The ABA and MDPs: Context, History, and Process

Charles W. Wolfram

Follow this and additional works at: https://scholarship.law.umn.edu/mlr
Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1028

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
The ABA and MDPs:
Context, History, and Process

Charles W. Wolfram†

Much divides those who support and those who oppose the concept of multidisciplinary practice (MDP), and much of the rhetoric and substance of that debate is reflected in the papers presented in this Symposium. I have, I trust, made my own MDP position reasonably clear—with appropriate regulation of (only) real and not imaginary risks, why not? More specifically, it seems clear to me that society could safely allow much more freedom in MDP activity than has been preliminarily recommended by the American Bar Association’s (ABA) Commission on Multidisciplinary Practice, which even in its modest form has pleased few lawyers and horrified some. Clients, on the other hand, have apparently been of one approving mind when it comes to MDP in virtually any form.

From its recent beginning, public debate in the United States about the pros and cons of MDP has often been


3. As sufficiently indicated by most of the articles in this Symposium, the
couched in lofty and largely symbolic terms. Some of it has had
the suspicious ring of lawyer advocacy to it, surely a trait that
none of the papers in the present Symposium will display.
Both MDP proponents and opponents have attempted to cap-
ture the ethical and professional high ground by usurping
the vocabulary of goodness and wisdom. This tone was set from the
outset of the current debate. ABA President Philip S. And-
erson, who directly appointed the ABA’s MDP Commission,
warned early on that while the Commission was considering
whether to redo the ABA’s prohibitory rules on lawyer relations-
ships with closely allied professions, they should take great
care in their work to preserve the core values of the legal pro-
fession. As with many other subsequent orators, Mr. And-
erson was suitably vague about what exactly those values might
be, exactly what importance they had and to whom, what
threats they might confront, and what measured or more rad-
cal measures might reasonably be considered necessary to ad-

predominant scholarly attitude favors MDP, with some significant variation.
See generally Greg Billhartz, Note, Can’t We All Just Get Along? Competing for
Client Confidences: The Integration of the Accounting and Legal Professions,
and criticizing the MDP Commission for its overly-restrictive recommenda-
tions are collected on the Federalist Society’s website, available at
<http://www.fed-soc.org/professpracticegroup.htm>. The website contains sev-
eral pertinent articles. See John S. Dzienkowski & Robert J. Peroni, MDP
Commission Opt for Expanded Regulation and Economic Protectionism,
available at <http://www.fed-soc.org/commissionoptsprofv3i2.htm>; Ronald D.
Rotunda, Multidisciplinary Practice: An Idea Whose Time Has Come, available
at <http://www.fed-soc.org/multidisciplinaryprofv3i2.htm>; Scott Univer, The
soc.org/mdpreportprofv3i2.htm>.

4. Shockingly little has been written in opposition to MDP, and almost
all of it has flowed from a single practitioner’s pen. See generally Hearing Be-
fore the Commission on Multidisciplinary Practice (Summer 1998) (written
remarks of Lawrence J. Fox), available at <http://www.abanet.org/cpr/
fox1.html> (providing remarks entitled You’ve Got the Soul of the Profession in
Your Hands) [hereinafter, Fox, Soul of the Profession]; Lawrence J. Fox, Ac-
countants, The Hawks of the Professional World: They Foul Our Nest and
Theirs Too, Plus Other Ruminations on the Issue of MDPs, 84 MINN. L. REV.
1097(2000) [hereinafter Fox, Accountants]; Lawrence J. Fox, Defend Our Cli-

5. See Interview with Philip S. Anderson, ABA President 1998-1999,
THIRD BRANCH, Oct. 1998, at 10, 11 (“I would like to see the preservation of
the core values of our profession by lawyers wherever they employ their legal
training.”); see also James Gibat & James Podgers, Feeling the Squeeze: Com-
1998, at 88, 88 (discussing Mr. Anderson’s speech announcing the appoint-
ment of the Commission at the ABA’s annual meeting in Toronto in August
1998).
dress real risks. The tag-line of "core values" has since been endlessly flung about, by parties including the Commission itself, in an attempt to demonstrate that the utterer has kept well in mind the traditional aspirations of the organized American legal profession.

A debate such as the one raging about multidisciplinary practice does not, of course, arise in a social, economic, and historical vacuum. For most lawyers the issue has arisen with astonishing speed, and has been accompanied and driven by great changes in several important social and economic institutions. With whatever speed, the MDP concept did not burst upon a kind of professional Eden, in which things exist always as they were created, and solely because of an originating and sublimely perfect conception. Far too often lawyer rhetoric about the MDP concept—as with much else about the legal profession—suffers from a constricted or fictional sense of history. I thus begin with an attempt to understand how we got to

6. Ted Schneyer's careful examination of the most important of those issues is well worth study. See generally Ted Schneyer, Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics, 84 MINN. L. REV. 1469 (2000).

7. The phrase has apparently been seen as one to be embraced, flag-like, by anyone with an opinion on MDPs, including lawyer-accountant executives from the Big Five accounting firms—the bete noire of those opposed to MDP. See ABA Multidisciplinary Panel Hears Final Witnesses on Regulation of MDPs, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 95, 95 (Mar. 17, 1999) (discussing representatives of the Big Five who emphasized that the core values of both legal and accounting professions are essentially the same); see also INTERNATIONAL PRACTICE OF LAW COMM., CANADIAN BAR ASS'N, STRIKING A BALANCE: THE REPORT OF THE INTERNATIONAL PRACTICE OF LAW COMMITTEE ON MULTI-DISCIPLINARY PRACTICES OF THE LEGAL PROFESSION 21-24 (1999), available at <http://www.cba.org/MDP/StrikingABalance.asp> [hereinafter CBA MDP REPORT].

8. See REPORT, supra note 2 (noting that in pursuing its work, "the Commission has been guided by the need to protect at all times the interests of clients and the public and the core values of the legal profession").

9. Most lawyers seem unnerved by the speed with which strong support for MDP activity has swept through the country, and even more clearly through the rest of the world. Most lawyers seem to have awakened as if to organized mobs already in the streets, not even aware that there had been any talk of revolution.

10. See James W. Jones & Bayless Manning, Getting at the Root of Core Values: A "Radical" Proposal To Extend the Model Rules to Changing Forms of Legal Practice, 84 MINN. L. REV. 1159, 1163-79 (2000) (examining the ways in which the legal profession is naturally resistant to change, much less rapid changes that seem to reflect extra-professional pressure, and especially pressure perceived by many lawyers as coming dominantly from powerful competitors).
where we are in the MDP debate, briefly tracing some of the history of the organized bar's dealings with kindred professions whose practitioners, like today's Big Five accounting firms, have in the view of the organized bar threatened to intrude upon the professional landscape that lawyers wish to occupy alone. I begin with the present—providing a sketch of the bar's historical relationships with the Big Five—and then work backwards and outwards to more general structural elements.

A. HISTORY OF THE MDP DEBATE WITHIN THE ABA

This symposium could not have been timed more exquisitely, given the current status of the ongoing MDP debates. Although its proposal was limited, the MDP Commission snapped back many heads11 with its June 1999 recommendation12 that the ABA change course. The recommendation was itself incomplete, had much new baggage attached,13 and left unaddressed several important MDP issues.14 Since 196915 the ABA lawyer codes have contained prohibitions against fee splitting with nonlawyers16 along with the closely-related prohibi-

11. See, e.g., Melody Petersen, Lawyers' Group Recommends Sharing of Fees With Others, N.Y. TIMES, June 9, 1999, at C6 ("A special panel at the American Bar Association rocked the legal profession yesterday by recommending that lawyers toss out decades-old rules that have prevented them from setting up partnerships with accountants, consultants and other professionals.").
12. See RECOMMENDATION, supra note 2.
13. On the unwieldy nature of the administrative apparatus recommended by the MDP Commission, and the highly unlikely nature of its task, see Schneyer, supra note 6, at 1469-72.
14. One MDP problem concerns limitations on law practice by in-house counsel for corporations. See infra text accompanying notes 83-91. During public discussion at the Symposium, the Commission's Reporter Mary C. Daly said this issue had not been addressed by the Commission. See Mary C. Daly, 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).
15. Before 1969, Canon 33 had declared that lawyer-nonlawyer partnerships were undesirable, but had not prohibited them. See CANONS OF PROFESSIONAL ETHICS Canon 33, in 2000 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 686, 695 (Thomas D. Morgan & Ronald D. Rotunda eds., 2000) (quoting Canon 33: "Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law."). Canon 33 was added to the 1908 Canons of Ethics in 1928. See HENRY S. DRINKER, LEGAL ETHICS 204 n.20 (1954).
tion against lawyers either entering into a business arrangement with a nonlawyer if any of the activities of the business consist of the practice of law.\textsuperscript{17} In addition, a lawyer may not practice law in a firm in which a nonlawyer owns any interest,\textsuperscript{18} exercises power as a corporate director or officer,\textsuperscript{19} or more generally has the right to direct or control the professional judgment of a lawyer.\textsuperscript{20} (That is why Sears can sell insurance, but cannot sell legal services.) Those prohibitions are relatively new and remain quite controversial among some members of the legal profession itself, certainly including legal academics.

The most well-known controversy about this set of rules occurred during the fateful and incredibly brief discussion held in the ABA House of Delegates in February 1983, when the ABA last considered them. The Kutak Commission, which had been charged with the responsibility of drafting what became the 1983 ABA Model Rules, would have obviated the need for the current debate about whether to allow multidisciplinary practice. Under the proposal that it carried forward through several drafts and to the final meeting of the ABA House of Delegates, it would have permitted all the now-prohibited activities listed above, so long as the lawyer's exercise of professional judgment on behalf of the client as well as client confidentiality were not impaired in the actual working of the enterprise. Specifically, the Kutak Commission draft version of Rule 5.4 would have permitted all imaginable forms of MDPs, including those in which nonlawyers were copartners, managers, and shareholders of the enterprise:\textsuperscript{21}

\textsuperscript{17} See Model Rules of Professional Conduct Rule 5.4(b) (1983); Model Code of Professional Responsibility DR 3-103(A) (1969). While the DR (from which the equivalent Model Rule was copied) refers to a lawyer not forming a "partnership" with a nonlawyer, and not other business forms, the prohibition is extended to corporate forms by DR 5-107(C), next discussed.


Rule 5.4 Professional Independence of a Lawyer

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

(a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

(b) information relating to representation of a client is protected as required by Rule 1.6;

(c) the arrangement does not involve advertising or personal contact with prospective clients . . . prohibited . . . by Rule 7.2 or Rule 7.3; and

(d) the arrangement does not result in charging a fee that violates Rule 1.5. 22

Given its radical departure from the 1969 ABA Model Code of Professional Responsibility, the concept of the proposed rule received surprisingly little attention compared to such topics as client confidentiality. 23 It was, however, discussed at meetings of the Minnesota State Bar Association committee charged with tracking the work of the Kutak Commission. 24 With our heads


23. A symposium devoted to an early draft of the Kutak Commission proposals, which already contained the above-quoted proposal on lawyer-nonlawyer alignments, was typical. See generally Review Symposium: The Model Rules of Professional Conduct, 1980 AM. B. FOUND. RES. J. 923. The symposium covered a wide range of topics, but not this one.

24. I served as reporter for the Committee and drafted its report. See Report of the MSBA Committee to Study the Kutak Commission Report, 37 MINN. BENCH & B., July/Aug. 1980, at 63, 65 [hereinafter Study Report]. The committee report described the MDP position of the Kutak Commission as follows:

In several significant ways the Kutak Commission proposals would remove or reduce some existing restraints on organizational forms of law practice . . . The current extensive regulations on legal clinics, prepaid legal insurance, legal service organizations, and the rest would be largely abandoned. Rule [5.4] would permit Sears Roebuck to run a law department dispensing wills in about the same manner that it dispenses eyeglasses in many states. Existing prohibitions against dual practice (law practice and life insurance sales) from the same office would be abandoned. Your committee believes that the practical effect of this change may be greater than that of any other proposal.

Id. at 66. For the differing views of committee members, see id. at 85-86. The Kutak Commission draft being studied, Model Rules of Professional Conduct (discussion draft, Jan. 30, 1980), stated the new concepts in Rule 7.5 in wording significantly similar to that of the 1981 draft. See supra text accompany-
filled with the perhaps intoxicating fumes of change caused by such then-recent innovations as lawyer advertising.\textsuperscript{25} the Minnesota committee did not oppose the concept, although individual members' views of concern were recorded.\textsuperscript{26} The Kutak Commission proposal was, however, rejected by the ABA House of Delegates on voice vote after a brief exchange in which a delegate asked whether the proposed rule would mean that Sears could offer to write wills, and the Commission's reporter replied, correctly, that it would. In place of the Kutak Commission's permissive approach, the House voted to carry forward the "old" (in fact, quite recent) Model Code prohibitions.\textsuperscript{27} All states followed suit,\textsuperscript{28} with only the District of Columbia showing much individuality.\textsuperscript{29} Those strictures still remain in place and prevent all but the most attenuated forms of MDP.

B. \textbf{THE MDP DEBATE COMES FULL CIRCLE}

The ABA's MDP Commission has, in effect, gone part-way back to the position of the Kutak Commission and to the kind of

\textsuperscript{25} See Bates v. State Bar, 433 U.S. 350, 383 (1977) (holding that advertising by attorneys may not be subjected to blanket suppression).

\textsuperscript{26} See Study Report, supra note 24, at 85-86 ("Other members felt that serious erosion of the quality of professional service could result from some aspects of the proposal, particularly the removal of the prohibition against non-lawyer ownership of a legal service organization . . . ").

\textsuperscript{27} See \textit{ABA CENTER FOR PROFESSIONAL RESPONSIBILITY}, supra note 22, at 159-64; \textit{CHARLES W. WOLFRAM, MODERN LEGAL ETHICS} 879 (1986).

\textsuperscript{28} See generally \textit{Laws. Man. on Prof. Conduct} (ABA/BNA) 91:404-405 (Supp. 1994).

\textsuperscript{29} The District of Columbia provides in its Rules of Professional Conduct that a nonlawyer may own an interest in a law firm or exercise managerial authority in it, subject to certain conditions. See \textit{D.C. RULES OF PROFESSIONAL CONDUCT} Rule 5.4(b) (1990). Among other things, there is no limitation on how many nonlawyers may be partners of a law firm. The rule applies only to a nonlawyer "who performs professional services which assist" the law firm in rendering legal services, however, and thus does not permit nonlawyers to own an interest in a law firm passively as an investor. \textit{Id.}; see also \textit{id.} Rule 5.4(b)(2) (stating that all nonlawyer partners must undertake to abide by the lawyer code); \textit{id.} Rule 5.4(b)(3) (stating that lawyer-partners in the firm must possess and exercise supervision over nonlawyer partners). A fortiori, in the District of Columbia it is also permissible for a lawyer to engage in ancillary business activities in an entity distinct from the lawyer's firm. Conflict-of-laws issues are created by the potentially wide disparity between the District of Columbia rules and those elsewhere, particularly in the case of a multi-office law firm with an office in the District. See, e.g., \textit{ABA Comm. on Ethics and Professional Responsibility}, Formal Op. 91-360 (1991) (ruling that a lawyer in a firm admitted in both D.C. and another state may practice in the D.C. office, but in no other office).
tolerated-if-discouraged practice permitted by the ABA itself prior to 1969. The proposal of the Commission would allow some MDP, including a certain kind of restricted MDP by the Big Five accounting firms, but not nearly as much as is allowed in several advanced economies abroad, and as has been proposed, for example, by an equivalent committee in Canada.\(^{30}\) (Among other things, Sears still would not be able to sell legal services in the United States, although it apparently would be permitted to do so in Canada.) The proposals of the Commission received a very mixed reception at the ABA's annual meeting in Atlanta in August 1999, and there was more controversy at hearings during the ABA's midyear meetings in February 2000.\(^{31}\) The August 1999 meeting of the ABA House of Delegates gave the Commission's tentative proposals no clear blessing or curse,\(^{32}\) and the Commission is currently considering what package of proposed changes to bring back to the ABA this coming July in New York City, or possibly later. In the meantime, the Commission's initial suggestion that it is time to allow lawyers and nonlawyers to join together in some kinds of jointly-owned and managed firms to provide some kinds of multidisciplinary services has clearly raised hopes and anxieties—of both lawyers and nonlawyers.

Much is at stake for several groups—including groups beyond lawyers. Before the Commission itself, testimony in favor of MDPs came from a wide range of client and consumer groups as well as a number of lawyers and legal scholars. Opposition came largely from lawyer groups\(^ {33}\) within the ABA itself. A

---

30. See CBA MDP Report, supra note 7, at 9-10; see also Wolfram, New MDP Age, supra note 1 (manuscript at 16-20) (comparing June 1999 ABA MDP Commission proposals and August 1999 proposals of corresponding committee of Canadian Bar Association). As with the report of the ABA MDP Commission, the report of the CBA group was largely unanimous, save for an objection by its chair to the refusal of the rest of the committee to support even a recommendation that MDPs be required to register. For subsequent work of the CBA group, see MDP Speaking Points (visited Mar. 2, 2000) <http://www.cba.org/news/2000/2-00/pdf/mdp.pdf> (featuring a report by the committee chair to CBA at the midyear meeting, with a further report to follow at the August 2000 annual meeting in Halifax).


33. Members and current and former officers of the ABA's Section of Litigation have been particularly prominent in leading anti-MDP sentiment, a
decade ago, many of the same lawyers and lawyer organizations also opposed ancillary business practices by lawyers. \(^{34}\) Those groups were initially successful within the ABA and were able to persuade the ABA House of Delegates to adopt an amendment to the ABA's Model Rules that was extremely restrictive and would have prohibited most ancillary business activities. \(^{35}\) But ultimately common sense prevailed, and in any negative role similar to the group's earlier work (through its Task Force on Lawyers' Ancillary Business Activities) in opposition to law firm ancillary business practices. See, e.g., Randall Samborn, *Showdown on Subsidiaries: The Struggle over Firm Ancillary Businesses Comes to a Head*, NAT'L L.J., Feb. 11, 1991, at 1. The Litigation Section may serve as the informal, replacement rallying point within the ABA that has otherwise been missing since the 1984 abolition of the ABA's Unauthorized Practice Committee. See infra note 76 and accompanying text.


35. See generally Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363 (1993); *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 312-19 (Stephen Gillers & Roy D. Simon eds., 1998) (discussing the "strange and complicated" legislative history of the current Model Rule of Professional Conduct 5.7); Charles W. Wolfram, *Parts and Wholes: The Integrity of the Model Rules*, 6 GEO. J. LEGAL ETHICS 861, 901 n.136 (1993). In brief, the ABA went from the quite permissive proposal of the Kutak Commission, to no regulation under the 1983 ABA Model Rules, to a highly prohibitory Model Rule 5.7 adopted by a narrow vote in 1991, to a repeal of that rule in 1992 by an almost equally narrow vote, to the adoption of the much more permissive, present Rule 5.7 in 1994 by a significant majority. See *REGULATION OF LAWYERS: STATUTES AND STANDARDS*, supra, at 312-19. The most recent version of Rule 5.7 provides as follows:

Rule 5.7 Responsibilities Regarding Law-Related Services
(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) [in] a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1994).

Few states have attempted to follow any of the ABA's ancillary business
event no state showed interest in adopting the ABA's temporarily "model" rule outlawing most ancillary business activities. The ABA repealed the rule at its next annual meeting, and a subsequent new amendment to the ABA Model Rules now provides that ancillary business by lawyers is to be regulated—not outlawed.

In the MDP debate, the issues involve not so much what lawyers should be allowed to do, as arguably was the case with ancillary business. This time the issue is what nonlawyers should be allowed to do. Nonetheless, the bar associations and their judicial allies claim that only lawyers should decide whether nonlawyer professions with similar services and clientele should be able to offer MDP services, and whether the bar's clientele should be able to exercise the power to choose them. There is no escaping the bar's dominance. A lawyer admitted to practice law who wished to practice in an MDP could, of course, resign from the bar, giving up the right to practice law in order to avoid future professional discipline for engaging in MDP activities.

However, the now-nonlawyer and her MDP leads (other than the default, no-rule approach in effect during 1983-1991). Pennsylvania, in one of the few efforts to regulate the subject comprehensively, rejected the ABA's approach. See Pennsylvania Adopts New Rule Regulating Non-Legal Services, 12 Laws. Man. on Prof. Conduct (ABA/BNA) 303 (Sept. 18, 1996); Laurel S. Terry, Pennsylvania Adopts Ancillary Business Rule, PROF. LAW., Nov. 1996, at 10.

36. One of the many disconnects between the ABA and American lawyers generally is that the ABA is dominated by large-city, large-firm lawyers. In contrast, state and local bar associations are more likely to be in tune with the concerns of small-firm lawyers and solo practitioners. Much of the lawyer opposition to the 1991 action of the ABA in adopting a prohibitory rule on ancillary business practices came from small-firm and solo lawyers, who have traditionally relied on so-called "dual practice" business involvements to supplement their comparatively meager law-related income. See WOLFRAM, supra note 27, at 897-98; Cassens Moss, supra note 34, at 133 (reporting the opposition of the General Practice Section of ABA to restrictions on ancillary business, noting that such is a critical part of the economics of practice for solo practitioners, small-firm and small-town lawyers). Holding true to form, many solo and small-firm practitioners testified in favor of MDPs before the Commission.


38. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1994); Ancillary Business Rule Emerges from ABA Meeting, 10 Laws. Man. on Prof. Conduct (ABA/BNA) 28 (Feb. 28, 1994); see also supra notes 35-36 and accompanying text.

39. Included could be charges of aiding the unauthorized practice of law. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(b) (1983) ("A lawyer shall not . . . (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.").
employer would remain fully subject to the potential for civil or criminal prosecution in an unauthorized practice lawsuit, in which the awesome power of contempt would theoretically exert all the power that was necessary to stop the practice.

So, lawyer-opponents of MDP activities seem at the moment to have their hands on all the relevant power. (I will shortly point out that absolute control currently eludes the organized bar.) Incidentally, I see no hands raised in opposition to MDPs other than those of lawyers. While I am in no position to deny that a nonlawyer exists who agrees with the anti-MDP position expressed by some lawyers, if there are either nonlawyer groups or individuals out there who oppose the MDP concept, they have been very timid in expressing their opposition. Furthermore, anti-MDP lawyers have been uncommonly modest in pushing their identities forward. Consequently, we lawyers have meetings such as this Symposium in which only or mainly lawyers debate—only or mainly in lawyer rhetorical terms—and we consider the question that affects far more than lawyers: whether the rest of the world should be permitted to conduct business as they wish. The stake of the rest of the world, of course, is enormous. Let's start with the Big Five themselves.

C. THE ROLE OF THE BIG FIVE IN THE MDP DEBATE

From its beginning two years ago, contemporary reflection on MDP on the part of the organized American bar has been impelled by the bar's perception of recent activities of the largest accounting firms. Indeed, "fixation" would not be too strong a term. The number of the large national—and now multinational—accounting firms has shrunk over the past decade in response to internal and global pressures and developments. We must now refer to the "Big Five," down successively punting on a key issue, the comment to Rule 5.5 says meekly, and quite unhelpfully, that "[t]he definition of the practice of law is established by law and varies from one jurisdiction to another." Id. Rule 5.5 cmt. 1.

40. See infra notes 66-80 and accompanying text.

from Eight, Seven, and Six firms that display ever more justified indicia of gigantism.\textsuperscript{42} Consolidation has occurred at the same time that the same large accounting firms have diversified their service products away from dependence on the auditing of company accounts as the bread and butter of their practice. As early as the 1930s, auditing has been defined by a public-oriented responsibility to assure—through accountants’ “attest function”—accuracy of published financial information about the nation’s businesses. In recent decades, however, the audit function has produced flat profits for accounting firms and, in some cases, embarrassing pools of red ink.\textsuperscript{43} Wishing both to improve their profit margins and to respond to what they perceive as increased client demand for business consulting services beyond auditing of financial records, the Big Five have recently moved away from the audit function to offer an expanding array of financial, economic, business, compliance, and other consulting services.\textsuperscript{44}

At the same time, the remaining number of global players in accounting and allied consulting fields has been aggressively recruiting lawyers—both those fresh from law school as well as established practitioners who are moving laterally from well-known law firms—to staff the companies’ efforts to provide enhanced consulting services to company clients. One dramatic illustration of that growth in sheer numbers of lawyers is that each of two Big Five companies—Arthur Andersen and Ernst & Young—now employs over 2000 lawyers around the world.\textsuperscript{45}

\textsuperscript{42} See, e.g., Billhartz, supra note 3, at 434 (discussing the multiple mergers that reduced the eight largest accounting firms to five).

\textsuperscript{43} At least some of the red ink was incurred because of liability exposure of the accounting profession in the savings-and-loan crisis of the 1980s. The monetary liability of the accounting profession occurred to a degree not approached by the corresponding exposure of law firms.

\textsuperscript{44} As pointed out in other articles in this Symposium, the SEC has been placing regulatory pressure on accounting firms to separate the audit-attest and consulting functions, on the ground that mixing the two threatens the independence of the former. See Fox, Accountants, supra note 4, at 1098-99; Carol A. Needham, Permitting Lawyers To Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?, 84 MINN. L. REV. 1315, 1318-23 (2000); Richard W. Painter, Lawyers' Rules, Auditors' Rules and the Psychology of Concealment, 84 MINN. L. REV. 1399, 1411-13 (2000). Responding to this and other inducements, the largest of the Big Five, PricewaterhouseCoopers, recently announced such a separation. See, e.g., Diana B. Henriques, Auditing Firm Plans to Split Its Businesses: Reivision Addresses Integrity Concerns, N.Y. TIMES, Feb. 18, 2000, at C3 (reporting on a press release by PricewaterhouseCoopers).

\textsuperscript{45} See Andersen Legal Reports Record Growth in Demand for Legal Serv-
Arguably (depending, that is, on how one defines "law firm"), they must now be ranked as two of the largest law firms in the world.\textsuperscript{46} It was precisely that surge in lawyer hiring, and concern about what it is that Big Five lawyers might be doing in rendering services to client-customers, that brought the organized bar's attention to the subject.\textsuperscript{47}

The clamor recently reached an apparently premature pitch in Texas. First, the Texas state bar announced that it was proceeding against Arthur Andersen for unauthorized practice of law because of what its lawyers were doing in preparing documents in the course of serving individual clients.\textsuperscript{48} Then the state bar backed off, reportedly because they could not find a law firm willing to take on the task of representing the state bar in prosecuting the case against Arthur Andersen.\textsuperscript{49} An equally compelling reason might have been caution learned from the immediate and strongly unfavorable political reaction of the state legislature to the state bar's momentarily successful suit to enjoin sale of Quicken's legal-forms software on the ground that it violated the state's unauthorized practice statute.\textsuperscript{50}
The emergence of large-scale, law-related practice by the Big Five has lent an interesting Corporate America legitimacy and urgency to demands that the ABA’s anti-MDP rules be reformed. That focus on the Big Five assuredly is also the single most important reason why many lawyers, particularly those in large law firms, which are heavily dependent on maintaining in their own practices good referral and close, cooperative working relationships with the Big Five, have urged acceptance of MDP as desirable or at least inevitable. A surprising numbers of large-firm lawyers, whom I would otherwise expect to oppose MDP, at least on grounds of traditionalism, have insisted that “it’s a fait accompli” and “the train has left the station,” or have uttered similar platitudes of resignation to the effect that the ABA should simply put its retroactive stamp of approval on developments that have already acquired irresistible force.  

1. Historical Perspective: The Big Five Test the Boundaries

Viewed historically, the move of the Big Five into the MDP forefront opens just the latest, if perhaps redefining, chapter of a century-long struggle in which the accounting profession has faced the strong opposition of the American bar. This has occurred as accountants have attempted to expand their services to include law-related consulting and similar services, including such mundane tasks as filling out a taxpayer’s tax forms. The struggle has always been decidedly one-sided, consisting of attempts by the ABA and its state bar allies to press accountants into narrowly-defined zones of allowable practice. Lawyers insist on calling activities outside those self-defined nar-

51. See, e.g., ABA Commission Examines Controversies over Lawyers’ Practice in Accounting Firms, 14 Laws. Man. on Prof. Conduct (ABA/BNA) 542, 542-44 (Nov. 25, 1998) (reporting statements made by several participants at the first public hearing of the Commission); ABA Delegates Tackle Lawyer Discipline, Defer Action on Law Firm and MDP Issues, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 41, 41-42 (Feb. 15, 1999) (describing statements by several speakers at the ABA midyear meeting); ABA Multidisciplinary Practice Commission Recommends Amending Rules To Allow MDPs, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 250, 250 (June 9, 1999) (discussing a press conference at Washington, D.C. during which the Commission’s report was released; ABA President Philip S. Anderson is quoted as saying: “Market forces cannot be stopped. But they can be channeled.”); Direction of Legal Profession Is Debated at Multidisciplinary Practice Panel Hearings, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 44, 44-47 (Feb. 17, 1999) (reporting speakers’ statements at February 4-6, 1999 public hearing of the Commission).
row zones "unauthorized practice." The struggle has been peculiarly American. In most of the advanced economies, including England, there is not now and never has been a similarly expansive prohibition against nonlawyer institutions performing what we, in our insular way, rigidly consider to be legal services, such as bank trust departments drafting wills and accountants forthrightly giving clients tax advice. For that matter, unauthorized practice as a concept involving more than control over who could represent litigants by appearing in court developed in the United States only in the 1880s, when collection agencies began their efforts at consolidated debt collection. Remarkably, there was no significant attention paid to the subject at the national level of the organized bar until 1930, when the ABA's Committee on Unauthorized Practice was first established. The beginning of the Great Depression one year earlier could hardly have been coincidental. One measure of the growing strength of the bar associations' unauthorized practice efforts was that the ABA's 1908 Canons of Ethics, which had said nothing about unauthorized practice, were amended in 1937 to add Canon 47, the last of the Canons, which strongly condemned it.


53. See James Willard Hurst, The Growth of American Law: The Law Makers 319 (1965). Professor Hurst has traced the beginnings of modern unauthorized practice campaigns to an unauthorized practice committee of the New York County Lawyers Association that was first appointed in 1914 to deal with competition from title and trust companies. See id. at 323; see also Rhode, supra note 52, at 7. Joan Brockman has written a history of unauthorized practice in Canada that indicates nearly contemporaneous origins of the bar's involvement in nonlawyer service providers there. See generally Joan Brockman, "Better to Enlist Their Support than to Suffer Their Antagonism": The Game of Monopoly Between Lawyers and Notaries in British Columbia, 1930-1981, 4 Int'l J. Legal Prof. 197 (1997). For a leading sociological analysis of lawyers' successful effort to force competitors to the sidelines, see Andrew Abbott, The System of Professions: An Essay on the Division of Expert Labor ch. 9 (1988).

In the American unauthorized-practice struggle over law-related services, the organized bar has always been the aggressor. For example, there has never been any significant sign of a reciprocal or retaliatory attempt by accountants or their trade associations to push lawyers off any turf that significant numbers of lawyers wished to occupy. Lawyers, of course, may not perform brain surgery, but no sane lawyer would wish to move into that field or has attempted to do so. And, in areas traditionally close to law in which licensure is required in a non-law discipline, lawyers have often been able to have themselves automatically included as fully qualified to receive the additional license or its equivalent solely by dint of their possession of a license to practice law.

As with the battles against the accounting profession, the ABA has historically waged similarly successful containment campaigns against other potential competitors—persons engaged in real estate sales, title insurance, life insurance sales, mortgage banking, trust banking, book publishing, and kindred activities claimed by lawyers to be manifestly and seriously dangerous to consumers if not practiced only by lawyers. Those campaigns were initially hard-fought. The bar associations, however, were strongly motivated in what economists would term their rent-seeking activity, and from the beginning they have held a monopoly on the ultimate weapon in such battles—the injunctive power of courts. Lawyer-judges in unau-

55. Consider for a moment what the world would look like if the tables had been turned. For example, suppose that lawyers had been precluded, on the entirely arguable ground of relative incompetence and hence the consequent ground of implied misrepresentation to clients, from giving clients any advice that involved anything other than rudimentary knowledge of accounting principles or practices.

56. See generally Jay M. Zitter, Annotation, Right of Attorney, As Such, to Act or Become Licensed to Act as Real-Estate Broker, 23 A.L.R. 4th 230 (1983) (discussing circumstances in which attorneys can sell real estate without a license).

57. See WOLFRAM, supra note 27, § 15.1.1 (describing the background of unauthorized practice regulation).

58. It is not too much to say that the availability of the injunctive remedy has been the single most important weapon that bar associations traditionally have been able to wield against nonlawyer competitors. In almost all states injunctions are issued solely by judges, without the potentially moderating intervention of nonlawyer jurors. Also, courts have accorded bar associations standing to seek injunctive relief. Of course, only lawyers are eligible for membership or possess significant influence in those associations. Thus, in enforcing unauthorized-practice restrictions, the bar has not been required to rely upon such politically sensitive, and thus occasionally uncooperative, pub-
Authorized practice litigation have traditionally erred on the side of gullibility in their willingness to listen to the tocsin-like peals of alarm sounded by their brother and sister lawyers—often lawyers who were both functionaries in and advocates for bar associations in which the judges themselves were active members. The alarms have concerned the supposed emergency threatened by nonlawyers providing law-related services, and courts have responded to the bar's distress calls with injunctions against unauthorized practice of law.

Most importantly, courts have been invaluable to lawyers' successful struggle with professional competitors because, at least at the doctrinal level in most states, there is no possibility of countervailing political forces to which accountants and other nonlawyer professions can turn if they feel aggrieved by courts. Competing professions who were enjoined off a bar-defined piece of professional turf could never hope to erode or counter the bar's monopoly on weaponry.

In many states, for example, there has been no hope of legislative assistance to overturn overly-restrictive court rulings because the courts claim that their power is exclusive of any other branch of government. State courts successfully claimed this for much of the past century with respect to the regulation of lawyers and, according to many courts, to the very definition of the unauthorized practice of law. The same inherent-powers concept

59. There are, of course, limits to the extent to which courts are willing to side with lawyers and bar associations against alleged unauthorized practitioners. See, e.g., People v. Romero, 698 N.E.2d 424, 427 (N.Y. 1998) (explaining that a state unauthorized practice statute authorizing the attorney general to bring "action" for prohibited conduct does not include the filing of a criminal proceeding; among other considerations, such a reading would unfortunately permit a bar association to do so.).

60. See WOLFRAM, supra note 27, at 845-46.

61. One small, collateral solace is that a nonlawyer practitioner could defend a failure to provide some kinds of service to a customer on the ground that doing so would constitute the unauthorized practice of law. See, e.g., Wilkinson v. Rives, 172 Cal. Rptr. 254, 254-58 (Ct. App. 1981) (holding that a title examiner who failed to give legal advice to a customer would have violated California's unauthorized practice treaty by doing so and thus was exonerated from the claim of professional malpractice).

62. See generally WOLFRAM, supra note 27, § 2.2 (describing the inherent power of courts to regulate the legal profession); Charles W. Wolfram, Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine, 12 U. ARK. LITTLE ROCK L.J. 1 (1989) (same).

63. See, e.g., Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779, 782-
forced many potential competitors, beginning in the late 1930s, to enter into treaties with the ABA that attempted to delimit exactly how far the affected profession could go before running afoul of the organized bar’s conception of unauthorized practice. Such unchecked judicial power and the defeat of lawyer competitors has been widespread across the states. The same has not been true for the federal government, which has essentially remained aloof from the unauthorized-practice wars. In particular, the federal courts have never accepted the kind of all-powerful inherent-powers concept that would preclude Congress from enacting legislation affecting such things as MDP.


Some courts have adopted the approach, with respect to legislation that was particularly congenial with the courts’ own conceptions, that they would accept in the name of “comity,” between the courts and a co-ordinate branch of government, legislation (invariably regulatory or otherwise restrictive) on the subject of unauthorized practice. See, e.g., State ex rel. Frieson v. Isner, 285 S.E.2d 641, 654 (W. Va. 1981); State ex rel. Reynolds v. Dinger, 109 N.W.2d 685, 690 (Wis. 1961).


“[C]ourts have no concern with the qualifications of lawyers except in so far as they are permitted to participate in the administration of the law in actions and proceedings in courts of law and equity.... The legislature may establish such qualifications as it chooses for those who are permitted to act as conveyancers, examiners of title, organizers of corporations, or any other type of legal services which [do] not give them power to influence the course of justice as administered by courts.”

Galloway, 335 N.W.2d at 479 (quoting Detroit Bar Ass’n v. Union Guardian Trust Co., 276 N.W. 365, 368 (Mich. 1937) (quoting In re Cannon, 240 N.W. 441, 449 (Wis. 1932))).

64. See WOLFRAM, supra note 27, at 826.

65. See id. § 2.2.5 (describing federal regulation of law practice). Federal courts have occasionally claimed an inherent power to regulate unauthorized practice, but only when the challenged incident occurs before the federal court itself. See United States v. Peterson, 550 F.2d 379, 384-85 (7th Cir. 1977). No federal court decision has ever claimed the inherent power to regulate unau-
Although Congress clearly has the power to act in an area such as interstate MDP, it has not done so.

This "inherent power" that courts claim to control the question of unauthorized practice has, more than any other factor, confined discussion of public policy in law-related services to lawyer-dominated forums such as this Symposium. It, therefore, has very significantly shaped the issues and arguments, indeed the very vocabulary, that count in the debate. In that respect and as a kind of armchair experiment, listen to applause lines and laugh lines in the speeches of anti-MDP speakers (among other things, they are almost invariably explicit appeals to other lawyers) and speculate how the same lines would be received by, say, an audience of accountants or, better because more disinterested, an audience of nonlawyers with no axe to grind.

2. The Big Five Enter MDP Terrain

Notwithstanding this general history of bar dominance, the Big Five have been able in recent years to move into MDP kinds of consulting practice—that in which the services of lawyer employees is currently quite relevant. The Big Five have been able to do so on the basis of two elements, each of a mutually reinforcing nature. One element concerns a rare defeat, or at least stalemate, that the organized bar suffered in its historical attempt to persuade courts to join them in sweeping accounting firms into corners of competitively insignificant activity. The single most important factor that has forced the MDP issue upon the American bar's attention in recent years is the sudden and persistent expansion of "tax consulting" work by hundreds of newly-hired lawyer-employees of the Big Five accounting firms in offices across the United States. That authorized practice to the exclusion of Congress, as several state supreme courts have done.

66. Another has been the sudden and widespread rise of MDP abroad and the consequent disadvantages that United States law firms suffer when attempting to compete globally. The origins of MDP can confidently be traced to Europe. See Wolfram, Comparative MDPs, supra note 1, at 307-09. Jurisdictions where some form of MDP is permitted include England, the supposed birthplace of American law practice traditions, where both Tories and Labour have repeatedly asserted strong political support for MDP in recent years. Cf. id. at 313-16.

67. See, e.g., Elizabeth MacDonald, Lawyers Protest Accounting Firms' Hiring, WALL ST. J., Aug. 22, 1997, at B8 (describing the reactions by attorneys and bar associations to accounting firms hiring tax lawyers); see also supra text accompanying note 47.
pansion partially rekindled an interprofessional war that raged a half-century ago when lawyers and their bar associations sought to persuade courts to prohibit accounting firms from having their employees perform tax work for members of the public, arguing that it constituted the unauthorized practice of law. Thankfully for the vast number of Americans with tax problems who rely on accountants to resolve them, the ABA and its state-bar allies failed in that effort, and failed miserably. Courts in many states have held that it is permissible for accountants to provide a wide range of tax-return-preparation and related tax-counseling services without committing the offense of unauthorized practice of the law. The resulting line between permissible tax consulting and purportedly impermissible legal services is difficult to draw and even more difficult to enforce.

The second element, federal antitrust constraints, can be introduced by the follow-on thought, which would seem to flow from the foregoing as night flows from day: if nonlawyer accountants may permissibly practice tax counseling, surely it must also be true that lawyer-employees of the same companies can provide the same services. (A discrete limitation, which seems quite bearable, is that the lawyer-employee must not otherwise "practice law" and must not hold herself out as a lawyer in providing the service.) A 1968 ethics opinion of the

68. The leading case is Gardner v. Conway, 48 N.W.2d 788, 796-98 (Minn. 1951) (holding that accountants can prepare tax returns and perform other routine accounting functions in connection with an individual's or corporation's income and other taxes, so long as the issue does not involve a difficult or doubtful question of law demanding application of a trained legal mind). See generally R.F. Martin, Annotation, Services in Connection with Tax Matters as Practice of Law, 9 A.L.R. 2d 797 (1950).

69. See, e.g., MacDonald, supra note 67, at B8 (quoting a well-known MDP opponent, and fellow symposist, Lawrence J. Fox, as worrying that the rules restricting law practice by accounting firms "get very fuzzy in the tax-law area"). The fuzziness of the rules restricting tax consulting has not, of course, been lost on accounting firms. See, e.g., Dan Trigoboff, Competition from Outside the Profession: Law Firms Losing Business to Accountants, Bankers, Actuaries, Consultants, A.B.A. J., Apr. 1995, at 18, 18-19 (quoting a partner-lawyer at then Price Waterhouse as saying: "When many think of a law firm... they think primarily of litigation. When they think of an accounting firm, they think of auditing and compliance. There's a big gray area in the middle—consulting.")

70. This relatively straightforward reading of the professional rules confines such rules as those limiting lawyers from engaging in business with a nonlawyer if any part of the business consists of the practice of law, see supra text accompanying notes 15-17, to permit a lawyer to engage in law-related services with a nonlawyer if the nonlawyer could engage in the service herself.
ABA, however, attempted to slam that door shut by ruling that a lawyer working as an employee of an accounting firm and performing activities that would constitute the practice of law by a lawyer (e.g., by appearing for a client before the Tax Court, which a nonlawyer accountant clearly may do) was in violation of the ABA Canons of Ethics. Nevertheless, the door was left very loosely ajar when the Antitrust Division of the federal Department of Justice took the position that the ABA's view on lawyers practicing in accounting firms "promotes a substantial and unjustifiable commercial restraint" and should not be followed by the Tax Court. The obvious implication of this finding was that any similar attempt to prohibit lawyers from practicing at a minimum tax law in an accounting firm would fall under federal antitrust laws.

The antitrust teeth of the Justice Department were sharpened considerably in 1975 when the United States Supreme Court decided Goldfarb v. Virginia State Bar. The Goldfarb Court held that non-public bar associations (a description that certainly includes the ABA and at least all non-mandatory state and local bar associations) were fully subject to the federal antitrust laws with respect to attempts to limit competition among lawyers or between lawyers and nonlawyers. The ABA soon felt compelled to rescind the interprofessional treaties that it had been able to force upon competing professional organizations. It abolished its hitherto highly active Commit-

73. 421 U.S. 773 (1975).
74. See id. at 792-93.
75. Repeal began only with the August 1979 ABA meeting, when the board of governors warned that all treaties should be rescinded. See Statements of Principles: Are They on Their Way Out?, 66 A.B.A. J. 129, 129-31 (1980). That action followed close on the heels of a Justice Department suit against a local bar association for violation of the antitrust laws through enforcement of an interprofessional treaty. See Title Firms Soft-Pedal Suits Against Bars, NAT'L L.J., Mar. 26, 1979, at 29 [hereinafter Suits Against Bars]. Two years earlier, a federal trial court held that a bar association's issuance of opinions that purported to define areas of unauthorized practice also offended the antitrust laws. See Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298, 307-08 (E.D. Va. 1977). The Fourth Circuit or-
tee on Unauthorized Practice in 1984.76 Furthermore, ABA activities in areas that may raise antitrust issues are now carefully vetted by a large law firm's antitrust department. Until the appearance of the June 1999 report of the MDP Commission,77 ABA groups had studiously avoided efforts, common in the older treaties, to define areas of unauthorized practice.

Because of well-founded fears of antitrust penalties, the ABA can now function only as a somewhat disorganized cheerleader and drafter of "model" rules, leaving it to state bar associations to persuade their own state supreme courts that a particular model rule approved by the ABA should be adopted locally. By the same token, the ABA has apparently received and accepted the advice that it should not attempt to use its own resources to finance unauthorized-practice litigation, again leaving such tasks to local bar associations. At the local level, only court-controlled bar associations may safely undertake

dered the district court decision vacated and the case held in abeyance pending proceedings that were pending before the Virginia Supreme Court to alter the method for issuing unauthorized practice opinions. See Virginia State Bar v. Surety Title Ins. Agency, Inc., 571 F.2d 205, 207-08 (4th Cir. 1978). The method eventually adopted was clearly designed to give the Virginia Supreme Court sufficient involvement in the issuance of opinions to support an argument that the activity was now exempt from the federal antitrust laws under the state action doctrine. The ABA House of Delegates, in one of the last acts involving the now disbanded unauthorized practice committee, see infra text accompanying note 76, approved a model rule for unauthorized practice advisory opinions that was modeled on the Virginia system. See Status Report on Model Rules Is Given at A.B.A. Meeting, 1 Laws. Man. on Prof. Conduct (ABA/BNA) 93, 95 (Mar. 7, 1984).


77. On the Commission's suggested, and very broad, definition of "the practice of law" (from which nonlawyer members of a permitted MDP would be prohibited), see COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASSN., APPENDIX A (1999), available at <http://www.abanet.org/cpr/mdpappendixa.html>.
such a task—again, for fear of exposure to antitrust penalties on the part of voluntary, non-court-controlled bars—for only bar associations that are tightly controlled by the state supreme court\textsuperscript{78} can shield themselves from the federal antitrust laws under the decisional exception for "state action."\textsuperscript{79} That means that the potentially enormous cost of taking on an adversary such as one of the Big Five accounting firms must be borne by one of two entities: (1) a local voluntary bar, which would thus incur the twin risks of arousing federal antitrust scrutiny and member complaints about necessarily steep increases in fees; or (2) a court-controlled (integrated) bar, with its powers to raise funds constricted by a divided and unruly membership of all lawyers in the state as well as by a state supreme court that will often not be terribly enthusiastic about high-cost projects, particularly ones that are likely to be unpopular with the state's legislature and electorate.

With state courts relatively uncooperative and the Antitrust Division rattling sabers, the bar's freedom to maneuver in further confrontations with the accounting profession is obviously limited. Elements of the bar undoubtedly view the move of the Big Five into multidisciplinary practice as a particularly threatening territorial encroachment. The inability of the bar to respond effectively is strongly suggested by the facts that (1) many lawyer opponents of MDPs apparently feel free under the laws governing defamation to accuse accounting firms of violating unauthorized practice laws in providing law-related services,\textsuperscript{80} and (2) no bar committee has thus far been sufficiently emboldened to follow through with a prosecution of any Big Five accounting firm for those supposed violations. Those developments may suggest that MDP opponents are now reduced to talk and hollow threats, including forum discussions in which antitrust immunity attaches because of free speech

\textsuperscript{78} One of many corollaries of the so-called "inherent-powers" concept, see supra text accompanying notes 61-65, is that in most states no organ of government other than the judicial branch has any direct control over bar associations.

\textsuperscript{79} See WOLFRAM, supra note 27, § 2.4.2; Bars Reforming Their U.P.L. Processes, 64 A.B.A. J. 1215, 1215 (1978) (describing the severe cutting back of activities of both national and local bar committees on unauthorized practice; most such activities were rechanneled through state supreme courts, which will probably slow and retard enforcement).

\textsuperscript{80} Cf. Fox, Accountants, supra note 4, at 1097-1104 (lamenting the fact that the Big Five are expanding legal services, hiring lawyers, and practicing law in spite of the fact that the accounting profession and the legal profession do not share the same values or professional rules).
considerations, but they have little hope of effective action. The bar may be left in the rearguard stance of flaunting before accountants and other would-be MDP competitors doctrinal weapons of a fading era—weapons that worked well in skirmishes of decades ago, but which are unreliable and perhaps entirely unsuitable in a modern encounter. It may be that aggressive members of the Big Five, sensing the bar’s self-doubt and political vulnerability, have been emboldened to move into previously disputed territory from which rules and decisions suggest they can be excluded, but which they are confident they can occupy and, if necessary, secure—by legislative action.

D. NON-BIG FIVE MDPs

It would be a mistake to assume that only the Big Five are interested in the outcome of the MDP debate. We should not lose sight in our discussions of the fact that the proposals of the MDP Commission, as with the earlier proposals of the Kutak Commission, would certainly affect more than large-client practice by large law-related service organizations. There are a multitude of other possibilities, on the part of Big Business and small-potato practice, for MDP arrangements. I think it not at all too grand to claim that much of both Corporate America and Main Street have a good deal at stake. I will canvass a few possibilities for MDP arrangements along this much larger spectrum.

1. Mom-and-Pop MDPs

Entities that are significantly smaller than the Big Five are heard occasionally in the current discussions for MDP. I met a Kentucky law student recently who had left his social work practice for law school and was keenly interested in the possibility of obtaining his law degree and going into business with his spouse, also a social worker. The two would jointly own and run a two-person, multidisciplinary firm practicing divorce law (lawyer) and psychotherapy and marriage counseling (social worker). That type of practice would now be illegal everywhere,81 except perhaps in the District of Columbia.82

81. See supra text accompanying notes 15-20 (explaining the current limitations on MDPs, including the limitation that a lawyer and nonlawyer may not enter into business together if part of that businesses involves the practice of law).

82. See supra note 29 and accompanying text.
least some such arrangements would be permitted under the ABA Commission's proposals of June 1999. Similar small-firm partnerships are undoubtedly possible for a range of ordinary-people practice areas, such as estate planning, financial planning, juvenile-defense work, and family counseling.

2. Corporate America MDPs

While occasional discussion is heard about such small-scale possibilities for MDP, little is heard about the possible relevance of the MDP debate to large business organizations other than the Big Five, such as the in-house legal counsel for corporations. That, however, might be an important area of future growth for MDP-style practice, as well as an area to which the MDP Commission should pay needed attention. One obvious possibility is that companies engaged in other, non-Big Five kinds of consulting (environmental, economic, lobbying, public relations, etc.) might want to follow the MDP lead of the Big Five. Many such companies are presumably now doing market research on whether it would be sensible and profitable to market their own kind of MDP services based on their traditional consulting work, and include legal services in the product mix by employing new or existing staff of inside legal counsel. For the potential service provider, the arrangement would offer new opportunities for growth in services and sales. For customers of such companies, the prospect of being able to negotiate for one-stop business consulting along with legal advice or other legal services such as drafting, all at a single negotiated price, may offer real convenience, economy, and better management of large projects. Although potentially of importance in some consulting and clientele communities, such expansion would probably constitute only a modest spread of MDP beyond the Big Five.

83. Much of this is taken from Wolfram, In-House MDPs?, supra note 1.

84. Of what is heard publicly, much of the discussion from organizations of inside legal counsel reflect the view that their client employers should be able to hire (presumably from outside the organization) MDP service providers. See, e.g., ACCA Board Backs Multidisciplinary Concept Allowing Lawyers to Practice with Nonlawyers, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 73 (Mar. 3, 1999) (describing a statement issued by the board of directors of the American Corporate Counsel Association); see also, e.g., Picking Your Battles, NAT'L L.J., Jan. 24, 2000, at A7 (reporting a poll conducted by the U.S. Chamber of Commerce and the American Corporate Counsel Association finding that 70% of Americans favor amending lawyer codes to allow multidisciplinary practice).
In addition, however, there are other possibilities for general multidisciplinary practice that almost any American corporation with existing or planned in-house legal staff of such counsel might be very interested in exploring. At present, this possibility is blocked from realization because it constitutes engaging in a kind of MDP that is treated as unauthorized practice of law and would remain unauthorized under the present proposals of the Commission. Under the present lawyer code rules in most states, inside legal counsel of a corporation may provide legal services only to the "entity" itself. This roughly translates into the rule, found in the statute books of many states, that "a corporation may not practice law." For inside legal counsel to provide legal services to the company president or any other officer or employee as an individual client would constitute impermissible practice of law by a corporation. Specifically, the lawyers rendering the service would violate the existing lawyer code prohibitions against practicing law in an organization in which a nonlawyer owns an interest (the company's shareholders), a nonlawyer is a corporate officer or director (presumably most corporations), and a nonlawyer has the right to direct or control the professional judgment of the lawyer (the company managers in charge of the matter). While this sort of "unauthorized practice" probably occurs occasionally through advising or document preparation by an organization's inside legal counsel for company insiders, it is technically a disciplinary violation for the in-house lawyer involved, as well as a possible misdemeanor on the part of the corporation. Hence, such legal services are rarely provided and in only non-public settings.

85. See WOLFRAM, supra note 27, § 15.1.3 (describing unauthorized practice of law by house counsel).
86. See UNAUTHORIZED PRACTICE HANDBOOK 64-71 (Justine Fischer & Dorothy H. Lachmann eds. 1972). On the fascinating legislative and judicial history of these statutes, see generally Bruce A. Green, The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate, 84 MINN. L. REV. 1115 (2000).
87. See supra text accompanying note 18.
88. See supra text accompanying note 19.
89. See supra text accompanying note 20.
90. Most states have statutes outlawing as a misdemeanor engaging in the unauthorized practice of law—often employing that term with no further elaboration. See, e.g., KY. REV. STAT. ANN. § 524.130 (Michie 1999); MINN. STAT. § 481.02 (1998); NEB. REV. STAT. § 7-101 (1997).
That inflexible state of affairs may be unfortunate and wasteful for many companies. Real advantages could be gained if inside legal counsel could widen their permissible range of clients. This would be particularly true in the growing number of companies that no longer farm out all litigation, keeping much or all of it in house. Expanding the permissible practice of inside legal counsel could also prove highly useful in many situations in which company insiders need non-litigation legal services. For example, insiders frequently are freestanding parties to negotiated arrangements to which the company is also a party, as is true of many officer-principals in expanding computer and other high-technology companies.

Another example arises in the corporate securities context when the SEC investigates the activities of the chief financial officer of a growing company. For a number of reasons, a lawyer responding to the initial agency inquiry might wish to respond on behalf of the company and its financial officer for the benefit of both. There are often, of course, conflict issues that must be resolved first. However, similar conflict questions are resolved every day by private practitioners through disclosure and consent of all affected clients. Undoubtedly they could also be resolved successfully and to the entire satisfaction of all clients if inside legal counsel represented co-clients. For the corporation, several advantages might be gained from the arrangements. If corporate counsel possesses the necessary background, both the corporation and company insiders well might prefer the flexibility and economy of dealing with the legal issues involving both the company and insiders solely on an in-house basis.

Today, however, that kind of joint representation of company and officer cannot be carried out by corporate counsel because of the prohibition against representation of any client other than the corporation. Thus, joint representation can be had only by going outside to a private law firm for multiple representation. At least some versions of MDP proposals, such as the version being considered by the Canadian Bar Association, would permit such representations to be conducted in-house. It might be a logical and important step forward for the American bar and business community to consider expanding the Commission’s more modest proposal to take into account this additional area of possible multidisciplinary practice.

91. See generally CBA MDP REPORT, supra note 7.
On a different and much larger scale, a corporation might wish to consider offering employees a company-funded program of free or low-cost legal services, including representation for legal matters that have nothing to do with the company, such as marriage dissolution. Providing free or low-cost legal services in-house could also be a highly effective adjunct to a company-operated substance-abuse or similar program. Again, however, the bar’s artificial barriers preclude such useful law practice.

CONCLUSION

We are all, I take it, weary of millennial proclamations, but epoch-marking statements about the choices confronting American society and political culture by reason of the MDP debate are compelling. The organized bar, in particular, faces a challenge of modernity that it may not be able to handle without tying itself too completely to the past (by insisting on its version of the status quo) or alienating too many died-in-the-wool traditionalists among its members (by venturing very far into the realms of permitted MDP activities). It has been this way for some time. A century ago, the reign of bar association unauthorized practice committees commenced with the bar opposing innovative banks that hired in-house lawyers to write wills and trusts for bank customers and title companies that had in-house legal staff do routine document preparation for property transfers. The bar successfully coopted state supreme courts in a turf-protecting operation that eventually led to the general outlawing of all lawyer-nonlawyer collaboration outside of law firms. That untidy bit of bar business was not finally completed until the ABA approved its Model Code of Professional Responsibility in 1969, and then persuaded most of the states to follow its lead.

Such kinds of bar turf protection suggest impressive political power and might make a kind of greedy economic sense for some lawyers in private practice, but little else can be said in its favor. Many “unauthorized practice” restrictions that have the direct and palpable effect of constricting consumers’ choice of service providers feed popular images of the bar as a guild whose primary activity is professional self-aggrandizement. For the public, the loss has been acute. Surely, an increase in MDP opportunities would provide more widespread and innovative legal services, as well as more client choice in shopping for legal services. Competition has been a good thing for all
other segments of the American economy. It is plausible to think that expanded competition in legal services would also be good for the large segment of the American economy represented by expenditures for lawyer services. Loosening MDP reins would open up new service possibilities for lawyers both in private practice and in corporate counsel offices. It is even possible, as seems to have occurred over the past quarter century with the concurrently large increases in the sheer number of lawyers and incomes of many of them, that greater supply will again be accompanied by increased demand. That happy state of affairs for lawyers in general—which, to be sure, is by no means a certainty if MDP restrictions are removed—could itself lead to increased economic opportunities for lawyers. Innovation and entrepreneurship have fueled modern prosperity in the American economy. It may be time for lawyers to set aside the restrictive thinking that generated recurring bar schemes of yesteryear to outlaw both nonlawyer practice of lawyer-related services and the practice of such tasks by lawyers solely because they were corporate employees.

A sensible move for the ABA and for the nation's state supreme courts in their ongoing regulation of lawyers would be to liberalize restrictions on businesses, allowing them to expand their services and their clientele. Similarly, the ABA should acknowledge the legitimacy of nonlawyer performance of traditional lawyer tasks, at least in MDPs in which lawyer assistance is available. More MDP is far preferable to continued unauthorized practice regulation. Both law practice and business could benefit, and the biggest winners could be the clients of both.

Whether the MDP Commission and, much more importantly, the ABA House of Delegates, state bar associations, and state supreme courts can muster the resolve to liberalize current lawyer code rules to allow meaningful MDP is doubtful. The legal profession has grown accustomed to living with its internal contradictions and in splendid isolation from its own history, larger political forces, and public opinion. As with many legal professional debates, the MDP debate has featured lawyer-cued imagery and arguments. Perhaps it is too much to expect that lawyers (most of them accustomed to function in a world in which only lawyers would decide how and where lawyers and others might practice) could focus with sufficient power and sympathy on the demands of consumers for more efficient, better quality legal services. With the MDP decision,
however, the American bar confronts one of its most important “sometimes” ally—the American accounting and, now, consulting profession. In addition, the bar faces the arrayed might of the accounting profession’s most important clients—both in Corporate America and in local chambers of commerce—who are demanding with increasing force that lawyers abandon the ossified thinking of a century ago and confront the realities of modern economic life in the United States and globally. While professions in law-related territory have usually had only the bitter taste of defeat in interprofessional turf wars with the bar, it is by no means clear that powerful agents of change, such as Congress, will continue to ignore their demands for a level interprofessional playing field. That prospect, by no means assured, has bar officials highly concerned. The current situation of lawyers in England suggests that both political parties in the United States could turn against the bar’s insular refusal to compete on fair terms with other professions.92 A new administration in Washington might be staffed, among others, by another attorney general and head of the federal Antitrust Division with marked impatience for the bar’s rhetorical excuses for a closed preserve of professional practice.

During much of the past century, the bar engaged in another debate—whether law was a business or a profession. The answer, of course, is that it is both. The business of law and the business of business are not oil and water as they are sometimes claimed to be by MDP opponents. Properly regulated to deal with real (rather than imagined) problems, law and business can function well together. It remains to be seen whether the ABA has a similar faith in both lawyers and allied professions, and in the wisdom and common sense of law’s own clientele.

92. See supra note 66.