

September 1999

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Recommended Citation

Gary A. Munneke, *A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm*, 20 Pace L. Rev. 1 (1999)

DOI: <https://doi.org/10.58948/2331-3528.1259>

Available at: <https://digitalcommons.pace.edu/plr/vol20/iss1/1>

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Symposium Speeches

A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm*

Gary A. Munneke**

The subject of multidisciplinary practice ("MDP") has intrigued me for well over a decade. The topic has led me into new areas of research, and sometimes into the cross hairs of colleagues in the legal profession. My views have not always represented the mainstream of thinking among lawyers, and that is reflected in the title of my talk today: "A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm."¹ When I suggested this title to the symposium organizers at the Pace Law Review, the response was, "This is a joke, right?"

* This transcript is adapted from a lecture given at the 1999 Pace Law Review Symposium, *Lawyers and Accounting Firms: Ethical Concern or Model for the Future?* at Pace University School of Law on March 5, 1999.

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1. *A Nightmare on Elm Street* (New Line Cinema 1984).

"No," I said, "it is not; there is some perverse logic to it." Of course, the subtle "MXL," stands for "1040," which I thought was a clever touch, but there is meaning in the rest of the title as well. In the popular slasher movies, the protagonists, hapless teenagers living on the pastoral, suburban Elm Street, would fall asleep, and while they slept, the evil antagonist, Freddie Krueger,² would attack them in their dreams, destroying them with their worst fears.³

Lawyers are somewhat like the unsuspecting teenagers, only the lawyers work on Main Street, instead of hanging out on Elm Street. When they fall asleep, Freddie, in the guise of an accountant, enters their dreams, and takes away their business. At least that is the way many lawyers seem to perceive the prospect of multidisciplinary practice. Reality, however, may differ from the movies or fantasy.

Before getting back to the question whether there is a basis for lawyers' fear of Freddie the Accountant, it might help to take this story back several decades to its roots. It has become clear to me that lawyers and accountants have a longstanding tradition of tension, if not outright conflict.⁴ During the 1920's and 1930's heyday of prosecution for the unauthorized practice of law, many of the defendants in those cases were accountants who transgressed the lines between accounting practice and legal practice.⁵ During the 1940's and 1950's, the American Bar Association ("ABA"), various state bar associations, and non-legal professional groups,⁶ in attempting to reduce these disputes, concluded inter-professional compacts that differentiated legal work from the work of the other professions.⁷ One might

2. *Id.*

3. *Id.*

4. See John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market Lawyers May Find Themselves Blindsided by the Assault but Also Limited by Professional Rules*, A.B.A. J., Feb. 1998, at 42, 42-44.

5. See Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 579-584 (1989).

6. The non-legal groups included professional associations such as the American Institute of Certified Public Accountants and the American Institute of Architects.

7. For many years, these inter-professional compacts were circulated widely among professional associations. See, e.g., Martindale-Hubbell Law Directory (1998). The ABA and these other associations also sponsored joint conferences that met regularly to discuss problems.

think of the compacts as peace treaties between the professions, because they tried to outline what each would do and what each would leave to the other. The absence of public discussion about the practice overlap between law and accounting during the post-World War II era suggests that the compacts were working.

By the late 1970's, however, the winds of change were in the air. The end of the decade produced significant changes in the way the legal and accounting professions marketed their services.⁸ This is particularly reflected in the case of *Bates v. State Bar of Arizona*.⁹ In *Bates*,¹⁰ two lawyers had the audacity to advertise in the *Arizona Republic* and were disciplined by the bar.¹¹ They took the case to the United States Supreme Court and won the right to advertise their availability to potential clients.¹² The ruling soon was applied to accountants and other professions.¹³ In the ensuing years, the world in which professionals obtained their clients through personal reputation and standing in the community was swept away and replaced by a world where professionals sold their services to people in a competitive marketplace.¹⁴ Today, for good or ill, we live with the consequences of that decision and its progeny.¹⁵

The legal marketplace has become more competitive, because lawyers now can market their services, and because the number of lawyers has increased dramatically.¹⁶ The profes-

8. Before 1977, all forms of direct communication with prospective clients concerning a lawyer's availability to provide legal services were prohibited. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101 (1969).

9. 433 U.S. 350 (1977).

10. *Id.*

11. *See id.* at 354.

12. *See id.* at 379, 384.

13. *See generally* Edenfeld v. Fane, 507 U.S. 761, 763 (1993).

14. *See* LORI ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION, 85 (1980); *see also* Arash Mostafavipour, *Law Firms: Should They Mind Their Own Business?*, 11 GEO. J. LEGAL ETHICS 435, 445 (1998).

15. Some commentators have decried the emergence of legal marketing as a force in the legal profession. *See, e.g.,* L. Harold Levinson, *Making Society's Legal System Accessible to Society: The Lawyer's Role and Its Implication*, 41 VAND. L. REV. 789 (1988). However the Supreme Court shows no signs of returning to the pre-1977 era.

16. *See* CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995 1-3 (1999); *see also* American Bar Association, *Legal Education and Professional Development – Educational Continuum Report of the Task Force on Law Schools and the Legal Profession: Narrowing the Gap* 13-18 (1992).

sions have also experienced a revolution in technology,¹⁷ changing societal values, and a fairly unregulated economic environment.¹⁸ In this world accounting firms, banks, investment firms, real estate firms and insurance companies, began to view some of the work that was done by lawyers as fair game for increasing their own market share.¹⁹ These changes have led us inexorably to the place we now find ourselves, facing this controversial battle about who owns which professional services.²⁰

Looking at the legal and accounting professions in particular, both have undergone radical change in the last half of the twentieth century.²¹ It is worthwhile to note and understand this change. As for accounting firms, it is a little appreciated fact that the most significant transformation for accounting firms was probably the invention of the personal computer. This is because both the accounting firms and their clients could use personal computers.²² It was not long before many companies that traditionally used accountants for basic bookkeeping services as well as audit functions and other internal tax matters were able to employ accounting software programs to maintain financial records.²³ The fallout from this change is that accountants lost a substantial segment of their traditional practice base.²⁴ This began a shake-out and consolidation within

The dramatic increase in the number of lawyers has sometimes been described as the glut of lawyers graduating from law school.

17. See RICHARD C. REED, BILLING INNOVATIONS: NEW WIN-WIN WAYS TO END HOURLY BILLING 5 (1996).

18. See generally Mostafavipour, *supra* note 14, at 439 (suggesting there is a need for strict regulation of ancillary services).

19. See Dan Trigoboff, *Competition from Outside the Profession: Law Firms Losing Business to Accountants, Bankers, Actuaries, Consultants*, A.B.A. J., Apr. 1995, at 18; see also CD ROM: The CPA Vision: 2011 and Beyond (American Institute Of Certified Public Accountants 1999).

20. See Gary A. Munneke, *Lawyers, Accountants and the Battle to Own Professional Services*, SYMP. ISSUE PROF. LAW., 63 (1998).

21. See Trigoboff, *supra* note 19, at 18.

22. See Phil J. Shuey, Program on Multidisciplinary Practice (June 12, 1999) (remarks at the State Bar of Texas Annual Meeting, Fort Worth, Texas) (on file with author).

23. Today most law firms have acquired some kind of in-house financial management software package, such as the popular Quickbooks program, by Parsons Communication.

24. See CD ROM: The CPA Vision: 2011 and Beyond (American Institute of Certified Public Accountants 1999).

the profession, as the Big Eight became the Big Six . . . and the Big Five . . . and who knows, we may have just one giant accounting firm in the world in another decade.²⁵

The accounting profession responded to this shake-out in an interesting way. They sat down and began a process of strategic planning, that is, trying to figure out the fundamental nature of the work they did, what business they were in, what markets they wanted to serve, and how they would survive in this changing world. Out of that planning process, a recognition evolved that if they defined their work as "just accounting," they were doomed. John Naisbitt, in his book *Megatrends*,²⁶ asks the question: What would transportation be like today if the railroad companies had thought of themselves as being in the transportation business rather than the rail business? We might be flying airlines with names like Santa Fe instead of United and American.²⁷ The accountants recognized that the world was larger than accounting, and they began to think of themselves as professional services providers. In fact, many members of the accounting profession today refer to themselves as members of professional services firms.²⁸

One way that accounting firms dealt with this expanded business concept was to create consulting services.²⁹ Firms like Andersen Consulting and PriceWaterhouseCoopers began working with clients in not just tax and accounting matters, but general business planning and advisement as well.³⁰ From this point, they began to realize that many clients were interested not just in narrow problem resolution, but also in what has become known as "one-stop shopping." One-stop shopping may be defined as the ability to bring a problem to one professional organization that can assign it to someone within its organization who can solve the problem. This concept has been extended

25. See Gibeaut, *supra* note 4, at 43.

26. See JOHN NAISBITT, *MEGATRENDS: TEN NEW DIRECTIONS TRANSFORMING OUR LIVES* (1990).

27. See *id.* at 85-86.

28. See CD ROM: *The CPA Vision: 2011 and Beyond* (American Institute of Certified Public Accountants 1999).

29. See *Background Paper on Multidisciplinary Practice: Issues and Developments*, 1999 Commission on Multidisciplinary Practice 10.

30. See *id.* at 7; see also Tom Herman, *Ernst & Young Will Finance Launch of Law Firm in Special Arrangement*, CHI. DAILY L. BULL., Nov. 4, 1999, at 3.

with great sophistication, and marketed throughout the world outside the United States. The current MDP debate represents the beginning of the movement here.³¹

The strategy of the accounting firms today involves three different initiatives. The first of these has been to gain the right to claim the evidentiary privilege for communications between accountant and client in tax court.³² Clients have traditionally chosen to be represented by lawyers in tax litigation because communications with counsel are privileged. Although accountants have been allowed to represent taxpayers in court, accountant representatives have not enjoyed the same type of privilege that lawyers have with their clients.³³ After considerable lobbying by the American Institute of Certified Public Accountants ("AICPA") and other accountancy groups, Congress extended the privilege to accountants representing taxpayers in tax court,³⁴ a change that could dramatically alter tax practice in the United States.³⁵

The second initiative involves the international ownership of law firms as subsidiaries of major accounting firms outside the United States.³⁶ In Europe, Australia, and even in Canada, the major accounting firms have acquired controlling ownership interest in law firms.³⁷ In effect, the law firms have become subsidiaries of the accounting firms, or professional service firms as they like to be called.³⁸ In these countries where the prohibition on trans-professional ownership and fee sharing is not strong, the concept of the MDP has already become a reality.³⁹

31. See, e.g., *Background Paper on Multidisciplinary Practice: Issues and Developments*, 1999 Commission on Multidisciplinary Practice 1 (discussing the complexities of the emergence of multidisciplinary practices).

32. Gibeaut, *supra* note 4, at 43, 45.

33. See *id.* at 43.

34. Section 3411 of the Internal Revenue Service Restructuring and Reform Act of 1998 added Section 7525 of the Internal Revenue Code, creating a privilege similar to the attorney-client privilege between CPAs and other federally authorized tax practitioners and their clients.

35. See Richard Pena, *Where Do We Go from Here?*, 62 TEX. B.J. 328, 330 (1991).

36. See, e.g., Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 197-203 (1997).

37. See Pena, *supra* note 35, at 330.

38. See Morello, *supra* note 36, at 198-203.

39. See Gibeaut, *supra* note 4, at 43.

The third initiative for the accounting firms has developed on the domestic front, as accounting firms have expanded their business planning services into areas that have been traditionally viewed as legal services, which is almost anything short of litigation and drafting legal instruments.⁴⁰ The accountants argue that they are not practicing law, but engaging in business planning incidental to their expertise in tax, which inevitably includes legal elements. This expansion has prompted a spate of unauthorized practice charges from lawyers,⁴¹ but in the gray shadows of transactional work, courts are loathe to declare such work as practicing law.

Law practice has changed as well during the past quarter century.⁴² First of all, we have seen the rise and fall of hourly billing.⁴³ As lawyers began to recognize the need to practice in a more businesslike way, they hung their hats on hourly billing as a way to be more productive.⁴⁴ Over the years, the hourly billing system has been subject to criticism, both from within the profession, and from clients.⁴⁵ Hourly billing is not unlike taking a taxi ride in a city where you do not know your way around. The taxi driver turns on the meter, and you do not know whether or not you will get to your destination via the most direct route. That is how clients feel when they visit a lawyer's office and the lawyer turns on the hourly meter. As a result, there has been a debate about what is called "value billing," identifying the value of the legal service and charging accordingly.⁴⁶ This concept seems to be gaining popularity among lawyers and clients today.⁴⁷

40. See Morello, *supra* note 36, at 250.

41. See Debra Baker, *Is This Woman a Threat to Lawyers?*, A.B.A. J., June 1999, at 54, 56-57.

42. Marilyn Astin Tarlton & Simon Chester, *The Territory Ahead: 25 Trends to Watch in the Business of Practicing Law*, L. PRAC. MGMT, July/Aug. 1999, at 33, 33-41.

43. See RICHARD C. REED, *BEYOND THE BILLABLE HOUR: AN ANTHOLOGY OF ALTERNATIVE BILLING METHODS* 9-11 (1989).

44. See *id.* at 6.

45. See *id.* at 4-5.

46. See *id.* at 6, 35, 172-73, 215, 224.

47. See REED, *supra* note 17, at 35.

Hardball litigation has become a prominent facet of litigation practice today.⁴⁸ The civility that may have existed in prior generations has been lost as lawyers fight harder and harder to win cases and gain short term objectives for their clients, while sometimes overlooking alternative dispute resolution mechanisms and opportunities to resolve problems in more creative ways.⁴⁹ There has been somewhat of a backlash to the tendency of lawyers to want to take everything to court.⁵⁰ Clients are saying that they want a different way to resolve their problems.⁵¹

For most of the twentieth century, the legal profession has tried to regulate competition by protectionist methods, including prosecution of the unauthorized practice of law and promulgation of rules that make it difficult for nonlawyers to encroach upon the legal marketplace.⁵² Most of the unauthorized practice statutes on the books today, were introduced by lawyers nearly a century ago.⁵³ The best example of protectionism, however, is probably ABA Model Rule 5.4,⁵⁴ which is in effect in al-

48. See MARK PERLMUTTER, *WHY LAWYERS LIE AND ENGAGE IN OTHER REPUGNANT BEHAVIOR* 49-62 (1997).

49. See *id.* at 50-51; see also Ann L. MacNaughton, *Law Practice in the 21st Century: Assisted Negotiation and Multidisciplinary Problem-Solving* (June 12, 1999) (State Bar of Texas Annual Meeting, Fort Worth, Texas) (on file with author) (discussing how conflict can be used to develop effective approaches to dispute resolution).

50. Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

51. See *id.*

52. See UNAUTHORIZED PRACTICE HANDBOOK: A COMPILATION OF STATUTES, CASES AND COMMENTARY ON THE UNAUTHORIZED PRACTICE OF LAW 157-69 (Justine Fischer et al. eds., 1972).

53. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibition*, 34 STAN. L. REV. 1, 6-11 (1981).

54. RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

most every jurisdiction in some form or another.⁵⁵ This rule prevents lawyers from entering into partnerships with nonlawyers, sharing fees with nonlawyers, and engaging in any activity where nonlawyers may influence a lawyer's independent professional judgment.⁵⁶ Over the years, these protectionist rules, which were described as ethical rules, effectively prevented law firms from doing business with nonlawyers.⁵⁷

From the late 1980's through the early 1990's the legal profession engaged in what has become known as the ancillary business debate.⁵⁸ The debate began when law firms in Washington, D.C., decided that it made sense to have wholly-owned subsidiaries or ancillary businesses, which engaged in lobbying, economic analysis, and sociological studies.⁵⁹ Rather than buying consulting services, these firms would simply hire full-time employees to handle all their clients' needs, and in many cases to sell the ancillary services on the open market to clients not represented by the firm.⁶⁰ Many bar associations and the ABA reacted negatively to the idea of law firm diversification into an-

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1999).

55. See generally Andrews, *supra* note 5, at 596-97 (providing that upon adoption of the Model Code by the ABA, that almost every state adopted it whether officially or unofficially).

56. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1999); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102, DR 3-103 (1999).

57. See generally Andrews, *supra* note 5, at 577 (providing a discussion on the history of the rules and their implementation).

58. See Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 *FORDHAM L. REV.* 559, 579-84 (1992).

59. See *id.* at 578 & n.111.

60. It was this aspect of ancillary services that troubled traditionalists. Law firms have always lured nonlawyer professionals, such as expert witnesses and jury consultants to assist with legal cases. Some firms have employed such professionals full-time. What was happening in D.C. however, was that the ancillary

cillary business activity. The Washington, D.C., approach was decried as unprofessional, unethical and improper. For several years the ABA debated how to handle ancillary business activities.⁶¹ In the end, the ABA House of Delegates adopted Model Rule 5.7.⁶² Essentially, Model Rule 5.7 provides that law firm owned ancillary businesses that do not, strictly speaking, practice law are acceptable.⁶³ The ancillary businesses are acceptable, provided the lawyer or law firm assures the ethical conduct of the lawyers involved, and advises clients of the distinction between the law firm's services and the ancillary firm's services.⁶⁴ Specifically, lawyers must protect professional ethics in the areas of confidentiality, conflicts of interest, and independence of professional judgment.⁶⁵ Almost a decade later, in spite of dire predictions to the contrary, neither the legal profession nor Western civilization as we know it have changed very much as a result of ABA Rule 5.7. For example, to this day the District of Columbia Rules of Professional Conduct permit non-lawyer partners in law firms.⁶⁶

Today, the question of control and ownership of professional services has again reared its ugly head in the form of the

businesses were working for the law firms, as well as for clients outside of the firms.

61. See Munneke, *supra* note 58, at 579-84.

62. 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) by 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 (1999).

63. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1999).

64. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 cmt. 4 (1999).

65. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 cmt. 1 (1999).

66. *Non-Lawyer Partners Rule Released*, NAT'L L.J., Mar. 12, 1990, at 7.

MDP debate.⁶⁷ Accounting firms tend to think of the issue as one of professional services, or “one-stop shopping,” as opposed to MDP, which seems to raise a red flag.⁶⁸ Within the ABA there are two distinct camps.

One group may be described as the “circle-of-wagons” camp.⁶⁹ This camp has attempted to cast the debate in terms of maintaining professional values, protecting traditional client services, and preventing the unauthorized practice of law.⁷⁰ The visceral concern of the opponents of MDP is epitomized in a resolution introduced into the House of Delegates by Delegate Jay Foonberg, which would have required the ABA to use one percent of all of its dues income to prosecute accounting firms for engaging in the unauthorized practice of law.⁷¹

The second group can be described as the “ride-the-wave” camp.⁷² The “ride-the-wave” camp simply recognizes that the profession has changed.⁷³ They acknowledge that we are not going back to the days of Abraham Lincoln or Clarence Darrow, and that for good or ill, many other professional groups will be providing law-related services to their clients.⁷⁴ The “ride the wave” proponents argue that we need to accept the change and learn to adapt to the new environment.⁷⁵ The ABA General Practice, Solo and Small Firm Section passed a resolution in its Council meeting in February, 1999, which basically said that

67. See *Commission on Multidisciplinary Practice House Debate Annual Meeting 1999*, (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/mdphouse.html>>.

68. See Letter from Jay G. Foonberg, Delegate at Large, American Bar Association, to the Members of the American Bar Association House of Delegates (Jan. 8, 1999) (on file with author).

69. *Commission on Multidisciplinary Practice House Debate Annual Meeting 1999*, (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/mdphouse.html>>.

70. See, e.g., Levinson, *supra* note 15, at 803-04, 806-07.

71. Letter from Jay G. Foonberg, Delegate at Large, American Bar Association to the Members of the American Bar Association House of Delegates (Jan. 8, 1999) (on file with author). The proposal was withdrawn.

72. Tarlton & Chester, *supra* note 42, at 33-41.

73. See *ABA Special Commission Endorses MDP with Conditions*, 3 PROF. RESP. NEWS: SPECIAL MDP EDITION 2, 2 (1999); see also Ronald D. Rotunda, *Multidisciplinary Practice: An Idea Whose Time has Come*, 3 PROF. RESP. NEWS: SPECIAL MDP EDITION 3 (1999).

74. See New York State Bar Association, *Report of Special Committee on Multidisciplinary Practice and Legal Profession* 1 (1999).

75. Tarlton & Chester, *supra* note 42, at 33-41.

the ABA should embrace multidisciplinary practice.⁷⁶ A recent conference on the future of the profession had the exact same result.⁷⁷

The ABA's response has been somewhat schizophrenic. It created a Commission on Multidisciplinary Practice ("MDP Commission") to study the issue and make recommendations.⁷⁸ Several sections of the ABA and various state bar associations looked at the MDP problem and set forth different views on what the ABA should do.⁷⁹ In February, 1999, the MDP Commission released an interim report drafted in large part by Professor Mary Daly of Fordham Law School. The MDP Commission released its "Final Report" on June 9, 1999, recommending that the ABA recognize multidisciplinary partnership, and prescribing regulation by the bar of MDPs that are not controlled by lawyers. The report did not satisfy either camp in the debate, and the matter was sent back to the Commission by the House of Delegates at the August 1999 ABA Annual Meeting in Atlanta.⁸⁰

While the MDP Commission struggles to satisfy the ABA's diverse constituencies, another commission known as the Ethics 2000 Commission⁸¹ ("Ethics Commission") is reviewing the Model Rules of Professional Conduct, in order to deal with issues that might require rule changes for the practice of law in the coming millennium.⁸² The Ethics Commission has jurisdic-

76. See *Commission on Multi-Disciplinary Practice, MDP House Debate, Annual Meeting*, (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/mdphouse.html>> (remarks by Larry Ramirez, Chair of the General Practice and Solo Small Firm Section).

77. See *Seize the Future Conference* (conference held on November 4-6, 1999), (visited Dec. 1, 1999) <<http://www.futurelaw.com>>.

78. See *ABA Special Commission Endorses MDP with Conditions*, *supra* note 73, at 2.

79. See *id.*

80. See *Commission on Multidisciplinary Practice, Report to the House of Delegates, Report* (visited Jan. 22, 2000) <<http://www.abanet.org/cpr/mdpreport.html>>. The Delegates also defeated Delegate Foonberg's unauthorized practice resolution. See Letter from Jay G. Foonberg, Delegate at Large, American Bar Association, to the Members of the American Bar Association House of Delegates (January 8, 1999) (on file with author).

81. *Ethics and Integrity and Professional Standards*, 1998 PROMOTING PROFESSIONALISM: A.B.A. PROGRAMS, PLANS, & STRATEGIES 7, 11 (1998). This commission is also known as the Veasey Commission because it is chaired by Justice Norman Veasey of Delaware.

82. See *id.*

tion to look at Model Rule 5.4, as well as rules on conflicts of interest, and marketing, all of which have implications for multidisciplinary practice.⁸³ In my view, the Ethics Commission has much greater potential for changing the way that we as lawyers do business than does the MDP Commission.⁸⁴ The Ethics Commission can make recommendations for changes in the rules of conduct, which may then be adopted and enforced by the states.⁸⁵ Thus, if the Ethics Commission recommends elimination of ABA Rule 5.4, or makes it easier to waive conflicts of interest, and its recommendations are adopted by the House of Delegates (and ultimately by various states) the changes will have an impact on how lawyers deal with multidisciplinary practice.

There are a few realities that we all must recognize as we think about this subject. The first is that lawyers continue to have a professional monopoly over the representation of people in court.⁸⁶ This monopoly is well established in every jurisdiction, and it is in the case law of most states. Going back to the turn of the century, in *In re Cooperative Law*,⁸⁷ the New York Court of Appeals held that it was unauthorized practice for a corporation to engage in the practice of law.⁸⁸ The holding was renewed as recently as several years ago in *Lawline v. American Bar Association*.⁸⁹ In *Lawline*,⁹⁰ the Court held that only lawyers will continue to be able to represent people in court,⁹¹ and we can probably count on rules that mandate that certain transactions must be handled by a licensed lawyer. I am less certain whether the monopoly will hold up beyond direct representation of clients before a tribunal.

Perhaps it will extend to the drafting of basic legal instruments that have traditionally been prepared by lawyers. Clearly, many of those instruments are now being drafted in

83. See *id.* at 11 (providing that the Ethics Commission will review the ABA Model Rules of Professional Conduct).

84. MDP Commission reports are often relegated to dusty bookshelves, while the ABA moves on to the next hot issue.

85. *Ethics and Integrity and Professional Standards*, *supra* note 81, at 11.

86. See Munneke, *supra* note 58, at 562.

87. 92 N.E. 15 (N.Y. 1910).

88. *Id.* at 16-17.

89. 956 F.2d 1378 (7th Cir. 1992).

90. *Id.*

91. See *id.* at 1386-87.

other places, from trust instruments drafted in banks, to real estate documents drafted in real estate and title companies, to virtually all other areas of business activity.⁹² The drafting business has certainly been affected by technology, which makes legal forms readily available on disk, CD-ROM, or on the Internet.

If you want to do your own will today, you can go to Borders instead of your local law office. In a recent case, the Western District Court of Texas held that the Quicken Family Lawyer's software represented the unauthorized practice of law and banned its distribution within the State of Texas, including on the Internet.⁹³ The case was overturned on appeal,⁹⁴ but undoubtedly more cases will arise as the line between providing information and legal advice continues to blur. Information traditionally held close to the vest by lawyers is now readily accessible to members of the public.⁹⁵ In addition, much of the drafting work that lawyers traditionally have done manually is now electronically stored on someone's hard drive, and it can be sold as First Amendment protected information. This says nothing about the quality of any of that information or whether individual guidance is necessary for individuals who handle legal work on their own. Some lawyers have quipped that these software self-help guides are really the "lawyers' full employment" devices, because instead of helping the purchasers, they will generate more work for lawyers.⁹⁶ Much of the information that lawyers used to provide, which no one else could access, is now available online.

The prospect of renewed unauthorized practice charges against accounting firms, banks, and other businesses in the

92. See generally Quintin Johnstone, *Land Transfers: Process and Processors*, 22 VAL. U. L. REV. 493, 499, 501 (1988) (discussing the drafting of real estate related legal documents); see also Peter J. Birnbaum, *Illinois Real Estate Lawyers and the Battle to Control Residential Closings*, 84 Ill. B.J. 132, 134 (1996).

93. See *Unauthorized Practice of Law Comm. v. Parson Tech., Inc.*, No. Civ.A3:97:CV-2859H, 1999 WL 47235, at *6 (N.D. Tex. Jan. 22, 1999).

94. 179 F.3d 956 (5th Cir. 1999).

95. The ABA is currently studying the delivery of legal services electronically, through information and forms on the Internet.

96. When individuals who are not educated in the law use self-help legal remedies they may make mistakes that subsequently require the involvement of a lawyer. For instance, an improperly prepared will may wreak havoc on the estate of a testator who drafted his own will.

coming years is a very real possibility. In another Texas case, an unauthorized practice complaint against Arthur Andersen LLC by the Texas Unauthorized Practice of Law Committee was dismissed by summary judgment.⁹⁷ Whatever Arthur Andersen was doing did not violate the Texas Unauthorized Practice Statute.⁹⁸ Professor Deborah Rhode, of Stanford Law School, has come to the conclusion that, not only does unauthorized practice not make pragmatic sense for lawyers, but in most cases, it is virtually impossible to prosecute people for the unauthorized practice of law.⁹⁹

I recently heard a story about a law student who was going door-to-door telling people that he was a lawyer and could draft their wills. He got caught and he will probably never practice law. In situations like this, unauthorized practice prosecutions may continue to have a degree of vitality, but the likelihood is slim that courts will find general business advisement about legal matters to be the practice of law. Virtually every transaction in the world today involving business has some legal aspects. I do not think that we, as a profession, are prepared to argue that we should have a monopoly over every activity that uses the word "law." In truth, most of what lawyers do is not protected by the professional monopoly, and with respect to such activities, our choices are to either get out of the business or learn to compete.

The legal profession has not done a very good job of competing in the marketplace for professional services. Lawyers have been slow to embrace technology, in part because they are uncertain of how to provide services efficiently. Instead, they rely on economic protectionism to defend their turf. Lawyers have resisted notions like "one-stop shopping," while their accounting friends have embraced it.¹⁰⁰ Lawyers have failed to accept the practice of law combined with multidisciplinary problem solving, unless they control it.¹⁰¹ If the legal profession does not

97. See Baker, *supra* note 41, at 56.

98. TEX. GOV'T CODE ANN. § 83.001 (West 1998).

99. See Rhode, *supra* note 53, at 1.

100. CD ROM: The CPA Vision: 2011 and Beyond (American Institute of Certified Public Accountants 1999).

101. See generally *Commission on Multi-Disciplinary Practice; Report to the House of Delegates*, (visited Dec. 1, 1999) <<http://www.abanet.org/cpr/mdpfinalreport.html>> (suggesting that MDP's should now be permitted).

want to go the way of the railroads,¹⁰² lawyers are going to have to view what we do in a different light.

One last reality lawyers must recognize is that law is a business, a professional service business, to be sure, but a business all the same.¹⁰³ To paraphrase the 1992 Clinton campaign slogan, which reminded staffers to focus on the winning issue, "It's business, stupid." Although sometimes couched in the high-minded language of ethics and professionalism, the MDP battle really comes down to who owns the business. Who is going to get the client and who will bring in the dollars? If lawyers do not provide legal services competitively, they will lose the business. Then they can be ethical and out of work. I want to make clear, however, that the ethical issues involved here are important. In order to compete, lawyers will have to deal with several ethical questions.

The first of these is confidentiality.¹⁰⁴ The lawyer/client privilege makes it a powerful requirement that anything communicated to a lawyer by a client may not be revealed to third persons.¹⁰⁵ Even secrets that are not privileged cannot be revealed by lawyers under their ethical codes.¹⁰⁶ In contrast, accountants, who also respect confidences, are actually required to reveal information to third parties in certain situations. This is because financial statements are often published for the benefit of third parties. Professional practice requires financial statements to be accurate and truthful.¹⁰⁷ Therefore, accountants have some duties to reveal information that lawyers do

102. See NAISBITT, *supra* note 26, at 85-86.

103. See Gibeaut, *supra* note 4, at 42.

104. See *id.*; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999).

105. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999).

106. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 4-5 (1999).

107. The essence of the audit process, to review and certify the books of a business, is not only for the benefit of the business owner, but also for interested third parties. This idea is captured in Model Rule 2.3. Model Rule 2.3 provides: **RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS**

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

not. Such differing responsibilities create tension between the professional obligations of lawyers and accountants, and make joint practice problematic.

The second area is in unauthorized practice itself.¹⁰⁸ We, as a profession, need to give some thought to the question, "What is the practice of law?" How far do we cast that net, beyond those things that only lawyers can do to the things that are ancillary to the practice of law, such as jury selection, investigation, and other similar activities. And who is a lawyer? Is a lawyer someone who engages in the private practice of law? By that definition, many active participants in the legal profession, such as judges and law professors, are not lawyers. The term needs to be defined more broadly than that. Does it have to be limited to someone who is in a traditional field of endeavor, like the judiciary, teaching, a corporate law department, government practice, or private practice? Where do we draw that line? Is it someone who has passed the bar exam? That is a good bright line test, although under this standard, people who have taken the bar, but who do nothing legal at all, are covered, while others who are doing law-related work but have not taken the bar, are not. Do we define it as someone who has been to law school, regardless of where they may be practicing? And if we do that, how can we apply ethical rules to people who are not licensed in any jurisdiction? For example, if someone graduates from law school, joins an accounting firm, moves up through the ranks of the accounting firm, and becomes a partner, there is no way to enforce disciplinary rules against such a person, unless he or she actually passes the bar exam.

What restrictions do we want to place on First Amendment rights of individuals who distribute information to the public through books, magazines, software and the Internet? Groups like Nolo Press and others are providing a lot of information.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 (1999). In addition, the Code of Professional Conduct of the American Institute of Certified Public Accountants ("AIPCA") regulates the conduct of Certified Public Accountants. Section 102 imposes a duty of integrity and objectivity, and Section 102-1 makes it a violation to make a misrepresentation in a financial statement. The responsibilities of lawyers and accountants appear not to be inconsistent.

108. See Baker, *supra* note 41, at 54 (discussing the concerns surrounding the unauthorized practice of law); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1999).

Some of those people are lawyers, some are not. Do we, as a profession, want to take on the First Amendment or do we want to embrace it? I think before we do anything more with unauthorized practice, we, as a profession, should think through some of these issues.

In the area of marketing, there is some tension between what lawyers can do and what accountants can do. After the *Bates*¹⁰⁹ case, the Supreme Court held in *Ohralik v. Ohio Bar Association*,¹¹⁰ that states could proscribe the solicitation of legal business for commercial purposes. The rule applied to lawyers and accountants as well, until more recently, when the Supreme Court, in *Edenfield v. Fane*,¹¹¹ held that the total prohibition on solicitations in the accountants' rules of conduct was unconstitutional.¹¹² The *Edenfield* Court declined to extend the holding to cover lawyers as well, and even suggested in a footnote that perhaps the holding might not apply to lawyers.¹¹³ And yet it did not really decide the question either way. So we are left with a situation where accountants may solicit business. They can walk into lawyers' clients offices and say, "We want to handle your work," whereas, lawyers, at least right now, cannot.

Professional liability is a growing concern for accountants and lawyers, since clients of both are more willing to sue to gain redress for perceived malpractice.¹¹⁴ At least part of the MDP problem may be resolved in court. If an accounting firm is engaging in legal practice and fails to provide service with a professional standard of care, clients are going to sue for breach of the professional standard of care. Accounting firms will be forced either to abstain from practicing in legally-related areas or to become competent to provide such services.

In the area of professional ethics, whose rules should apply? Do accounting firms, employing the lawyers and providing legal services, have to follow the lawyers' rules? Do law firms that employ accountants have to recognize the rules governing

109. 433 U.S. 350 (1977).

110. 436 U.S. 447 (1978).

111. 507 U.S. 761 (1993).

112. *Id.* at 763.

113. *Id.* at 762.

114. RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* (West Publishing 3d ed. 1989).

accountants? Will multidisciplinary firms comprised of both lawyers and accountants have to try to meet the obligations of both professions, or of other professions that might become incorporated in the mix? There are no clear answers to these questions.

One question remains: What will we do about Freddie Krueger? Will he wait until we fall asleep, and then slip into our dreams, green eyeshade and all, then skewer us on our billable hours? Will we rise up and destroy him the way all the *Nightmare on Elm Street* movies end? Will we decide that Freddie is a better ally than antagonist, and sign him up as a partner in our new multidisciplinary firm? I suppose you will all have to get a ticket to see the sequel.