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MDPs, 'Spinning,' and Wouters v. Nova

Laurel S. Terry



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MDPs, “SPINNING,” AND WOUTERS V. NOVA

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When I was first invited to participate in the Case Western Symposium on multi-disciplinary practice (“MDP”). I accepted on the condition that I not be required to present a paper at the conference. The sponsors graciously agreed and indicated that my “publication” could consist of an edited copy of the remarks I made during the live Symposium. Because of a death in the family, however, I did not participate in the live Symposium, did not hear the other speakers, and have no remarks to transcribe or edit. In light of my Symposium absence, I wondered what I could write about that would be reasonably short (not my strong suit), interesting, and would not be repetitious of my prior writings on MDPs.¹ As the publication deadline loomed, I realized that *Wouters v. NOVA*,² the long-awaited European Court of Justice case about MDPs, probably would be decided just about the time of the publication deadline. Although I have some trepidation about whether it is wise for me to memorialize my first reactions, which may or may not be sound, I decided that it would be fun to write about my immediate reactions to the *Wouters v. NOVA* decision. (As I write this paragraph, the case has not yet been decided; I expect

[†] Professor, Penn State Dickinson School of Law. Professor Terry would like to thank Bob Lawry for his patience and consideration, Jonathan Goldsmith for comments on the thesis of this article, Erin Drew, Dickinson '02, for excellent research assistance and Katy Mahoney, Dickinson '97, for collaborating on the original article about *Wouters v. NOVA*. All errors are, of course, the author's own. Professor Terry would like to dedicate this article to the memory of her mother, Betty Terry.

¹ My articles on MDPs include Laurel S. Terry & Clasina B. Houtman Mahoney, *What If . . . ? The Consequences of Court Invalidation of Lawyer-Accountant Multidisciplinary Partnership (MDP) Bans*, in PRIVATE INVESTMENTS ABROAD: PROBLEMS & SOLUTIONS IN INTERNATIONAL BUSINESS IN 1998, ch. 7 (Matthew Bender 1999) [hereinafter *What If?*]; Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547 (2000) [hereinafter Terry, *German MDPs*]; Laurel S. Terry, *A Primer on MDPs: Should the “No” Rule Become a New Rule?*, 72 TEMP. L. REV. 869 (1999); Laurel S. Terry, *MDPs: Reflections from the U.S. Perspective*, 8 INT'L J. LEGAL PROF. 151 (2001); Laurel S. Terry, Submissions to the ABA Commission on Multidisciplinary Practice, at <http://www.abanet.org/cpr/multicomshed399.html> (last visited April 15, 2002) (on file with CWRU Law Review). All of these items should be available soon at <http://www.personal.psu.edu/faculty/l/s/lst3/publications.htm>.

² ECJ Judgment, Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* (“NOVA”), 2002 ECJ CELEX LEXIS 186, at *1 (Feb. 19, 2002) [hereinafter ECJ Judgment]. The opinion is also available at <http://curia.eu.int/en/juris/index.htm>.

to submit this essay shortly after reading the decision.) As part of my reflections, I have shared my perspectives on the “spinning” that has occurred with respect to the *NOVA* case specifically and MDPs generally.

I. THE BACKGROUND OF *WOUTERS V. NOVA*

Wouters v. NOVA involved two challenges to The Netherlands Bar Association³ (“NOVA”) rule that prohibits partnerships between lawyers and auditors. At the time this case arose, NOVA had a regulation known as SV 93, which permitted a lawyer to form a partnership with members of another profession only if the profession was recognized by NOVA. NOVA permitted lawyers to be partners with notaries and tax advisors, but not with auditors.⁴

In July 1995, the Supervisory Board of the Order of Attorneys for the District of Amsterdam determined that the proposed partnership between J.W. Savelberg and Price Waterhouse Tax Consultants, Inc. did not comply with SV 93.⁵ In July 1995, the Supervisory Board of the District of Rotterdam determined that Jos Wouters was in a partnership that violated SV 93 and that SV 93 prohibited Jos Wouters from participating in a partnership that had in its joint name, the name of Arthur Andersen. The ruling from the Rotterdam Supervisory Board occurred after Jos Wouters attempted to open a second office in Rotterdam; he had for several years operated an office in Amsterdam pursuant to conditions that his lawyer negotiated with the Amsterdam bar.

After the Amsterdam and Rotterdam Supervisory Board Rulings, Mr. Savelberg and Mr. Wouters appealed their cases to NOVA, challenging these rulings. After a hearing, NOVA ruled that these appeals were baseless. Mr. Savelberg and Mr. Wouters then appealed these decisions to the District Court of Amsterdam, Administrative Law Section. In a lengthy opinion (thirty-one pages in the English translation), the trial court rejected the lawyers’ arguments.⁶ The trial court’s opinion was wide-ranging. For example, the trial court ruled on various procedural issues, which included rejecting the request by the

³ The Netherlands Bar Association is formally known as The General Council of the Dutch Order of Attorneys (“NOVA”).

⁴ *What If?*, *supra* note 1, § 7.04[1].

⁵ *Id.* § 7.04[2][a] nn.45-47 and accompanying text. This citation supports all of the facts about the case that are contained in the next two paragraphs.

⁶ *Id.* § 7.07 (translating the Dutch trial court opinion). See also Opinion of the Advocate General Philippe Léger, Case C-309/99, *Wouters v. NOVA*, ¶¶ 27-30 (July 10, 2001), available at <http://curia.eu.int/en/jurisp/index.html> (describing the trial court opinion, which the Advocate General refers to as the “Rechtbank”). The trial court’s name is the Arrondissementsrechtbank Amsterdam and was referred to in some of the relevant opinions as the Rechtbank.

Council of the Bars and Law Societies of the European Union (“CCBE”) to participate in the proceeding as a party and deciding that it lacked jurisdiction to hear an appeal by Arthur Andersen. The trial court also rejected the arguments based on Dutch law and the arguments based on European Community (“EC”) competition [antitrust] law and the EC treaties granting lawyers the right of establishment and the freedom to provide services.⁷

After the trial court ruling, the case was appealed to the Raad van State, which is the Dutch high court.⁸ On August 10, 1999, the Raad van State confirmed that the appeals brought by Arthur Andersen were inadmissible.⁹ As to the other appeals, the court “considered that the outcome of the dispute in the main proceedings depended on the interpretation of several provisions of [European] Community law. Consequently, it decided to stay proceedings and to refer [nine questions] to the [European Court of Justice].”¹⁰ The European Court of Justice hearing on the case was held on December 12, 2000.¹¹ On July 10, 2001, Advocate General Philippe Léger issued his opinion.¹² On February 19, 2002, the European Court of Justice issued its ruling.¹³

During the spring of 1998, before the American Bar Association (“ABA”) MDP Commission was created, I presented a paper about MDPs and the *Wouters v. NOVA* case at a conference sponsored by the Center for American and International Law, formerly the Southwestern Legal Foundation. The title of my paper was *What If? The Consequences of Court Invalidity of Lawyer-Accountant Multidis-*

⁷ *What If?*, *supra* note 1, § 7.04[2][b] & [c] nn.48-55 and accompanying text. For an introduction to the European Union’s (“EU”) regulation of lawyers, including a lawyer’s right to establishment (permanent presence in another EU Member State) and the lawyer’s right to provide services in another EU Member State, see Interview with Laurel S. Terry, Question 1 (May 17, 2001), at <http://www.crossingthebar.com/Terry.htm>, reprinted in Stephen Gillers & Roy Simon, REGULATION OF LAWYERS: STATUTES AND STANDARDS 1052 (2002) [hereinafter Terry Interview].

⁸ Opinion of the Advocate General, C-309/99, *Wouters v. NOVA*, ¶ 31.

⁹ *Id.* ¶ 33.

¹⁰ *Id.* ¶¶ 33-34.

¹¹ ECJ Judgment, *supra* note 2, at *4-5.

¹² There is no counterpart in the U.S. system to the Advocate General. As one commentator has explained:

Article 166 of the EEC Treaty provides that the Advocate-General is to assist the Court in its decision making process In practice, the Advocate-General submits to the Court an opinion on what he believes the law to be on the particular issue. These opinions are not legal authority but they do provide background on the various issues posed and they do give insight into the Court’s reasoning of its decisions.

Gregory B. Crinion, *AM&S Europe Limited v. Commission of the European Communities: Confidentiality of Lawyer-Client Communications in Commission Competition Investigations*, 1984 WIS. INT’L L.J. 131, 138 n.32.

¹³ See ECJ Judgment, *supra* note 2, at *1.

*ciplinary Partnership (MDP) Bans.*¹⁴ The thrust of the article was twofold. First, after summarizing the bases for the *Wouters v. NOVA* trial court's opinion, I argued that in my mind, the Dutch trial court had not done a very good job of explaining why it believed that the MDP ban was proper:

NOVA argued, and the court appears to have agreed, that a lawyer-accountant MDP ban is justified because attorneys should be independent of third parties, should have the right not to testify, and must always represent the interests of their clients. The court believed that in contrast to these lawyer functions, the primary function of an accountant is to perform audits, which is not compatible with the position of trust that an attorney occupies. The court also concluded that if either the reality or the name "Arthur Andersen, attorneys and tax consultants" were permitted, the objectively justifiable distinction of lawyers as impartial and independent disappears, to the detriment of citizens. In other words, the lawyer-accountant MDP ban is justifiable within the framework of the public interest, in order to achieve a fair and accessible justice system, and is not intended merely to close off the legal market to competition by accountants. In sum, the *Wouters* court accepted, almost totally, the reasoning of the Netherlands Bar Association.

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

¹⁴ See *What If?*, *supra* note 1. For an additional article on this case, see G. Ellis Duncan, *The Rise of Multidisciplinary Practices in Europe and the Future of the Global Legal Profession Following Arthur Andersen v. Netherlands Bar Ass'n*, 9 TUL. J. INT'L & COMP. L. 537 (2001).

those other professions owe obligations to persons or institutions other than the client.¹⁵

The second aspect of my *What If?* paper was to speculate about what might happen in the event that a U.S. court were willing to invalidate an MDP ban. I observed:

[*Wouters v. NOVA* demonstrates that] the Big Six firms are willing to invest significant resources in order to invalidate existing bans on lawyer-accountant MDPs. Thus, one must expect that sooner or later, the Big Six will challenge in U.S. courts those state ethics rules prohibiting MDPs. Moreover, because one must at least contemplate the possibility that a court will accept the Big Six arguments and find the MDP bans to be overbroad and unjustified, it is worthwhile to think about the effect of such a ruling on the interpretation of lawyers' legal ethics obligations.¹⁶

The article then continued by outlining, for approximately twenty-three pages, the U.S. ethics rules and other issues that might be implicated by court invalidation of the U.S. MDP bans.¹⁷

This paper was my last extensive involvement with *Wouters v. NOVA*. Although I have followed the news reports with interest when they periodically appeared, I did not read any of the briefs that were submitted to the Court of Justice, nor do I know how one would obtain Court of Justice briefs, absent asking the parties for a copy.

II. THE ADVOCATE GENERAL'S OPINION

The European Court of Justice is aided in its deliberations by the Advocate General. Unlike U.S. Supreme Court law clerks, who usually are recent law school graduates, the Advocate General is an experienced lawyer who writes advisory opinions for the pending ECJ cases.¹⁸ The Advocate General's Opinion in *Wouters v. NOVA* was issued on July 10, 2001. It is a lengthy document, consisting of 258 paragraphs,¹⁹ 241 footnotes, and sixty-two printed pages when downloaded from Lexis. A thorough review of this lengthy opinion is beyond the scope of this brief essay. However, the concluding sec-

¹⁵ *What If?*, *supra* note 1, § 7.04[3], at 7-24 to 7-25.

¹⁶ *Id.* § 7.05, at 7-26.

¹⁷ *Id.* §§ 7.05-7.06. This article was described by the ABA MDP Commission in note 7 of its Background Report as providing "a thorough and comprehensive analysis of the ethical issues raised by MDPs in the United States."

¹⁸ *See supra* note 12.

¹⁹ European Court of Justice opinions, as well as the Advocate General opinions, look very different than U.S. Supreme Court opinions. They are organized in numbered paragraphs.

tion of the Advocate General's Opinion included seven numbered subsections that responded to the nine questions submitted to the Court by the Dutch high court. The Advocate General recommended that the European Court of Justice rule as follows:

(1) that Article 85(1) of the EC Treaty (now article 81(1)EC)²⁰ is applicable to a professional association of lawyers such as the Dutch Bar,

(2) that it is contrary to Article 85(1) in the Treaty for such an organization to adopt a rule prohibiting lawyers from associating with auditors;

(3) that Article 86 (now Article 82 EC) would not apply to the bar where it adopts, pursuant to regulatory powers conferred by statute, binding measures forbidding partnerships between lawyers and auditors;

(4) that it is not contrary to article 90(2) (now article 86(2)) for the bar to adopt a binding measure prohibiting MDPs if that measure is necessary in order to safeguard lawyers' independence and professional secrecy and that it is for the national court to determine whether that is the case;

(5) that it is not contrary to article 5 (now Article 10 EC) for a Member State to confer on a professional association the power to adopt binding measures governing MDPs subject to the conditions that: (a) the authorities reserve to themselves the power to determine directly or indirectly, the content of the essential rules of the profession; and (b) the members of the profession have an effective legal remedy before the courts of general jurisdiction against the decisions adopted by the bar association's bodies. It is for the national court to determine whether that is the case;

(6) that article 52 of the Treaty (now Article 43 EC) is not applicable to situations that are internal to a Member State; and

(7) that it is not contrary to article 59 (now article 49 EC) for an association of lawyers to adopt a binding measure forbidding MDPs if that measure is necessary to safeguard lawyers' independence and professional secrecy. It is for the national court to determine whether that is the case.²¹

²⁰ The Advocate General's Opinion is somewhat confusing to read because the article numbers of the EC Treaty changed between the time the case was filed and the time the case was decided. Because I have quoted the Advocate General and the European Court of Justice throughout this essay and because their opinions use the "old" article numbers in the analysis, rather than the "new" article numbers, this essay also uses the "old" article numbers.

²¹ See Opinion of the Advocate General, C-309/99, *Wouters v. NOVA*, ¶ 258 (July 10, 2001), available at <http://curia.eu.int/en/jurisp/index.html>. The language in the text is a paraphrase, not a quotation, of the Advocate General's conclusions.

III. MY REACTIONS TO THE ADVOCATE GENERAL'S OPINION

My strongest reactions to the Advocate General's Opinion have concerned the "spin" it seemed to receive in the media, rather than the substance of the Opinion.²² I first read the Advocate General's Opinion shortly after it was issued. My reading was a "quick" one; I focused on the conclusion and those aspects of the opinion that addressed NOVA's consideration and treatment of the MDP issues. As detailed below, my reaction was that the Opinion was more of a victory for lawyers Wouters and Savelberg than I might have expected.

First, the Advocate General opined that the ban was an "undertaking" in the meaning of Article 85(1) of the Treaty and thus subject to its antitrust provisions.²³ *Second*, despite arguments to the contrary from NOVA, the CCBE, and some government intervenors,²⁴ the Advocate General concluded that a restriction on trade could be found by looking at the "effects" of a regulation, rather than just at its object. *Third*, the Advocate General concluded that the NOVA ban on MDPs between lawyers and accountants did have the effect of restricting competition.²⁵ Moreover, in reaching this conclusion, the Advocate General cited assertions that sounded very "pro-MDP." For example, the Opinion endorsed the appellants' arguments that in the absence of the MDP ban, "competition would be likely to develop in various ways."²⁶ The Opinion continued by repeating the appellants' arguments that "lawyers in association with accountants could also improve the quality and diversity of their services"²⁷ and that "integrating those various services into a single structure would bring addi-

²² I confess that one reason why I may have focused on the "spin" rather than the substance is because the substance is quite dense, concerns areas that are outside my expertise, such as competition law, and because I spent limited time studying the opinion.

²³ Opinion of the Advocate General, *Wouters v. NOVA*, ¶¶ 56-87.

²⁴ *Id.* ¶ 97.

²⁵ *Id.* ¶¶ 116-121.

²⁶ *Id.* ¶ 116.

²⁷ *Id.* ¶ 118. The full paragraph states:

Conversely, lawyers in association with accountants could also improve the quality and diversity of their services.

Taking account of their activities, accountants have gained real experience in some legal spheres, such as tax law, the law of accountancy, financial law, legislation on aid to undertakings and the rules relating to the (re)structuring of undertakings. Lawyers could benefit from the experience acquired by accountants in those various fields and, thus, improve the quality of the legal services offered.

Furthermore, accountants operate on markets other than that of the provision of legal services. They also offer services in such areas as the certification of accounts, auditing, book-keeping and management consultancy. Creating an associative structure with accountants would enable lawyers to offer a distinctly more varied range of services to their clients.

tional advantages both to the professionals concerned and to consumers.²⁸ *Fourth*, the Advocate General concluded that the restriction on competition was indeed appreciable.²⁹ *Fifth*, the Advocate General articulated two conditions that must be followed by a bar in order to justify its exercising, on behalf of the state, the power to regulate lawyers. The first condition was that the public authorities must reserve to themselves the power to determine the content of the essential rules of the profession.³⁰ The second condition was that the members of the profession must have access to a legal remedy and have the right to challenge decisions taken by the bar so as to be able to contest any anti-competitive conduct within that profession.³¹ Although the regulations of many bar associations probably comply with these two conditions, it did not appear to me that this was a negligible requirement.

The final step in this analysis was for the Advocate General to determine whether this restriction on competition could be justified. Although the Advocate General's Opinion concluded that an MDP ban was, in his view, necessary, he nevertheless recommended that the European Court of Justice remand the case to the Netherlands

²⁸ *Id.* ¶ 119. The full paragraph states:

Second, integrating those various services into a single structure would bring additional advantages both for the professionals concerned and for consumers.

In the first place, lawyers and accountants should be able to achieve economies of scale since the common structure would comprise a greater number of service providers. Those economies of scale ought to be reflected in the cost of providing the services and, eventually, have positive effects for consumers in terms of price.

Next, clients would be able to turn to a single structure for a large part of the services required for the organization, management and operation of their businesses. They would, as a result, obtain services which were better adapted to their needs since the structure would possess overall and in-depth knowledge of their policies (commercial policy, sales strategy, personnel management, etc.) and the difficulties they encounter. In addition, clients ought to be able to save both time and money. They would not themselves need to coordinate the services offered by the two professional categories (lawyers and accountants), and could simply communicate to just one person all the information necessary for handling their business.

²⁹ *Id.* ¶ 123. In the subsequent section, the Advocate General also concluded that trade between EU Member States was affected by the NOVA MDP ban. *Id.* ¶ 132.

U.S. lawyers may find it especially interesting to note that one of the bases for the Advocate General's conclusion about the "appreciability" of the restriction is the fact that "the market share held by the legal profession on the market for legal services in the Netherlands amounts to between 35 and 50%." *Id.* ¶ 125. Because the practice of law by non-lawyers traditionally is viewed as the improper "unauthorized practice of law" in the U.S., this sentence appears strange by U.S. standards. In my view, until the MDP debate arose in the U.S., we would have been much more likely to conclude that 100% of the market share of legal services is provided by lawyers since legal services are, by our definition, what lawyers do.

³⁰ *Id.* ¶ 212.

³¹ *Id.* ¶ 213.

court so that the Netherlands court could determine whether the MDP ban indeed was necessary and was “proportional,” i.e., was not more restrictive than necessary.³²

The Advocate General’s Opinion certainly contained strong language about why, in his view, an MDP ban between lawyers and accountants is “necessary.” He stated:

185. In the first place, the existence of multi-disciplinary structures including lawyers and accountants is liable to constitute a threat to the independence of the lawyers.

There is a certain incompatibility between the advisory activities of a lawyer and the supervisory activities of an accountant. The written observations submitted by the Association show that accountants in the Netherlands have the duty to certify accounts. They undertake objective examination and scrutiny of their clients’ records, so as to be able to impart to interested third parties their personal opinion concerning the reliability of those bookkeeping data.

Lawyers might no longer be in a position to advise and defend their clients independently if they were to belong to an organisation that had *also* to give an account of the financial results of the transactions in which they acted. In other words, setting up a body with financial interests in common with members of the professional category of accountants poses the risk of tempting—even forcing—lawyers to take account of considerations other than those exclusively linked to their clients’ interests.

186. In the second place, the existence of multi-disciplinary partnerships between lawyers and accountants is such as to constitute a major obstacle to observance of lawyers’ professional secrecy.

Once members of the two professional categories have undertaken to share the profits, losses and financial risks connected with their association, they will obviously have an interest in exchanging information about the clients they have in common. An accountant may be tempted to ask for and obtain information from a lawyer relating to, for example, negotiations conducted by the latter in a certain dispute. A

³² *Id.* ¶¶ 184, 196-197, 201.

lawyer may, vice versa, be tempted to ask questions of an accountant in order to obtain evidence which would help him to make a better presentation of his client's case in court.

The risk of violating legal professional secrecy is the greater because, in some circumstances, accountants are required by law to impart to the competent authorities information concerning their clients' activities.³³

After concluding that an MDP ban between lawyers and accountants may be necessary, the Advocate General stated that in his view, the "independence and professional secrecy of lawyers cannot be safeguarded by measures less restrictive of competition."³⁴

Although this language is certainly damning of MDPs, I found it interesting and noteworthy that despite this language and his strongly expressed personal views, the Advocate General did *not* recommend that the European Court of Justice uphold NOVA's regulation. Instead, he concluded that the Court did not have enough facts to reject the lawyers' arguments about why the MDP ban was unnecessary and disproportionate.³⁵

Thus, after summarizing the lawyers' arguments about why the lawyer-accountant MDP ban was unnecessary and not proportional, the Advocate General recommended that the Court remand the case to the Dutch court so that it could decide, based on Dutch law, whether the regulation was necessary and proportional.³⁶

The Advocate General's Opinion contained a similar analysis with respect to the EU Treaty provision that grants EU citizens the freedom to provide services in any EU Member State. The Advocate General concluded that NOVA's MDP ban constituted an obstacle to the EU Treaty's guarantee of the right to provide service (thus requiring justification of such a limitation).³⁷ As he did with respect to the antitrust analysis, the Advocate General recommended that the European Court of Justice find it acceptable for NOVA to adopt "a binding measure prohibiting lawyers practising in the territory of the Member State concerned from entering into multi-disciplinary partnership with accountants if that measure is necessary in order to safeguard lawyers' independence and professional secrecy."³⁸ According to the

³³ *Id.* ¶¶ 185-186 (emphasis in original).

³⁴ *Id.* ¶ 192.

³⁵ *Id.* ¶ 196.

³⁶ *Id.* ¶¶ 193-201.

³⁷ *Id.* ¶ 248.

³⁸ *Id.* ¶ 257.

Advocate General, however, the issue of whether a measure such as an MDP ban *is* necessary was a question for the Netherlands court.

As this summary shows, there were many points in the Advocate General's Opinion about which the appellant lawyers might be said to have "prevailed." It therefore came as quite a shock to me when, several months later, I ran across the European Court of Justice press release about the Advocate General's Opinion that seemed to indicate that the Opinion was a victory for NOVA and a loss for lawyers Wouters and Savelberg. The one-page press release issued by the European Court of Justice accurately described the case. What I found surprising, however, was the following language, which was in bold type and emphasized in the press release:

According to Mr. Léger, application of the competition rules to authorise multi-disciplinary partnerships would compromise the obligations which are peculiar to the legal profession, namely independence, respect for professional secrecy and the need to avoid conflicts of interest. **In the Advocate General's view, there is a certain incompatibility between those advisory activities and the supervisory activities of an accountant. To his mind, the very essence of the legal profession may preclude the establishment of a community of financial interests with members of the professional category of accountants.**

In those circumstances, the **restriction of competition caused by the Netherlands regulation seems to him to be lawful**, especially as it does not forbid lawyers and accountants separately to offer their services to clients established in other Member States. It is, to his mind, the measure least damaging to competition (other forms of cooperation between the two professions remain possible).³⁹

Although this press release mentioned the recommendation for a remand to the Dutch court in the last line, it did so by stating that the Advocate General "considers that it is for the national court to determine whether those two conditions are satisfied," referring to the conditions that a bar must follow when enacting rules.⁴⁰ No mention was made of the fact that after offering his own opinion, the Advocate General concluded that the issue of whether the MDP ban itself was

³⁹ Press Release No. 26/2001, European Court of Justice, In the Advocate General's View, A Prohibition of Collaboration Between Lawyers and Accountants May Be Justified (July 10, 2001) (emphasis in original), at <http://curia.eu.int/en/cp/cp01/aff/cp0126en.htm>.

⁴⁰ *Id.*

necessary and proportional should be referred back to the Dutch courts.⁴¹

I remember being quite shocked after reading this press release because in my view, the press release seemed to present the Advocate General's Opinion as a victory for NOVA and the anti-MDP proponents, rather than as a "mixed bag" opinion, which is how I had viewed the Opinion. After reading the press release, I immediately flipped through the Opinion again, panicked that I had somehow misunderstood it previously. But after carefully skimming the Opinion again, I once again concluded that my reaction was at odds with the emphasis given in the Court's press release. Although the Advocate General clearly had expressed strong views that might be called "anti-MDP," he ultimately could not conclude that the Court had enough information to be able to reject the lawyers' arguments that the Dutch ban was unnecessary and disproportionate. Thus, whereas the press release focused on his views about necessity, I found the more striking aspect of the Opinion to be the fact that he recommended a remand.

Moreover, I found it quite significant that the bar was held to be capable of antitrust violations. I also found it significant that bar rules now must ensure the opportunity for state review and provide a method of challenge. Finally, I didn't find it the least bit surprising that the Advocate General would remand rather than resolve the issue of whether a particular regulation was necessary to protect the independence and core values of the legal profession. Because the legal professions and cultures differ significantly among the EU countries, it didn't seem surprising to me that the Advocate General was not willing to issue a global opinion. In short, I considered the Opinion at best a mixed victory for plaintiffs and defendant and probably more of a victory for plaintiffs than defendant. I also thought the press re-

⁴¹ *Id.* In this respect, the Advocate General's Opinion reminds me somewhat of the famous U.S. Supreme Court case *Nix v. Whiteside*, 475 U.S. 157 (1986) which considered the issue of whether a lawyer's threat to inform the court of his client's proposed perjury deprived the defendant of his constitutional right to effective assistance of counsel. Justice Burger, writing for the majority, held that the Sixth Amendment test is to examine whether the course of conduct fell within the "wide range of professional responses" and that there was no constitutional violation under the circumstances of the case. *Id.* at 166. Despite the context of the issue, Justice Burger suggested that disclosure of perjury was the only proper response for a lawyer to this situation. *Id.* at 174 ("The rule adopted by the Court of Appeals, which seemingly would require an attorney to remain silent while client committed perjury, is wholly incompatible with the established standards of ethical conduct and the laws of Iowa and contrary to professional standards promulgated by that State."). In my view, this conclusion was pure dicta, as Justice Brennan pointed out in his concurring opinion. *Id.* at 177 ("[T]he Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law.").

lease did not present a complete picture of the contents of the Advocate General's Opinion.

IV. ON MDPs AND "SPINNING" GENERALLY

As explained above, I was very surprised at how the *Wouters v. NOVA* case seemed to have been "spun" in the media. On the other hand, I don't think I should have been too surprised that my reaction differed from the media "spin" because I have often found that in the MDP context, my reactions are at odds with some of the "spin" I read.

For example, I have been surprised by the "spin" associated with New York's new rule on ancillary businesses. It is no secret that some of New York's bar leaders were among the most vocal and most effective opponents of the ABA MDP Commission's proposals. Bob MacCrate and Terry Cone, for example, spoke out vigorously and often against MDPs.⁴² Both of these men were on the New York State MDP Commission that issued the lengthiest MDP report of which I am aware.⁴³ Although the New York State Report resoundingly rejected the ABA MDP Commission proposals, it did recommend that better efforts be made to facilitate multi-disciplinary practice between lawyers and nonlawyers to aid in the better provision of legal services.⁴⁴ While I think this is a laudable goal, I think it is a very different proposition than the MDP issue that was discussed before the ABA MDP Commission. Thus, I have been surprised and bemused to see press reports citing New York as the first state to adopt an MDP proposal.⁴⁵ Pennsylvania adopted its version of Rule 5.7 on Ancillary Businesses in 1996.⁴⁶ In short, I find the "spin" on

⁴² See, e.g., Sidney M. Cone III, Testimony to the ABA Commission on Multidisciplinary Practice (March 12, 1999), at <http://www.abanet.org/cpr/cone1.html>; Report 10F Adopted at the ABA Annual Meeting 2000, at <http://www.abanet.org/cpr/mdp-report10f.html> (last visited Apr. 12, 2002) (referring to the motion's reliance on the "MacCrate Report").

⁴³ See New York State Bar Association Report, Special Committee on Multi-disciplinary Practice and the Legal Profession (Jan. 8, 1999), at <http://www.nysba.org/multidiscrpt.html> [hereinafter New York State MDP Report]; Joint Order of the Appellate Divisions Adopting N.Y. APP. DIV. CT. R. § 1200.5-b (McKinney 2002) (adopting N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-106, Responsibilities Regarding Nonlegal Services), at <http://www.nysba.org/opinions/mdprules.html> (last visited Apr. 12, 2002).

⁴⁴ See New York State MDP Report, *supra* note 43.

⁴⁵ See, e.g., Press Release, New York State Bar, New Rules Clarify Standards for N.Y. Lawyers' Alliances with Nonlegal Professional Service Firms, Court adopts rules proposed by New York State Bar Association for MDP's and sets national standard (July 24, 2001), at <http://www.nysba.org/media/newsreleases/2001/ocampdp.htm> ("New York now becomes the first state in the nation to adopt rules that specifically govern lawyer participation in multi-disciplinary practice groups, or MDP's, which offer clients a variety of professional services such as engineering, financial planning, accounting, brokerage, social work, and real estate, for example.").

⁴⁶ See Laurel S. Terry, *Pennsylvania Adopts Ancillary Business Rule*, PROF. LAW., Nov. 1996, at 10, WESTLAW, Lawprac Index.

the New York rule out-of-sync with my perception about the substance of this rule.

One of the things that has occurred to me over the past few years is that the reality of MDPs—what is happening and what will happen in the future—is not necessarily the same as what one reads about or what one might expect. After the ABA House of Delegates resoundingly defeated the ABA MDP Commission's proposals in July 2000, the issue of MDPs seemed to drop off of the media's radar screen. The media silence on the issue during the past year suggests to me that many lawyers are of the view that because the ABA defeated the MDP Commission proposals, MDPs have also died.

My perception is different. I talk to my students and it sounds like some of them are working part-time in firms that are currently offering or contemplating offering activities that look a lot like MDPs. I look at the Chart of State MDP Activity that the ABA Center for Professional Responsibility has continued to maintain and update on the ABA MDP Commission webpage.⁴⁷ For quite awhile, it seemed like each time the chart was updated, more committees had come out in favor of MDPs. Although the majority of states certainly have rejected MDP proposals, and although no states have actually adopted MDP rules, I have been interested to see how much the issue is still actively percolating in many states.⁴⁸ Thus, although multi-jurisdictional practice ("MJP") may be the new media poster issue (soon to be replaced by the General Agreement on Trade in Services' ("GATS") effect on legal services, if I have my way),⁴⁹ I don't think

⁴⁷ See Center for Professional Responsibility, American Bar Association, MDP Information (Apr. 5, 2002), at http://www.abanet.org/cpr/mdp_state_summ.html [hereinafter State MDP Summary Chart] (prepared with the help of the Oregon State Bar).

⁴⁸ North Carolina, for example, recently recommended adoption of a lawyer-control model. Minnesota's Task Force has recommended that its Supreme Court adopt rules permitting MDPs. In Colorado, the Board of Governors approved the concept of MDPs and a task force is now drafting specific rules. *Id.*

⁴⁹ I have recently written several articles about the GATS' effect on legal services. See Laurel S. Terry, *GATS' Applicability to Transnational Legal Practice and its Potential Impact on U.S. Domestic Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001) (one-hundred page article exploring the effect of the GATS and its progeny on legal services) [hereinafter Terry, *GATS' Applicability*]; Laurel S. Terry, 2001 Symposium, *A Challenge to the ABA and the U.S. Legal Profession to Monitor the GATS 2000 Negotiations: Why You Should Care*, PROF. LAW. 63 (2001), available at <http://www.crossingthebar.com/GATS2000.htm>; Terry Interview, *supra* note 7, at Question 2 (two page summary of the effect of the GATS).

In my view, it is exceedingly important for lawyers, educators, clients, and regulators around the world to get "up to speed" on the GATS because the World Trade Organization ("WTO") currently is engaged in a new set of negotiations about legal services. In November 2001, the WTO Member States agreed to a schedule in which requests must be submitted by June 30, 2002, offers must be submitted by March 31, 2003, and the negotiations should be completed by January 1, 2005. See Ministerial Declaration, World Trade Organization Ministerial Conference, Fourth Session, Doha, Qatar 3, 10 (Nov. 14, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm. My current mission is

that the MDP issue has dropped off the face of the earth as much as one might expect based on the current dearth of articles on the topic compared to two years ago.

Finally, with respect to “spin,” it is hard not to mention Enron. As I write this essay, the Enron situation has just begun to unfold, numerous congressional committees are holding hearings, and numerous Enron officials have asserted their Fifth Amendment rights when called to testify before Congress. Many of my friends and colleagues who know about my work on MDPs have mentioned Enron to me, seeking my concurrence to their assertions that Enron spells the death knell for MDPs in the U.S. While I certainly think this is a possible outcome of Enron, I do not think it is inevitable. It seems to me that another possible scenario is that the SEC will decide that to preserve an auditor’s independence, an audit firm may not offer significant consulting services to a client that it audits. It is also possible that such a ruling would take away much of the momentum for MDPs by the Big Five.⁵⁰ If the Big Five back off of MDPs, then it seems to me that some of the opposition to MDPs might also dissolve. Meanwhile, states such as Colorado, Minnesota, and Utah appear to be seriously contemplating adoption of a rule permitting MDPs. Thus, it may be that the MDP development would unfold in the U.S. as it originally did in Germany,⁵¹ with the bulk of the MDPs being offered in small firms to “Main Street” clients. It would indeed be interesting if that was one of the effects of Enron.

In sum, one of the things I have learned over the past few years is that I should not expect my reactions to events to match the “spin” given in the media to events such as the *Wouters v. NOVA* Advocate General’s Opinion; New York’s adoption of DR 1-106, N.Y. Code of Professional Responsibility, Rule on the Responsibilities Regarding Nonlegal Services; and the effect of the Enron situation on the development of MDPs in the U.S.

V. REACTIONS ON READING THE COURT’S OPINION IN *WOUTERS V. NOVA*

On February 19, 2002, the European Court of Justice issued its opinion in *Wouters v. NOVA*.⁵² My reaction to the opinion was that I

to encourage lawyers to learn about the GATS so that the U.S. Trade Representative (and his counterparts in other countries) hears from as broad a constituency as possible.

⁵⁰ I am not sure that I agree that such a ruling will result in all arms of the Big Five backing off from their plans to offer legal services, but I note that this was one of the points made by several commentators in response to the ABA MDP Commission report.

⁵¹ See Terry, *German MDPs*, *supra* note 1, at 1547.

⁵² ECJ Judgment, *supra* note 2, at *1. See also Press Release No. 15/02, European Court of Justice, The Netherlands Rules Prohibiting Multi-Disciplinary Partnerships Between Mem-

was quite surprised by the outcome. As is explained below in greater detail, the European Court of Justice agreed with the Advocate General's Opinion in many key respects. On the ultimate point, however, the Court departed from the Advocate General's recommendation. The Court found that it was *not* necessary to remand the case to the Dutch court to determine whether a lawyer-accountant ban was necessary and proportional. I found it very surprising that the Court would make this ruling despite the Advocate General's conclusion that more facts were needed, and I found it even more surprising that the opinion contained so little analysis to support the Court's conclusions. A fuller explanation of the Court's Judgment and my reasoning follows.

In contrast to the seven conclusions contained in the Advocate General's Opinion, the conclusion of the European Court of Justice's Judgment contains only four paragraphs:

1. A regulation concerning partnerships between members of the Bar and other professionals, such as the Samenwerkingsverordening 1993 (1993 regulation on joint professional activity), adopted by a body such as the Nederlandse Orde van Advocaten (the Bar of the Netherlands Bar), is to be treated as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty (now Article 81 EC).

2. A national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite effects restrictive of competition, that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

3. A body such as the Bar of the Netherlands does not constitute either an undertaking or a group of undertakings for the purposes of Article 86 of the Treaty (now Article 82 EC).

4. It is not contrary to Articles 52 and 59 of the Treaty (now, after amendment, Articles 43 and 49 EC) for a national regulation such as the 1993 Regulation to prohibit any multidisciplinary partnerships between members of the Bar and

accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.⁵³

Despite the difference in numbering, the European Court of Justice's Judgment is, in many respects, similar to the Advocate General's recommendation. First, the Court, like the Advocate General, concluded that the bar was an "undertaking" in the meaning of Article 85(1) of the Treaty and thus subject to its antitrust provisions.⁵⁴ In reaching this conclusion, the Court explicitly rejected the argument propounded by intervenors Germany, Austria, and Portugal, to the effect that the bar "may be treated as comparable to a public authority where the activity which it carries on constitutes a task in the public interest forming part of the essential functions of the State" and that the "Netherlands have made the Bar of the Netherlands responsible for ensuring that individuals have proper access to the law and to justice, which is indeed one of the essential functions of the State."⁵⁵ In doing so, the Court stated:

58. When it adopts a regulation such as the 1993 Regulation, a professional body such as the Bar of the Netherlands is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies (Poucet and Pistre, cited above, paragraph 18), nor exercising powers which are typically those of a public authority (Sat Fluggesellschaft, cited above, paragraph 30). It acts as the regulatory body of a profession, the practice of which constitutes an economic activity.

59. In that respect, the fact that Article 26 of the Advocatenvet also entrusts the General Council with the task of protecting the rights and interests of members of the Bar cannot a priori exclude that professional organisation from the scope of application of Article 85 of the Treaty, even where it performs its role of regulating the practice of the profession of the Bar (see, to that effect, with regard to medical practitioners, Pavlov, cited above, paragraph 86).⁵⁶

The Court, like the Advocate General, concluded that a restriction on trade could be found by looking at the "effects" of a regulation,

⁵³ ECJ Judgment, *supra* note 2, at *55-57, ¶ 124.

⁵⁴ *Id.* at *32, ¶¶ 58-59.

⁵⁵ *Id.* at *30, ¶ 53.

⁵⁶ *Id.* at *32, ¶¶ 58-59.

rather than just its object and that the Dutch rules were indeed such a restriction.⁵⁷ The Court reached this conclusion despite Luxembourg's argument that an MDP-ban is pro-competitive:

[T]he Luxembourg Government claimed at the hearing that a prohibition of multi-disciplinary partnerships such as that laid down in the 1993 Regulation had a positive effect on competition. It pointed out that, by forbidding members of the Bar to enter into partnership with accountants, the national rules in issue in the main proceedings made it possible to prevent the legal services offered by members of the Bar from being concentrated in the hands of a few large international firms and, consequently, to maintain a large number of operators on the market.⁵⁸

In explaining why it thought the Dutch MDP ban restricted competition, the Court stated:

As regards the adverse effect on competition, the areas of expertise of members of the Bar and of accountants may be complementary. Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider range of services, and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business (the "one-stop shop" advantage).

Furthermore, a multi-disciplinary partnership of members of the Bar and accountants would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation.

Nor, finally, is it inconceivable that the economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the cost of services.

A prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in the

⁵⁷ *Id.* at *41, ¶ 86.

⁵⁸ *Id.* at *41, ¶ 85.

1993 Regulation, is therefore liable to limit production and technical development within the meaning of Article 85(1)(b) of the Treaty.⁵⁹

The Court, like the Advocate General, also found that the restriction on competition was appreciable and affected intra-community trade.⁶⁰

The next stage of the Court's analysis, however, differed significantly from the conclusion contained in the Advocate General's Opinion, although the Court relied heavily on the views expressed there. After concluding that the Dutch ban on lawyer-accountant MDPs was an appreciable restriction on trade, the Court concluded that such a ban "could therefore reasonably be considered necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned."⁶¹ Furthermore, the Court found that it was reasonable for the Dutch Bar to conclude that its objectives could not "be attained by less restrictive means."

Given the Court's analysis here, it declined to address the fifth and sixth questions that had been posed to it by the Dutch court that concerned the application to the bar of Treaty article 90(2) and the conditions under which the state must supervise the adoption of bar rules.⁶²

⁵⁹ *Id.* at *41-42, ¶¶ 87-90 (paragraph numbers omitted).

⁶⁰ *Id.* at *44, ¶ 95 (finding that the restriction affected intra-Community trade); *Id.* at *45, ¶ 96 (finding that the restriction in trade was "appreciable").

⁶¹ *Id.* at *49, ¶ 107.

⁶² *Id.* at *52-53, ¶¶ 117-118. The fifth and sixth questions were as follows:

5. If an institution such as the Bar of the Netherlands is to be regarded in its entirety as an association of undertakings for the purposes of Community competition law, is Article 90(2) of the EC Treaty (now Article 86(2) EC) to be interpreted as extending to an institution such as the Bar of the Netherlands which lays down universally binding rules, designed to safeguard the independence and loyalty to the client of its members who provide legal assistance, on cooperation between its members and members of other professions?

6. If an institution such as the Bar of the Netherlands is to be regarded as an association of undertakings or an undertaking or group of undertakings, do Article 3(g), the second paragraph of Article 5 and Articles 85 and 86 of the EC Treaty (now Articles 3(g), 10, 81 and 82 EC) preclude a Member State from providing that that institution (or one of its agencies) may adopt rules concerning *inter alia* cooperation between its members and members of other professions when review by the relevant public authority of such rules is limited to the power to annul such a rule without the authority's being able to adopt a rule in its stead?

See id. at *20, ¶ 39. On these issues, the Advocate General had articulated two conditions that must be followed by a bar in order to justify its exercising, on behalf of the state, the power to regulate lawyers. The first condition was that the public authorities must reserve to themselves the power to determine the content of the essential rules of the profession. The second condition was that the members of the profession must have access to a legal remedy and have the right to challenge decisions taken by the bar so as to be able to contest any anti-competitive conduct within the profession. *See supra* note 30-31 and accompanying text.

The Court ended its analysis with the “freedom of services” and “freedom of establishment” questions.⁶³ Similar to the Advocate General’s Opinion, the Court’s analysis of “freedom of services and establishment” tracked the Court’s analysis of the competition arguments. The Court found that even if the services and establishment provisions applied to the Dutch MDP ban and even if such a ban constituted a restriction on the freedom of movement, “that restriction would be justified for the reasons set out in paragraphs 97 to 109 above.”⁶⁴

So what were paragraphs 97 to 109? Why did the European Court of Justice conclude that an MDP ban between lawyers and accountants was acceptable when the Advocate General thought that the Court did not have enough facts before it and should remand to the Dutch court? Rather than paraphrase what the Court said and risk omitting something or mischaracterizing the Court’s statements, I have reproduced below the Court’s entire analysis in paragraphs 97-110:

97. However, not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 38). It has then to be consid-

⁶³ The difference between “services” and “establishment” is that services are temporary in nature and establishment is not. For a general discussion of the EU’s regulation of lawyers and the principles of establishment and services, see generally Terry Interview, *supra* note 7, at Question 1.

⁶⁴ See ECJ Judgment, *supra* note 2, at *54, ¶ 122. Based on this determination, the Court concluded in the next paragraph that:

[I]t is not contrary to Articles 52 and 59 of the Treaty for a national regulation such as the 1993 Regulation to prohibit any multi-disciplinary partnership between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned.

Id. at *55, ¶ 123.

ered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

98. Account must be taken of the legal framework applicable in the Netherlands, on the one hand, to members of the Bar and to the Bar of the Netherlands, which comprises all the registered members of the Bar in that Member State, and on the other hand, to accountants.

99. As regards members of the Bar, it has consistently been held that, in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory (Case 107/83 Klopp [1984] ECR 2971, paragraph 17, and Reisebüro, paragraph 37). For that reason, the rules applicable to that profession may differ greatly from one Member State to another.

100. The current approach of the Netherlands, where Article 28 of the *Advocatenwet* entrusts the Bar of the Netherlands with responsibility for adopting regulations designed to ensure the proper practice of the profession, is that the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty, mentioned above, to avoid all risk of conflict of interest and the duty to observe strict professional secrecy.

101. Those obligations of professional conduct have not inconsiderable implications for the structure of the market in legal services, and more particularly for the possibilities for the practice of law jointly with other liberal professions which are active on that market.

102. Thus, they require of members of the Bar that they should be in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that respect, guarantees that all steps taken in a case are taken in the sole interest of the client.

103. By contrast, the profession of accountant is not subject, in general, and more particularly, in the Netherlands, to comparable requirements of professional conduct.

104. As the Advocate General has rightly pointed out in paragraphs 185 and 186 of his Opinion, there may be a degree of incompatibility between the advisory activities carried out by a member of the Bar and the supervisory activities carried out by an accountant. The written observations submitted by the respondent in the main proceedings show that accountants in the Netherlands perform a task of certification of accounts. They undertake an objective examination and audit of their clients' accounts, so as to be able to impart to interested third parties their personal opinion concerning the reliability of those accounts. It follows that in the Member State concerned accountants are not bound by a rule of professional secrecy comparable to that of members of the Bar, unlike the position under German law, for example.

105. The aim of the 1993 Regulation is therefore to ensure that, in the Member State concerned, the rules of professional conduct for members of the Bar are complied with, having regard to the prevailing perceptions of the profession in that State. The Bar of the Netherlands was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts.

106. Moreover, the concurrent pursuit of the activities of statutory auditor and of adviser, in particular legal adviser, also raises questions within the accountancy profession itself, as may be seen from the Commission Green Paper 1996/321/01 "The role, the position and the liability of the statutory auditor within the European Union" (OJ 1996 C 321, p. 1; see, in particular, paragraphs 4.12 to 4.14).

107. A regulation such as the 1993 Regulation could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.

108. Furthermore, the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community

law (see, to that effect, Case C-108/96 Mac Quen and Others [2001] ECR I-837, paragraph 33). Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means (see, to that effect, with regard to a law reserving judicial debt-recovery activity to lawyers, *Reisebüro*, paragraph 41).

109. In light of those considerations, it does not appear that the effects restrictive of competition such as those resulting for members of the Bar practising in the Netherlands from a regulation such as the 1993 Regulation go beyond what is necessary in order to ensure the proper practice of the legal profession (see, to that effect, Case C-250/92 DLG [1994] ECR I-5641, paragraph 35).

110. Having regard to all the foregoing considerations, the answer to be given to the second question must be that a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.⁶⁵

As this excerpt shows, the Court provided a lengthy analysis in paragraphs 97-107 of the grounds for its conclusions that the Dutch bar rule was necessary in order to protect the important values of the independence of the legal profession and lawyer secrecy. Although one might perhaps disagree with this analysis, the Judgment explains how the Court reached its conclusion.

What *is* surprising to me, however, is how little explanation the opinion contains with respect to the issue of whether the regulation was more restrictive than necessary. The Court appears to have simply deferred to the Dutch Bar authorities' analysis on this point, stating that "the Bar of the Netherlands is entitled to consider that the

⁶⁵ *Id.* at *45-51, ¶¶ 97-110.

objectives pursued by the 1993 Regulation cannot . . . be attained by less restrictive means.”⁶⁶

Similarly, the concluding paragraph of this section of the Judgment states:

[the Dutch Bar rule] does not infringe Article 85(1) of the Treaty, since *that body* could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.⁶⁷

I found the Court’s analysis of “proportionality” particularly surprising in light of the Advocate General’s Opinion. The Advocate General had concluded that in his view, the Dutch Bar rule was “proportionate”; he did not find persuasive the arguments that less restrictive means were available to protect the independence of the legal profession and lawyer secrecy.⁶⁸ Unlike the Court’s Judgment, however, the Advocate General summarized the plaintiffs’ arguments about why the Dutch rule was more restrictive than necessary:

Supporters of the existence of integrated structures maintain generally that several mechanisms make it possible to ensure compliance with the rules of professional conduct particular to the legal profession. In their view: (1) the Association can adopt disciplinary measures in respect of lawyers who fail to fulfill their professional duties; (2) contractual agreements may stipulate expressly that members of the structure must perform their obligations under the rules of professional conduct; and (3) a Chinese wall mechanism makes it possible to prevent any transfer of information between lawyers and accountants.⁶⁹

Moreover, although he explained the reasons why he did not find these arguments persuasive, the Advocate General ultimately concluded that “the Court is not in possession of sufficient evidence to settle the question itself of the proportionality of the contested Regulation.”⁷⁰ In light of the Advocate General’s conclusion that a remand was necessary on the issue of proportionality or less restrictive means,

⁶⁶ *Id.* at *49-50, ¶ 108.

⁶⁷ *Id.* at *50-51, ¶ 110 (emphasis added).

⁶⁸ Opinion of the Advocate General Philippe Léger, Case C-309/99, *Wouters v. NOVA*, ¶¶ 190, 194 (July 10, 2001), available at <http://curia.eu.int/en/jurisp/index.html>.

⁶⁹ *Id.* ¶ 193.

⁷⁰ *Id.* ¶ 196.

I was very surprised that the Court's Judgment did not summarize the plaintiffs' arguments about the less restrictive means they believed were available, the Court's reasoning about why those means were insufficient, or why a remand on these issues was inappropriate.⁷¹ In short, I found it surprising that the Court was willing to rely on the bar's judgment with respect to these issues, without a fuller explanation of why such deference was appropriate.

While the European Court of Justice's deference to the Dutch Bar with respect to the issue of whether a bar rule is "proportional" may be a relief for bars and regulators around the world, I am not convinced that bars should expect to consistently receive such deference to their judgment concerning whether a less restrictive solution would be adequate. An example in which such deference was not given to the bars is the landmark U.S. Supreme Court case *Bates v. Arizona*.⁷² *Bates* found unconstitutional Arizona's rule that prohibited lawyers from advertising their fees. Although the bar offered several justifications in support of the rule restricting price advertising, the court examined the justifications closely and concluded that the goals could be served through less restrictive means.⁷³ In other words, in *Bates*, the U.S. Supreme Court was not willing to defer to the judgment of

⁷¹ Because an impetus for this essay was the disconnect I perceived between the Advocate General's Opinion and the accompanying press release, it was ironic that on the eve of sending this essay to Case Western, I once again read a press story that caused me to panic and worry that I had completely misunderstood the Court's Judgment. After completing this essay, I read some of the press stories that had been issued about the Judgment. Several of these stories refer to the fact that the case is not over and that it is now up to the Dutch Council of State, the Dutch high court, to resolve all the issues. See, e.g., James Pressley, *EU Court Permits Dutch Ban on Accountant-Lawyer Links*, BLOOMBERG NEWS, Feb. 19, 2002, LEXIS, All Bloomberg News File ("In its ruling today, the European Court said the Dutch ban impeded competition. The judges added though, that this restriction could be justified if it was necessary to safeguard the independence and professional secrecy of lawyers. *It was up to the national court to decide if that was the case, the court said.* The case now goes back to the Dutch court for a final ruling, which must follow the reasoning laid down by the European court.") (emphasis added).

Despite this news story, I see nothing in the Court's Judgment to suggest that it is up to the national court to decide whether the Dutch MDP ban was necessary and proportional. Whereas the Advocate General specifically included this aspect in his Opinion, the Court's Judgment contains no language stating that it is up to the Dutch court to decide the issues of necessity and proportionality. Nor is any statement to this effect included in the press release about the case.

Because this case was referred by the Dutch court, the news report is correct that the case goes back to the Dutch court for a final ruling. In my view, however, it is inaccurate to state that it is up to the national court to decide whether the restriction was necessary. While the comments of Arthur Andersen following the case suggest that Andersen and its affiliated lawyers may offer that argument to the Dutch court, I think it is optimistic for them to assume that this issue was left open by the European Court of Justice. See, e.g. Michael Mann & Nikki Tait, "Big Five" Plans for Legal Tie-Ups Suffer Setback, FINANCIAL TIMES (LONDON), Feb. 20, 2002, at 8 ("Andersen Legal said it would continue to press its case with the Dutch Council of State, which must now make the final ruling in the matter.").

⁷² 433 U.S.350 (1977).

⁷³ *Id.*

the bar about whether the challenged rule was more restrictive than necessary. (The concept of “less restrictive means” is referred to as “proportionality” in EU law⁷⁴ and in the *NOVA* opinion.⁷⁵)

Another example of a case where deference was not shown is *Barnard v. Thorstenn*.⁷⁶ In *Barnard*, the U.S. Supreme Court ruled that it was unconstitutional for the Virgin Islands to impose a one-year residency requirement on lawyers who wished to be licensed to practice law in the Virgin Islands. Although the Court recognized the validity of the objectives the bar was trying to achieve and although the bar argued that a residency requirement *was* required in order to achieve those goals, the Supreme Court ruled that there were less restrictive means available by which the bar could achieve its goals.⁷⁷ In short, the Court refused to defer to the bar’s judgment about whether the means used were necessary, but instead performed its own analysis. In this respect, the case differs significantly from the approach used by the European Court of Justice in *Wouters v. NOVA*.

Moreover, it is clear that in the context of the ongoing work of the GATS,⁷⁸ some bar associations are worried about whether all decision makers will show the same deference to bar rules as did the European Court of Justice. The Canadian Bar Association and the Federation of Law Societies of Canada, for example, have voiced concerns about extending the GATS “accountancy disciplines”⁷⁹ to the legal profession because of concerns about the WTO appellate body’s jurisprudence interpreting the requirement that regulations not be more restrictive than necessary.⁸⁰ The CBA paper, for example, stated:

⁷⁴ See, e.g., Opinion of the Advocate General Philippe Léger, Case C-309/99, *Wouters v. NOVA*, ¶¶ 189-190 (July 10, 2001), available at <http://curia.eu.int/en/jurisp/index.html>.

⁷⁵ See ECJ Judgment, *supra* note 2, at *49-51, ¶¶ 108-110.

⁷⁶ 489 U.S. 546 (1989).

⁷⁷ *Id.* at 554-58.

⁷⁸ The GATS is technically Annex 1b to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations: General Agreement on Trade in Services, 33 I.L.M. 1125, 1168 (1994), available at http://www.wto.org/english/docs_e/legal_e/final_e.htm (last visited Apr. 11, 2002). For a list of articles discussing the GATS and its applicability to legal services, see the articles cited *supra* in note 49.

⁷⁹ The “accountancy disciplines” were adopted by the WTO in December 1998. See WTO Council for Trade in Services, *Decision on Disciplines Relating to the Accountancy Sector* (Dec. 15, 1998), at http://docsonline.wto.org/gen_home.asp?language=1. These “Disciplines” are available on the Internet at Press Release, WTO adopts Disciplines on Domestic Regulation for the Accountancy Sector (Dec. 14, 1998), at http://www.wto.org/english/news_e/pres98_e/pr118_e.htm. For a discussion of these disciplines, see Terry, *GATS’ Applicability*, *supra* note 45, at 1050-58. The WTO Working Party on Domestic Regulation is a forum in which WTO Member States, including the U.S., are engaged in a discussion about whether the accountancy disciplines should be extended to cover all service sectors, including legal services. See *id.* at 1042, 1047-49.

⁸⁰ See Canadian Bar Association, *Submission on The General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Pro-*

The remainder of the disciplines may potentially raise problems for the Canadian legal profession and therefore cause the CBA concern. These are summarized below.

Article I: General Provisions: para. 1 - This provides that regulatory measures must not be “prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade.” Further, it commits Member States to “ensure that such measures are not more trade-restrictive than necessary to fulfil [sic] a legitimate objective.” Finally, it provides a non-exhaustive list of “legitimate objectives” which includes: quality of service, professional competence and integrity.

WTO dispute resolution panels under the General Agreement on Tariffs and Trade (GATT) have articulated a very high standard for the word “necessary” under Article XX of the GATT. A party must establish there “were no alternative measures consistent with the General Agreement or less inconsistent with it” that could reasonably be expected to have attained the relevant objective. In the dozen or so cases which have been decided under Article XX, a member state’s measure has never been upheld on the grounds of “necessity.” Further, the burden of establishing necessity falls upon the party imposing the restriction.⁸¹

The three examples cited above suggest to me that despite the considerable deference shown by the European Court of Justice to the Dutch Bar’s evaluation of MDPs, not all bars can expect such deference from courts in the future. Although the European Court of Justice upheld the ruling of the trial court opinion by deferring to the judgment of the Dutch Bar with respect to the issue of whether an MDP ban was “proportional,” I continue to believe that bars around the world must be prepared to explain why less restrictive alternatives are not sufficient. I also stand by my 1998 conclusion that because “one must at least contemplate that a court will accept the Big Six arguments and find the MDP bans to be overbroad and unjustified, it

fession 1 (Nov. 2000), at <http://www.cba.org/epigram/november2000/pdf/00%2D30%2Deng.pdf>; Federation of Law Societies of Canada, *Meeting Canada’s Current Obligations for the Legal Profession Under the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO)* (Feb. 2001) at <http://www.flsc.ca/english/committees/wto/reports/2001wtomwmpaper.doc>.

⁸¹ *Id.* at 9.

is worthwhile to think about the effect of such a ruling on the interpretation of lawyers' legal ethics and obligations."⁸²

CONCLUSION

Although I was sorry to have missed participating in the Case Western Symposium and hearing the papers presented by Charles Wolfram and Carole Silver and the remarks of the commentators, I have enjoyed this after-the-fact opportunity to share my first reactions to the European Court of Justice case *Wouters v. NOVA*. Although my thoughts about the case may mature upon longer and further opportunity for reflection, I suspect that my views about the case will not change radically. Furthermore, I expect that even in the future, my views about the case may be out of step with the mainstream "spin." I would not be surprised if the "spin" continues to focus on the blow this case has given to MDPs by upholding the Dutch Bar ban.⁸³ In contrast to this "death-knell" view, I suspect that even upon longer reflection, I will continue to believe that: (1) this case articulated some significant conditions to bars' abilities to regulate lawyers; and (2) that bars should not expect to have all decision-makers in the future defer so completely to the bars' judgment about whether a rule is more restrictive than necessary.

⁸² *What If?*, *supra* note 1, at 7-26.

⁸³ See, e.g., *Siobh N. Creaton, Accountants' Pacts with Lawyers Ruled Out by EU Decision*, THE IRISH TIMES, Feb. 20, 2002, at 16, LEXIS, The Irish Times ("A ruling by the European Court of Justice has effectively ruled out partnerships between lawyers and accountants here."); James Pressley, *EU Court Permits Dutch Ban on Accountant-Lawyer Links*, BLOOMBERG NEWS, Feb. 19, 2002, LEXIS, All Bloomberg News File ("The ruling cuts to the heart of a growing business that's already worth hundreds of millions of dollars in fees each year."); Paul Rogerson, *European Court Deals Blow to One-Stop Shops*, BUSINESS A.M., Feb. 20, 2002, LEXIS, Business A.M. File ("The European Court of Justice has dealt a blow to the EU-wide expansion of 'one-stop shop' professional services firms which offer both accounting and legal services.").