Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective

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Multi-disciplinary professional practices (MDPs) involving lawyers, accountants and other professionals, have been the subject of considerable industry study and controversy in Canada and abroad. In this article, the authors evaluate the advantages and disadvantages of MDPs strictly from a consumer welfare perspective. They argue that, although MDP critics' concerns surrounding such issues as solicitor-client privilege, independence, conflicts of interest, and unauthorized practice are valid, they are often overstated and are, in many cases, encountered even today by professionals outside the MDP context. The advantages to consumers of permitting the evolution of such practices would, in any event, significantly outweigh such disadvantages. The authors' analysis provides the background for their specific proposals to facilitate the creation and proliferation of fully-integrated MDPs and an appropriate regulatory framework for such firms emphasizing inter-professional cooperation rather than competition and including inter-professional coordination committees with consumer representation.

L'établissement de cabinets pluridsiciplinaires réunissant sous un même toit avocats, comptables de même que d'autres professionnels a suscité de nombreuses études et fait couler beaucoup d'encre au Canada et à l'étranger. Dans cet article, les auteurs évaluent les avantages et les inconvénients des cabinets pluridisciplinaires strictement du point de vue du consommateur. Bien que les critiques aient raison jusqu'à un certain point de soulever d'éventuels problèmes liés au secret professionnel, à l'indépendance, aux conflits d'intérêt et à la pratique non autorisée de la profession, l'ampleur du problème tend à être exagéré. Du reste, les professionnels oeuvrant à l'extérieur du cadre des pratiques pluridisciplinaires n'échappent pas pour autant à ces problèmes. En définitive, ces inconvénients sont négligeables par rapport aux avantages pour le consommateur. Au terme de leur analyse, les auteurs proposent des modèles précis pour l'établissement et la prolifération des cabinets pluridisciplinaires pleinement intégrés de concert avec le cadre réglementaire approprié. Ces cabinets miseraient sur la collaboration entre les diverses disciplines professionnelles plutôt que la rivalité et seraient dotés de comités de coordination interprofessionnelle où les consommateurs seraient représentés.

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Introduction¹

Multi-Disciplinary Professional Practices (MDPs) involving lawyers, accountants, and other professionals have emerged as a major issue of controversy, particularly in the legal and accounting professions, and in recent years have been the focus of studies in Canada by the Inter-Provincial Chartered Accounting Task Force on the Multi-Disciplinary Activities of Members Engaged in Public Practice (1995), the Law Society of Upper Canada's Task Forces on Multi-Disciplinary Practice (1998 & 2000), the Barreau du Québec (1999), the Canadian Bar Association (1999), and the Canadian Federation of Law Societies (1999). Beyond Canada, the issue has attracted study by the International Bar Association, the American Bar Association, the U.S. State Bar Associations, the Law Society of England and Wales, English and Scottish Royal Commissions, and governing bodies of the legal profession in Europe, Australia and New Zealand.² The recommendations of these bodies diverge in both perspective and detail in many respects, reflecting a serious lack of consensus in the legal profession on the role and regulation of MDPs. The potential domain of MDPs extends to many other contexts: in the family law context, family lawyers, social workers, and financial advisers; in the personal and institutional wealth management field, lawyers, accountants, and financial advisers; in the antitrust and regulatory context, lawyers and economists; in the small and medium sized business context, lawyers, accountants, and business consultants; in the commercial real estate and infrastructure development context, lawyers, urban planners, engineers, and financial consultants.³

¹ This paper is based on a larger study undertaken by the authors and Charles River Associates for the “Big Five” professional service firms in Canada in 1998 and 1999.
³ For a discussion of “social justice collaboratives” involving legal and other services for low and moderate income clients in contexts such as at-risk families with children, domestic violence, and community economic development (such as low-income housing), see Louise G. Trubeck & Jennifer J. Farnham, “Social Justice Collaboratives: Multidisciplinary Practices for People” (2000) 7 Clinical L. Rev. 227.
This paper focuses principally on the current controversy between lawyers and accountants and related professionals. Currently, a number of regulatory constraints maintained by professional bodies in these two professions constrain the formation and operation of such practices. For example, the Institute of Chartered Accountants of Ontario maintains a rule that disqualifies a firm from holding itself out as a firm of chartered accountants unless all the partners in the firm are chartered accountants. The Inter-Provincial Chartered Accounting Task Force on the Multi-Disciplinary Activities of Members Engaged in Public Practice has recommended that public practice firms that perform third-party reliance services or hold themselves out as chartered accountants must be under the direct control of Canadian chartered accountants. The Law Society of Upper Canada, in turn, (like other provincial law societies throughout Canada) maintains a number of professional rules of conduct that substantially constrain the formation and operation of MDPs between lawyers and non-lawyer professionals. The rule that most directly impacts MDPs is Rule 9 of the Professional Rules of Conduct which provides that lawyers may not directly or indirectly share fees with non-lawyers who bring or refer business to them. Other rules relating to unauthorized practice, permissible firm names, advertising and solicitation, confidentiality, solicitor and client privilege, conflicts of interest, and lawyers' indemnity insurance and trust funds also impede the formation and operation of MDPs involving lawyers and non-lawyer professionals in various ways.

The premise of this paper is that a principled evaluation of the advantages and disadvantages of MDPs and appropriate frameworks for regulating them should adopt a rigorous and single-minded consumer welfare perspective. Delegated self-regulation of the professions can only be justified in public interest terms. Its function is not to parcel up various monopoly privileges on particular professional domains in order to advance the economic self-interest of one or another professional group. Adopting this consumer welfare perspective, in Part I of this study we outline potential efficiency gains for consumers of professional services from MDPs. In Part II, we evaluate the potential disadvantages to consumers of professional services from MDPs within a market or contracting failure framework. In Part III, we evaluate various models for the regulation of MDPs involving lawyers, accountants, and other professionals with a view to identifying models that maximize the advantages and minimize the disadvantages of such firms to relevant segments of consumers of professional services. We argue for permitting and indeed facilitating fully integrated MDPs, with inter-professional coordination.
committees that include representatives of demand-side interests constituted to resolve issues of conflicting regulatory requirements.

I. The Economics Of Integrated Professional Service Provision

The demand for MDPs relative to more specialized professional firms is likely to depend upon the type of consumer and the type of transaction for which the consumer requires assistance. Professional services for some transactions for certain types of consumers are more efficiently provided by MDPs, while others are more efficiently provided by more specialized firms. The economic theory of the firm provides some guidance as to why this is the case by analyzing the benefits and costs of integration.

The theory of the firm attempts to explain why some private sector activities are organized within firms through vertical or horizontal integration of complementary functions, while other activities are organized through external contracting in the market. The key consideration is the relative cost of the alternative arrangements. For example, General Motors, as a demander of tires for its vehicles, may purchase them from an independent tire-manufacturing company or it may create its own tire-manufacturing division. In fact, firms such as General Motors exhibit a whole spectrum of methods of organizing inputs necessary to the production of its final goods. At one extreme, General Motors may decide to produce everything in-house, even to the point of producing raw inputs. In this case, it would be a fully vertically-integrated firm. Alternatively, General Motors may decide to subcontract the production of all the inputs of vehicle production, including assembly, so that General Motors itself would merely be a coordinator of production and a reseller.

This is similarly the case for users of professional services. A large company, such as Microsoft, in producing business plans, marketing strategies and other inputs for which law, accounting, consulting and other expertise may be necessary, may choose to employ full-time staff to provide the whole gamut of these services. It is rare, however, to observe a firm characterized by such full vertical integration. One reason is limited demand. A firm's demand for such a variety of expertise may be episodic and may not warrant maintenance of full-time in-house expertise. The problem of coordinating all the different aspects of production, without the benefit of market signals with respect to value

4. For a review of literature on the theory of the firm, see Paul Milgrom & John Roberts, Economics, Organization, and Management (Englewood Cliffs, N.J.: Prentice-Hall, 1992) c. 2. Recent law and economics scholarship that views the firm as “a nexus of contracts” between various stakeholders in the firm suggests that the distinction between integration by ownership and integration by contract is really a distinction between various modes of internal and external contracting. See e.g. Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law (Cambridge, Mass.: Harvard University Press, 1991).
and scarcity of inputs, may also prove inefficient. Microsoft may, however, require the expertise of some professionals, such as accountants, with sufficient frequency that it may be more economical to employ dedicated accountants who are devoted full-time to Microsoft's interests. The balance that a company like Microsoft strikes between these two models of obtaining professional services depends, in part, on the cost of obtaining these services from outside the firm and the relative benefits Microsoft derives from outside services. The outcome of such a cost-benefit analysis will not only depend on the client, service and transaction in question, but also on the type of professional service firm providing it. Some services may be more efficiently provided by an MDP through horizontal integration of complementary inputs while other services may be more efficiently provided by more specialized firms. Just as both the legal and accounting/consulting professions have witnessed the growth of large full-service domestic and multinational firms, through horizontal integration, so simultaneously both professions have witnessed the proliferation of small, specialized (or boutique) firms. This broadly tracks experience in many other sectors of the economy where one observes simultaneously increased concentration of firms in some segments of these markets and the proliferation of start-ups and small and medium-sized enterprises (SMEs) in other segments of these markets. (SMEs account for much of the job creation in many industrialized economies). Hence, MDPs are not a portent of a more general trend to "monopoly capitalism" in the modern economy.

Section 1 below describes the cost savings that consumers may be able to realize by dealing with a professional services firm that is able to offer a wide spectrum of services. Section 2 describes the reduced costs of production from which a firm may benefit by offering a wide spectrum of services. It further indicates how consumers may also benefit from these reduced production costs through reduced prices and enhanced quality. Section 3 discusses the benefits of integration that may be lost should legal services only be offered through law firms that are affiliated with accounting firms, but where the firms do not share revenues.

1. Reduced Consumption-Related Costs

A consumer may incur reduced consumption-related costs when dealing with a firm, such as an MDP, that is able to offer a number of services and specialists in one location. This is most evident in the case of grocery supermarkets or department stores offering a wide range of goods and services, although typically in competition with specialized or boutique retail stores that operate in sub-segments of the market. The cost savings from which a consumer may benefit include a reduction in the following
costs: search, contracting, coordination, monitoring, and information costs. These benefits are commonly referred to as the virtues of one-stop shopping. There are fixed costs associated with search, verification, and monitoring if the user contracts across several non-integrated suppliers of complementary services. These costs will be reduced if these services are provided by one horizontally-integrated firm. The buyer can then either monitor randomly across the services and impute the verified quality to the entire integrated firm and/or rely on substantial brand name capital that would be at risk if the integrated firm were to fail to deliver on its promised quality. If buyers use these services only infrequently then they are more likely to resort to an integrated provider. Thus if a client firm engages only periodically in activities that require professional services, the client firm may wish to use a more fully integrated provider of those services. This is likely to be particularly true of small and medium sized enterprises (SMEs) seeking additional capital to finance expansion or to enter new markets where a combination of corporate law, financial, and business consulting services may be required. If the client firm is a frequent purchaser of these services, or alternatively is a highly sophisticated and specialized consumer of professional services, it may pay that client to assemble a team independently and to incur the enhanced search, monitoring, and coordination costs. For instance, a firm that engages in many mergers may choose to divide up the finance, tax, and competition aspects of an individual acquisition across different professional firms (integration or coordination by contract rather than ownership).

a. Search Costs

Suppose a corporate consumer of professional services were interested in a major merger with a rival affecting a number of geographic markets. Such a transaction would require the consumer to obtain the expertise of specialists in a variety of areas – law, finance, tax, accounting, and so forth. The consumer would have to search for experts in each of these service areas and possibly in a variety of geographic locations. The costs of this search would likely increase if the consumer has not previously had dealings with professional firms in all these service areas in all the geographic areas in question. The consumer would then have to incur the additional cost of obtaining information on the quality of a number of firms in a number of areas before an informed decision could be made. Thus, the search process is likely to be time-consuming, resulting in the additional cost of delaying the merger. Despite the high search costs,

however, given no other alternatives, it may be in the consumer's best interest to incur them because the cost of choosing an inappropriate or inferior firm in one service area or one geographic market could have consequences for the entire transaction. Given these costs and risks, a consumer may wish to reduce search costs by engaging an MDP that is able to provide all these services in many or all of the geographic locations.

The MDP could offer such a consumer the additional benefit of a signal of quality. An MDP would be unlikely to invest in the assembly and promotion of a full gamut of specialized professional services if it did not expect a return on its investment. In order better to assure a return, the MDP would benefit from providing a certain quality of service which is consistent with the size and specificity of its investment. Observing this signal would further reduce the consumer's need to undertake the cost of attempting to discern quality. The issue of search costs is likely to be particularly relevant to smaller firms with little experience outside their local market seeking to grow nationally and internationally.

Should the consumer be well-informed with respect to the type and quality of services offered by a variety of firms in the relevant countries so that her search costs are low or negligible, the consumer may wish to by-pass an MDP in favour of a combination of specialized firms. Search costs tend to be consumer-specific. The more complex and geographically dispersed a transaction, the higher search costs are likely to be.

b. Contracting Costs

If a consumer chooses to complete the merger process using the services of a variety of professional firms, she will have to contract with each one. This increases costs not only because of the time required and the cost of writing each contract, but also because of the cost of specifying the tasks that each firm must perform in order to avoid duplication or omitted tasks. The contracting costs are also likely to be further increased if the transaction is unique or complex. Consumer and producer requirements are less likely to be satisfied through standardized contracts. If an MDP were to be available, the consumer may choose not to incur costs of contracting with a large number of firms and only choose to contract with one. Furthermore, contracting for separate responsibilities is often not possible because it is not known ex ante what types of information are

7. For further discussion of the effects of information costs on economic structures, see Armen Alchian & Harold Demsetz, "Production, Information Costs, and Economic Organization" (1972) 62 Am. Econ. Rev. 777.
needed or the informational requirements that would follow from information discovered in initial stages of investigation. Integration of information inputs into a single enterprise allows the efficient coordination of related inputs.

c. **Coordination Costs**

Once having entered into a series of contracts with separate firms to perform various parts of the merger process, the consumer must coordinate these tasks. Either the client or a designated service firm can perform this coordination role. In either case, it may involve a variety of firms that are normally rivals or otherwise do not have established lines and means of communication. As a result, the consumer will have to provide similar information to some or all of the service firms she has hired, since much of the same information will be relevant to the different service firms. For instance, business consultants, accountants or investment bankers in determining the cost savings of a merger would likely be interested in information similar to that required by economists and lawyers determining, for anti-trust purposes, whether the merger results in a substantial lessening of competition or an increase in efficiency. The net result is that the cost to the consumer of dealing with a variety of firms may be greater than if the consumer had dealt with just one. Again this will depend upon the individual consumer and her preferences and requirements.

If an MDP were available to a consumer, the consumer would be able to weigh the benefits of these reduced transaction costs against any cost she may incur from conducting the transaction through an MDP. For instance, a consumer may be interested in a specific type of highly specialized expertise that an MDP has not been able to assemble in its repertoire of services, or is not able to provide at a sufficiently high level of quality. It is this variety in consumer needs and preferences which explains the simultaneous emergence of large full-line professional service firms and highly specialized boutique firms. The costs to the consumer of dealing with the MDP may also include the possible costs and risks to solicitor-client privilege, conflicts of interest and independence discussed in Part II.

2. **Reduced Production-Related Costs**

The benefits that the producer of professional services may realize from moving a function in-house (through horizontal or vertical integration) rather than purchasing it through contracts on the open market or leaving it to his customer to purchase elsewhere include benefits specific to the technology of production – economies of scale and scope. The benefits may also include a reduction of transaction costs specific to the producer. These reduced production and transaction costs may in turn translate into
lower costs to consumers by further reducing consumers' transaction costs, by lowering the price paid by consumers, or by increasing the quality and variety of services made available to them. Apart from these economic advantages to producers of professional services from horizontal and vertical integration, it is also arguable that constitutional values associated with freedom of association (section 2(d) of the Canadian Charter of Rights and Freedoms) are engaged.8

a. Economies of Scope

Economies of scope arise when the total cost of producing a group of products or services is less when those products are produced by a single firm than when the same volume of those products or services are produced by a set of independent firms. For instance, in the case of an MDP in our merger example, it may be cheaper to produce the final product – the requirements of the merger – in one location. An MDP, for instance, may facilitate the coordination and collaboration between a tax accountant and a tax lawyer.9 This is a cost-saving not only to the producer, but also possibly to the consumer who, in the absence of an MDP, may have had to incur some of the costs of coordination herself. Further exemplifying economies of scope, "[l]awyers and non-lawyers working together may also complement each other by bringing different problem-solving techniques to bear on an issue. As professionals become more specialized in order to satisfy complex client needs, a collaboration of professionals is more likely to result in optimal problem-solving approaches."10 The consumer would benefit from the resulting increase in quality of service.

b. Economies of Scale

Economies of scale arise when the average cost of producing a good decreases with increased production of the good. Conjecturing that MDPs will result in economies of scale assumes that the introduction of an MDP will result in an increase in firm demand. This assumption is not unrealistic since product diversification is normally undertaken in order to increase the combined demand for a firm's services and reduce its dependency on any one class of product or service. Such an increase in demand may be more likely in geographic markets where the market is sufficiently small so that offering a limited set of services does not allow

10. Ibid. at 59.
for growth opportunities and thus does not allow scale economies to be achieved. An MDP may allow for the following: the employment of highly specialized personnel; technological investments that would otherwise be too costly; and an increase in production that would otherwise not be possible due to limitations in growth potential when product or service offerings are restricted.

With the increase in firm demand that may accompany an MDP service offering, a firm may be able to justify the hiring of more specialized people. Since the skills of these people are particular to a more limited set of tasks, they would likely be able to complete that task more efficiently and competently than someone whose expertise only touches upon the area. For instance, having tax accountants and tax lawyers or corporate lawyers and financial analysts in-house may be complementary in that they enhance each other’s productivity. Clearly, the MDP would not hire a specialized tax or corporate lawyer unless an increase in MDP demand justified it, allowing both the lawyer and the accountant or business consultant to concentrate on their areas of comparative advantage. Thus, the MDP may lead to an increase in firm demand, which would permit the employment of more specialized personnel, allowing for a reallocation of tasks, resulting in a decrease in average costs and an increase in quality.

A reallocation of tasks within an MDP may, in some cases, translate into a substitution away from the demand for more traditional law firms in favour of MDPs and the non-lawyers employed there, with the net result that the overall demand for legal services may decrease. This is likely to be counter-balanced by several factors. First, the ability to substitute across disciplines is likely to be limited given the “narrow areas in which the skills of particular professions and occupations overlap in some substantial way.”\(^{11}\) Some products offered by law firms and other professional services firms are entirely distinct or without complementarities. For instance, an accounting firm providing a valuation of physical assets and a law firm providing advice regarding a particular lawsuit may use informational inputs that are completely distinct. Consequently, as there is little by way of efficiencies to be gained by offering these products jointly, one would expect these types of services to continue to be offered by specialized firms. Second, MDPs “may result in the creation of new services, either through advances in quality or through the introduction of wholly original forms of service.”\(^{12}\) Where these lead to enhancements in the productivity of lawyers in an

12. Ibid. at 7.
MDP context, *e.g.* through combining of complementary skills, this is likely to lead to an increase rather than a decrease in the demand for lawyers.

The increase in demand accompanying an MDP may also allow for investment in technologies that could not otherwise be justified, or, absent the MDP, would have resulted in two parties duplicating the investments. A major area of investment required in order to respond to business client needs is information technology, such as databases containing information on firms, industries, and markets that permit rapid development of firm and industry profiles, allowing all branches of a professional services firm consistently, accurately and quickly to address client needs. Being able to offer this service benefits clients by providing them with a higher quality service. Investments in such technologies, however, are costly and a firm that is small and limited in its growth potential by the services that it is able to offer may find the cost prohibitive. If, however, the same firm is able to diversify its product offerings, the resulting increase in demand may render the investment feasible. Thus, markets that would otherwise not be served by such a product, may now be served. Alternatively, even if a firm is able to make such an investment, an increase in demand would enlarge the client base over which the fixed costs of the investment are spread. This type of decrease in average costs is equally true for more traditional fixed costs of production such as overhead. Some geographic markets may be so small that a professional services firm or branch location cannot be justified absent the ability to offer a full spectrum of services.

c. Potential Benefits to Consumers

Consumers may benefit directly from the enhanced production economies through the increase in quality of service that MDPs can provide – for instance, the greater specialized skill sets of the professional personnel and improved technological capabilities. Consumers may also benefit by being served in markets in which they had previously not been served. Consumers may also benefit from the lower costs of production. In a competitive market, greater production efficiencies translate into lower prices as competitors bid prices down towards the new, lower costs. As an MDP does not in itself involve a decrease in the number of

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13. The Report by the American Bar Association’s Commission on Multidisciplinary Practice notes that there was "strong testimony from business clients, representatives of consumers groups, and ABA entities that amending the Model Rules to permit fee sharing and partnerships and other association with a nonlawyer is in the best interests of the public." *(American Bar Association Commission on Multidisciplinary Practice Report to the House of Delegates, August, 1999, Appendix C, at 8.)*
professional services firms competing for business but rather entails an extension of product offerings, the introduction of these services is more likely to increase rather than decrease the competitiveness of the market.

d. Limits on Alternative Means of Achieving Economies

It is possible that some of the economies associated with MDPs could be achieved by other means. For instance, an accounting firm and a law firm may decide to invest jointly in a database, the sharing of which would be established through a long-term contract. While such a system of organization is possible, there are a number of factors that may make such a solution less attractive than keeping such a function strictly in-house. First, the contract is likely to be cumbersome and incomplete, particularly given the uncertainty of the demand and use for such a database. All possible contingencies could not possibly be contracted for so that contracting would become more a question of specifying rights, obligations and procedures rather than actual performance standards. Such a situation is likely to be further exacerbated if an asset-specific investment is required by either party.\textsuperscript{14} For instance, the database may require one firm, Firm A, to invest in a computer system that has a lower value to Firm A absent the partnership. Once this commitment is made, the partner to the agreement, Firm B, may have an incentive to behave opportunistically, demanding, for instance, better contractual terms. Consequently, Firm A would end up with lower than anticipated returns or, should the joint effort to produce the database fail as a result of opportunism, a costly investment that Firm A would not otherwise have made.\textsuperscript{15}

Even if the joint investment in the database were successfully contracted and produced, difficulties may arise due to an imperfect ability to measure output and use. For instance, one party to the investment may argue that the usage costs charged to it are too high because of inefficient maintenance of the database by the other party. Many of these transaction costs could be avoided or reduced were these transactions to be internalized within a firm rather than through a contracting process. With single ownership, the incentive for opportunistic behaviour would be reduced or eliminated. This again would lower the cost of producing the product, which would benefit final consumers.

\textsuperscript{14} See Milgrom & Roberts, \textit{supra} note 4 at 32.

\textsuperscript{15} For further discussion of asset specificity see Benjamin Klein, Robert G. Crawford & Armen A. Alchian, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process" (1978) 21 J.L. & Econ. 297.
e. Limits on Economies of Scale and Scope

There are limits to the extent to which a firm may find it beneficial to internalize certain functions. There are limits to economies of scale and scope and some firms may simply become so big that the returns to scale are negative. This is evident from the decline in conglomerate business firms which faced span of effective control problems. There are real advantages to managers being well-acquainted with the businesses they run, and there is evidence that less diversified firms often perform better.\(^\text{16}\)

3. Efficient Incentive Structures: MDPs vs. Affiliated Law Firms

We have outlined a variety of factors that suggest that there can be a number of advantages associated with having a number of professional services offered by one firm. Some of the advantages of scale and scope are likely to be lost if professional service firms were only allowed to provide legal services through a separate firm, such as an affiliated law firm, since the efficiencies largely rely upon the services being produced in one organization. Furthermore, an affiliated law firm structure does not allow for revenue-sharing across firms. Without a revenue-sharing arrangement, in order to benefit from the arrangement the affiliated law firm and the professional services firm would have to rely on the other reciprocating should one refer work to the other. Should one firm fail to reciprocate with a similar volume or value of referrals, there would be little incentive to continue with such referrals and indeed incentives would exist to “hoard” clients, even though referrals may be more efficient from the client’s perspective. Should the reciprocal arrangement fail, any benefits to integration that remain in the affiliated law firm arrangement would be completely lost.

Furthermore, a client’s monitoring of quality may prove to be more difficult with respect to an affiliated law firm structure compared to an MDP. When a client is unable to distinguish the quality of the legal advice from the quality of the accounting advice contained in a product jointly produced by both entities, the incentives to provide a quality product are distorted. Each firm bears only part of the cost in reputation of any reduction in quality. Should a client complain with respect to the joint product, each firm’s position may be to blame the other for the product’s shortcomings. This “reputational externality” is internalized with the provision of the product by a single organization. An MDP can put in

place incentives for professional personnel to produce quality products, in addition to being better able to monitor quality of output.

II. Objections To Multi-Disciplinary Practices

1. Framework of Analysis

In this section of our study, we both identify and evaluate the principal objections to, or concerns that have been raised by, MDPs that include the provision of legal services as part of a broader array of professional services. In our view, the paramount perspective in evaluating these objections or concerns should be that of purchasers of professional services (i.e. clients). That is to say, the regulation of the professions must be grounded in a public interest justification that, in the nature of things, will overwhelmingly focus on the need to protect consumers of professional services against service deficiencies or ethical improprieties that are likely to arise in the absence of regulation. This consumer welfare perspective stands in sharp contrast to a producer welfare perspective that, in its most extreme form, is likely to view the rationale for professional regulation in large part as economic protectionism. From this latter perspective, issues relating to the regulation of MDPs quickly become reduced to turf wars between lawyers, accountants, and other professionals contending for different divisions of the rents from alternative delineations of professional monopolies. We believe that it is self-evident that the only principled justification for professional regulation is a consumer welfare perspective. The adoption of such a perspective enables us to evaluate both the advantages and disadvantages of MDPs within a single, consistent framework.

Within this framework, the principal justification for professional regulation is what economists refer to as market or contracting failures that are likely to arise in the absence of regulation. In the professional service context, these market failures are likely to fall into two broad categories: first, information asymmetries, and second, externalities. With respect to information asymmetries, the efficient provision of many professional services involves the deployment of complex bodies of technical knowledge and expertise that are only likely to be acquired through protracted periods of formal and on-the-job professional training and experience. Comparable levels of expertise will rarely be possessed by consumers of professional services (in which event they should

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17. Professional Organization Committee, Ontario Ministry of the Attorney-General, Professional Regulation (Staff Study) by Michael Trebilcock, Carolyn Tuohy & Alan Wolfson (1979) c. 3.
consider switching sides in the market place). This informational imbalance or asymmetry both explains the need for many consumers to purchase specialized professional services and also their vulnerability in engaging in such transactions. Consumers may be unaware of the precise technical issues that their circumstances require to be addressed; they may be unaware of which professional service providers are best equipped to provide assistance in resolving these issues; and they may have limited ability to monitor the quality, appropriateness, cost and efficacy of services once rendered. That is to say, in economists' terms, professional services are often "credence" or "experience" goods, rather than "search" goods. The severity of these information failures is likely to differ widely from one professional context to the other. For example, with respect to the provision of legal services, large multi-national corporations with recurrent needs for highly specialized professional services and in-house counsel and a supporting legal department to act as purchasing agents when external legal services are required may face modest informational barriers that are no more severe than those that they face in a host of other professional and technical contexts where they are accustomed to purchasing services from sources external to the corporation and where regulation is often minimal or non-existent (e.g. strategic planning, marketing expertise, management consulting, information technology services). On the other hand, household consumers purchasing even relatively routine legal services in connection with, for example, family law, estate planning, tax, or civil litigation matters on a relatively episodic basis are likely to face much more severe information problems. Thus, a combination of both the technical complexity of the service in question and the degree of sophistication and discernment of the consumers of that service provides the basis for this rationale for regulation.

The second major market or contracting failure rationale for professional regulation relates to externalities. With respect to some professional services, even if the direct purchasers of these services are sophisticated and discerning, the provision of professional services may have negative third-party effects which, in the absence of regulation, both service providers and service consumers may have inadequate incentives to internalize. For example, purchasers of engineering services, even if well informed, may assign too little weight to potentially negative effects on third-parties of unsafe design and construction practices, in order to minimize project costs. Similarly, while the management of corporations

or other entities that are subject to statutory audit requirements typically hire a firm's auditors, the principal purpose of a statutory audit is the protection of shareholders in and lenders to firms subject to audit. Regulation may thus be required to ensure that auditors are not excessively deferential to incumbent management which have retained them and insufficiently sensitive to the interests of potentially affected third-parties. In some cases, of course, these third parties may be sufficiently sophisticated and discerning that they can adopt effective self-precautionary strategies. In other cases, potentially affected third parties may either be unsophisticated or lack realistic self-precautionary options. In our view, regulation of the quality, cost, and performance of professional services, including various ethical rules pertaining to professional conduct, must find a justification within the market or contracting failure framework sketched above in order to satisfy a public interest (or as we would prefer to characterize it, consumer welfare) test.

In evaluating the strength of objections and concerns relating to MDPs, ideally the analysis should proceed at both theoretical and empirical levels. That is to say, at a theoretical level, one can develop various tentative hypotheses as to the likely strength or otherwise of various objections or concerns relating to MDPs within the market or contracting failure framework sketched above, and then test these hypotheses against empirical evidence (an exercise that is facilitated if there is a varied body of comparative regulatory experience upon which to draw).

There are various ways in which these objections and concerns can be taxonomized. The Working Group on Multi-Discipline Partnerships of the Law Society of Upper Canada identified three areas of primary concern: (a) solicitor-client privilege; (b) independence; and (c) conflicts of interest. In addition, several other issues characterized as "secondary and largely surmountable" were identified, including (d) the impact of lawyers' participation in MDPs on coverage and liability insurance premiums under the lawyers' mandatory professional indemnity scheme; (e) regulation of professional responsibility with respect to ethical breaches by non-lawyer partners, including the unauthorized practice of law by such partners; and (f) problems in the extension of rules relating to the management of lawyers' trust funds to non-lawyer partners.

Professors Kent Roach and Edward Iacobucci in a background study initially prepared for the Law Society of Upper Canada’s Working Group on Multi-Disciplinary Partnerships\(^\text{20}\) identify the following three broad problem areas and sub-issues within each of these areas.\(^\text{21}\)

1. **Governance Concerns**

(i) Unauthorized Practice  
(ii) Disciplinary Jurisdiction Over Non-Lawyers  
(iii) Self-Regulation of the Legal Profession  
(iv) Advertising and Solicitation  
(v) Assessment of Fees  
(vi) Trust Accounts  
(vii) Custodianship and Practice Reviews  
(viii) Insurance and Compensation Funds  
(ix) Disbarred Persons

2. **Independence Concerns**

(i) The Independence of Legal Advice  
(ii) Outside Interests and Ancillary Businesses  
(iii) Fee Splitting  
(iv) Steering

3. **Confidentiality Concerns**

(i) Confidentiality  
(ii) Privilege  
(iii) Conflict of Interest

In the following discussion, we confine our focus to what appear to be the primary areas of concern, \textit{i.e.} (a) solicitor-client privilege; (b) lawyers’ independence; (c) conflicts of interest; and (d) the unauthorized practice of law.

2. **Solicitor-Client Privilege**

Communications between clients and their lawyers have historically been accorded an extremely high degree of immunity from enforced disclosure in subsequent civil and criminal proceedings under the doctrine of solicitor-client privilege. The rationale for this doctrine is that without the immunity it provides, clients may be discouraged from fully

\(^{21}\) \textit{Ibid.} at 15-36.
confiding their legal secrets to their lawyers because of apprehensions that their lawyers may be called as witnesses in subsequent legal proceedings. However, without the ability of clients to confide fully in their legal advisors, the latter would be severely hampered in discharging their role as both advisors to and advocates of their clients in the adversarial processes that characterize the administration of justice in most common law jurisdictions. This privilege may be lost if a lawyer discloses privileged information to third parties who are not lawyers. In the context of MDPs, it is often argued that the very nature of these practices entails information sharing between lawyers and non-lawyers, so that the risk of loss of privilege is pervasive. While it has been established that the privilege extends to non-legal personnel working under the supervision of a lawyer (e.g. paralegal staff, secretarial staff, and articling students), it is far from clear that the privilege would also extend to information disclosed by lawyers to non-lawyer partners in an MDP. While the privilege may extend to information disclosed by a lawyer to non-lawyer professionals with a view to preparing material for litigation and may also extend to information provided by clients to a non-lawyer professional with a view to the latter in turn providing the information to a lawyer for the preparation of a legal opinion, there is serious doubt that the privilege would extend to cases where a lawyer has provided information to a non-lawyer partner (e.g. an accountant) for the performance of purely accounting functions, or where a client of a multi-disciplinary firm has provided information to an accountant to perform purely accounting functions unrelated to prospective litigation.22

While the risks to solicitor-client privilege entailed in MDPs are legitimate concerns, in our view they are easily and commonly overstated. If a client is involved in a complex transaction or dispute which genuinely requires inputs from a number of different types of professionals, the client will have little choice but to disclose relevant information to all of these professionals either directly or perhaps through the agency of his or her lawyer. While it is common in such situations for lawyers or their clients to obtain confidentiality agreements from other professionals involved in providing advice, confidentiality obligations are not coterminous with the doctrine of solicitor-client privilege, and disclosures made pursuant to such commitments may nevertheless be subject to subsequent mandatory disclosure in legal proceedings. Put differently, if a client's problem genuinely requires a multi-disciplinary approach to its resolution, then no matter how the multi-disciplinary inputs are

organized and coordinated, solicitor-client privilege will be at risk relative to a situation where the only professional inputs required are legal. But, it must be emphasized, the source of this risk is the nature of the client’s problem, not the mode of organization employed to address that problem. Moreover, it might reasonably be argued that in an MDP, lawyers may be able to exert more influence with both clients and non-lawyer professionals in exercising caution in making or requesting non-privileged disclosures than when clients purchase these services from separate service providers, many of whom may be unable to assert privilege. Finally, in order to keep the value of solicitor-client privilege to clients in perspective, it should be noted that beyond the right against self-incrimination in criminal law, clients themselves are typically discoverable in most civil litigation.

3. Legal Independence

Legal independence concerns about MDPs have several strands to them. First, it is argued that a lawyer’s obligation of undivided loyalty to his or her client’s interests is likely to be compromised in a multi-disciplinary firm, given the professional and economic interdependencies entailed in such a firm’s structure. For example, it is argued that the professional and economic interests of non-lawyer members of the firm in ensuring that a transaction is consummated may lead them to bring pressures to bear on lawyer members of the firm to compromise their advice to a client where this advice might identify risks (e.g. tax, securities law, competition policy, environmental law risks) in proceeding with the transaction. Moreover, the economic interests of the lawyer in the firm may militate in the same direction. Second, it is sometimes argued that the multi-disciplinary form of practice is likely to create incentives for inappropriate forms of “steering”, where non-lawyer partners “steer” clients to their lawyer partners or vice versa, because of economic interdependencies, when the client’s interests would be better served by securing the professional services in issue from superior quality sources external to the firm.

Again, while these concerns are not without substance, it is easy to overstate their novelty and significance in the multi-disciplinary firm context relative to other established forms of professional practice. For example, in a large full service corporate/commercial law firm embracing many specialities, an individual lawyer may be subject to the same pressures from other partners to facilitate a transaction which in the former’s view raises certain legal or other risks for the client. Similarly, there will be incentives for lawyers in large law firms to steer clients to other members of the firm for other legal services when these services
might be more competently provided by professionals outside the firm. Indeed, "steering" within large law firms is a widely-endorsed contemporary marketing strategy, except that it is called "cross-selling".

4. Conflicts of Interest

Concerns that MDPs involving lawyers and other professionals exacerbate conflict of interest problems again have several strands. First, it is argued that in large and professionally diverse multi-disciplinary firms, conflicts of interest are inherently likely to become more pervasive. Second, it is argued that some professions have different cultures and traditions than other professions in relation to the regulation of conflicts of interest and that lawyers, who are subject to stringent conflict of interest rules in order to ensure uncompromising fidelity to individual client's interests, are especially likely to find their commitment to these ethical norms in jeopardy in MDPs with non-lawyer professionals. For example, it is sometimes argued that accounting/consulting firms will often audit and/or provide consulting services to more than one major firm in the same industry, arguing that this often well serves their clients' interests both individually and collectively by developing substantial industry-specific expertise. Lawyers, however, may be concerned that providing legal services to several major competitors in the same industry may compromise their ability to serve any one of these firm's interests effectively, particularly in the event of disputes between such clients. Third, it is often argued that divergent legal and ethical duties of lawyers and non-lawyer professionals may create insoluble dilemmas within MDPs. For example, auditors who are subject to legal duties to third parties may feel bound to disclose publicly information provided to them by their corporate clients even though this may be adverse to the latters' interests, while lawyers in the same firm possessed of this information (e.g. information about contingent liabilities of the corporate client) would feel duty bound not to disclose this information to third parties out of concern for jeopardizing the client's interests. Indeed such information may be subject to solicitor and client privilege.

Again, our view is that all of these concerns have merit but few of them are novel or *sui generis* to the multi-disciplinary form of practice. As to the first concern (pervasiveness of conflicts of interest), it is also true that conflict of interest problems become more pervasive as law firms grow larger in size and more diverse in the classes of specialized services that they provide. As to the second concern (different professional traditions with respect to conflict of interest), it is not the case that law firms are prohibited from acting for firms in the same industry which may be actual or potential competitors, and indeed law firms often do (albeit not in
relation to the same matter). Obviously, lawyers should disclose potential conflicts of interest to their clients, and clients have the prerogative of deciding whether substantial industry-specific expertise in the matter at hand matters more to them than the risk that they will receive less than uncompromising fidelity to their own interests exclusively. With respect to the third concern (divergent ethical duties), we believe that this may present a genuine problem precisely because it engages simultaneously both of the forms of market or contracting failure identified above (i.e. information asymmetries and externalities). While the lawyer’s overriding duty is to his or her client, the auditor has a dual duty both to his or her client and to potentially affected third parties whose interests may be adverse to that of the client, although even auditors have a duty not to disclose confidential client information without the client’s consent but rather to report material adverse information to the corporate board of directors, who in turn may face duties of public disclosure. In the event of non-disclosure by the board, an auditor may be required to qualify his opinion, or at the limit withdraw from the engagement.\(^2\) In MDPs involving lawyers and accountants, and perhaps other MDPs that raise a similar divergence of duty to the client and duties to third parties (e.g. family lawyers and social workers with respect to reporting cases of child abuse), this problem clearly requires special consideration. For example, if an MDP acts in both capacities, rules could require advance disclosure to clients of possible conflicts of duty and/or a waiver of duties of confidentiality in the limited cases of a conflict of duties. Alternatively, lawyers might be limited to becoming partners in the consulting practices of large professional services firms, and not their accountancy practices which are organized in Canada as separate but financially linked partnerships. Again, it is important not to overstate the novelty of this problem. Lawyers not uncommonly sit on the boards of their corporate clients and face potential conflicts of interest similar to those of auditors.

5. Unauthorized Practice

It is sometimes argued that MDPs involving lawyers may facilitate the unauthorized practice of law by non-lawyer partners and personnel in such firms. One strand of this concern argues that MDPs may become a kind of regulatory “no-man’s land” that fall outside the effective reach of any of the self-regulatory professional bodies. Another strand of this concern emphasizes that as the provision of multi-disciplinary professional services becomes more highly integrated, it will, practically

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speaking, become impossible for external regulators to determine who is doing what, thus eroding the legitimate boundaries of professional competence. A third strand of this concern is that lawyers, particularly if they are a minority in a multi-disciplinary firm, will have limited ability to insist on non-lawyer partners and personnel confining themselves to their legitimate domains of professional competence, or to exercise effective supervision over such personnel to the extent that they are performing functions related to the provision of legal services.

We are sceptical of the force of these concerns. With respect to the first, it is not the case that multi-disciplinary firms will fall into some form of regulatory no-man's-land. Each self-regulatory professional body will continue to license and discipline its own professionals who are members of such firms and will retain the right to take enforcement action against non-lawyer personnel who are engaged in the unauthorized practice of law, and against lawyer members who facilitate or assist in the unauthorized practice of law by non-lawyer personnel. With respect to the second concern, while it may be the case that the closer integration of a range of multi-disciplinary professional services within a single firm will render professional boundaries less distinct, it is important to acknowledge that these boundaries even now, in a wide variety of other contexts, are far from distinct (e.g. tax advice). Moreover, it seems incongruous to argue that bringing lawyers into multi-disciplinary firms is likely to increase rather than reduce reliance by these firms on non-lawyer personnel in the provision of legal services. Assuming that the boundaries that have traditionally been recognized around the various professional domains are approximately (albeit imprecisely) an accurate reflection of relative specialized expertise and competence, substitution possibilities of lawyers by non-legally trained professional personnel would seem likely to be extremely limited. The principal efficiencies that are likely to be engendered by MDPs (as outlined in Part I) relate to complementarities in production and consumption that can be realized by horizontal integration, and not for the most part to substitution efficiencies. The third strand of the concern seems equally unpersuasive. Lawyer members of MDPs, even if they are a minority, can be held to professional obligations not to facilitate the unauthorized practice of law. To the extent that non-lawyer personnel are involved in some functions relating to the provision of legal services, lawyers would also assume similar obligations of supervision or responsibility as currently pertain with respect to para-legal personnel and articling law students within law firms. Moreover, joint and several liability for professional deficiencies will maintain incentives for professionals to monitor other professionals within the firm to ensure that
they are adhering to their respective spheres of comparative competence, a goal that is in fact facilitated in a large multi-specialty MDP.

More generally, and more importantly, the concerns that MDPs may facilitate the unauthorized practice of law need to be evaluated in the market or contracting failure framework outlined above. The only purpose of prohibiting the unauthorized practice of law (or any other profession) is to protect ill-informed consumers or at-risk third-parties. For the most part, in the present context, our principal concern is with clients who may be led or induced by virtue of incomplete information to purchase professional services from providers who are not competent to supply such services. We are not concerned, it must be repeated, with protecting professional territorial enclaves from competitive incursions from other disciplines or innovative modes of professional organization where these do not jeopardize clients' interests and indeed may enhance them. For many contexts where multi-disciplinary forms of practice seem most plausible, including especially lawyers, accountants and other business consultants, the present and prospective clientele are likely to be relatively sophisticated and recurrent business purchasers of professional and other technical services (many of which are largely unregulated). Such consumers are likely to derive minimal, if any, benefits from vigorous and exacting monitoring of professional boundaries within multi-disciplinary firms.

III. Regulatory Models For MDPs

1. The Status Quo

In evaluating regulatory models for MDPs it is important to recognize that we are not starting with a tabula rasa. In a mail-out survey undertaken by the "Futures" Task Force24 about one-third of the roughly 8,000 private practitioners who responded indicated that they maintained some form of referral arrangements with other professionals, most notably with accountants, but also real estate brokers, trustees in bankruptcy, financial planners, doctors, and patent/trade mark agents. About 760 of the respondents indicated that they maintained business arrangements with other professionals in order to provide multi-disciplinary services to clients. In addition, significant numbers of lawyers are employed by non-law firms, including government departments and agencies, corporations, non-profit agencies, labour unions, and community organizations. In areas such as personal banking and wealth management, investment banking, and private pension services, lawyers are increasingly em-

ployed by non-law firm institutions in these fields in order to facilitate the provision of a broader and more integrated set of professional services to clients. In Western Europe, Australia and the U.S., the Big 5 professional service firms already employ thousands of lawyers either in-house, for example, in their tax practices, or in affiliated law firms performing a broader range of functions, presumably reflecting revealed preferences on the part of their clients. In Canada, at least one of the Big 5 professional service firms (Ernst & Young) has set up an affiliated law firm (Donahue Ernst & Young) that has grown to over 80 lawyers (and four offices) in Canada since its inception in 1996.25 These trends confirm this process of erosion of traditional exclusive professional enclaves through greater integration of professional services.

While the Law Society of Upper Canada’s “Futures” Task Force largely rejects what it calls “the inevitability theory” of the growth of MDPs, current professional realities decisively negate as a realistic option complete suppression or prohibition of all such arrangements. More importantly, the thrust of the analysis developed in the present paper strongly suggests that consumer welfare would be enhanced by adopting a more permissive or facilitative approach to MDPs than many features of current professional regulation allow. Thus, in our view, little purpose is to be served by debating regulatory options that involve more stringent regulation of MDPs than at present or more aggressive enforcement of existing restrictions, with a view to retrenching from the present diverse range of multi-disciplinary practice arrangements. As the "Futures” Task Force itself acknowledges in relation to the option of rejection of the MDP concept and the maintenance of the status quo, viz. the practice of law by partnerships of lawyers only: “Support of the status quo is a statement that improvement in the present practice model is not possible and there is no potential for useful change. Any such conclusion would obviously be superficial and unsupportable.”26 The National Multi-Disciplinary Partnerships Committee of the Federation of Law Societies of Canada in 1998 reported, in a similar vein, that “there is a strong consensus of the Committee that multi-disciplinary partnerships will happen, whether law societies choose to regulate them or not”.27

26. Futures Report, supra note 19 at 51.
27. Press Release, 30th June, 1999
2. MDPs Controlled By Lawyers and Providing Only Legal Services

The “Futures” Task Force considered four major options: (a) the acceptance, recognition and regulation of full multi-disciplinary partnerships; (b) the acceptance of the New South Wales Model, viz. multi-disciplinary partnerships offering multi-disciplinary services provided that the partnership is in the effective control of lawyers; (c) the acceptance of the District of Columbia model, viz. multi-disciplinary partnerships offering legal services only with no specific provisions for control; and (d) the recognition, acceptance and regulation of multi-disciplinary partnerships offering legal services only, provided that the partnership is in the effective control of lawyers. The Task Force noted that the “captive” or affiliated law firm raises distinctive regulatory issues that require independent study and recommended that an effective vehicle be struck to undertake this study. Subject to this caveat, the Task Force recommended the rejection of options (a), (b), and (c) and the adoption of option (d), viz. multi-disciplinary partnerships offering legal services only, with the partnership in the effective control of lawyers. In the Task Force’s view, all of the concerns with respect to privilege, conflicts of interest, independence, public duty etc., would be eliminated as the service offering would be confined to the delivery of legal services. Furthermore, adherence to required professional norms in the delivery of such services would be guaranteed by the controlling influence of lawyers.28

The Task Force considered that this model presents lawyers with the opportunity to attract para-legals into their partnerships as well as non-legal professionals such as patent and trade mark agents, psychologists and social workers, forensic investigators, accountants etc., but in all cases subject to the constraint that they would be supporting the delivery of legal services only. The Task Force considered that more permissive options would entail unacceptable risks to clients relating to solicitor-client privilege, legal independence, and conflict of interest. The Task Force’s recommendations were adopted by the Benchers of the Law Society in the form of a new By-Law.29 The By-Law defines “practice of law” very broadly to mean the giving of any legal advice respecting Canadian laws or the provision of legal services. MDPs between lawyers and non-lawyers are only permitted where non-lawyers are providing services that “support or supplement” the practice of law. In addition, lawyers, must have “effective control” over non-lawyers’ practices. This position has become further entrenched with the Law Society of Upper

28. Futures Report, supra note 19 at 53.
Canada's October 2000 adoption of the Task Force's final report which recommends that affiliated law firms only be allowed provided that these firms are owned and effectively controlled by lawyers. The firm with which the law firm is affiliated may provide non-legal services, but it is not permitted to share in the law firm's profits or revenues in any way.  

In our view, the position taken by the "Futures" Task Force is deeply misconceived. First, restricting multi-disciplinary partnerships to the provision of legal services is, in a fundamental sense, something of an oxymoron. The defining characteristic of MDPs is that the services provided do not fall within the exclusive competence of members of one profession. The essence of the advantages from a client's perspective of horizontal integration of professional service provision set out in Part I of this paper is largely negated by attempting to confine MDPs to single-disciplinary practices - an obvious contradiction in terms. Moreover, while limiting MDPs to the provision of legal services may reduce the dangers of conflicts of interest, loss of solicitor-client privilege or adverse effects on the independence of legal advice, it does not provide a guarantee of these attributes of the solicitor-client relationship. For example, information passed on by a lawyer to an accountant or trademark agent within such a firm may not necessarily be subject to solicitor-client privilege.  

Second, with respect to the proposed lawyer in control requirement, while it may mitigate some of the concerns about preserving the ethical standards of the legal profession, it does not solve them. Even if they control a firm, lawyers may not supervise non-lawyer partners as if they were employees. Moreover, non-lawyers remain outside the direct control of legal regulators. More importantly, even aside from enforcement issues, a control requirement does not respond to most of the ethical and practical problems concerning conflicts of interest, solicitation, advertising, steering, insurance and compensation, assessment of bills, or the loss of solicitor-client privilege, that can arise with non-lawyer partners, even when lawyers constitute a majority of the partners. Practically speaking, a lawyer in control requirement, coupled with the requirement that MDPs offer only legal services, almost certainly means that very few organizations will form multi-disciplinary partnerships, as exemplified by the experience in the District of Columbia and, to a lesser extent, the state of New South Wales in Australia. The proposed lawyer in control  

32. Ibid. at 75.
requirement, like the proposed mirror image accountant in control requirement proposed by the Canadian Chartered Accountants’ Inter-Provincial Task Force, raises the unedifying prospect of a zero-sum turf war between the accounting and legal professions that is likely to deprive many consumers of professional services of most of the advantages of multi-disciplinary service provision. While the Law Society’s “Futures” Task Force purports to accord great weight to the ethical objections and concerns relating to MDPs, as earlier indicated we believe that in most respects these objections and concerns have been overstated, and in fact will only be marginally mitigated by adoption of the restrictions proposed by the Task Force.

As Roach and Iacobucci conclude: “We would not require lawyers to control MDPs and we would not restrict MDPs to the provision of legal services. Such blunt and restrictive regulatory requirements do not target specific mischiefs precisely enough, and moreover are doomed to irrelevance given the availability of exit options” (which include affiliated law firms). The International Practice of Law Committee of the CBA in their August 1999 report recommended that there be no requirement of control of MDPs by lawyers and that their services not be restricted to legal services (although the Committee has now resiled from this position and taken a position similar to that of the LSUC Task Force). We note also that the recent ABA Commission Report on MDPs rejected both of these restrictions as inconsistent with the potential client benefits from utilizing MDPs and with client choice.

In short, the only constructive way forward, viewing consumers’, not providers’, concerns as paramount, entails abandoning both of these requirements (i.e. that MDPs should be restricted to providing only legal services, and that these practices should be controlled by lawyers). This conclusion enables us to consider a number of much more constructive options.

3. The Affiliated Law Firm

To begin, at a minimum, affiliated law firms associated with broader groups of professional service providers should be both permitted and encouraged. Organizationally discrete affiliated law firms may reduce the problems associated with confidentiality and loss of solicitor-client privilege, and reduce client confusion about when they enjoy the attributes of a solicitor-client relationship in their dealings with various

33. Ibid. at 79, 80.
34. The Lawyers Weekly (2 March 2001).
35. ABA delegates rejected the Commission’s recommendations and voted to support the current ban on fee-sharing with non-lawyers.
elements of the larger professional group. Affiliated law firms might also help contain conflict of interest problems and minimize the situations where lawyers and other professionals will have competing duties. However, there are still risks of conflicts of interest within the broader professional group of which the affiliated law firm is part; risks of disclosures of information to non-lawyer professionals entailing loss of solicitor-client privilege, and problems of steering. However, as we have argued above, these problems are inherent in the complexity of clients’ professional needs that require multi-disciplinary solutions and are not peculiar to any particular professional organizational modality. In this respect, an ineluctable trade-off must be faced. The more an affiliated law firm is hermetically sealed-off from the larger professional group of which it is a part, the greater the sacrifice in integration efficiencies described earlier in this paper. If effective and efficient multi-disciplinary service provision in many contexts requires a highly coordinated or integrated teamwork approach, it would be fanciful to suppose that the various ethical and related objections and concerns regarding MDPs can be entirely eliminated through an affiliated law firm structure.

Indeed, in order to enhance integration efficiencies, we would argue that several restrictive professional rules currently in place in the legal profession in Ontario and elsewhere should be relaxed. First, in order to minimize information asymmetries between service providers and clients, the affiliation between the law firm and the larger professional group of which it is a part should be clearly and publicly signified. In our view, this calls for allowing such a law firm to adopt a firm or brand name that clearly signifies the affiliation (as is the case in a number of Western European and Australian jurisdictions). This signals to consumers and potential consumers of professional services not only the potential advantages of fuller professional service integration but also some of the risks (the two sides of the ledger reviewed in Parts I and II of this paper). Second, current restrictions on advertising and solicitation, which in our view are anti-competitive, should be substantially relaxed so that MDPs have the ability to promote this form of organizational innovation to prospective clients, including existing clients of other service providers. There is little point to recognizing the potential advantages of this form of service provision to many clients while at the same time denying firms the ability to communicate these advantages to such clients. Third, the current rules on fee-splitting or revenue sharing in the context of MDPs involving lawyers should be abandoned. Appropriate incentives for fuller professional service integration are only created with some appropriate form of revenue pooling and sharing. While this is often said to raise the risk of “steering,” we have argued above that this risk is already pervasive
in many large firms within existing professions, including the legal profession, and moreover with more sophisticated purchasers of professional services is unlikely to prove a serious problem.

The counterpart problem raised by the prohibition on revenue pooling or sharing is client "hoarding" rather than "steering", where professionals are reluctant to enlist the assistance of other professionals in servicing the needs of the client because they derive no direct pecuniary benefits from this and may be tempted to overreach their own professional competence in order to preserve all the economic benefits from the professional relationship in question for themselves. The experience with law firms which have formed loose affiliations with other law firms in other geographic centres, typically on some form of mutual referral basis, is instructive in this respect. These arrangements have in general been much less successful in yielding economic efficiencies from fuller professional integration than more unified ownership structures. Currently, where affiliated law firms are associated with larger professional groups, such as large accounting/consulting firms, typically a wide range of costs are shared including office space, support services, information technology, and professional development. Presumably, these costs are shared on some basis that reflects the relevant size and revenue contributions of the constituent elements of the professional groups, but once one accepts that cost sharing on a revenue-related basis is appropriate, it is largely a semantic step then to recognize the advantages of a broader and more complete sharing of costs and revenues.

The Law Society of Upper Canada’s Multi-Disciplinary Task Force in its recent 2000 report\(^{36}\) has recommended that affiliated law firms should be permitted, but subject to stringent conditions that include (inter alia):

1. Affiliated law firms must be owned and effectively controlled by lawyers;
2. The non-lawyer firm should not be permitted to share in the law firm’s profits or revenues either directly or indirectly through excessive inter-firm charges that do not reflect fair market value;
3. An affiliated law firm should be required to establish a system for conflicts as if both firms were one, applying to conflict situations the obligations applicable to law firms;
4. The affiliated law firm should be required to carry on its practice entirely within its own separate premises and maintain its documents, records, and files, including all electronic data, entirely separate and apart from the files, documents, records and electronic data of the affiliated firm; and,

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\(^{36}\) Supra note 30.
5. An affiliated law firm should be required to observe the current rules on firm names (requiring firm names to include only names of present or deceased partners) in order to ensure that the public is not misled into believing that non-lawyers are practising or entitled to practice law.

For reasons given above, we believe that these rules are much too restrictive and will entail the sacrifice of most integration efficiencies, thus severely discouraging the formation of affiliated law firms.

4. Fully Integrated MDPs

If one accepts the logic of our argument to this juncture, first against restricting MDPs to the provision only of legal services and then only if under the control of lawyers and second in favour of affiliated law firms with high degrees of identification and integration with the larger professional groups of which they are a part, then the question must necessarily be faced of whether any useful purpose is served by insisting on this degree of organizational discreteness. The ABA Commission took the view that affiliated law firms with fee-sharing and fully integrated MDPs are functionally similar. In other words, what is gained or lost by then permitting complete integration of lawyers within larger professional multi-disciplinary service firms (i.e. the full blown multi-disciplinary partnership)? The gains, at least conceptually, are easily identified. First, one ceases engaging in largely semantic charades - of confounding form with substance - which has the virtue of forthrightness and intellectual honesty. Second, as a matter of principle, integration efficiencies are likely to be maximized when the most complete forms of professional integration are permitted. Third, joint and several liability across the partners in an MDP is likely in fact to enhance incentives for monitoring adherence by professionals to their respective spheres of comparative advantage. With respect to the losses or risks to consumers from integration, it may be arguable that, relative to the affiliated law firm, effective regulatory oversight by the governing bodies of the legal profession is rendered somewhat more difficult with more diffuse and pervasive professional interactions to monitor. Arguably again, solicitor-client privilege problems, confidentiality problems, conflicts of interest problems, and independence problems are rendered marginally more acute in a multi-disciplinary partnership relative to an affiliated law firm, but, as we have emphasized before, this is the inherent trade-off between the advantages of fuller service integration and some of the disadvantages. This is a calculus that in the end only clients, given their own particular circumstances, are able to make.
We believe that there are several regulatory options that should be explored that would maximize the advantages to clients of professional service provision by MDPs, while minimizing their disadvantages.

a. Individual Licensing

The first is continued individual licensing of professionals by each self-governing profession as at present, but with removal of restrictions that especially impede the formation of MDPs, such as prohibitions on fee-splitting, prohibitions on use of firm or brand names, and restrictions on advertising and solicitation. Prohibitions on individual unauthorized practice would continue, and licensed professionals would be prohibited from facilitating or assisting in the unauthorized practice of law. Existing rules could be amplified to ensure that only lawyers have access to lawyers' trust funds and that compensation for defalcations only applies to defalcations by lawyers. Rules could also clarify that mandatory lawyers' indemnity insurance is only available with respect to legal services rendered by lawyers. The taxation of bills for legal services could be preserved by requiring that legal services be separately itemized on accounts rendered by MDPs. Issues relating to solicitor and client privilege, confidentiality, and conflicts of interest as they arise in an MDP context should attract a presumption that few special rules are required, recognizing that most of these concerns may arise in a wide range of other organizational contexts and are inherent in clients' problems that require multi-disciplinary solutions rather than in the organizational modality deployed to provide solutions.

This option is the least intrusive, least bureaucratic, and most flexible approach to MDPs and will provide maximum latitude for the evolution of organizational modalities in the provision of professional services in the future and hence least constrain dynamic efficiency. However, it does not, in itself, resolve potential conflicts in regulatory or ethical requirements imposed by different professions.

b. Firm Certification

Another proposal initially advanced by John Quinn in a background paper for the Professional Organizations Committee in 1979 (adapted from the Certificate of Authorization regime maintained for engineering firms by the Association of Professional Engineers of Ontario) and endorsed by the Research Directorate (of which Trebilcock was a member) of the Professional Organizations Committee and again endorsed recently by Roach and Iacobucci37 contemplates a form of firm

licensing for MDPs, in addition to existing forms of individual licensing. The ABA Commission on MDPs adopts a variant of this regime, while the International Practice of Law Committee of the CBA recommends that MDPs should not be required to obtain a firm licence but notes that circumstances may evolve which may require licensing of certain types of MDPs. A condition for the issuance of a Certificate of Authorization to a firm comprising members of more than one profession would be the firm’s commitment to adhere to certain basic ethical requirements. Some of these requirements may involve a form of mandatory disclosure to clients and waivers with respect to aspects of solicitor-client privilege and confidentiality. Other issues might pertain to rationalized conflict of interest rules, directorships or investments in clients subject to audit (a rule now maintained by the accounting profession), and the prohibition of audit assignments and legal assignments for the same clients (to resolve the client/third-party potential conflict), or alternatively a rule providing for waiver of solicitor-client privilege and confidentiality obligations in this case. Other rules would need to be adopted with respect to management of and access to lawyers’ trust funds and limiting exposure of mandatory lawyers’ indemnity insurance to claims arising out of actions by non-lawyer partners or personnel. These examples are merely illustrative of how such an approach to the potential advantages and disadvantages of multi-disciplinary practice might be elaborated. Regulatory overreach would be discouraged by the fact that firms would possess a number of exit options, including the affiliated law firm option, which would be simultaneously available. The advantage of firm licensing over individual licensing is that it creates a collective rather than individual stake in ensuring compliance by all personnel within a firm with applicable rules and thus may provide more effective incentives to this end. However, the firm licensing approach is somewhat more bureaucratic than the individual licensing approach in that additional layers of licensing are entailed, especially if certificates must be obtained from each of the professional bodies of all participating professionals. It also does not, in itself, resolve potential conflicts in regulatory or ethical requirements imposed by different professions.

The ABA Commission’s proposals exemplify these difficulties. Certification of an MDP by the court (or in Canada the governing body of the legal profession) would only be required where the MDP is not controlled by lawyers. For MDPs controlled by lawyers, only individual licensing would be required. It seems incongruous in many respects that the regulatory authority of the legal profession over an MDP as a firm increases as the number of lawyers participating in such a firm decreases.
By parity of reasoning, it would seem to follow that in the case of MDPs controlled by lawyers with a minority of accountants, the accounting profession should be able to insist on a firm-level certification regime whereby the lawyers are required to comply with the accounting profession’s regulatory requirements. However, if conditions for certification differ between the two professions, little will have been accomplished except additional layers of cumbersome and potentially dysfunctional professional regulation. These problems will increase exponentially if more than two professions are involved (which may often be the case) and if firms seek to operate in more than one jurisdiction.

c. *Inter-professional Coordination Committees*

These problems suggest the strong desirability of an inter-professional coordinated or joint approach to setting any special conditions for the issuance of individual or firm licenses in an MDP context. More concretely, we propose that where MDPs involving members of more than one self-regulating profession are proposed, a committee be struck comprising representatives of each of the professions involved, together with demand-side interests to be appointed by government (perhaps committees of about nine members, three from each profession and three from demand-side interests with the committee to be chaired by one of the latter, and with decisions to be made by a two-thirds vote). The mandate of such a committee would be to resolve potential regulatory conflicts between the two professions in an MDP context in ways that best serve consumer interests and to recommend appropriate rule changes to the professions with respect to participation by their members in MDPs. In the event of the governing bodies of the professions failing to adopt a committee’s recommendations, the government to whom they account would need to contemplate legislative or regulatory intervention. Such committees would need to be struck for each particular combination or configuration of professions in an MDP to ensure relevant expertise and to avoid a bureaucratic imbroglio which a large, single multi-stakeholder inter-professional committee may entail. Once a particular committee resolves points of potential regulatory conflict between two or more professions whose members are proposing an MDP, it would be *functus*. Each committee would be given a tight timeframe for decision-making (e.g. six months from its constitution). In the event of an inability to reach decisions, a new committee would be struck. Once appropriate rule changes are in place, each profession would continue to licence and supervise its individual members as at present; firm certification or licensing would be unnecessary. Under this proposal, no one profession could assert supremacy in setting the conditions under which MDPs
involving its members and members of other professions will be permitted – clearly an invitation to a counter-productive turf war in which the consumer interest is in danger of disappearing from view. Some refinements to this proposal will be required in the case of proposed MDPs between regulated and unregulated professionals. To the extent that the professional regulations of the regulated profession require modification to accommodate such arrangements, in some cases professional associations of the unregulated professionals may be sufficiently inclusive to appoint representatives of their interests to an inter-professional coordinating committee. In other cases, where such bodies are lacking, government may need to appoint representatives of both demand-side interests and the unregulated profession.

Unlike the CBA’s committee on MDPs, which recommends that the CBA and the law societies address specific regulatory issues regarding lawyers’ participation in MDPs, the creation of inter-professional coordination committees recognizes the interplay among professionals that MDPs necessarily entail. MDP regulation cannot be effectively developed and implemented absent the participation of representatives of all the professions which the MDP involves.

Conclusion

In contrast to the sweeping and in many respects crude prophylactic approach that has hitherto been adopted by both the legal and accounting professions and that remains reflected in the recent proposals by the Law Society of Upper Canada and the Inter-Provincial Chartered Accounting Task Force, approaches along the lines that we have sketched would come to terms with both professional realities as they stand today and accelerating trends towards the internationalization and integration of professional service markets (as with many other markets). These approaches would move debates over the future role of MDPs beyond the domain of the unedifying professional turf wars that have come to dominate such debates and toward a co-operative rather than competitive focus on the only question that ought to dominate these debates: What do informed consumers of professional services want, and to the extent that there are currently grounds for concern that information asymmetries or externalities may distort such choices, what steps can the various professions involved take, through their governing bodies and inter-professional co-operative mechanisms, to enhance informed choice and resolve externalities? In the end, as a matter of principle, how consumers purchase professional services should be their decision, not a decision taken for them by the professions or their professional bodies, whose paramount duty is to serve their clients’ diverse interests as effectively as
possible. To date, inter-professional rivalry and the skirmishes that it has generated have prevented any serious focus on the possible form of inter-professional cooperative mechanisms and on a targeted agenda of substantive issues requiring resolution through these mechanisms if MDPs are to be facilitated in ways that enhance consumer welfare (and coincidently, the productivity and incomes of participating professionals). But unlocking the present inter-professional impasse demands that the hard work entailed in a constructive approach to the design of the details of a cooperative rather than competitive approach to these issues be accorded a central and immediate priority.