *See, e.g.*, Hearings Before the Commission on Multidisciplinary Practice (Feb. 12, 2000) (comments of Cherly Niro, President of the Illinois State Bar Association) (asking the Commission to investigate the facts concerning the law firm of McKee Nelson Ernst & Young) (notes on file with author); *What Kind of Firm is McKee Nelson Ernst & Young*, 16 *Laws. Man. on Prof. Conduct* (ABA/BNA) 66 (Mar. 1, 2000).

is simply a proxy for our true concerns, especially lawyer independence. Thus, because lawyer majority and lawyer control requirements likely will impede small MDPs and because they do not directly address the concerns about large MDPs, particularly Big 5 MDPs, I think the ABA should permit Model 5 fully integrated MDPs as Germany does. Instead of using the form of association as a proxy for our true concerns, I think we should identify those concerns and determine the best way to address them.

Because one of my concerns is fairness to clients, and avoidance of some of the deception Dr. Hellwig described, I endorse Germany's rule that requires disclosure of the nature of the MDP to clients<sup>276</sup>—the necessity of disclosure to clients is axiomatic and need not be defended.<sup>277</sup> Germany's requirement that the nature of the MDP be disclosed on the

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276. See *infra* notes 277-79 and accompanying text (discussing disclosure requirements).

277. As I noted in my testimony to the Commission, there are two different kinds of disclosure that might be required:

The Commission has heard testimony about two different kinds of transparency requirements. Several witnesses testified that there should be disclosure (transparency) from lawyers to clients. Disclosure items that were mentioned included:

- 1) the nature of the MDP firm (or the relationship between firms under the *Ancillary Business* and *Contract* models);
- 2) identification of lawyers *qua* lawyers on business cards, announcements, etc.;
- 3) disclosure of lawyer participation in a particular project (*i.e. no Trojan horses*);
- 4) the fact that a client who uses one set of services of the MDP (*e.g.* audit) is under absolutely no obligation and will face no penalties if it does not use other services of the MDP;
- 5) possible compromises to the attorney-client privilege from using an MDP; and
- 6) the amount of any MDP fee attributable to legal services.

I assume that if MDPs are permitted, some if not all of such lawyer-client disclosures will be required. Indeed, I did not hear any witnesses who opposed the idea of lawyer-client disclosure, although I suspect there might be disagreements about the exact contents of such disclosures. (I listed the items above according to my view of the ascending order of likely objection.) Thus, the necessity of lawyer-client disclosure, if not the details, seems beyond debate.

The second type of transparency would be more unusual in the U.S. The Commission heard testimony about several European systems in which MDP lawyers are required to share with the regulatory authorities their MDP agreements. The Paris Bar MDP proposal, for example, appears to require MDP lawyers to disclose their firm agreements to regulators.

Terry Remarks, *supra* note 264. In contrast to the Paris Bar and other proposals, Germany does not appear to require this level of detail with respect to this second kind of disclosure. As I have argued elsewhere, the disclosure inherent in the Commission's suggested court audit could prove to be much more powerful as an educational tool than as an enforcement mechanism. See Terry, *supra* note 8, at 929.

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firm's letterhead seems like a useful starting point.<sup>278</sup> I might go further, however, and affirmatively require the client to give informed consent to representation by an MDP.<sup>279</sup>

On the other hand, I recommend that regulators reject several of Germany's strict form of association rules. For example, I would reject the strict German rules on the use of an MDP trade name. The German experience suggests that such rules will be met with legal challenges and perhaps evasion.<sup>280</sup> In my view, law firm names such as Baker & McKenzie and White & Case clearly are trade names. Assuming that MDPs are permitted, I see no significant difference between a law firm trade name consisting of deceased lawyers, an MDP trade name that uses only lawyers' names, and an MDP trade name that explicitly includes the name of a Big 5 firm, provided that full disclosure is made to the client about the nature of the MDP and the credentials of the MDP individuals with whom the client has contact.

I similarly would reject Germany's limitation on the individuals with whom a lawyer may form an MDP.<sup>281</sup> Both the German constitutional case law<sup>282</sup> and the Dutch case presently before the European

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278. See *supra* notes 90-92 and accompanying text. Compare RECOMMENDATION, *supra* note 240, Recommendations 9, 11 (recommending limited disclosure requirements), with MARCH 2000 DRAFT RECOMMENDATION, *supra* note 240 (omitting specific disclosure requirements).

279. The "informed consent" language is consistent with the Ethics 2000 Commission's proposed changes to Model Rule 1.4. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (Discussion Draft 1999), available at <<http://www.abanet.org/cpr/e2k/rule14draft.html>>.

280. See *supra* note 143 and accompanying text (describing how the Arthur Andersen-affiliated law firm changed its name to Andersen Freihalter when it hired a lawyer named Andersen); *supra* text accompanying note 196 (describing how, if it had been challenged, PricewaterhouseCoopers Veltins was prepared to defend its name in the constitutional court).

281. The Commission's Recommendation did not, on its face, limit the individuals who might join a lawyer MDP, although the Commission's use of the word "appropriate" in the Draft Model Rule comment raised questions about this issue. Compare RECOMMENDATION, *supra* note 240, Recommendation 2 (giving no express limitation on who may join an MDP), with COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORT, APPENDIX A (1999), available at <<http://www.abanet.org/cpr/mdpappendixa.html>> (proposed Rule 5.8, cmt. 2) ("Examples of professions that may *appropriately* be included in an MDP include . . .") (emphasis added). The Commission's March 2000 Draft Recommendation however, clearly limits MDPs to nonlawyer professionals, who are members of recognized professions or other disciplines that are governed by ethical standards. See MARCH 2000 DRAFT RECOMMENDATION, *supra* note 240, Principle 1 ("Nonlawyer professionals' means members of recognized professions or other disciplines that are governed by ethical standards."); see also Terry, *supra* note 8, at 931 (discussing the issue of who should be permitted to join an MDP).

282. See *supra* notes 94-96 and accompanying text discussing this case.



Court of Justice<sup>283</sup> suggest the difficulty in limiting the individuals with whom a lawyer may join. Moreover, after hearing the Commission's questions about the propriety of a lawyer forming an MDP with a Nobel Prize-winning economist who might not have a specific "profession" or ethics code versus joining with a hairdresser, who might have such a code, I was persuaded that the better solution is to permit lawyers to form MDPs with anyone they want. If a particular fact pattern makes one uncomfortable, such as a lawyer/tow-truck driver MDP, the better solution is to ask why (e.g., fear of solicitation?) and address that underlying concern.

## 2. Rules About the MDP's Scope of Practice

Despite my research showing that German lawyers do not routinely limit a lawyer's scope of practice to prohibit simultaneous legal and audit services by the same MDP firm, I support such a ban.<sup>284</sup> I believe there may be inherent conflicts between an auditor's obligations to the public when serving in the attest function and a lawyer's obligations to the client.<sup>285</sup> Accordingly, I find such a ban appropriate, at least in the initial

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283. See Terry & Houtman Mahoney, *supra* note 1.

284. See, e.g., Terry, *supra* note 8, at 927 (explaining both the Commission's December 1999 clarified position, which included such a ban, and the Commission's March 2000 Draft Recommendation, which omitted this ban, along with most of the details about how MDPs would be regulated); Letter from Laurel S. Terry, Professor of Law, Penn State Dickinson School of Law, to the Commission on Multidisciplinary Practice (July 1999), available at <<http://www.abanet.org/cpr/terry8.html>> [hereinafter Terry Letter].

285. I think there are more similarities between the lawyer's and auditor's obligations than one might sometimes suspect from the popular press. It appears that commentators may sometimes exaggerate the lawyer's duty to keep information confidential, on the one hand, see generally *Symposium: The Attorney-Client Relationship in a Regulated Society*, 35 S. TEX. L. REV. 571 (1994) (discussing the Kaye Scholer case) [hereinafter *Kaye Scholer Symposium*], and the auditor's duty to disclose, on the other hand:

Prior witnesses have expressed concern that the professional duties of lawyers and accountants offering attest services cannot be reconciled. . . . [T]his argument demonstrates a fundamental misunderstanding of the obligations governing accountants and the relationship of the auditor and client management in the preparation and disclosure of financial information to the public.

Management of a public company, and not the outside auditor, bears the ultimate responsibility to prepare and disseminate accurate financial information about the company to users of financial statements. . . .

The duty to render an informed, objective audit opinion does not override the duty to keep client information confidential. Despite Mr. Fox's assertions to the contrary, CPAs may not disclose any confidential information without the specific consent of the client, even when the preparation of audit opinions is involved.

Of course, a CPA cannot attest to a financial statement that he knows is false or misleading or is *not* prepared in accordance with generally accepted accounting principles. Even in these circumstances, the CPA cannot disclose confidential information himself. Instead, generally accepted auditing standards provide a

stages of regulation as the issues are resolved. In contrast to the legal/audit ban, I found no evidence that German MDP lawyers avoid litigation and see no necessity for such a limitation. I do not see the same potential inherent conflicts between litigation and transactional work as I do between legal work and the attest function.<sup>286</sup> I also think such a limitation would disadvantage the “Main Street” MDP that may be less specialized and that it may be difficult in practice to define what exactly is transactional work and what is litigation-related.

### 3. Rules About Functional Ethics Within the MDP

As noted earlier, *Berufsordnung* section 30 requires MDP nonlawyers to agree to abide by legal ethics rules.<sup>287</sup> I partially endorse this German rule. In my view, it is entirely appropriate to require MDP nonlawyers to act consistently with the legal ethics rules in certain contexts. Current U.S. law requires secretaries, paralegals and nonlawyer professionals working with lawyers to observe many legal ethics principles; for example, nonlawyers must comply with the duty of confidentiality with respect to information they learned in the course of assisting a lawyer.<sup>288</sup> Therefore, I endorse that aspect of this rule that requires

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path to properly deal with such matters.

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 . . . [U]nder generally accepted accounting principles, the auditor may not disclose the information. Instead, the auditor must, either render some type of modification of his opinion on the financial statements, disclaim an opinion or withdraw from the engagement. . . . However, even in this circumstance it will be the client and not the auditor that must make the decision to disclose the information to the public or deal with the consequences of a modified opinion on the financial statements.

Hearings Before the Commission on Multidisciplinary Practice (Mar. 11, 1999) (written remarks of Roger Page, National Director of the Washington National Tax Practice at Deloitte & Touche, LLP), *available at* <<http://www.abanet.org/cpr/page1.html>>; *see also id.* (Mar. 1999) (testimony of Richard Miller, General Counsel and Secretary of the AICPA), *available at* <<http://www.abanet.org/cpr/rmiller.html>>.

286. During this Symposium, Professor Kostant suggested that one basis for segregating litigators is the differing nature of their duty of confidentiality. *See* Peter C. Kostant, Remarks at the University of Minnesota, Future of the Profession: A Symposium on Multidisciplinary Practice (Feb. 26, 2000) (videotape on file with the *Minnesota Law Review*). Given the short time allowed for presentation, Professor Kostant did not have time to develop his thesis and I have not read his paper. My initial reaction, however, was skeptical. Both litigators and transactional lawyers are subject to a duty of confidentiality and duties to third parties. While the balance of these two duties may be slightly different in certain transactional settings, *see Kaye Scholer Symposium, supra* note 285, I do not think the obligations are so fundamentally different as to be the basis for carving out litigation from an MDP lawyer’s scope of practice. Neither the Commission Recommendation, *supra* note 240, nor the March 2000 Draft Recommendation, *supra* note 240, included such a ban.

287. *See supra* note 80 and accompanying text.

288. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1983).

nonlawyers to comply with applicable legal ethics rules if necessary to enable the lawyer to act consistently with these rules.<sup>289</sup> Accordingly, I agree with *Berufsordnung* section 30 and the Commission's recommendation in this respect.<sup>290</sup>

On the other hand, I recommend that regulators reject that portion of *Berufsordnung* section 30 that requires MDP nonlawyers to comply with legal ethics rules even when there is no connection to the MDP's provision of legal services. Some commentators have criticized the Commission's initial Recommendation, arguing that the Commission improperly required nonlawyers *always* to comply with legal ethics provisions.<sup>291</sup> In my view, these commentators' criticisms would be warranted if the Commission *had* adopted a recommendation similar to *Berufsordnung* section 30 and had required nonlawyers always to use legal ethics. The Commission's Recommendation was distinguishable, however, from section 30. The Commission recommended nonlawyer compliance with legal ethics only in connection with the provision of legal services.<sup>292</sup> I believe there is a valid reason for requiring compliance with legal ethics if legal services are involved, but no need for an accountant providing only accounting services to comply with legal ethics.<sup>293</sup>

Although I endorse some aspects of *Berufsordnung* section 30, I believe regulators should take steps to ensure greater familiarity and com-

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289. For a further elaboration of my reasoning, see Terry, *supra* note 8, at 896; Terry Remarks, *supra* note 264. *But see* Hellwig Remarks, *supra* note 115 (stating that one cannot expect compliance with the stricter standards and therefore efforts should be made to harmonize the rules of the professions). This apparently would require a "mega-regulator" of some type. *See* Terry, *supra* note 8, at 896.

290. The Commission Recommendation contained provisions requiring, in certain circumstances, that nonlawyers comply with the legal profession's rules of conduct. *See* RECOMMENDATION, *supra* note 240, Recommendations 8, 10. The March 2000 Draft Recommendation contained no comparable provisions. *See* MARCH 2000 DRAFT RECOMMENDATION, *supra* note 240.

291. *See, e.g.*, Letter from Olivia F. Kirtley, Chair of the Board of AICPA, to the Commission on Multidisciplinary Practice (July 30, 1999), *available at* <<http://www.abanet.org/cpr/aicpa2.html>>.

292. Commission Recommendation Paragraph 10 states:

A lawyer in an MDP who delivers legal services to a client of the MDP and who works with, or is assisted by, a nonlawyer who is delivering nonlegal services in connection with the delivery of legal services to the client should be required to make reasonable efforts to ensure that the MDP has in effect measures to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

RECOMMENDATION, *supra* note 240, Recommendation 10. The Commission's March 2000 Draft Recommendation, *supra* note 240, dropped this requirement. As explained earlier, this Draft Recommendation focuses on the issue of whether to permit MDPs rather than on the details of how they should be regulated.

293. For an additional explanation of my reasoning, see Terry, *supra* note 8, at 938-42; Terry Remarks, *supra* note 264; Terry Letter, *supra* note 284.

pliance with these types of provisions. My interviews and other discussions with German lawyers convinced me that it would be useful to take some steps, beyond the mere adoption of a rule, to ensure that lawyers are aware of their obligations and institutionalize compliance efforts.<sup>294</sup> For this reason, I previously have recommended that any certification and audit procedure apply to all MDP lawyers, not just those in nonlawyer-controlled MDPs as originally suggested by the Commission.<sup>295</sup> In my view, the education and self-policing function of certification is extremely important. Thus, even if commentator Sydney Cone is correct that enforcement of certification and audit obligations will be difficult, I nevertheless find the process worthwhile because of the education function it serves.<sup>296</sup> The certification process originally suggested by the Commission undoubtedly is not the only method to achieve such education, but it is acceptable. This is the major reason why I endorsed the Commission's suggestion on this point.

#### 4. Rules About Substantive Ethics Within the MDP

I also endorse *Berufsordnung* section 3, which requires imputation of conflicts of interest among all professionals in a fully integrated MDP. Given what I was told about the sharing of information and close integration that occurs among MDP lawyers and nonlawyers in the fully integrated MDP, MDP-wide imputation seems appropriate and necessary. If an MDP-wide imputation rule were adopted, the problems Dr. Hellwig described either would not occur in the United States with respect to a fully integrated MDP or remedies would be available.<sup>297</sup> The imputation rule would subject separate teams to the U.S. conflicts rules and our cur-

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294. See *supra* pp. 1591-96 (discussing German lawyers' lack of familiarity with this aspect of the *Berufsordnung*).

295. See Terry, *supra* note 8, at 928-29; Terry Letter, *supra* note 284. The Commission originally included an audit and certification procedure for MDPs that was not controlled by lawyers. See RECOMMENDATION, *supra* note 240, Recommendations 12, 14. The Commission dropped this requirement from its March 2000 Draft Recommendation and instead recommended that regulatory authorities enforce existing rules and adopt such additional enforcement procedures as are needed to implement the principles identified in the Commission's Recommendation. See MARCH 2000 DRAFT RECOMMENDATION, *supra* note 240, Principle 3.

296. See, e.g., Letter from Sydney M. Cone, III, Counsel, Cleary, Gottlieb, Steen & Hamilton & C.V. Starr Professor of Law, New York Law School, to the Commission on Multidisciplinary Practice (June 20, 1999), available at <<http://www.abanet.org/cpr/cone3.html>>. Commission witnesses testified about another situation—that of group prepaid legal services—that has an analogous certification and education process in some states. See Hearings Before the Commission on Multidisciplinary Practice (Mar. 11, 1999) (testimony of William A. Bolger, Executive Director of the National Resource Center for Consumers of Legal Service), available at <<http://www.abanet.org/cpr/bolger.html>>.

297. See *supra* notes 236-42 and accompanying text.

rent conflicts rules presumptively make directly adverse representation nonconsentable.<sup>298</sup>

I find the issue much more difficult, however, with respect to a Model 4 MDP. If a law firm truly is a separate entity and does not share information with the affiliated entity, then the case for MDP-wide imputation is much less compelling. Indeed, I assume that the Model 4, Big 5-affiliated firms currently avoid Big 5-wide imputation by asserting that they are not in fact engaged in the MDP work covered by *BRAO* section 59a.

On the other hand, there is something troubling to me about a Big 5 or other firm that holds itself out in its advertising and elsewhere as having integrated services, but asserts, for confidentiality and conflict imputation purposes, that the legal services arm and the other arms are completely separate firms. In short, I think the Model 4 MDP, rather than the Model 5 MDP, presents the most difficult questions for a regulator.<sup>299</sup> Although I have not explored this idea, one solution that occurs to me is to have a regulator presume imputation in a Model 4 context unless the law firm provides the regulator with information to show that such imputation is not warranted. In other words, I would shift the burden to the MDP to disprove imputation.<sup>300</sup>

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298. See *supra* note 262 and accompanying text. Some MDP critics assert that MDP-wide imputation is no solution because it will not be accepted. They assert that lawyers will simply “opt out” by choosing not to hold themselves out as a lawyer. Perhaps I am simply naive, but I am not willing to rule this option out of hand on the theory that no one will use it. Presently, I am willing to take at face value the comments of the Big 5 representatives that they want to be able to hold themselves out as offering legal services and that they will comply with the necessary rules. I think the “carrot” of being able to offer legal services may be enough to entice the Big 5 to embrace rules they do not necessarily like. (I recognize they may then lobby to change those rules, but I am willing to live with those consequences.)

299. As an aside, I am somewhat surprised when I hear those who are hostile to MDPs suggest that Model 4, rather than Model 5, should be used. I think the regulatory problems are much more difficult with Model 4 because the law firm is asserting that it is separate and independent, but those facts may be much more difficult to assess. The Commission originally took the position that conflicts be imputed among all professionals in an MDP, but omitted any reference to this issue in the March 2000 Draft Recommendation. Compare RECOMMENDATION, *supra* note 240, Recommendation 8, with MARCH 2000 DRAFT RECOMMENDATION, *supra* note 240.

300. An even more difficult question for me is whether an MDP that carries this burden should be permitted to advertise its worldwide network. From the perspective of client protection and public interest I see no harm in this, provided full disclosure is made to the client. On the other hand, from a marketplace competition perspective, it seems unfair that a law firm that holds itself out as having a worldwide network must impute conflicts among all of its offices, whereas a Big 5-affiliated firm might be able to advertise its network, but not impute conflicts among the network offices. The answer may be that traditional law firms probably will either turn imputation into a competitive advantage by citing it as a distinguishing characteristic of a traditional law firm, or else this will add to existing pressure to relax the imputation rule. Because I generally favor client disclosure and

With respect to independence of legal judgment, the Germans have no rules to emulate. Because the MDP situation presents new kinds of pressures and risks, I believe it would be a useful exercise to identify the circumstances in which a lawyer's professional judgment is most likely threatened and then design a rule to address those situations. This would be similar to what is done for in-house counsel in Model Rule 1.13.<sup>301</sup> Having such a rule might help address Dr. Hellwig's and others' concerns about what will happen in the Big 5-affiliated law firm context.

Since Germany does not have a provision equivalent to ABA Model Rule 1.15, the German experience offers no particular guidance as to the adequacy of the amendment suggested by the Commission on IOLTA (Interest on Lawyers' Trust Account).<sup>302</sup> Similarly, because Germany has no pro bono provision equivalent to Model Rule 6.1,<sup>303</sup> the German experience offers little guidance on the debate within the United States about whether Big 5 lawyers should perform pro bono work.<sup>304</sup> If Model

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autonomy, and because imputation results in increased client disclosure, I would rather eliminate the "non-consentable" conflict rule than eliminate MDP or law firm-wide imputation.

301. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1983). I agree with the comments Professor Ted Schneyer made during this Symposium. See Ted Schneyer, Remarks at the University of Minnesota, Future of the Profession: A Symposium on Multidisciplinary Practice (Feb. 26, 2000) (videotape on file with the *Minnesota Law Review*). I believe there are actions one can envision that almost all would agree impair independence, and actions that almost all would agree MDP nonlawyers appropriately could take. The difficulty will be in analyzing the gray middle area, just as it has been difficult in recent years with respect to the third-party payer-insurance company situation. Therefore, I think it would be useful to initiate discussions to better understand these gray areas.

302. See UPDATE, *supra* note 123 (seeking input on the adequacy of the amendment suggested by the ABA Commission on IOLTA).

303. See, e.g., CCBE COMPENDIUM, *supra* note 16, at Germany-28-30 ("The fees a lawyer may charge in legal aid cases are substantially lower than the regular fees. Every lawyer is obligated to represent clients on the basis of legal aid [if appointed by the court].").

304. I believe that it is quite possible that Big 5 lawyers will not handle pro bono matters to any significant degree. The Commission Report stated:

Accordingly, the Commission recommends that an MDP formally acknowledge those obligations as well as the special obligation of a lawyer to render voluntary *pro bono publico* legal service. Lawyers in law firms are expected to meet their professional obligations by providing a substantial majority of their *pro bono publico* legal services to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the legal needs of persons of limited means. Lawyers in an MDP should fulfill that responsibility in the same way.

REPORT, *supra* note 240. The Draft Recommendation lists pro bono publico as one of the core values of the legal profession. See MARCH 2000 DRAFT RECOMMENDATION, *supra* note 240, Principle 2. The Big 5 representatives who testified before the Commission all said that their lawyers would comply with whatever obligations exist. This testimony highlights the problem, which is that there are no mandatory pro bono obligations. Professors Hazard and Rhode, for example, have summarized the current U.S. pro bono situation

Rule 7.3 regarding solicitation is retained, then I believe it should be interpreted to permit solicitation of clients with whom the MDP firm, not just the lawyer, has a prior professional relationship. "Cross-selling" may be one of the primary benefits to *clients of* MDPs, although that expression is a crass and lawyer-oriented method of expressing the concept. In addition, my interviews convince me that such cross-selling will occur and that it would be exceedingly difficult to enforce a contrary rule.<sup>305</sup>

#### 5. Rules Relevant to the Threshold Issues

As a final matter, I endorse Germany's approach to MDPs in which large and small MDPs are subject to the same regulations. While there are some German rules that could be improved upon, as described above, the German experience confirms my intuitive approach to have the same set of rules apply to all lawyers, regardless of the size of the firm in which they practice.

### VII. CONCLUSION

Because Germany has had MDPs for a much longer time period than many of the jurisdictions currently considering the issues, it is worthwhile for these jurisdictions to look to Germany's experience. In my view, Germany's history shows that it is possible for lawyers to work together with nonlawyers to provide multidisciplinary services to clients without impeding the public interest or hurting those clients. I also think it is worth noting that small MDPs seem to have functioned quite effectively in Germany, even in the absence of a lawyer majority.

Because large German MDPs historically have been dominated by lawyers, however, Germany does not necessarily provide information about what will happen in the large, nonlawyer controlled MDP. Moreover, there is a much shorter history of Big 5-affiliated law firms in Germany than elsewhere in Europe. Thus, in my view, the German experi-

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as follows:

Although the bar has long supported pro bono in principle, its commitment in practice has been less consistent. Surveys from the late 1980s and early 1990s indicated that more than two thirds of the nation's attorneys donate some free legal services, but that the amounts are quite modest and little of this activity goes to representation of indigents. One ABA study found that only 17 percent of American lawyers participate in organized legal assistance programs for the poor. Other research suggests that much of attorneys' non-paying work goes to friends, relatives, and organizations likely to attract paying clients.

GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 469 (3d ed. 1994). Thus, I do not believe that concerns about low participation rates should be a basis for denying clients the right to use an MDP.

305. See *supra* note 224 and accompanying text.

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ence neither proves nor disproves the claims of problems associated with Big 5-affiliated law firms. Finally, I think it worthwhile for every regulator to examine the various German rules discussed in this Article and make an independent evaluation about which rules seem to work and which do not; in short, the world's regulators have lessons to learn from the German experience.