MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: PROSPECTS, PROBLEMS AND POLICY OPTIONS

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In this extended work the authors treat comprehensively and comparatively the multiple issues surrounding MDPs. They offer proposals for the extension of the range of services of these entities and present cogent arguments with respect to their regulation. In sum, they believe that consumers will benefit from a liberal regime of governance of MDPs.

Dans ce long article, les auteurs font une étude complète et comparative des nombreuses questions entourant les sociétés multidisciplinaires. Ils présentent des propositions pour l'extension de la gamme des services de ces sociétés. Ils apportent de puissants arguments concernant leur réglementation. En somme, ils croient que les consommateurs bénéficieront d'un régime libéral de réglementation des sociétés multidisciplinaires.

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This paper is a revised and updated version of the third part of a three part project commissioned by the Law Society of Upper Canada's Futures Task Force Working Group on Multi-Disciplinary Partnerships. The first part was a paper reviewing the literature on multidisciplinary partnerships, parts of which have been integrated in this paper. The second part of the project involved consultation with members of the legal and accountancy professions and resulted in another report prepared to assist the Working Group in its deliberations. The views expressed here and in other parts of the project only reflect the personal views of the authors. The Working Group issued a report to Convocation on September 25, 1998 entitled, "The ‘Futures’ Task Force - Final Report of the Working Group on Multi-Discipline Partnerships.” This report was subsequently implemented in by-laws enacted by the Convocation of the Law Society of Upper Canada in April, 1999. We express our gratitude to the Working Group for initially commissioning this work and allowing us to attend their sessions. We also thank Jim Varro of the Law Society’s Policy Secretariat and his staff for their excellent guidance and assistance in all aspects of this project and Michael Trebilcock for helpful comments. Kent Roach also thanks the Canadian Bar Association (British Columbia) and the Federation of Law Societies for inviting him to present this paper at meetings in Vancouver and Montreal.
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Multidisciplinary Practices and Partnerships

I. Introduction

A great deal has been written about the economic basis for multidisciplinary practices and informal and formal partnerships between lawyers and non-lawyers, particularly the convergence in services offered by accountants and lawyers and the interest expressed by the Big 5 accountancy firms in providing legal services. This information provides important background to our work, but our focus is on the ethical and practical problems that might arise from alliances, especially partnerships, between lawyers and non-lawyers and the options that regulators in the common law world, especially law societies, face in responding to demands for multidisciplinary services.

We will examine the ethical rules that apply to most Canadian lawyers, but much of our analysis should be relevant in other common law jurisdictions including England and Wales, Australia and the United States. A few jurisdictions, the District of Columbia in the United States, Ontario in Canada, and New South Wales in Australia allow multidisciplinary partnerships (MDPs). These regimes, as well as other reform proposals, will be critically evaluated in this paper.

Multidisciplinary practices, defined to include lawyers working within accounting and actuarial firms and captive law firms aligned with accounting firms, are a present reality. The Big 5 accounting firms are offering “one stop shopping” for a broad range of professional services and rank high among the...
employers of the largest number of lawyers in the world. In England, Australia and Canada, they have established captive or affiliated law firms that are allied with their practice, but have separate partnerships and generally separate names. Large multi-national corporations may be attracted to one stop shopping and the consistency of services offered by the Big 5 throughout the world. Multidisciplinary services may also eventually be supplied to smaller corporations and individuals. Financial institutions and other corporations may wish to offer their customers various legal services related to real estate transactions, tax and estate planning. The immediate question is how legal regulators should respond and whether they should allow MDPs in which lawyers partner with other service providers while retaining a solicitor-client relationship with the firm’s clients.

A starting point in our analysis is that any reform should account for the ethical concerns of the existing regulatory regime. It is not our purpose to assess the current regulatory approach generally, but rather to analyze how multidisciplinary practices should be incorporated into such a regime. For example, we do not consider whether it is sensible policy to protect solicitor-client privilege, or to prohibit unauthorized practice of law, but only ask how these rules may relate to multidisciplinary practice. Rather than embarking on an analysis of the wisdom of the ethical rules, we will examine whether allowing MDPs would be consistent with the ethical framework established by the current rules.

In light of this starting point, market considerations alone will not dictate regulatory responses. It is important, however, that regulatory responses

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2 P. Cannon, “Big Six Mobilize Legal Forces” [April 1997] 8 Int’l Tax Rev. 13. In November, 1998 Pricewaterhouse Coopers had 1,663 non-tax lawyers in 39 countries and Arthur Andersen had 1,500 lawyers in 27 countries, ranking them third and fourth, behind Baker and McKenzie and Clifford Chance, in terms of numbers of lawyers employed. The American Lawyer November, 1997 at 47. The Big 5 Accounting firms have expressed their intention to expand their provision of legal services by hiring more lawyers to work within accounting firms and in their own law firms.

3 Ibid. In some jurisdictions, there are no restrictions on these separate firms having the same name as the accounting firm and the accounting firms prefer that the law firms bear their brand name.


6 For example we do not consider the literature which criticizes solicitor-client privilege as “a political device for according special protection to a favoured elite”. “Developments in the Law - Privileged Communications” (1985) 98 Harv.L.Rev. 1450; see also, D. Fischel, “Lawyers and Confidentiality” (1998) 65 U.Chi.L.Rev. 1.

contemplate changing market behaviour. In 1979, the Research Directorate of the Professional Organizations Committee in Ontario recommended that licensed MDPs be permitted among lawyers, accountants, engineers, and other professionals, but not unlicensed non-professionals.\(^8\) Since that time, however, the range of services offered to corporations and individuals has changed. For example, the Big 5 accounting firms no longer define themselves only as accountants. An increasing amount of their work is consulting work which, while provided by highly trained people who may have professional degrees, does not fall under the aegis of the practice of any of the traditional professions. Similarly, the services provided by financial institutions have also dramatically expanded to include work such as financial planning that may include a legal component related to tax planning and estates.\(^9\) Paralegals and consultants have emerged as new and often unregulated service providers.\(^10\) Alliances with accountants have driven the multidisciplinary issue; but any regulatory regime must contemplate that lawyers may wish to align themselves not only with other self-governing professionals, but with a wide range of service providers including unregulated consultants of all types.

Whatever regulatory response is taken must be justified in the public interest as necessary to protect the consumers of legal services and the ethical canons of the legal profession. There is a significant danger, however, that regulators will be pressured to act in a protectionist manner. As we set out below, efficiencies may be realized by MDPs because non-legal services may be substitutes for legal services to some extent.\(^11\) If lawyers were allowed to partner with non-lawyers, the MDP may be able to provide services more cheaply and efficiently than a firm

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\(^9\) A 1996 survey of solicitors' firms in England found that of those firms with a view to forming MDPs, 44% approved of partnerships with financial planners, as opposed to 91% who approved of partnerships with accountants; 58% with chartered surveyors and 40% with patent agents. “Practice Snapshot” Gazette (12 Feb. 1997) 19. Solicitors in Scotland are allowed to sell real estate and the privately owned Edinburgh Solicitors' Property Centre turned over one billion pounds in residential transactions in 1997. M. Fitz-James, “If you can't beat 'em, join 'em” *The Law Times* (2-8 March 1998) 5.

A 1997 survey of Ontario lawyers found that 2772 respondents maintained formal or informal regular referral arrangements with other service providers while 4359 did not. Over 2000 referral arrangements were reported with accountants, 785 with real estate brokers, 646 with financial planners, 568 with insurance agents, 480 with trustees in bankruptcy, 392 with family counsellors, 387 with mediators and 380 with actuaries: Futures Task Force, *supra* appendix 10. The same survey found that 767 lawyers reported regularly providing legal services with other professions while 6299 did not. Of those jointly providing services, 505 provided them with accountants, 145 with financial planners and 134 with real estate agents: *Ibid*.


which involved lawyers alone. There are fears that MDPs may cause economic dislocation to lawyers and harm their status and prestige by relegating them to a secondary role in the management of firms. There are fears that even the largest law firms will not be able to compete with the Big 5 accounting firms, which have access to greater capital and wider international networks. At the same time, it is possible that lawyers might benefit from an expanded labour market as accounting and actuarial firms and MDPs compete for their services.

Whatever the net effect on lawyers, concern for the public interest, rather than lawyers’ parochial interests, means that “pure economic protectionism cannot be a legitimate justification for maintaining or expanding ethical restrictions that surround lawyer-non-lawyer affiliation.” We recognize, however, the political reality that the actions of various regulators will be interpreted as part of a traditional struggle over the respective and changing roles of professionals in a competitive economy, even when the regulators respond in good faith to genuine concerns about the ethical integrity of their professions. The prospect of multidisciplinary practices and partnerships implicates the political economy of the legal profession, the future governance of lawyers and the question of what, if anything, is distinctive about being a lawyer.

The politicization of the multidisciplinary issue into what Yves Dezalay has colourfully described as “turf battles and tribal wars” is perhaps inevitable but

12 The consumer groups and association of retired people who testified in favour of MDPs before the American Bar Association’s Commission on Multidisciplinary Partnerships certainly believed that such partnerships could more efficiently provide their members with legal services. For summaries of their testimony see http://www.abanet.org/cpr/multicom.html. For further, largely favourable, reactions from clients about MDPs, see Trebilcock and Csorgo, supra note 12.


14 Competition between accountants and lawyers is not a new phenomenon. See D. Sugarman, “Who Colonized Whom? Historical Reflections on the Intersection Between Law, Lawyers and Accountants in England” in Y. Dezalay and D. Sugarman, eds., supra note 1. In 1955, the Dean of the Harvard Law School, Edwin Griswold, criticized accountancy firms for hiring lawyers and offering legal services: A Further Look: Lawyers and Accountants (1955) 41 A.B.A.J. 1113. Concerns that legal practices were threatened by various businesses are also not new. In 1913, an American lawyer, G. Bristol, argued that the advent of title insurance was a sign of “The Passing of the Legal Profession” (1913) 22 Yale L.J. 590 at 613.

15 Y. Dezalay, supra note 1. We know of this from personal experience. The release of the first part of this project in the form of a literature review that took great pains to outline arguments both for and against MDPs, without reaching final conclusions, was reported in the popular press as another sign of lawyers’ protectionism. “Law society cool on multidisciplinary partnerships” Law Times (16-22 March 1998) 1; “MDPs Love them or loathe them” Law Times (16-22 March 1998) 6; “Getting in bed with accountants” The Financial Post (24 March 1998) 13. On the other hand, the third part of our paper was subsequently described by a member of the Law Society of Upper Canada’s Task Force as based on a “Chicago-style” preference for markets. See testimony of Rob Collins http://www.abanet.org/cpr/multicom.html. Unlike our critics, we see our own proposals as neither protectionist nor a capitulation to market forces; we conclude that MDPs can be accommodated within the framework represented by current ethical rules.
can be countered in three important ways. First, the analysis should focus less on generalizations about the respective professions and emerging professions and more on specific practical and ethical issues that emerge from their interaction. Everyone has their own views about how lawyers are similar to or different from accountants, engineers, patent agents, consultants or real estate agents, but discussion at this level of generality is likely to be based on unhelpful stereotypes and self-images. In this paper, we examine a number of specific practical and ethical issues that emerge when lawyers move towards closer and permanent relationships with non-lawyers, including solicitor and client privilege, conflict of interest, the independence of legal advice, as well as technical yet important issues concerning the administration of trust funds and the availability of insurance and compensation funds and fee assessment procedures.

Second, a politicized focus on the parochial economic interests of the professions can also be countered by exploring the broadest range of policy options open to regulators. At one end of the regulatory spectrum is the more rigorous enforcement of rules, such as those against unauthorized practice and fee splitting, that effectively prohibit MDPs and may restrict multidisciplinary practices. At the other end would be a wide open scheme that would allow passive investment in law firms and allow all non-lawyers, including unregulated consultants, to partner with lawyers. Rather than battling in a winner-take-all fashion over these extremes, regulators should look to the wide variety of options in the middle of this spectrum:

Even when emphasis is not on polar regulatory extremes, there is a problematic focus on which professions will control MDPs. The common law jurisdictions which have so far authorized MDPs have required lawyers to be in control through a variety of mechanisms. Conversely, the Canadian Institute of Chartered Accountant has recommended that accountants be allowed to form partnerships with non-accountants, but only if public practice firms are controlled by accountants. These competing demands for control put lawyers and accountants on a collision course. It is important to understand the many reasons why so many proposals have gravitated towards control mechanisms, but also to develop less blunt alternatives. We will examine more tailored approaches, including making some fundamental ethical rules from each profession apply to all within the firm and/or requiring double majorities on some crucial issues, such as declining business because of conflicts of interests. Other options include having the regulators of each service provider license each multidisciplinary partnership on meeting certain conditions. To say the least, the range of regulatory options is robust with many options deserving serious consideration.

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16 G. Gilbert and L. Lemperthave observed that in the United States the debate has been dominated by the extreme and polar positions of "an absolute ban and outright nonlawyer investment": They suggest that "the options in the intermediate space should be examined by more jurisdictions than have been willing to do so to date": The Nonlawyer Partner: Moderate Proposals Deserve a Chance (1988) 2 Geo.J. of Legal Ethics 383 at 409-10.

17 Interprovincial TaskForce on the Multidisciplinary Activities of Members Engaged in Private Practice (Revised Report, April, 1995)
Finally, the politicization of the multidisciplinary issue into turf wars and economic struggles between the professions can be countered by candidly recognizing that the rules established by regulators are only one factor in determining the future evolution of multidisciplinary practice. Lawyers sometimes make the mistake of assuming that legal rules govern realities. Economists and social scientists do not. Throughout our work, we were reminded of Coase's famous insight that legal rules establish starting points for the negotiation of contracts and that, assuming zero transaction costs, the efficient outcome will occur regardless of legal rules.\textsuperscript{18} Legal rules are not irrelevant and can increase the social cost of transactions, but it must be remembered that many who desire multidisciplinary alliances are sophisticated and resourceful "transaction costs engineers."\textsuperscript{19} Within the present rules, lawyers can align with other service providers through associated "captive" firms and lawyers can be employed by accountancy and other multidisciplinary firms. Given that the parties will contract around restrictive rules, the question arises whether lawyers can be better governed and their clients better protected where legal services are provided by these alternative adaptive arrangements, or in a permissive regulatory regime that allows formal partnerships between lawyers and non-lawyers. This is a difficult question, but at least one which does not pretend that regulatory rules by themselves will determine the future of multidisciplinary practice.

The next part of this paper briefly reviews developments concerning multidisciplinary practices and partnerships. The third part of this paper will identify existing legal and ethical rules that effectively prohibit MDPs and affect other forms of multidisciplinary practice. This will include a discussion of a large number of ethical and practical problems that affect the governance of MDPs involving non-lawyers, the independence of legal advice and the protection of confidentiality including solicitor-client privilege.

The fourth part of this paper discusses regulatory regimes in the common law world that permit MDPs, as well as the rapidly growing number of reform proposals.

The fifth part outlines and assesses a broad array of regulatory options open to legal regulators in responding to multidisciplinary practices. They range from maintaining and tightening the status quo, which effectively prohibits MDPs, to a permissive regime that would allow lawyers freely and without prior regulatory approval to partner with any non-lawyer. The ability of each regulatory regime to respond to the practical and ethical problems previously identified will be outlined.


\textsuperscript{19} R. Gilson, \textit{Value Creation By Business Lawyers: Legal Skills and Asset Pricing} (1984) 94 Yale L.J. 239. Accountants in most Canadian jurisdictions are prohibited from forming partnerships in their public practices with non-accountants, yet they form overlapping partnerships. Patent agents practice with lawyers, but through separate partnerships and other arrangements to avoid rules against fee splitting. The existing restrictive rules do not provide an insurmountable barrier to multidisciplinary practice.
The final part presents our conclusions upon which regulatory regime should be adopted and which should be discarded.20

II. The Development of Multidisciplinary Practices and Partnerships

Lawyers have traditionally involved other professions in their practices. Barristers have consulted and called other professionals as expert witnesses, and now frequently involve mediators in their work. Tax lawyers and accountants work on the same files for corporate clients, as do pension lawyers and actuaries. In many cases, lawyers and other professionals working on a matter are separately retained and belong to separate firms. Some lawyers believe that this provides a valuable system of checks and balances. Others see it as inefficient and advocate "one stop shopping." In any event, the last decade has seen closer alliances between lawyers and other professionals and consultants. Large accounting firms have hired more lawyers and have entered into more formal arrangements with law

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20 Our search for the optimal regulatory regime means that we have not examined whether present restrictions on MDPs violate domestic or international law standards. This is not, however, an insignificant topic. The World Trade Organization has embarked upon an examination of national regulation of professional services. It is presently examining whether national regulation of the professions results in unnecessary barriers to trade. See Working Party on Professional Services, World Trade Organization, The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4 of the General Agreement on Trade in Services (11 September 1996). Its conclusion could have significant influence over a country's approach to professional regulation in general, and MDPs in particular.

Some academics in the United States have argued that rules restricting multidisciplinary alliances may be vulnerable under anti-trust laws and constitutional guarantees of freedom of association. See T. Andrews, Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules? (1989) 40 Hastings L.J. 577. In Canada, law societies exercising their statutory mandates to regulate the profession have been found immune from anti-trust prosecutions: Canada (Attorney General) v. Law Society (British Columbia), [1982] 2 S.C.R. 307. Restrictions on interprovincial legal partnerships, however, violated the mobility right in s.6 of the Charter to gain a livelihood in any province: Black v. Law Society of Alberta, [1989] 1 S.C.R. 591. In holding that the restrictions could not be justified under s.1 of the Charter, the Court noted that lawyers within Alberta would have to supervise and take full responsibility for the work of those including non-lawyers who were not members of the Law Society of Alberta. Outside of this limited context, courts have generally been reluctant to protect economic interests under the Charter. For example, restrictions on the exclusion of certified general accountants from the practice of public accounting have been held not to violate rights such as freedom of association, mobility rights or the right not to be deprived of life, liberty or security of the person without accordance to the principles of fundamental justice: Walker v. P.E.I., [1995] 2 S.C.R. 407. See also Canadian Egg Marketing Agency v. Richardson (1998), 166 D.L.R. (4th) 1; W. King, Legal Issues Relating to Multi-disciplinary Partnerships, (1999 prepared for the Canadian Bar Association.)
firms. Some law firms have also hired non-lawyers to assist in their delivery of services to clients.

There is much talk in the popular literature about the efficiency and desirability of one stop shopping. This concept refers to efficiencies that can be attained because of substitution between professional services and complementarities between legal and non-legal services in production and consumption. Substitutional efficiencies may arise where more cost-effective service providers replace lawyers in certain respects on a particular file. These efficiencies may help explain both the impetus to forming MDPs provided by non-lawyers and the resistance to them by lawyers. To the extent that substituting other service providers for lawyers is efficient, it could reduce demand for lawyers.

To illustrate the point, imagine that at least one lawyer must be consulted on a particular task because of regulatory requirements. Suppose, however, that significant portions of the task in question are more efficiently carried out by accountants. In a world without MDPs, the regulatory requirement of a lawyer’s involvement and the additional transaction costs of dealing with two distinct firms, a law firm and an accounting firm, may lead the client to consult a single firm, a law firm, with the result that lawyers carry out the desired task in its entirety. In a world with MDPs, however, greater substitution of accountants for lawyers would likely occur. The client may go to an MDP which comprises accountants and lawyers and the portions of the task more efficiently carried out by accountants will be carried out by accountants. Substitution occurs within the firm and the client does not bear the transaction costs of consulting multiple firms. Such substitution, while efficient, reduces the demand for lawyers and thus may give rise to their opposition to MDPs.

Lawyers and other service providers may also efficiently combine because their services are complements in production: they can be jointly provided at lower cost than when provided separately. For example, a client may be able to convey information cost-effectively to a co-ordinated team of professionals, such as accountants and lawyers, whose advice is relevant to a particular problem. A closely integrated team of professionals

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21 See Quinn, supra note 12; Trebilcock and Csorgo, supra note 12.
22 But not all respects - if lawyers and non-lawyers could substitute in all respects in a certain context, an MDP would not be required to realize the efficiencies: the consumer could simply bypass a law firm altogether. If some legal services are required, consulting an MDP may be more cost-effective than both consulting a law firm and other professionals or quasi-professionals. As a pioneering work by Coase points out, firms are organized as a general matter in large part to minimize transactions costs between the members of the firm, thus enhancing efficiency: R. Coase, The Nature of the Firm (1937) 4 Economica n.s. 386.
23 Quinn, infra note 12 at 333.
24 For greater detail on this point, see Trebilcock and Csorgo, supra note 12. As will be explored below, loss of solicitor-client privilege may be one of the costs entailed by greater efficiencies in the communication of information.
who belong to the same firm may also be better able to produce solutions
to the clients’ problems by combining their areas of expertise on a continuing
basis. Professionals working together on a file may more efficiently divide
their functions and provide more creative and comprehensive services. In this way, multidisciplinary firms may increase the demand for legal services.

The efficiency gains of multidisciplinary firms can only be confirmed
by empirical analysis beyond the scope of this paper. It is noteworthy, however, that a market seems to be emerging for such services, which perhaps suggests the market’s recognition of the efficient characteristics of multidisciplinary services. The Big 5 accounting firms are aggressively moving to provide legal services. The American Bar Association’s Commission on Multidisciplinary Practice heard representations from various consumers groups, as well as the ABA’s solo and small firm section and the American Corporate Counsel Association in support of MDPs.

Multidisciplinary practices short of partnerships are developing in two
main ways. One trend in both the United States and Canada is for accounting
and pension firms to hire more lawyers who then work for the firm, but do
not have a formal solicitor-client relationship with the firm’s clients. For
example, Ernst and Young in the U.S. employs 700 lawyers. The second
trend in multidisciplinary practices is the development of alliances between
accounting firms and law firms. These law firms tend to be started by the
accounting firms and are sometimes known as captive law firms, but could
also include alliances between established firms. In Canada, Ernst and
Young created a rapidly expanding law firm, Donahue and Partners.
Donahue started in 1996 with only 3 partners and presently has 60-70
lawyers in Toronto and Calgary offices with plans to open offices in
Vancouver and Montreal. Its ambition is to become one of Canada’s
leading business law firms. Donahue is a member of Ernst and Young

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25 Quinn, supra note 12 at 333. One trend in healthcare has been towards a
multidisciplinary approach in which doctors, nurses, social workers, psychologists,
nutritionists and others work on the same case.
26 American Bar Association Commission on Multidisciplinary Practice Report
June, 1999. The reporter noted “representatives of consumer groups indicated that many
middle-income individuals with legal needs do not go to lawyers due to unfamiliarity,
discontent or even fear. In the view of these witnesses, a large number of these individuals
would have easier access to legal services provided by a lawyer in an MDP that was already
providing them with other services.” (hereinafter, Report); Ibid., Appendix C, Reporters
Note at 16.
August 1997) A1; M. Fitz-James “Are Accountants Poaching on Lawyers’ Turf?” Law
Times (14 July 1997) 1.
28 Cannon, supra note 3 at 14.
International and advertises its close connections with Ernst and Young.\textsuperscript{29} In New South Wales, the Big 5 all have their own law firms and unlike in Canada or the United Kingdom, these law firms bear the brand name of the accounting firms.

The greatest growth in captive firms has been in London, England.\textsuperscript{30} Arthur Andersen affiliated itself with a start-up law firm, Garret & Co. The law firm, which is a separate entity from Andersen, but is associated with them, went from nothing in 1993 to a firm of 145 solicitors in five offices across England.

\textsuperscript{29} Its promotional material stresses that their lawyers “work side by side with your Ernst & Young business and financial advisors” and that this “close relationship” offers “‘one stop shopping’ from your trusted advisors - saving you time, money and energy…” Donahue and Associates Integrated Professional Services. Robert Brown of Price Waterhouse has predicted that captive law firms might develop more slowly in Canada than Europe because of the large number of competent law firms in Canada and concerns “that having an accounting firm establish an affiliated law firm might imperil relations with other law firms.” The relatively slow development of captive law firms in the United States has been related to the SEC’s concerns that business relationships between auditors and clients might affect the auditor’s ability to carry out their statutory duties. R. Brown FCA, “The Future of Tax Practice in Canada: Where Have We Been, Where We Are Going” (Canadian Tax Foundation Conference, 26 Nov. 1997) at 30-1, 26-7. Nevertheless, Brown notes that captive firm arrangements are attractive in part because they allow law and accounting firms to share “common support services, office facilities, databases, client contacts, and so on”. Finally, he hints at the artificiality of separate partnerships in terms of revenue sharing by noting that “the common interest of each of the parties in the economic success of the other...[can]...be recognized in specific terms.”

\textsuperscript{30} City firms in London have also expanded dramatically in the face of competitive pressures from Big 5 accounting firms, international law firms based in the United States and European firms. See D. Trubek et al, supra note 1; Y. Dezalay, The Big Bang and the Law: The Internationalization and Restructuration of the Legal Field (1990) 7 Theory, Culture and Society 279.

While activity appears most frenetic in the City and the accountancy area, there is evidence in the U.K. of more general movement to tighter associations between lawyers and non-lawyers. In a survey conducted by the Law Society of England and Wales in 1996, 73% of respondent firms with a view on MDPs (36% of the sample) indicated that they would be interested in forming an MDP if allowed, with the greatest support for partnerships with accountants. J. Sidaway and B. Cole, “Practice Snapshot” Gazette (12 February 1997) 18. Smaller firms with fewer than five partners were more likely to have considered formation of an MDP than large firms. This suggests that the demand for MDPs may not be limited to very large firms. Although acknowledging that there was little evidence that this had occurred, Quinn, suggested that particularly in smaller markets, MDPs may be attractive because they could achieve economies of scale by pooling the fixed costs of running a professional service business. Quinn, supra note 12 at 334.

At the same time, Canadian tax lawyers interviewed by the authors suggested an interesting contrast in approaches to the inevitability of MDPs. Two tax lawyers from larger firms argued that MDPs were inevitable and had already arrived because of the demands of large corporations for integrated service. A tax lawyer in a small firm in a large urban area, however, strongly argued that while MDPs may occur with large firms, they were not desirable in small or even mid size firms. He received referrals from 10-20 accountants and would not jeopardize these informal relationships by entering into a formal alliance with any of the accountants. He also believed that more informal referrals ensured that the accountants could recommend the best lawyer for a particular file and better ensured the independence of legal advice.
in only 3 years. Price Waterhouse is affiliated with the law firm Arnheim & Co. and Coopers and Lybrand helped establish Tite and Lewis in 1997. As an example of the importance of the relationships between the law and accounting firms, Arnheim & Co. earns 30% of its fees from referrals from Price Waterhouse and believes that this figure will increase. Ernst and Young has signalled its intention also to establish an association with a law firm. Significant integration between lawyers and accountants has occurred in the United Kingdom even without the adoption of a regulatory regime specifically permitting MDPs. Captive firm associations appear to have been very successful.

In the common law world, lawyers are only allowed to partner with non-lawyers in the District of Columbia, New South Wales and Ontario. Interestingly, there is some evidence that in these jurisdictions, forms of alliance short of partnership still dominate. Some European countries appear to take a more permissive approach, but in many countries law firms retain separate partnerships while being aligned with accounting firms. The largest law firm in France, Fidal, is part of KPMG. In Spain, while full MDPs are not permitted, a top

31 Garretts Claims Fastest Growth” Gazette (6 November 1996). The firm’s name reflects a practice rule that prohibits the use of brand names but which does not prohibit a statement that the firm works in association with an accounting firm. See Testimony of Alison Crawley before the Multidisciplinary Commission.

32 Cannon, supra note 3.


34 Legislative amendments in England which allow multinational firms may also allow MDPs should the Law Society change its practice rules to accommodate MDPs. The new Labour government has indicated its intention to permit closer integration in the form of MDPs.

35 In New South Wales, for example, as of July 1998, only 11 firms were organized as MDPs and in the District of Columbia, a firm that had initially been the first to take advantage of liberalized MDP rules, Arnold and Porter, apparently no longer includes other disciplines in its practice, Futures Task Forces, supra at paras. 43, 47. Very few firms in D.C. have non-lawyer partners because of the requirement that the firm have as its sole purpose the provision of legal advice and the prohibition of such firms having offices in other American jurisdictions: Commission on Multidisciplinary Practice, supra note 27, Appendix 3 at 12. Since 1994, on the other hand, each of the Big 5 accounting firms in NSW have established their own law firms practising under their trade name: Futures Task Force, supra at para. 44.

36 J. Carr, “Any Other Business? Multi-Disciplinary Partnerships and All That” (Aug./Sept 1993), 25 Lawyers in Europe 15. The Continental approach to MDPs, although often described as one stop shopping, often involves what we would describe as a separate captive law firm which advertises its connections with a Big 5 accounting firm, refers clients and purchases goods and services from the accounting firm. See Ontario Future Task Force supra at 21; Commission on Multidisciplinary Practice, supra note 27, Appendix C ai 7-8. The confusion about the Continental approach only underlines our point that the regulatory rules will not determine the ultimate question of how the services of lawyers are integrated with those of other service providers.

37 Carr, ibid. at 16. The French Bar has expressed concerns that the ethical standards of the profession, including confidentiality, conflicts of interest, and independence be maintained in multidisciplinary alliances. Barreau du Quèbec, Rapport sur la multidisciplinarite entre avocats et comptables (February 1999) at 75, annex 5.
law firm, J&A Garrigues, merged with Arthur Andersen’s pre-existing law firm to form the largest firm in Spain, J&A Garrigues, Andersen Y Cia. Switzerland has allowed MDPs since 1991. Smaller, newer firms have taken advantage of this rule change\textsuperscript{38} and the largest law firm in the country is part of Ernst and Young.\textsuperscript{39} Germany has adopted very liberal rules with respect to MDPs that allow full partnerships between attorneys, patent lawyers, auditors, accountants, tax advisors and other similar professionals.\textsuperscript{40} Belgium has apparently allowed MDPs, although as of the end of 1993, nobody had applied to establish one.\textsuperscript{41} The Netherlands has been more restrictive. Andersen attempted to open a law office in Rotterdam, but the local bar refused permission. Price Waterhouse was also refused permission to hire a lawyer from the Dutch bar to open a law firm on its behalf. The accounting firms challenged these restrictions as anti-competitive and against the public interest. The District Court at Amsterdam ruled against the accounting firms, holding that the restrictions on competition were not excessive and served the public interest.\textsuperscript{42} MDPs were dealt a blow by the court’s decision, but affiliations between accounting firms and lawyers are proliferating in the Netherlands. Ernst and Young has formed cooperation agreements with two Dutch law firms, and Andersen has stated that if its appeal is unsuccessful, it will seek a similar arrangement.\textsuperscript{43} Regardless of the exact regulatory rules or partnership arrangements, the trend is towards more multidisciplinary practices and alliances.

The increase in the employment of lawyers by accounting firms and the increase in the number of captive firms place pressure on regulators in the common law world to respond. Nevertheless, it is important to recognize that no response in most common law jurisdictions does not mean that multidisciplinary alliances and practices will not occur. It means that they will occur in the form of captive firms or other alliances in which the services offered by lawyers and non-lawyers become more functionally integrated while separate partnerships, corporate forms and billings are preserved. It also means that accounting, actuarial and other multidisciplinary firms will continue to employ lawyers while at the same time not entering into a formal solicitor-client relationship with their firm’s clients.

\textsuperscript{38} Ibid. at 16.
\textsuperscript{39} M. Fitz-James, \textit{supra} note 10. The Commission on Multidisciplinary Practice describes ATAF Ernst and Young as a fully integrated accounting firm which also is the country’s largest law firm. Its work includes all aspects of corporate and banking law. \textit{Commission on Multidisciplinary Practice, supra} note 27, Appendix C at fn. 11.
\textsuperscript{40} Trebilcock and Csorgo, \textit{supra} note 12 at 50.
\textsuperscript{41} Carr, \textit{supra} note 37 at 16.
\textsuperscript{42} The Court held that accountants are “held to account objectively as to the financial situation of his client. In so doing, an accountant must be directed primarily by the interests of others than his own client. The accountant therefore has a public function, and therein does not have a right of confidentiality, whilst an attorney must allow the interests of his client to come foremost, and to that effect does have a right of confidentiality.” Case numbers 96/1283 WET 29; 96/2891 WET 29 at 28. Decisions rendered February 7, 1997. The decision is presently subject to appeal.
\textsuperscript{43} J. Killeen, “Dutch Court Rules Against Firms in MDP Case” (27 February 1997) \textit{European Accounting Bulletin} II.
III. Ethical and Regulatory Problems

There are numerous restrictions in most common law jurisdictions that effectively prevent the formation of partnerships between lawyers and non-lawyers. These rules prohibit the practice of law by unlicensed persons, the splitting of fees between lawyers and non-lawyers, the advertising together of legal and other services and the mixing of trust accounts. In addition, ethical rules demand that lawyers keep their clients' confidences and not act when the interest of a pre-existing client would conflict with the interest of a prospective client. Moreover, special rules of privilege apply to the lawyer-client relationship.

It may be helpful to break down the mass of individual problem areas into broad themes, even though there is considerable overlap. The first group of problems relates to governance concerns about the limits of the jurisdiction of legal regulators over non-lawyers. Non-lawyers may be prosecuted for unauthorized practice, but otherwise they are not subject to the rules or discipline imposed on lawyers by law societies: The second broad category of problems relates to concerns that MDPs may compromise the independence of legal advice provided by lawyers by dividing the lawyer's loyalties between the client and the lawyer's own interests in the MDP. This includes concerns about outside interests, ancillary businesses, fee splitting and steering. The third broad category relates to confidentiality problems, in particular the difficulties of preserving solicitor-client privilege when confidential information is conveyed to non-lawyers. The important issue of preventing conflicts of interest will be discussed in this section, although it clearly also engages concerns about the independence of legal advice.

A. Governance Concerns

1) Unauthorized Practice

Legislation in most provinces prohibits those who are not members in good standing with the provincial law society from acting or holding themselves out as a barrister or solicitor.\textsuperscript{44} It is possible that an MDP might not violate such prohibitions if non-lawyers within it were extremely careful not to act or practice as lawyers or hold themselves out as lawyers.\textsuperscript{45} Nevertheless, there is

\textsuperscript{44} See, for example, \textit{Barristers and Solicitors Act} R.S.B.C. 1979 c.26 s.77; \textit{Law Society Act} R.S.O. 1990 c.L-8 s.50(l)(a).

\textsuperscript{45} Case law has not directly addressed most of the situations in which multidisciplinary practices might evolve. The prohibition on acting as a barrister or solicitor "was intended to apply to every service which imperatively requires the exercise of the skill and training of a solicitor..." (\textit{Reg ex rel Smith v. Mitchell}, [1952] O.R. 896 (C.A.)) and has been interpreted to prohibit the preparation of documents to close real estate deals, drawing wills (\textit{R. v. Engel and Seaway Divorcing Services} (1974), 11 O.R. (2d) 343 and incorporating companies. (\textit{R. v. Ballett}, [1967] 1 O.R. 696). On the latter issue, the Alberta Court of Appeal more recently held that filling out forms with an appropriate objects clause was not unauthorized practice: \textit{R. v. Nicholson} (1979), 96 D.L.R.(3d) 693.
a real risk that an MDP would run afoul of broad prohibitions against unauthorized practice. One of the reasons why MDPs may be efficient is that they might allow others to do the work of lawyers even though the lawyer might assume, for regulatory and civil liability purposes, responsibility for the work. In addition, an MDP might well represent itself as a firm that provides legal services, which might lead to an assumption by the public that all of its members could provide legal services, contrary to the prohibition. In proposing a licensing scheme for MDPs, John Quinn commented that even if ethical rules effectively prohibiting fee splitting were repealed, “non-licensee partners in multidisciplinary firms would still be subjected to the risk of prosecution for unauthorized practice” and suggested that all members of a multidisciplinary firm be given a statutory defence if they “performed the licensed functions in collaboration with a qualified professional.

The restriction on unauthorized practice is supplemented by Rule 17 of the Canadian Bar Association’s Code of Professional Conduct concerning unauthorized practice, which provides that a lawyer “should assist in preventing the unauthorized practice of law.” The commentary explains that non-lawyers “are immune from control, regulation, and in the case of misconduct, discipline by any governmental body.... Moreover, the client of a lawyer who is authorized to practice has the protection and benefit of the lawyer-client privilege, the lawyer’s duty of secrecy, the professional standard of care which the law requires of lawyers, as well as the authority which the courts exercise over them. Other safeguards include professional liability insurance, rights with respect to the taxation of bills, rules respecting the handling of trust monies, and requirements for the maintenance of compensation funds. This commentary succinctly sets out the rationale for prohibiting unauthorized practice. It also indicates that lawyers who assist non-lawyers in unauthorized practice could be disciplined for such conduct and that lawyers within multidisciplinary practices have a duty to assist in preventing the unauthorized practice of law.

Lawyers are allowed to delegate tasks to non-lawyers, but only if they supervise the work and maintain professional responsibility for the delegated work. Lawyers working in an MDP could assume professional responsibility for the legal work done by their non-lawyer partners but are less likely to be able to claim that they supervised the work of a fellow partner. The Codes generally contemplate non-lawyers such as law clerks being used for matters of

46 Trebilcock et al., supra note 9 at 368-70.
47 Quinn, supra note 12 at 61-2. The Big 5 accounting firms in the United States have been investigated for engaging in the unauthorized practice of law, but there has not yet been a successful prosecution: Commission on Multidisciplinary Practice: Report, supra note 27, Appendix C at 10.
48 Ottawa: Canadian Bar Association, 1988) Each province has its own code which is enforced against the member but many follow the CBA code quite closely.
49 Ibid. at 73.
50 Trebilcock et al., supra note 9 at 376.
routine administration, but not licensed professionals and partners providing other professional services. It is generally impermissible for non-lawyers to accept cases, fix fees, give legal opinions, give or accept undertakings, conduct negotiations, take instructions, act finally in matters involving professional legal judgment, to be held out as a lawyer, to be named in association with a lawyer in pleadings and to be remunerated on a sliding scale related to the lawyer’s earnings, except as an employee. MDPs might run afoul of such ethical rules as well as the statutory prohibition against unauthorized practice.

Legislative prohibitions of unauthorized practice target the mischief of non-lawyers providing legal services and having the public rely upon non-lawyers as if they were lawyers. It does not, however, deal with the similar mischief which can occur when a lawyer who is employed by an accounting, actuarial or other firm provides services to the firm’s clients in such a way that leads the clients to rely on the lawyer’s legal advice. If the lawyer has not entered into a solicitor-client relationship with the client then the benefits of solicitor-client privilege, confidentiality, assessment of bills and insurance and compensation funds may not apply. The lawyer working for such a firm may be in a position similar to an unqualified person providing legal advice, except that he or she may, if professional qualifications have been maintained, be subject to a law society’s disciplinary authority. The American Bar Association’s Commission on Multidisciplinary Practice has recently warned that lawyers who work in accounting and other multidisciplinary firms may be engaging in a material misrepresentation if they simply claim that the services they provide to the firm’s clients are not legal services “if those same services would constitute the practice of law if provided by a lawyer in a law firm.” The Commission goes on, however, to indicate that such a misrepresentation may be avoided if “it is made clear to the client, preferably in writing, that the MDP is not providing legal services and that the client should consider retaining its own counsel.” Warning clients to obtain independent legal advice is ethical and prudent, but may not be realistic if the client is paying the MDP for the convenience of one stop shopping.

2) Disciplinary Jurisdiction over Non-Lawyers

One of the central concerns underlying rules against unauthorized practice is that the law societies cannot assume disciplinary jurisdiction over non-lawyers who provide legal services or hold themselves out as lawyers. The 1988 Marré Report of the Law Society of England and Wales expressed concerns that MDPs “might not be seen as accountable for their conduct to any single professional body and would provide no clear information to clients as to the professional body which would take action if the firm’s conduct or service were

\[\text{51 Supra note 27 at 5.}\]
inadequate. A year later, however, a report from the Lord Chancellor’s Department argued that accountability could be preserved by ensuring that “each member of a multi-disciplinary practice should remain individually subject to the rules of his or her professional body...It will therefore be essential for a solicitor’s personal responsibility to his or her profession as a lawyer to override, in any case of conflict of interest or rule, his or her responsibility to the practice as a whole or to fellow-members of it. Lawyers in multidisciplinary practices or partnerships would remain accountable to law societies for any personal breach of ethical rules. More problematic is whether lawyers should also be held responsible for breaches of ethical rules by their non-lawyer partners or associates.

A White Paper prepared by American lawyers in support of multidisciplinary practices and partnerships concluded that there were sufficient alternatives to direct discipline of non-lawyers by legal regulators. Non-lawyers could be disciplined by their own professional associations or the threat of civil liability; the lawyers that they work with may be disciplined by the bar; and the substantive law itself may impose ethical standards. We would note, however, that discipline by other regulatory bodies would not occur if non-lawyers were not themselves regulated professionals. Moreover, because of its cost and fee structures, the Canadian system may be slow to recognize innovative civil liability claims arising from multidisciplinary practices. This, along with the absence of licensing of consultants and emerging professions, may create a regulatory gap. The ABA’s Commission on Multidisciplinary Practice has recently proposed that lawyers remain responsible for all breaches of rules of professional conduct and that the rules specifically provide that a lawyer acting in accordance with a non-lawyer supervisor’s instructions should not be excused from failing to observe the rules of professional conduct. It also recommended that MDPs not controlled by lawyers provide undertakings to legal regulators that those in the firm who

54 Three possibilities have been suggested and will be discussed below. First, lawyers could be held vicariously liable for the breaches of their non-lawyer partners or associates. Second, liability could accrue to the firm as a whole. Third, non-lawyers could agree by contract to abide by lawyers’ rules.
55 White Paper, supra note 14. See also Andrews, supra note 21 at 603-05.
57 While there would be non-regulatory penalties from poor service, such as reputational costs, we reiterate that we take the need for some form of regulation as a starting point.
58 Report, supra note 27 at Recommendation 6.
deliver or assist in the delivery of legal services will abide by the rules of professional conduct.59

3) **Self-Regulation of the Legal Profession**

Concerns have been expressed that MDPs may erode the legal profession's ability to regulate itself and lead to governmental regulation of lawyers.60 One possibility would be the establishment of an MDP governing body composed of members from all the professions who participated in them.61 Such an approach might preserve some independence from government, but most other professions do not oppose direct government regulations as much as the bar. In any event, there appears to be little support for this form of governance and a consensus seems to be emerging that if MDPs are allowed, each profession should regulate its own members. If conflicts between the rules governing the professions were not anticipated and resolved, however, it is possible that some form of collaborative governance would be required, which may invite government intervention. It might also be encouraged in a system in which MDPs had to acquire licenses from various regulators. If lawyers are allowed to partner with unregulated service providers, there may also be pressure to extend regulation to these non-lawyers. Thus law societies could find themselves regulating paralegals, patent agents or consultants who practice in an MDP. In sum, MDPs may present a challenge to the profession's ability to govern itself free from co-ordination with other professions or governmental regulation.

4) **Advertising and Solicitation**

Rules restricting advertising and solicitation by lawyers may constrain the development of MDPs. Some provinces restrict the name of a law firm to living or dead persons who are qualified to carry on law in that province and do not allow a law firm to bear a trade name, commercial name or figure of speech. This

59 Ibid., Recommendation 14. The undertakings would be enforced by the threat of withdrawing the firm's license.

60 Professor Flood has predicted that state regulation may follow as a result of the abandonment of the partnership model. He predicts a future in which the professions converge and develop in tiers so that corporate services are offered by corporations staffed with lawyers, accountants and investment bankers while other services would be offered by corporations staffed with real estate agents, financial counsellors and lawyers. These service corporations would be regulated by the government: J. Flood, supra note 1 at 591.

61 Trebilcock and Csorgo, supra note 12 conclude that an “inter-professional coordinated or joint approach” to regulating individuals practising in MDPs is desirable. They propose that where MDPs involving members of more than one self-regulating profession are proposed, a committee be struck to resolve potential regulatory conflicts and to recommend appropriate rule changes to the professions with respect to their members' participation in an MDP. Once a committee has made its recommendations, it would be functus officio.
explains, for example, why Ernst and Young's Canadian law firm is called Donahue and Partners and not Ernst and Young Law.\textsuperscript{62}

Closely connected to restrictions on advertising are rules limiting the direct solicitation of clients. Other professions or consultants may not have the same restrictions on direct solicitation as are imposed on lawyers. The \textit{White Paper} submitted to the ABA recommended that enterprises affiliated with law firms respect any applicable restrictions on advertising if "an attorney's services are offered, even indirectly, by the advertising and promotion of the affiliate."\textsuperscript{63} It does not address how these prohibitions would be enforced against an affiliate not subject to the jurisdiction of the Law Society. Advertising and soliciting restrictions might, however, be easier to enforce within MDPs in which lawyers within the partnership or the firm itself could be held responsible for prohibited advertising and solicitation by non-lawyers.\textsuperscript{64} For example, in a system in which law societies licensed MDPs, a license could be withdrawn if the firm violated rules restricting advertising and solicitation.

5) \textit{Assessment of Fees}

A practical problem would be whether a bill rendered by an MDP could be assessed and enforced in the same manner as bills strictly for legal services. The assessment procedure does not lend itself to examination of the fees charged by non-legal services. One option would be to require an MDP to distinguish which part of its fees were for legal services and then subject that part of the bill to

\textsuperscript{62} Such restrictions could be challenged under s.2(b) of the Charter which clearly protects commercial freedom of expression: \textit{Rocket v. Royal College of Dental Surgeons of Ontario} (1990), 71 D.L.R. (4th) 68 (S.C.C.) The question would then be whether such rules could be justified under s.1 of the Charter as necessary to maintain professionalism and protect the public from irresponsible and misleading advertising. While we do not wish to engage in a debate about the wisdom of the current ethical rules, which we take as a starting point, we note that it is questionable whether the rules restricting advertising could survive Charter challenge, especially when using the name "Ernst and Young" could increase consumer protection by making clear the law firm's affiliation with the larger entity. Moreover, there are some exceptions to restrictive rules on advertising which may make them more difficult to justify under s.1 of the Charter as a proportionate restriction on freedom of expression. Patent and trademark agents can be included in legal advertisements even though they are not lawyers. Lawyers are also allowed to include other professional qualifications such as P.Eng., C.A, and M.D. in their advertisements, even though they will presumably not be offering engineering, accounting or medical services, and some provinces do not prohibit the use of corporate brand names. A more permissive regime would allow accountants, actuaries and the like also to be identified in legal advertisements and could, as in New South Wales, allow an accounting firm's name to be used by a law firm.

\textsuperscript{63} \textit{White Paper, supra} note 14 at 46.

\textsuperscript{64} Carlson, however, suggests that lawyers are unlikely to be aware of or disciplined for impermissible forms of solicitation by their non-lawyer partners: C. Carlson, \textit{Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms} (1993-4) 7 Geo.J. of Legal Ethics 593 at 628.
This approach would, however, impose transaction costs by requiring separate bills to be submitted. In a true MDP, it might be very difficult and counterproductive to identify what portion of fees relate to the provision of legal services. A segregation requirement might also create a moral hazard in that the firm may have an incentive, depending on the circumstances, to minimize or maximize the portion of its bill designated as fees for legal services. Another option would be to inform clients that fees assessed by an MDP would not be subject to the assessment procedures ordinarily available for legal bills. This option might diminish the client’s protection, but it would avoid the transaction costs and potential moral hazard associated with preparing separate bills.

6) Trust Accounts

A trust account held in the name of a firm that included non-lawyer partners may violate requirements that trust accounts be kept only by lawyers. The restrictions placed on lawyers’ trust accounts are a special feature of the solicitor-client relationship: For example, each lawyer must annually file reports with her law society concerning trust accounts and other financial matters. The options with respect to trust accounts are similar to those with respect to assessment of fees. The first is to require that monies paid in trust to lawyers in MDPs be clearly designated and held in trust accounts for which the lawyers are responsible. This would impose the transaction costs of segregating money held in trust by lawyers as opposed to non-lawyers in the firm. It might also present a moral hazard with firms having incentives, depending on the circumstances, to either minimize or maximize the amount placed in their lawyers’ trust accounts. Another option would be to apply lawyers’ rules to all the money held in trust by an MDP. This, however, might expose law society funds to frightening defalcation claims and/or perhaps impose the cost of determining what profession should have to compensate the MDP’s clients. A third option would be to prohibit MDPs from accepting trust monies and to require them to inform their clients that the protections that the clients of lawyers usually enjoy with respect to funds paid in trust are not available.

7) Custodianships and Practice Reviews

It is unclear whether MDPs would be subject to the same custodianship and practice review provisions as law firms. If they were, legal regulators would assume responsibility for the provision of non-legal services. If they were not, The American Bar Association’s Commission on Multidisciplinary Practice recommended this approach both with respect to fees and trust monies. It reasoned that “whereas fees paid by clients to law firms are by definition legal fees, fees paid by clients to MDPs will often cover both legal and nonlegal services. Thus, a lawyer in an MDP must take special care that payment for legal services and funds received on behalf of a legal services client are clearly designated as such and segregated from other funds as required by the rules of professional conduct.” Report, supra note 27 at 6.
clients of MDPs would receive less protection than clients of law firms. A middle course would be for law societies only to regulate that part of the MDP which involved the provision of legal services. In a true MDP, such separation might be artificial.

8) **Insurance and Compensation Funds**

Clients receiving services from MDPs might not receive the benefit of insurance that lawyers are required to possess when they provide legal services, or of funds available to compensate clients for losses caused by lawyers. It seems likely that MDPs would have to secure their own separate insurance. Andrew McGee has commented that "it seems unlikely that the insurers under any one of the schemes would be prepared to cover all the activities of an MDP without considerable revision to the policy, range of exclusions and, most important of all, the premium." Many lawyers interviewed by the authors expressed concern that they might have to pay increased insurance premiums because of increased claims against lawyers working in MDPs. Large firms such as the Big 5 or the banks could obtain insurance or engage in self-insurance. Smaller MDPs might have difficulty in obtaining insurance or securing insurance comparable to the minimum insurance required for lawyers. Ontario’s by-law requires that lawyers in MDPs shall maintain professional liability insurance for non-lawyers in an amount determined by the law society. This requirement, however, may only be practical in situations where MDPs are controlled by lawyers and only provide legal services.

9) **Disbarred and Otherwise Disreputable Persons**

The concern has been raised that a disbarred lawyer might be able to practice law by becoming a member of an MDP. Rules which require the approval of law societies before a person who had been disbarred, suspended or has resigned because of disciplinary actions is allowed to practice or occupy office space with lawyers could, however, be extended to MDPs. Ontario’s recently enacted by-law requires that lawyers only enter partnerships with non-lawyers who are “qualified to practice a profession, trade or occupation that supports or supplements the practice of law” and are “of good character”

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66 Insurance is, of course, related to the threat of civil liability. Reform of liability rules to restrict the present joint and several liability of all partners for the negligence of others would affect insurance costs by lowering liability costs. As Professor John Quinn in his 1979 study cautioned, however, “the costs of relaxing the enterprise liability rule for multi-disciplinary firms may be substantial” because the rule gives members strong incentives to monitor the work of their colleagues. Quinn, supra note 12 at 63.


68 Bylaw 25 S.19.

69 Carlson supra note 63 at 617.
defined to include a reasonable expectation that the non-lawyer will comply with the rules imposed on lawyers. This rule would allow the law society to regulate not only the repute, but also the competence of non-lawyers in the MDP.

B. Independence Concerns

1) The Independence of Legal Advice

Ensuring the independence of legal advice is the object of several legal and ethical rules, such as those against fee-splitting. While we consider these specific rules below, we consider here the general concerns that have been raised that MDPs might adversely affect the independence of legal advice by giving non-lawyers managerial status and perhaps even control of partnerships which offer legal services to clients. Some lawyers consulted for this project expressed concerns that an MDP could break down a system of checks and balances in which independently retained lawyers and accountants offer advice to clients. Concerns were also raised that lawyers in an MDP might be the last to advise a client on a deal and that legal misgivings about a transaction might be perceived by their non-lawyer partners to be obstructionist and contrary to the firm’s interests. Lawyers within accounting or pension firms now presumably face the same pressures, but the difference is that in an MDP they would be offering legal advice to a client and not advising the client that independent legal advice should be sought.

The White Paper submitted to the ABA argued that allowing non-lawyers to have interests in law firms would not impose a greater threat to the independence of legal advice than that posed by the employee status of many lawyers, including associates in large firms, corporate counsel and government lawyers, or by the power that lenders might have over a lawyer or law firm. They also argued that the close affiliations between law firms and firms of non-lawyers do not threaten the independence of legal advice because such arrangements “involve collaboration and joint consultation, rather than supervision or control by non-lawyers.” The United States Supreme Court

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71 Professor Levinson has written about the importance of independent law firms, but it is interesting that his understanding of independence precludes not only MDPs, but also financial involvement by the law firm and its partners in clients or single clients who constitute a significant portion of a firm’s billings. Although passionately committed to the independence of law firms, he suggests that this independence should generally not be regulated, but held out as a professional ideal: H. Levinson, Independent Law Firms that Practice Law Only: Society’s Need, the Legal Profession’s Responsibility (1990) 51 Ohio State L.J. 229.

72 White Paper, supra note 14 at 9.

73 Ibid. at 10.
has rejected arguments that the employment of lawyers by unions and political organizations should be prohibited because of a "theoretically imaginable" compromise of the lawyer's independence.\textsuperscript{74}

Potential threats to the independence of legal advice come from a variety of sources both within law firms and from multidisciplinary alliances that are either controlled or not controlled by lawyers. The personal integrity of each lawyer is the only ultimate guarantee that the independence of legal advice will not be affected by the lawyer's own financial interests, but as discussed below, disclosure to the client of the lawyer's interests may also be valuable. The ABA's Commission on Multidisciplinary Practice also recommended that the rules of professional conduct clearly state that a lawyer may not use the fact that he or she was taking instructions from a non-lawyer as an excuse for violating the rules of professional conduct. It would rely on both discipline of individual lawyers and the ability to revoke the annual license of MDPs which are not controlled by lawyers.\textsuperscript{75}

2) \textit{Outside Interests and Ancillary Businesses}

Rule 7 of the CBA's Code of Professional Conduct provides that a lawyer "who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence."\textsuperscript{76} This rule suggests that lawyers should not allow their interests in an ancillary business\textsuperscript{77} or an overlapping partnership affect the independence of their legal advice. Thus a lawyer in a captive law firm should not allow his or her interest in the larger partnership to affect the independence of the legal advice offered by the firm. This would apply to "steering" which refers to the lawyer's advice about what other services his or her client requires and who should provide such services. In an MDP, the interest of the affiliated accounting firm would no longer be an outside interest subject to the rule, but similar concerns that business loyalties to the MDP might compromise the independence of legal advice would remain.


\textsuperscript{75} Report, \textit{supra} note 27 at 3-4. MDPs would have to undertake to regulatory authorities that they would not directly or indirectly interfere with a lawyer's exercise of independent professional judgment and would establish and enforce procedures to protect a lawyer's exercise of independent judgment from interference by the MDP. The Commission also recommended the retention of Model Rule 5.4(c) which provides that a "lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such services."

\textsuperscript{76} Some provinces restrict the ability of lawyers to sell mortgages or title insurance.

3) Fee-Splitting

Another obstacle to the formation of MDPs are rules against fee-splitting which exist in many jurisdictions. The commentary to Rule 11 of the CBA Code declares that “any arrangement whereby lawyers directly or indirectly share, split or divide fees with conveyancers, notaries public, students, clerks or other persons who bring or refer business to the lawyer’s office is improper and constitutes professional misconduct.” The commentary also prohibits the acceptance of “hidden fees” because “the fiduciary relationship between lawyer and client requires full disclosure.” Thus: “No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance or other compensation whatsoever related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client...” The prohibition on hidden fees is less absolute than the prohibition on referral fees because it allows for such arrangements when disclosed and consented to by the client. The rule, as presently worded, would not prohibit lawyers from receiving some commission from non-lawyers so long as this commission was disclosed to the client and the client agreed.

The rule against fee splitting may preclude a non-lawyer from having a partnership interest in a law firm, or may preclude a lawyer who offers services to clients being paid by a firm wholly or partially owned by non-lawyers. The rule against fee-splitting does not prevent a firm from hiring non-lawyer personnel as employees, but participation in the partnership at the managerial level is prohibited. The rule against fee splitting contemplates that lawyers will share their fees with other lawyers who are their partners or associates. It also permits fee splitting with lawyers outside the firm provided that the client consents and the fees are divided in proportion to the work done.

The rationale for the somewhat unclear rule against fee splitting is also somewhat cloudy. Concerns have been raised at various times that fee splitting will encourage the unauthorized practice of law, adversely affect the independence of legal advice and result in impermissible forms of solicitation. These mischiefs could be targeted directly rather than by a ban on fee splitting. However, the ban on fee splitting may partially respond to the difficulty of enforcing more direct rules targeting the above mischiefs, which are often difficult to detect. Fee splitting among lawyers is allowed, presumably on the basis that lawyers who

78 In contrast, Rule 216 of the Institute of Chartered Accountant’s Rules of Professional Conduct contemplates commissions or referral fees from other public accountants.

79 A footnote explains it would be improper for lawyers to receive commissions or rewards from a stock broker or real estate or insurance agents “without express disclosure and consent” from the client.

80 Quinn has observed that “the only practical effect of the rule against sharing fees with lay associates and clerks has been to prevent unlicensed persons from attaining partner status and participating in firm profits”: Quinn, supra note 12 at 24.

share fees will still recognize the importance of not compromising the independence of another lawyer’s advice.

MDPs would allow fee splitting by allowing all partners, whether lawyers or non-lawyers, to share in the fees charged by all their colleagues. At present only lawyer partners can effectively share in each other’s fees. Should existing rules against fee splitting be preserved, law firms and affiliated organizations will simply continue their present practice of separately billing clients and each other for services provided. This practice imposes additional transaction costs on clients and firms, and may affect incentives by preventing different types of professionals from belonging to the same firm.

Separate billing is not, however, likely to prevent multidisciplinary alliances, nor associated strains on lawyers’ independence. Law firms aligned with accountancy firms and partnerships of patent agents presumably comply with the rule against fee splitting. Nevertheless, the success of captive firms is likely tied to the success of their affiliated firms so that lawyers within a firm might well have a financial interest in the success of a separate partnership of patent agents or accountants with which they are affiliated. Disclosure of these financial arrangements to the client, however, while perhaps prudent, is not currently required.

4) Steering

MDPs might affect the independence of legal advice by giving lawyers a financial incentive to steer their clients towards their non-lawyer partners. The British Royal Commission on Legal Services concluded that MDPs were not in the public interest in part because “there would be an inevitable tendency to refer the client to the partner in the firm who engaged in that discipline. But he might not be the person best suited to solve the client’s problems. The independence of the solicitor’s advice would therefore be likely to be impaired.” A year later, however, the Royal Commission on Legal Services in Scotland reached the opposite conclusion and suggested that referrals to non-lawyer partners “might not always be a matter of concern” because “[m]any clients who require particularly specialised advice know their requirements fairly precisely, whereas the typical problem presented by most citizens will be well within the competence of the average non-specialist practitioner.”

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82 White Paper, supra note 14 at 19-20 and confirmed in various interviews with lawyers.
83 For an early work on the optimal boundaries to a firm, see Coase, supra note 23. For some types of market interactions, such as a one-off exchange, a contractual relationship may be optimal, while for others, such as a longer term relationship between professionals, it may be optimal to conduct these interactions within a firm in order to reduce transaction costs.
84 The Royal Commission on Legal Services Sir Henry Benson Chair (October 1979) Cmd 7648 V.1 at para. 30.14.
85 Royal Commission on Legal Services in Scotland Lord Hughes Chair, (May 1980) Cmd 7846 at V.1 para. 15.21.
that formal arrangements between lawyers and non-lawyers might result in less inappropriate steering than informal arrangements because formal arrangements are more transparent and easily disclosed to clients.\textsuperscript{86}

C. Confidentiality Concerns

1) Confidentiality

Lawyers cannot generally disclose to third parties information obtained in the course of the solicitor/client relationship without explicit or implicit authorization from the client. Commentary to CBA Rule 4 contemplates the implicit authorization (unless the client instructs otherwise) that confidential information will be shared with the lawyer’s partners and associates and, to the extent necessary, non-legal staff such as secretaries. The lawyer is required to take reasonable care to prevent these people from disclosing or using any information which the lawyer is bound to keep in confidence.

The \textit{White Paper} submitted to the ABA suggests that in many cases, disclosure of information to non-lawyers in an MDP will not be different from the routine disclosure of confidential and privileged information to non-legal employees of a law firm. The employees would be instructed about the importance of confidentiality and solicitor-client privilege will generally be preserved and may even be enhanced by formal relationships between the lawyer and non-lawyer.\textsuperscript{87} The Commission on Multidisciplinary Practice recommended that lawyers in an MDP be required to make reasonable efforts to ensure that non-lawyers in their firm discharge the lawyer’s duty of confidence and shall take necessary measures to prevent disclosure of confidential information to those in the MDP who are not providing services in connection with the delivery of legal services to the client.\textsuperscript{88} Some commentators have argued that non-lawyers in an MDP might not respect clients’ confidences in the same way that lawyers are required to do.\textsuperscript{89} Our own consultations among lawyers, however, support the \textit{White Paper’s} finding that concerns about other professionals breaching client confidences are largely “unfounded.”\textsuperscript{90} All professions and most emerging professions observe standards of confidentiality similar to those of lawyers. Of course, law societies would not have jurisdiction

\textsuperscript{86} Andrews, \textit{supra} note 21, This implicitly supposes that a disclosure and waiver approach to the problem of steering would ensure that the client was aware of the lawyer’s economic interest in any steering arrangement. The \textit{White Paper, supra} note 14, contemplated such an approach, arguing at 48-51 that clients “were generally sophisticated and experienced in shopping for legal and related services” and thus could make the decision whether to accept the referral or not.

\textsuperscript{87} \textit{White Paper, supra} note 14 at 39-43 of addendum.

\textsuperscript{88} Report \textit{supra} note 27, Appendix A Rule 1.6 paras. 24,25.

\textsuperscript{89} Carlson, \textit{supra} note 65 at 618-20.

\textsuperscript{90} \textit{White Paper, supra} note 14 at 37 of addendum.
to discipline a non-lawyer who breached confidentiality and in the case of many unregulated service providers, no regulator might have disciplinary authority.

There are some possible conflicts where the professions take different approaches to confidentiality. For example, accountants in Ontario are obliged to contact other accountants they replace on a matter. The former accountant must advise if suspected fraud or other illegal activity by the client was a factor in the former accountant resigning or being removed from the matter. The disclosure required by this rule could conflict with lawyers' duties of confidentiality. In addition, unless the client makes an unsolicited request in writing, accountants must notify a client's existing accountant before accepting engagements for the client. In contrast, commentary to Rule 4 indicates that as a general rule, the lawyer should not disclose having been consulted or retained by a particular person. Some disclosures required under accountants' rules could breach lawyers' duties of confidentiality and these concerns have led the American Securities Exchange Commission to conclude that the role of auditors and attorneys is incompatible.

2) Privilege

Although the exact scope of privilege is not free from controversy our view is that there are two distinct forms of legal privilege that may be adversely affected by multidisciplinary practices or partnerships. Solicitor-client privilege applies to communications between a client and his or her lawyer for the purpose of obtaining legal advice, whether or not litigation is contemplated. The rationale for this privilege is that lawyers and their clients must be able to freely exchange information without fear of it being disclosed or used against the client. The second privilege is litigation or lawyer's work product privilege which applies to papers and materials created or obtained for the dominant

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92 Ibid. R.305.
93 Report supra note 274. This position is apparently under review.
95 Susan Hosiery v. M.N.R. 69 DTC 5278 (Ex.Ct.); R. Sharpe, "Claiming Privilege in the Discovery Process" in Law Society of Upper Canada Special Lectures 1984 (Toronto: Butterworths, 1984). Solicitor-client privilege does not apply to communications which are not confidential and does not apply to "communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime," (Descoteaux v. Mierzwinski (1982), 70 C.C.C.(2d) 385 at 413 (S.C.C.)) or to communications if disclosure is necessary to prevent a serious, clear and imminent danger to the public (Smith v. Jones (1999), 132 C.C.C.(3d) 225 (S.C.C.)). See also Geffen v. Goodman Estate (1990), 81 D.L.R. (4th) 211 (S.C.C.); R. v. Shirose (1999), 133 C.C.C. (3d) 257 (S.C.C.).
The purpose of litigation. The rationale for this privilege is that lawyers require a zone of privacy in preparing for litigation in an adversarial system. Litigation privilege may be less absolute than solicitor-client privilege.

A leading Canadian case decided in 1969 provides some guidance concerning the application of these privileges in situations in which accountants and lawyers work together. Jackett P. stated,

that no communication, statement or other material made or prepared by an accountant as such for a business man falls within the privilege unless it was prepared by the accountant as a result of a request by the business man's lawyer to be used in connection with litigation, existing or apprehended.

Work by accountants or other non-lawyers may be subject to litigation privilege if it is made for the purpose of litigation. The problem is that many MDPs would involve the transmission of information to non-lawyers when litigation is not the dominant, or even a substantial, purpose. In most of the advising, consulting and planning work done by such firms, litigation privilege would not apply. Thus the exact scope of solicitor-client privilege becomes a crucial legal problem for MDPs.

How would solicitor-client privilege apply and be preserved in an MDP? In the above case, the Court decided that solicitor-client privilege would apply to information possessed by accountants, but only if the accountants were conveying the client's information to the lawyer for the purpose of the client obtaining legal advice. Jackett P. explained that,

where an accountant is used as a representative, or one of a group of representatives, for the purpose of placing a factual situation or a problem before a lawyer to obtain

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100 J.D. Wilson, supra note 95 has recently argued that the distinction between solicitor-client and litigation privilege should be collapsed and the former applied to communications between lawyers and third parties (i.e. accountants) for the purpose of obtaining legal advice. He cites as support McEachern C.J.B.C.'s statement that there is "one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such inquiries and collect such material as he may require properly to advise the client and for the solicitor to furnish legal services": Hodgkinson v. Simms (1988), 33 B.C.L.R. 2d 129 at 136 (C.A.). This expansive view of solicitor-client privilege has been cogently criticized by Watson and Au, supra note 95. In any event, even Wilson's expanded view would only protect clients of MDPs to the extent that the courts found that communications between lawyers and non-lawyers were necessary to provide legal services to the clients. Its acceptance would, however, provide more arguments that solicitor-client privilege could be preserved when MDPs provide services in a non-litigious context.
legal advice or legal assistance, the fact that he is an accountant, or that he uses his knowledge and skill as an accountant in carrying out such a task, does not make the communications that he makes, or participates in making, as such a representative, any the less communications from the principal, who is the client, to the lawyer; and similarly, communications received by such a representative from a lawyer whose advice has been so sought are none the less communications from the lawyer to the client.\footnote{101}

Information that accountants supply to lawyers on behalf of their clients may be covered by the solicitor-client privilege between the lawyer and the client. Thus in Susan Hosiery, the information provided by the accountant to the lawyer was protected by solicitor-client privilege on the basis that the accountant acted as the client’s agent in conveying information for the purpose of obtaining legal advice.\footnote{102} The extension of solicitor-client privilege in Susan Hosiery would not apply if 1) the accountant was not an agent of the client or 2) the information was not provided for the purpose of obtaining legal advice.

In an MDP, accountants and other professionals may not be acting as the agent or alter ego of the client in conveying information to lawyers, but rather as independent service providers. Moreover, the client’s purpose in conveying information to the MDP may not always be to obtain legal advice. The Supreme Court of Canada has indicated that solicitor-client privilege “does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity.”\footnote{103} Information that a client provides to an accountant or an actuary to obtain accounting or actuarial advice may not be covered by solicitor and client privilege. Similarly, “no solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer.”\footnote{104} Clients could easily

\footnote{101}Ibid. See also Re Sokolov 68 D.T.C. 414 at 419-20 (Man.Q.B.) (solicitor-client privilege applies when accountants acting as client’s agent for the purpose of obtaining legal advice but not to information “volunteered by the auditors in their communication to the client”) and Re Goodman and Carr (1968), 70 D.L.R.(2d) 670 at 674 (Ont. H.C.) (communication not privileged because accountant not acting as agent of client for purpose of obtaining legal advice). See also Sopinka, Bryant and Lederman, The Law of Evidence (Toronto: Butterworths, 1992) at 649.

\footnote{102}Watson and Au have criticized this result on the basis that the “accountant who was held to be an ‘agent’ was likely not merely a conduit for information passing between the client and solicitor, but was actively engaged in setting up the tax arrangement and exercising his professional expertise.” Supra note 95 at 348 n.161. Susan Hosiery, supra note 96 suggests that the courts may not consider the application of some professional skill to be inconsistent with holding that the accountant or other third party acted as the client’s agent in conveying information to the lawyer. See also General Accident Assurance Co. v. Chrusz (1998), 37 O.R. (3d) 790 at 795 (Div. Ct.) holding that an insurance adjuster’s report was covered by solicitor-client privilege because he acted as “an agent of the insurer in the obtaining of legal advice.”


\footnote{104}The Court observed that “government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected.” R. v. Shirose, supra note 96 at 289 para. 50. See also Mutual Life Insurance v. Canada (1988), 28 C.P.C.(2d) 101 (Ont. S.C.).
be confused about the scope of solicitor-client privilege in the context of an MDP that included lawyers.

An even more difficult question is whether solicitor-client privilege would be preserved if information supplied to a lawyer was then conveyed to non-lawyers in the partnership. A leading American case held that an accountant could refuse to reveal confidential information received from a lawyer because the information was provided to the accountant in order for a lawyer to give legal advice.\(^{105}\) Nevertheless, the Court added that “if what is sought is not legal advice but only accounting service..., or if the advice sought is the accountant’s rather than the lawyer’s, no privilege exists.”\(^{106}\) This would seem to suggest that solicitor-client privilege over information would be lost if a lawyer asked his or her accountant partner to look at the information in order to provide accounting advice.\(^{107}\) Much would depend on whether courts would be prepared to hold that the client was seeking legal advice even if that was not the exclusive or the dominant purpose of engaging the MDP.

Solicitor-client privilege may apply if a client gives information to a non-lawyer in an MDP in order to obtain legal advice from a lawyer in that partnership. The Supreme Court has indicated that solicitor-client privilege applies to all communications made to a lawyer “or to employees” with a view to obtaining legal advice whether the information concerns “matters of an administrative nature such as financial means or with the actual nature of the legal problem.”\(^{108}\) This would suggest that solicitor-client privilege could apply even though employees as opposed to the lawyer take information from a client for the purpose of obtaining legal advice. If, however, the information was provided to an accountant or other non-lawyer for the purpose of obtaining accounting advice, or perhaps even for the dual purpose of obtaining legal and accounting advice, solicitor-client privilege might not apply. The Supreme Court was contemplating the situation where employees under a lawyer’s direct supervision took preliminary information, not one where a non-lawyer partner or associate took information from a client in order to obtain a mix of professional advice.

It is possible that solicitor-client privilege could be lost when a lawyer communicates information to a non-lawyer who does not keep the information confidential. The Supreme Court has indicated that “where the communication is not intended to be confidential, privilege will not attach.”\(^{109}\) Solicitor-client privilege can be lost by the subsequent disclosure of the information. In the


\(^{106}\) Ibid. at 921-22.

\(^{107}\) If a third party overhears the communication, with or without the client’s consent, no privilege can be claimed and that person may be forced to reveal the conversation. Similarly, if a third party, openly or covertly, secures a document or makes a copy thereof, he may produce it; notwithstanding that it would have otherwise been privileged in the solicitor’s possession.” Sopinka et al., supra note 102 at 673.

\(^{108}\) Descoteaux v. Mierzwinski, supra note 96 at 413.

\(^{109}\) R. v. Solosky, supra note 103 at 757.
United States, disclosure to auditors has been held to destroy solicitor-client privilege.\(^{110}\) Solicitor-client privilege can also be lost to the extent that clients authorize the release of information to non-lawyers.\(^{111}\)

Another problem arises when lawyers and non-lawyers have conflicting duties. One such situation might be the lawyer's duty to keep client's confidences, including confessions to crimes (subject to certain exceptions), and the duty that is placed on medical health professionals to report suspected child abuse.\(^{112}\) Another would be an accountant's duty to render an accurate audit and a lawyer's duty to keep his or her clients' confidences including information that might affect the audit. In this vein, Trebilcock et al. posited a situation where, a lawyer retained by a client might work in a context which requires him to be a partisan advocate for the client's interests, whereas an auditor partner is required to play the role of independent watchdog on behalf of users of the financial information about the client corporation. In this situation it is easy to imagine instances where information that a lawyer might properly wish to be withheld in order to safeguard his client's interests coincides with the information that the auditor might feel compelled to disclose publicly. This would, of course, violate normal dictates of solicitor-client privilege.\(^{113}\)

The above noted conflicts have lead the United States Supreme Court to contrast the lawyer's role as the "client's confidential adviser and advocate, a legal representative whose duty is to present the client's case in the most

\(^{110}\) United States v. El Paso Co. 682 F.2d 530 at 539-41 (5th Cir.).

\(^{111}\) Interprovincial Pipeline v. The Queen 95 D.T.C. 5462 (F.C.T.D.) (solicitor-client privilege waived when information given to auditor but only waived for that limited purpose). Commentators have suggested that one problem with multidisciplinary teams servicing children or the elderly is that solicitor-client privilege will be lost when information communicated between the lawyer and the client is then conveyed to another professional, particularly if that other professional has an affirmative duty to report that information. "The attorney's communications with third parties outside the attorney-client relationship, even if made on behalf of the client, ordinarily are not protected by the attorney client privilege. The rationale for the privilege extends only so far as putting the clients' minds at ease in their personal communications with the attorney. Therefore an attorney communication with third party professionals may not be protected in litigation." H. Wydra, Keeping Secrets within the Team: Maintaining Client Confidentiality while offering Multidisciplinary Services to the Elderly Client (1994) 62 Fordham L. Rev. 1517 at 1542. See also G. Glynn, Multidisciplinary Representation of Children: Conflicts Over Disclosure of Client Communications (1995) John Marshall L. Rev. 617.


\(^{113}\) Trebilcock et al., supra note 9 at 374. Their proposal, which we discuss more fully below, was that the client would partially waive solicitor-client privilege at the start of its relationship with the MDP to the extent that disclosure "was required by the legal or ethical obligations of the non-lawyer involved in the engagement." They acknowledged that the "extension of the solicitor-client privilege to the mixed firm as a whole would raise serious problems", but contemplated that "some clients may be willing to forgo some of the protection provided by solicitor-client privilege in exchange for the opportunity to purchase services from a mixed professional firm, and the option should be afforded to them."
favorable light” with the auditor’s “ultimate allegiance to the corporation’s creditors and stockholders, as well as to the investing public.” 114 In other words, information provided to an MDP performing an audit would not be protected by solicitor-client privilege.

The exact scope of solicitor-client privilege in MDPs is difficult to predict. 115 For example, some solicitor-client privilege might survive in a multidisciplinary partnership when a non-lawyer acted as the client’s agent in conveying information to a lawyer to obtain legal advice, or if the distinction between solicitor-client and litigation privilege were collapsed. Nevertheless, solicitor-client privilege cannot be guaranteed when non-lawyers have access to information for purposes other than the provision of legal advice. The White Paper submitted to the ABA, which was otherwise quite supportive of MDPs, concluded that clients would be “advised to deal directly with an attorney when seeking legal advice” and should be “warned that communications not made in the context of a direct attorney-client relationship may not be privileged.” 116 The more recent Commission on Multidisciplinary Practice was not completely precise on this crucial matter and somewhat vaguely recommended “the provision of information to clients concerning the lawyer’s function as a provider of legal services and the likelihood that the client’s communication to non-lawyers in the MDP that are unrelated to the provision of legal services would not be protected by the attorney-client privilege.” 117 In summary, there

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115 In this untested area, we are cautious about making categorical conclusions when solicitor-client privilege would or would not apply. K. White, a senior Legal Officer in the Law Society of New South Wales, has written that “client legal professional privilege applies to communications and documents which occur or come into being in relation to legal or administrative proceedings or in a multi-disciplinary practice carrying on practice as solicitors or by a solicitor in his independent legal practice within a Professional Service Group, but not in relation to the solicitor’s involvement in an ancillary business.” “Developments in Practice Structure” [July 1995] Law Society Journal 50 at 53. To the extent that this suggests that communications made to a non-lawyer in an MDP for the dominant purpose of litigation (or the sole purpose of litigation in Australia) would be covered by litigation brief privilege, this statement is not controversial. Similarly, it cannot be denied that legal privilege does not apply to communications made to lawyers and non-lawyers in ancillary businesses. As the above analysis suggests, however, it is not clear that communications made to a non-lawyer practising in an MDP would be covered by solicitor-client privilege as distinct from litigation brief privilege. The Ontario Futures Task Force warned that solicitor-client privilege can easily be lost when “legal advice otherwise privileged (but not protected on the basis of litigation privilege)...is routinely...communicated to non-lawyers.” Final Report Sept, 1998 at 41. They proposed that limiting MDPs to the provision of legal services would eliminate all concerns about privilege. Ibid. at 54. We recognize that this limitation would increase the chances of preserving privilege, but are not entirely convinced that it guarantees it. Courts may not necessarily accept the regulator’s instructions that MDPs limit themselves to the provision of legal services as representing the reality of the situation and could possibly conclude that privilege was lost when the non-lawyer applied his or her own professional skills to information communicated by the clients.
116 White Paper, supra note 14 at 8-9 of the letter.
117 Report supra note 27 at 5.
are no guarantees that solicitor-client privilege would be preserved within an MDP and it appears that, at the very least, clients should be made aware of these dangers.

3) Conflict of Interest

Concern about conflicts of interest is motivated both by concerns about preserving the independence of legal advice and preserving client confidences. Rule 5 provides that lawyers should not act in a matter where they are likely to have a conflicting interest with their clients "save after adequate disclosure to and with the consent of the client or prospective client concerned."\(^{118}\) The rule considers a lawyer's clients to include all the clients of his or her associates or partners whether or not the lawyer handles the client's work. The lawyer's judgment and choice of action should be as free as possible from compromising influences, including conflicting financial interests and the obligation to communicate information. Lawyers should not act against former clients in the same or related matter or when they possess relevant confidential information. Lawyers who do act on both sides of a dispute may have to cease acting for both parties should a contentious matter arise. Rule 5 also suggests that clients should be able to make informed decisions about possible conflicts and may accept them considering other factors such as "the extra cost, delay and inconvenience involved in engaging another lawyer and the latter's unfamiliarity with the client and the client's affairs."

The Supreme Court's decision in Martin v. Gray\(^{119}\) heightened lawyers' sensitivity to conflicts of interest issues and has produced a flurry of applications to remove law firms from cases because of conflicts of interest. In that case, the Court indicated that courts will enforce rules against conflicts of interests whenever there is a possibility of mischief involving the misuse of confidential information. Justice Sopinka explained the relationship between conflict rules and rules of privilege and confidentiality as follows:

When the management, size of law firms and many of the practices of the legal profession are indistinguishable from those of business, it is important that the fundamental professional standards be maintained and indeed improved. This is essential if the confidence of the public that the law is a profession is to be preserved and hopefully strengthened. Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. The legal profession has distinguished itself from other professions by the sanctity with which these communications are treated. The law, too, perhaps unduly, has protected solicitor and client exchanges while denying the same protection to others. This tradition assumes particular importance when a client bares his or her soul in civil or criminal litigation. Clients do this in the justifiable belief that nothing they say will be used against them and to the advantage of the adversary. Loss of this confidence would deliver a serious blow to the integrity of the profession and to the public's confidence in the administration of justice.\(^{120}\)

\(^{118}\)CBA Code of Professional Conduct (1987) at 17.


\(^{120}\) Ibid. at 255-6.
Following from this concern and recognizing the importance of appearances, the Court created rebuttable presumptions that 1) all within a law firm receive privileged information that a client conveys and 2) that lawyers will divulge this privileged information to others they work with in a law firm. In part because of a recognition of the large size of some law firms, the Court rejected an irrebuttable presumption that the knowledge of one partner or associate is the knowledge of all, both in terms of the knowledge that lawyers were privy to in their former firms and the knowledge that they might divulge to their colleagues in new firms. Rather, it recognized “a strong inference that lawyers who work together share confidences” that could be rebutted by showing that lawyers had no reasonable connection to the relevant retainers in their former firms or, if they were tainted with confidential information, by demonstrating with “clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the ‘tainted’ lawyer to the members of the firm who are engaged against the former client.”

The courts are beginning to define the exact scope of conflict problems under Martin v. Gray. A lawyer may not be presumed to have been exposed to confidential information unless there was a sufficient relationship to the retainer. Potential conflicts created by international partners may be accepted if the international affiliates were “not partners in domestic practice.” This might allow law firms to become affiliated with the Big Five accounting firms and MDPs for the purpose of international as opposed to domestic practice. At the same time, in an age of globalization, it may be difficult to sustain a dichotomy between international and domestic practices. Some case law suggests that “Chinese Walls” can avoid having a law firm removed for conflicts of interest, but suggests that these devices must be in place at the start of an engagement which results in a conflict. Waiver also plays an important role in conflict situations. Nevertheless, the courts may not accept waivers if the client was not fully informed, did not receive independent legal advice or if the conflict was incompatible with the public interest. Waiver would presumably not be an option if a conflict were based on a confidential retainer.

If conflicts are not adequately prevented by screening devices, barriers to the distribution of information and waivers, courts will remove a law firm which acts in a conflict of interest situation against a former client. Courts may also apply this jurisdiction to MDPs. The House of Lords has recently exercised this jurisdiction in a conflict of interest situation against a former client.

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121 Cory J. (Wilson J. concurring) in Martin v. Gray did not decide whether the knowledge of one partner should be imputed to all in a law firm, but supported an irrebuttable presumption that a lawyer who received privileged information would share it with his or her new colleagues. He based his dissent on the fact that most lawyers in Canada practice in small sized firms.

122 Martin v. Gray, supra note 120 at 269.


jurisdiction to remove KPMG from a case because they were acting in a conflict against a former client to whom they had provided litigation support services. Lord Hope observed that he considered “the nature of the work which a firm of accountants undertakes in the provision of litigation support services requires the court to exercise the same jurisdiction to intervene on behalf of a former client of the firm as it exercises in the case of a solicitor.” Similarly, Lord Millet observed that it was of “the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.”

Like law firms, MDPs may find themselves subject to applications by former clients to have them removed from cases. Given the concentration of the market and their apparent acceptance of what lawyers would define as conflicts, the Big 5 accounting firms may find themselves embroiled in much conflict-related litigation. At the same time, however, such litigation would afford clients a vehicle to protect the confidentiality of information that they conveyed to an MDP.

MDPs, especially those involving large accountancy and pension firms, will increase conflict of interest problems. Many of these firms act for clients who are competitors and may even be on both sides of a transaction. Moreover, the accountancy and actuarial profession are both much more highly concentrated than the legal profession. Accountants and actuaries are sensitive to conflict of interest problems, but by definition they do not approach conflict problems with the primary goal of protecting solicitor-client confidences. The Commission on Multidisciplinary Practice has proposed that MDPs be subject to the same imputation and screening rules as law firms. This would mean that for “the purposes of a conflict of interest analysis, the lawyer must treat each and every client of the MDP as the lawyer’s clients.” This stringent imputation rule would apply to an MDP’s clients throughout the world. It remains to be seen whether such a rule, even subject to the possibility of clients waiving conflicts, will be workable in the concentrated practice of the Big 5 accounting firms.

4) **Summary**

The broad range of ethical and legal rules which prevent or inhibit the development of MDPs presents a great challenge to reform. Any reform should account for the three broad areas of concern we have identified. First, MDPs

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126 Price Jefri Bolkiah v. KPMG, supra note 124. One commentator has suggested that this case “helps to build a ‘unified field theory’ of client confidentiality, a worthy contribution as boundaries between professional disciplines become blurred and as practice groups increasingly transcend geographic and political borders.” J. Kleefeld, “Case Comment” (1999) 57 The Advocate 223 at 228-9.

127 Rule 204.4 of the Institute of Chartered Accountants of Ontario Rules of Professional Conduct simply contemplated disclosure of conflicts or influences that might impair the accountant’s judgment or objectivity in the accountants’ written report or other communication accompanying financial statements.

128 Report, supra note 27 at 5.
present a governance problem because of the limited methods and expertise that law societies have in regulating non-lawyers. Second, MDPs may affect the independence of legal advice by giving lawyers financial interests in the MDP. Third, very difficult problems are created by confidentiality and solicitor-client privilege in the MDP context, along with related problems of conflict of interest.

At the same time, these problems may not be insurmountable. As will be explored below, there is a broad range of devices that may allow non-lawyers to be indirectly subject to rules imposed on lawyers. In addition, there are some signs that courts themselves may adapt the concepts of solicitor-client privilege and conflict of interests in a way which provides meaningful protection for clients of the MDP. Solicitor-client privilege might be applied broadly to cover communications between lawyers and others in the MDP if the purpose is to obtain legal advice or when third parties act as agents of the client for the purpose of obtaining legal advice. Courts may also extend their jurisdiction to remove law firms from cases because of conflicts of interests to MDPs. Finally, clients may be willing to accept conflicts of interests and disclosed risks to solicitor-client privilege depending on their expectations and comfort with particular MDPs.

IV: Regulatory Proposals

The task is now to outline various regulatory options and to assess their likely ability to deal with the problems identified above. In this section, we survey existing regimes and proposals. In the next two sections, we outline a broader range of options and our own proposals.

1) Canadian Proposals

a) Professional Organizations Committee

The Professional Organizations Committee in Ontario sponsored a 1979 report by its Research Directoraté that recommended that MDPs be permitted in the professions, but not with respect to non-licensed non-professional services.\(^{129}\) It proposed that “every professional service provider in a multidisciplinary firm be required to observe the limits of his respective

\(^{129}\)Trebilcock et al., *supra* note 9. This study argued that “multi-disciplinary firms create the potential for a more efficient allocation of functions among members of a multi-disciplinary team” while noting that “the effect of the substitution of functions is that formally unqualified persons may be performing professional functions otherwise appropriated exclusively to licensed professionals.” *Ibid.* at 368-9. Clients could convey information more efficiently to a team of professionals who could deal comprehensively with the client’s needs. “Centralized managerial control over coordination between related service functions may also reduce the risk of error and improve overall service quality.” *Ibid.* at 370.
licensed function unless there is a formal assumption of responsibility (perhaps jointly) for the service in question by a professional licensed to provide such a service."

Thus, a firm could offer any service it wished, so long as there was at least one licensed member of the firm willing to assume responsibility for the service. The mix of professional services would be subject to regulation by professional bodies administering statutory regimes of licensure or certification. Moreover, a certificate of authorization scheme was recommended in which "multidisciplinary professional firms, as firms, or dually qualified individuals, should be licensed by all relevant professional bodies." All multidisciplinary organizations would have to be licensed as such by each and every regulatory body that had jurisdiction over its individual members. Thus both professionals within the firm and the firm itself would have to be licensed, although the details of firm licensure were not developed. The study suggested that majority ownership and directorship requirements could be satisfied by any mix of licensed professionals. Licensed professionals had to control the firm, but no particular profession had to have control. The study concluded that "the prospect of civil liability awards for professional negligence and the importance of not endangering individual licenses or endangering the certificates of authorization of the firm as a whole provide sufficient assurances of competent professional service."

Although liberal compared to many reform proposals, the Professional Organization Committee proposal was restrictive to the extent it recommended that "multidisciplinary collaborative enterprises between professionals and non-professionals involving the provision of professional services should be prohibited." Lawyers could partner with accountants, engineers, and doctors, but not real estate agents, consultants, or financial advisors. As suggested above, this 1979 proposal was developed before consultancy became a growth industry in both the Big 5 accounting firms and other venues.

b) Ancillary Business Proposals

Law societies in British Columbia and Alberta have proposed rules with respect to ancillary businesses that have some relevance for the regulation of MDPs. In general, the British Columbia Law Society proposed a more restrictive approach which would require ancillary businesses to have the same insurance coverage and trust funds as law firms and would prohibit lawyers from receiving fees for directing clients to an ancillary business in which the lawyer owns more

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130 Ibid. at 373.
131 Ibid. at 376. This licensing requirement was patterned after the requirement that the Association of Professional Engineers of Ontario provide a certificate of authorization before engineering firms, which could also include surveying, planning, urban design and project management, offered services to the public. The Professional Engineers Act RSO 1970 c.237 s.20(2), 6. Quinn, supra note 12 at 42-3.
132 Trebilcock et al., supra note 9 at 373.
133 Ibid. at 376.
than 10% or has an interest that would reasonably be expected to affect the lawyer’s judgment. The Alberta Law Society took a more *laissez faire* approach based on disclosure and waiver. Lawyers would have to inform clients that “many of the attributes of a solicitor/client relationship, such as confidentiality, privilege and assurance fund protection, may not be applicable.”

Rules concerning conflicts of interests, hidden commissions and disreputable activities would still apply to ancillary businesses.

The Alberta proposals would likely be easier to administer than the British Columbia proposals, which would extend lawyers’ rules to ancillary businesses and presumably MDPs. The Alberta disclosure and waiver approach, however, would work best with sophisticated clients who could judge the risks of dealing with ancillary businesses and MDPs.

c) *Law Society of Upper Canada*

In 1998, a Task Force of the Law Society of Upper Canada accepted neither the maintenance of the status quo nor full-service MDPs. With respect to the latter, it concluded:

> The convenience of ‘one stop shopping’ must not be permitted to overwhelm professional responsibilities. The notion, mooted in some quarters, that these partnerships might be accommodated by lawyers offering clients the option of waiving traditional solicitor and client relationships in the interest of what is perceived to be a more seamless delivery of legal advice, is not only contrary to the public interest but would lead to a complete breakdown of the role of the profession in society.

The Task Force proposed that MDPs be allowed, but only if they were restricted to the provision of legal services and were controlled by lawyers. As will be seen, this proposal combines the most restrictive rules of the first two jurisdictions (the District of Columbia and New South Wales) to permit MDPs. It would allow lawyers to partner with paralegals and patent and trade mark agents, but not those who provide non-legal services. The Task Force concluded that “professionals and para-professionals would be engaged in supporting delivery of legal services and would thus not be in an environment likely to attract conflicting standards and duties which might otherwise arise in the conduct of their professional practices.”

Moreover, lawyers would have to control any partnership. The Task Force concluded that solicitor-client privilege and the independence of legal advice would be preserved if an MDP were controlled by lawyers and limited to the provision of legal services.

A by-law implementing the Task Force’s report was subsequently enacted pursuant to specific statutory authority given to the Law Society to govern the

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135 Futures Task Force, *supra* at para. 137.
provision of legal services with other professions including "requiring the licensing of those persons, partnerships, corporations and other organizations" that provide legal services. The by-law requires that MDPs be approved by the law society and that non-lawyers in the MDP be "qualified to practise a profession, trade or occupation that supports or supplements the practice of law"; that they be of good character; that they only provide their services in the MDP and in separate facilities; that they give lawyers in the MDP "effective control over the individual's practice of his or her profession"; that they maintain insurance as required by the law society; and that they agree to be bound by all the rules applying to lawyers including those concerning conflict of interest. The Ontario scheme involves a form of licensing: MDPs are approved by the law society, subject to annual filing requirements and notices of any changes in the partnership, and the law society has the power to require the dissolution of the partnership or its continuation "subject to such terms and conditions" as it may impose.

In addition to this fairly robust and rigorous licensing scheme, the by-law only allows non-lawyers to practice in a partnership if they support or supplement the practice of law and are effectively controlled by lawyers. Effective control is defined as existing when the lawyer may "without the agreement of the individual, take any action necessary to ensure that the member complies with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's Rules of Professional Conduct and the Society's policies and guidelines." In turn, lawyers are responsible for ensuring that non-lawyers in the MDP practice their "profession, trade or occupation with the appropriate level of skill, judgment and competence" and comply with the various rules imposed on lawyers. Thus the Ontario regime combines firm licensure with requirements that non-lawyers in the MDP only support or supplement the practice of law and be under the unilateral control of lawyers with respect to compliance with the rules and regulations imposed on lawyers.

d) Barreau du Québec

In 1999, a committee of the Barreau du Québec proposed a regime that was much less restrictive than the Ontario scheme. It rejected a control requirement on the basis that it would lead "to confrontations with accountants who, no doubt, will also demand a controlling interest in multi-disciplinary firms."

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137 Law Society Act R.S.O. 1990 c.L.8 s. 62(0.1).32. This power includes the power to issue, renew and suspend licences and to govern the terms and conditions imposed on licenses.
138 By-law 25 ss.4, 19.
139 Ibid. ss.16, 17.
140 Ibid. s.4(3).
141 Ibid. s.5.
142 Report of the Barreau du Québec Committee on Multi-Disciplinarity Between Lawyers and Accountants For An Open and Responsible Approach Executive Summary and Overview Feb 1999 at 7.
It also rejected restricting MDPs to providing legal services on the basis that such restrictions do “not meet the market’s needs.” The Barreau also recommended that the lawyer’s role as a business consultant be recognized and promoted.

At the same time that it rejected control and restrictions on services, however, the Québec committee proposed that non-lawyers would be required to agree contractually as individuals and as an entity “to comply with the professional duties imposed by the Bar Act, and to hold the Barreau and its Compensation Fund harmless of any loss or damage resulting from this partnership and not otherwise covered.” The Barreau would determine a “mandatory content in multidisciplinary partnership agreements between lawyers and accountants, which would include rules respecting conflicts of interests, professional privilege and independence of the profession.” Thus this contractual approach contains elements of a mandatory licensing scheme, albeit one which encourages firms to commit themselves to respect the essential features of the solicitor-client relationship “with recourse for the Barreau in case of violation.” Récourse is contemplated with respect to individual lawyers through the Barreau’s ordinary jurisdiction, and, “[u]nder the terms of the contract, non-lawyers would agree to comply with the legal profession’s conduct rules and if there is failure to do so, the Barreau could take some remedial action and even nullify the multidisciplinary agreement.” The last condition contemplates a kind of firm licensing arrangement. In summary, the Québec proposals are significantly less restrictive than the Ontario scheme. There is no requirement that lawyers control the MDP or that the MDP be restricted to the provision of legal services.

e) Canadian Bar Association and the Federation of Law Societies of Canada

The Canadian Bar Association also examined the MDP issue. An interim report released in 1998 followed the Ontario report and concluded that MDPs should not be permitted unless their primary activity was the provision of legal services. The Committee stated that it was “not satisfied that the core values of the solicitor/client privilege and the avoidance of conflict of interest can be adequately addressed” unless the MDP’s primary activity was the provision of legal services. As will be suggested in more detail below, a control requirement is not only a blunt device to address these fundamental issues, but one that may frequently be ineffective because privilege can be lost and a conflict created even though non-lawyers remained a minority in the firm.

143 Ibid.
144 Ibid. at 8.
145 Ibid. at 11.
146 Ibid. at 4.
147 Ibid. at 7.
Upon further reflection, in part spurred by reaction in the profession to the interim report, the Committee's final report released in 1999 took a much less restrictive approach.\textsuperscript{149} Taking the view that along with the values of the legal profession, values such as freedom of association and market efficiency should be taken into account, the recommended approach abandoned the previous focus on control by lawyers. The Report instead relied on individual lawyers within the practices to ensure that concerns about matters such as confidentiality, the avoidance of conflicts and solicitor-client privilege are met adequately. Significantly, the Report did not recommend any licensing requirements for multidisciplinary practices, but rather took the position that individual lawyers should ensure compliance with the ethical precepts of the legal profession. For example, with respect to avoidance of conflicts, the Report states, "Lawyers in a [multi-disciplinary practice, including multi-disciplinary partnerships,] must ensure that the MDP meets the standards of the legal profession with respect to conflict of interest and confidentiality in relation to the provision of legal services. If that cannot be done, lawyers should not practise in that MDP."\textsuperscript{150}

It is unclear what the Report contemplates should be done as a disciplinary matter if a lawyer does practice in a multidisciplinary practice that consistently neglects the legal profession's standards, even though the lawyer herself is not individually responsible. Taking the view that regulation of individual lawyers would be insufficient, the Chair of the Report dissented on this question and took the position that some form of \textit{ex ante} licensing of multidisciplinary practices by law societies should take place. The majority disagreed, but stated that the issue could be revisited in the future. The Report did suggest that rules should be developed regarding the compatibility of other practices with the practice of law in various situations, including those presenting conflicts between professional duties, such as the auditor's duty to disclose certain information about clients, such as illegal acts, and the lawyer's duty of confidentiality. As a final observation on the Report, it is noteworthy that it recommended not making a distinction as a matter of regulation between multidisciplinary partnerships and other forms of multidisciplinary practice.\textsuperscript{151}

Another recent report from a national body, the Federation of Law Societies of Canada, did not attempt to set out regulatory details, but rather outlined a broad framework to govern multidisciplinary partnerships.\textsuperscript{152} Its basic approach was that lawyers should be permitted to participate in MDPs, providing that the


\textsuperscript{150} \textit{Ibid.} at 33.

\textsuperscript{151} Hence the Report's use of "MDP" to signify "multidisciplinary practice" rather than "multidisciplinary partnership."

\textsuperscript{152} Federation of Law Societies of Canada, National Multi-Disciplinary Partnerships Committee, "Multi-Disciplinary Partnerships: Report to Delegates" (July 29, 1999).
legal profession's standards with respect to several issues, such as confidentiality, conflicts of interest, marketing of the MDP and liability insurance, are met. The Report to Delegates provided specific approaches on some topics. For example, if it is clear that there will be a conflict of professional duties to disclose or retain confidential information as a result of a particular retainer, the MDP must fully disclose the conflict and either obtain a waiver to disclose the information, or refrain from acting in a way that allows the conflict to happen. Similarly, clients should be informed of any risk to solicitor-client privilege that may result from retention of the MDP. On the matter of enforcement, the Report to Delegates recognized that it “may not be realistic” to hold lawyers personally responsible for the misdeeds of their colleagues in an MDP. It contemplated some form of ex ante regulation, recommending that lawyer participation in an MDP be conditional on satisfying the relevant law society that the MDP has addressed the relevant issues. With respect to ex post sanctions, lawyers individually may be held responsible for their own misdeeds, and lawyers may be required to withdraw from an MDP that acts unprofessionally because of a non-lawyer's actions.

2) English Proposals

a) The British Department of Enterprise

The British Department of Enterprise proposed in 1991 that MDPs be allowed as long as between 51% and 75% of partners were members of adequately regulated professions. An adequately regulated profession would keep a register of its members; have a code of conduct; have disciplinary proceedings with expulsion as the ultimate sanction and have mandatory insurance or compensation schemes. The Department contemplated that chartered accountants, certified accountants, actuaries, valuers, engineers, loss adjustors, patent agents, insurance brokers, lawyers, architects, surveyors, town planners and the London Stock Exchange would satisfy these criteria. In restricting MDPs to regulated professions, the Department of Enterprise report echoed the Research Directorate's report to Ontario's Professional Organization Committee.

b) The Law Society of England and Wales

The Law Society of England and Wales has expressed some interest in adopting the regulatory scheme that it applies to multinational law partnerships (MNPs) to MDPs. MNPs are required to have insurance for their English offices

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153 Ibid. at 11.
and pay fees to the Law Society which in part finance compensation schemes. The firm name must be approved by the Law Society and usually consists of partners’ names. The Law Society keeps a register of all foreign lawyers in partnership with English lawyers. The foreign lawyers are required to provide a certificate of good standing in their home jurisdiction and to pay a registration fee and a contribution to the Solicitor’s Compensation Fund. The registered foreign lawyer must provide the Law Society with information about their practice in the MNP as the Society reasonably requires and comply with the Law Society’s rules including rules relating to the keeping of accounts and ancillary businesses. The Law Society has the power to regulate and discipline foreign lawyers on the register, including the power to fine the registered foreign lawyer, and to strike his or her name off the register. The foreign lawyer will also be removed from the registry if he or she becomes bankrupt or is suspended in his or her home jurisdiction. If applied to MDPs, such an approach would give legal regulators regulatory and disciplinary power over non-lawyers and require non-lawyers to follow lawyers’ rules.

3) American Proposals

a) The Kutak Commission

The Kutak Commission of the American Bar Association proposed in 1982 that the following Model Rule 5.4 be adopted:

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

(a) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;
(b) information relating to representation of a client is protected as required by [the rule on confidentiality of information];
(c) the organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so...; and
(d) the arrangement does not result in charging a fee that violates [the rule on fees].

This proposed rule would have allowed lawyers to be partnered or managed by non-lawyers including corporations, but subject to the overriding conditions that there be no interference with the independence of legal advice or the lawyer-client relationship or infringement of confidentiality or breach of lawyers’ rules relating to advertising, solicitation or fees. Stated at this level of generality, the Kutak Commission’s proposal was perhaps more aspirational than operational. For example, the proposed rule does not explain how the independence of a lawyer’s advice would not be compromised by the management authority of
non-lawyer\textsuperscript{155} or how solicitor and client privilege would be preserved when information given to a lawyer was transmitted to another professional.

The Kutak Commission's proposed rule was rejected by the A.B.A. House of Delegates. The "fear of Sears", namely a fear that a large corporation such as Sears, Roebuck and Co. would begin to compete in the legal services market, apparently influenced the decision.\textsuperscript{156} The approved version of the \textit{Model Rules} affirmed existing prohibitions on non-lawyer partnerships with lawyers. Nevertheless, the Kutak Commission's proposal suggests that many lawyers who contemplate fairly wide open MDPs recognize the need, if not the exact means, to protect the independence of legal advice and the confidentiality of information within such organizations.

b) \textit{The District of Columbia}

A general prohibition on MDPs has remained the norm in the United States. The exception is the District of Columbia. A report chaired by Robert Jordan found a market demand for collaborative services between lawyers and non-lawyers and initially echoed the Kutak Commission's proposal. In response to concerns that accounting firms and other corporations, including Sears, might acquire law firms and that the involvement of non-lawyers might result in conflicts of interest, loss of solicitor-client privilege and breaches of ethical rules, Jordan subsequently proposed that partnerships with non-lawyers be restricted to the provision of legal advice and that only non-lawyers who actually perform professional services be allowed to hold a financial interest or managerial authority in a multidisciplinary firm. He reasoned that this would avoid a "big leap" and ensure that a multidisciplinary law firm would practice law.\textsuperscript{157}

\textsuperscript{155} Andrews has suggested that the Kutak commission's rules be supplemented by obtaining contractual commitments from all members of the organization to comply with the ethical rules imposed on lawyers. Andrews, \textit{supra} note 21 at 641-42. This would inform non-lawyers of the ethical rules and allow the organization to take actions including dismissal against those in the organization who breach the ethical rules.

Andrews also suggested that clients be informed of the various roles played by members of the firm. A \textit{White Paper} submitted to the American Bar Association also stressed the importance of disclosure. Disclosure relies more on clients than the firm to ensure compliance with or at least voluntary waiver of those attributes of the solicitor-client relationship which might be jeopardized in an MDP.

\textsuperscript{156} The proposed rule was defeated after one of its authors replied in the affirmative to a question of whether the proposed rule would allow Sears to offer legal services: Gilbert and Lempert, \textit{supra} note 17 at 392. The "fear of Sears" perhaps illustrates possible reasons why lawyers may tend to oppose MDPs: the loss of prestige associated with losing control of the firms in which lawyers practice; and the concern of lawyers with specific, sunk investments in traditional law firms about competitive pressure from innovative forms of firms.

\textsuperscript{157} Jordan also anticipated that firms that wished to offer non-legal services with non-lawyer partners would "set up one entity for the practice of law, and other entities - separate partnerships or corporations - involving nonlawyers holding management positions and equity interests." Gilbert and Lempert, \textit{supra} note 17 at 394-98.
Following these revised proposals, the District of Columbia subsequently changed Rule 5.4 of the D.C. Rules of Professional Conduct to provide:

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

(4) sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b).

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) the partnership or organization has as its sole purpose providing legal services to clients;
(2) all persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;
(3) the lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1 [which sets out that senior lawyers are responsible for the work of their juniors];
(4) the foregoing conditions are set forth in writing.

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

Like the Kutak Commission, the D.C. rules attempt to ensure that a lawyer's professional judgment will not be affected by non-lawyers who recommend, employ or pay them. Again, however, this injunction is aspirational and does not explain how the independence of legal advice will actually be preserved.

The D.C. rules allow MDPs, but subject to the restrictions that non-lawyers perform professional services which assist the organization in its sole purpose of providing legal services to its client. On its face, the D.C. rules would seem to prohibit any MDP which provides, for example, business, accounting, or engineering advice to its clients.\(^{158}\) As such, it does not seem to accord with what is known about consumer demand for multidisciplinary services. Of course, the rule could be more permissive if the provision of legal services were interpreted broadly.\(^{159}\) Defining what constitutes the practice of law or the

\(^{158}\) Professor Carlson argues that "it is unclear why a law partnership which includes individuals without legal training who provide services to law firm clients should be preferable to a hybrid partnership where each partner works independently in his area of expertise." Carlson, supra note 65 at 626 Gilbert and Lempert, supra note 17 at 410 also suggest that the D.C. rules are flawed because law firms can offer nonlegal services so long as non-lawyers are employees as opposed to partners.

\(^{159}\) Commentary to the rule suggests that the rule "permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counselling clients, non-lawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office manager, executive directors, or in a similar position." Gilbert and Lempert, supra note 17 at 400.
delivery of legal services is a notoriously difficult endeavor akin, some would say, to nailing Jell-o to a wall.

Another feature of the D.C. rules is that non-lawyers with a financial interest or managerial authority in the MDP agree to abide\textsuperscript{160} by all of lawyers’ rules of professional conduct with the lawyers being responsible to the legal regulator for any breaches by non-lawyers. This would enable the firm itself to discipline the non-lawyer partner and might be one step in encouraging MDPs to internalize and institutionalize the ethical rules of the legal profession. In such a scenario, impermissible forms of solicitation or advertising or other ethical breaches could lead to the partner’s dismissal from the firm or demotion, the denial of rewards or informal forms of shaming.\textsuperscript{161} At the same time, the firm may not have an economic incentive to discipline non-lawyer members from engaging, for example, in impermissible forms of solicitation that economically benefit the firm. Hence vicarious liability of lawyers within the firm or direct discipline of the firm might still be necessary to encourage internal enforcement within the firm. Nevertheless, internal enforcement from within the firm should be more creative and immediate than external disciplinary enforcement from regulators.\textsuperscript{162}

Thus, a contractual approach, as contemplated under the D.C. rules and the Barreau du Québec proposals, may encourage creative and flexible forms of internal firm discipline. Contractual commitment to all of lawyers’ ethical rules may, however, be less feasible in an MDP which offers a broad array of professional services, as opposed to the D.C. partnerships which are restricted to the provision of legal services. The more tailored idea that only some ethical rules would be binding on non-lawyers will be examined below.

The legalization of MDPs in D.C. does not seem to have diminished the number of alliances between law firms and entities providing other services. Indeed, a recent report stated that no MDP presently operates under the restrictive D.C. rules.\textsuperscript{163} This is a reminder that regulatory regimes are subject to the discipline of exit or non-entrance strategies since lawyers and other service providers will form alliances short of partnerships if the partnership requirements are perceived to be too restrictive.

\textsuperscript{160}The commentary to the rule suggests that this agreement should be in writing because “the requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structures of entities in which non-lawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.”

\textsuperscript{161}In the importance of alternatives to formal disciplinary sanctions in securing compliance with legal rules see M.L. Friedland ed., \textit{Securing Compliance: Seven Case Studies} (Toronto: University of Toronto Press, 1990); J. Braithwaite, \textit{Crime, Shame and Reintegration} (Cambridge: Cambridge University Press, 1989).

\textsuperscript{162}Discipline proceedings against lawyers largely focus on violations such as misappropriating trust funds and failing to respond to the regulator. See H. Arthurs, \textit{Discipline in the Legal Profession in Ontario} (1969) 7 Osgoode Hall L.J. 235; B. Arnold and J. Hagan, \textit{Careers of Misconduct: The Structure of Prosecuted Professional Deviance Among Lawyers} (1992) 37 Amer. Sociological Rev. 771.

\textsuperscript{163}Futures Task Force, \textit{supra} at para. 49.
c) The ABA’s Commission on Multidisciplinary Practice

In 1998, the American Bar Association established a 12 person Commission which held open hearings into MDPs. Like the Kutak Commission, this Commission concluded that “it is possible to satisfy the interests of clients and lawyers by providing the option of an MDP without compromising the core values of the legal profession.” The Commission’s recommendations were, however, both more cautious and concrete than those of the Kutak Commission. The Commission recommended a two tier regulatory approach that would subject MDPs that are not controlled by lawyers to an annual licensing system while allowing MDPs controlled by lawyers to operate subject to the usual ethical rules imposed on lawyers. MDPs not controlled by lawyers would have to undertake to the regulatory authority of the bar that it will not directly or indirectly interfere with the lawyer’s independent exercise of professional judgment on behalf of the client; to establish and enforce procedures to protect the independence of legal advice; to establish and enforce procedures to protect a lawyer’s professional obligation to segregate client funds. The MDPs would also have to undertake that its members would abide by the rules of professional conduct when delivering legal services to clients; that it would recognize the unique role of lawyers, including pro bono obligations; and that it would allow the legal regulator to conduct administrative audits and recognize its power to terminate the firm’s licence. As will be more fully argued below, the licensure of MDPs as firms is a promising regulatory technique in large part because it allows regulators to impose multiple conditions on the firm and to encourage the firm itself to establish and enforce its own procedures to ensure that the MDPs respects the essential attributes of the solicitor-client relationship.

All MDPs would be subject to a rule that treats all clients of the MDP as clients of each lawyer in the MDP for the purpose of determining conflicts of interest. As discussed above, this rigorous rule could create problems for the Big 5 accounting firms. Lawyers would remain liable for not acting in an independent fashion, and the fact that they might be following instructions from a non-lawyer supervisor was specifically excluded as an excuse for professional misconduct. On the other hand, the Multidisciplinary Commission was somewhat less rigorous with respect to confidentiality and privilege issues. Although the Commission was alive to conflicting duties between lawyers and accountants with respect to confidentiality and the danger that attorney-client privilege might be lost in an MDP, it only recommended that lawyers be required to make reasonable efforts to ensure that non-lawyers in the MDP behaved in a manner that discharged the lawyer’s obligation of confidentiality and that they should take measures “to prevent disclosure of confidential information to members of the MDP who are not providing services in connection with the delivery of the legal services to the client.” The Commission’s report contemplated that

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164 Report, supra note 27 at 2.
165 Ibid., Appendix A Rule 1.6.
clients should be informed of the "likelihood" that their communications "to non-lawyers in the MDP that are unrelated to the provision of legal services would not be protected by the attorney-client privilege," but its draft rules did not flesh out how risks to privilege would be disclosed and accepted by the client.

The Commission's report recognized that multidisciplinary practice involves not only MDPs, but other models such as lawyers working for accounting firms. Unlike most other reform proposals, the Commission defined MDPs broadly enough to include lawyers working in accounting or actuarial firms and captive law firms. The Commission essentially warned lawyers in accounting firms who hold out their qualifications as lawyers against pretending that they were not offering legal services or were not bound by the rules of professional conduct if they provided services to the firm's clients that would constitute the practice of law if provided by a law firm. The Commission did recognize that such lawyers might avoid making a material misrepresentation of fact if they "made clear to the client, preferably in writing, that the MDP is not providing legal services and that the client should consider retaining its own counsel." MDPs were also defined by the Commission to include captive law firms. A captive law firm might not be subject to the Commission's proposed licensing or undertaking requirements, which only apply to firms that are not controlled by lawyers, but it could very well be subject to imputed disqualification based on conflicts produced not only by its clients, but the clients of its accounting firm.

4) Australian Proposals

a) New South Wales

In 1992, the Law Society of New South Wales requested that the State's Attorney General amend the Legal Profession Act, 1987 to allow the formation of MDPs. The Legal Profession Reform Act, 1993 was subsequently enacted to allow MDPs subject to certain conditions, such as the requirement that the partnership be controlled by licensed lawyers and that at least 51% of the firm's revenues accrue to licensed lawyers. The amendments allow a partner who is not a lawyer to conduct "the business of the partnership that is the business of a barrister or solicitor" and to receive fees for such services, and to advertise him- or herself as a member of a partnership conducting the business of a barrister or solicitor. Rules concerning trust accounts, receivers and managers

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166 Ibid. at 5.
167 Ibid.
168 MDPs were defined in appendix A to include "an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement."
169 Recently, the 51% rule has come under scrutiny as possibly violating fair trading and competition rules: "Australia MDP Battle Brews" Gazette (12 June 1996) 12.
apply as if each partner who is not a solicitor is one. The Solicitor’s Manual was amended to require that the lawyers in the MDP “maintain effective control of the legal practice and the delivery of legal services and have majority voting rights (or in the case of a sole partnership, at least equal voting rights) in the affairs of the partnership”. In addition, not less than 51% of the gross income earned by the MDP must be earned by lawyers. Lawyers are instructed to avoid “any conflict between the interest of any client to whom legal services are delivered, and any other interest which a member of the partnership may be required to serve.” The MDP must deliver legal services in accordance with relevant rules imposed on lawyers.\(^{170}\) Unlike the D.C. rules that restrict MDPs to the provision of legal services, other services can be offered under the N.S.W. rules provided that they do not conflict with the rules imposed on lawyers and avoid conflicts of interests between clients for legal services and any member of a partnership.\(^{171}\)

There are, however, apparently only a small number of MDPs in N.S.W. and the Big 5 have opted to create separate captive law firms.\(^{172}\) This may be an indication of the limits of regulatory approaches that require lawyers to control MDPs, as well as another reminder that any regulatory regime will be subject to adaptive behaviour in the form of exit and non-entry by actors who form multidisciplinary alliances short of partnerships.

b) **South Australia**

A South Australian proposal differed somewhat from N.S.W. by not requiring lawyers to be in a majority in the entire firm. Nevertheless, it still embraced the control notion by proposing that lawyers would maintain effective control of the delivery of legal services and trust accounts and “shall exclude non-legal-partners of the practice from interference with a file conducted by the legal practitioner and from access to any information in such file except with the express consent of the client.”\(^{173}\) These requirements are designed to protect the independence of legal advice and solicitor-client privilege, but might be difficult to implement in a true MDP.

c) **Law Council of Australia**

The Law Council of Australia has issued a policy statement on MDPs. It rejects a firm licensure approach and concludes that “the regulation of MDPs

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\(^{170}\) See Rule 40 of the *New South Wales Solicitors’ Manual*.

\(^{171}\) *Ibid.* s.40.1.3.

\(^{172}\) See letter from K. White, Senior Legal Officer, Law Society of New South Wales to P. Freeman, Secretary, Law Society of Alberta, July 18, 1996. See also “Australia MDP Battle Brews” *Gazette* (12 June 1996) 12. The Futures Task Forces, reports at p. 24 that as of July 1998, 11 MDPs were registered in N.S.W., *supra*.

\(^{173}\) C. Westley et al., Memorandum to Council (10 July 1995).
should focus on compliance by individual lawyers with their ethical standards and professional duties rather than on the regulation of the business entity." The issue of whether MDPs can be adequately regulated solely through the regulation of individual lawyers is a crucial one that will be more thoroughly discussed below. At this juncture, we would note that mischiefs such as the loss of privilege and threats to the independence of legal advice in MDPs may frequently be the result of the organizational structure of MDPs as much, if not more, than the demonstrable ethical failings of individual lawyers within the MDP.

The Law Council of Australia recommended a fairly liberal approach to MDPs on the basis that the "regulation of business structures should no longer be regarded as critical or necessary to the maintenance of professional standards." Like the Kutak Commission, the Law Council's admonition that "no commercial or other dealing relating to the sharing of profits shall diminish in any respect the ethical and professional responsibilities of a lawyer" is more inspirational than operational. It did, however, recommend that no MDP should in any way require its lawyers to act in breach of the obligations placed on individual lawyers.

5) International Bar Association

In 1998, the International Bar Association identified principles that should govern each jurisdiction's decision whether to allow MDPs. The first principle was transparency, which would require disclosure to regulatory authorities and the public of the interests that non-lawyers might have in MDPs, as well as notice to clients of limitations and risks associated with multidisciplinary as opposed to strictly legal services. A second requirement would be that the entire MDP submit to the regulatory and disciplinary authority of the legal profession. A third principle was to avoid conflict of interests including preventing the combination of audit services with legal or consulting services. Other principles were the development of precise rules restricting access to confidential information and the establishment of maximum degrees of ownership and control that non-lawyers could have in an MDP.

V. Regulatory Options

In this section, we will outline a broad range of options for legal regulators. We will assess the likely ability of each option to address the governance,
independence of legal advice and confidentiality problems identified in part three of this paper. We will also relate the options to existing developments and proposals examined in parts two and four of the paper.

1) Getting Tough and Enforcing Existing Rules

This is an option which would not only maintain existing rules restricting unauthorized practice of law, fee splitting, outside interests, and advertising, but would enforce them more rigorously. Quite a few lawyers interviewed by the authors expressed the view that professionals in accounting and actuarial firms are actually practising law and expressed some concern that law societies were not enforcing the existing rules. The A.B.A.’s Commission on Multidisciplinary Commission expressed similar concerns and a desire to regulate lawyers who may be inclined to say that they do not practice law within existing multidisciplinary practices. Nevertheless, legal regulators have generally taken a hands-off approach to these issues. Professor Andrews concluded in 1989 that much unauthorized practice of law occurs in accounting firms, but could find no example of a prosecution in that context. The Commission on Multidisciplinary Practice subsequently reported two unauthorized practice investigations against Big 5 accounting firms, one which was dismissed after a very expensive 11 month investigation and another that is still pending. One regulatory option would be to enforce the current rules more strictly so that multidisciplinary practices would face more obstacles than they presently face given the lax enforcement policy.

One problem with this “get tough” approach is the limited number of regulatory options open to law societies. Prosecutions for unauthorized practice are a blunt and potentially costly instrument. More fundamentally, it is not clear whether strict enforcement of the existing rules would actually reduce the mischiefs that they target. From a political perspective, prosecutions against

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178 Andrews argues that “lawyers who interpret the tax laws and decisions for individual clients of the accounting firms are engaged in the ‘practice of law’ by any accepted definition of the term.” He could find no evidence of enforcement in the United States in the last twenty years and relates this to the ability of accountants in the United States to practice federal tax law; the dominant position of accountants in providing tax advice and the lack of “any evidence that lawyers working in such an environment have had their professional judgment or independence compromised by their non-lawyer employers and partners. Nor does one find any complaints that client confidences are being disclosed without consent. If such complaints were forthcoming, one can be sure that some restrictive action would have been taken by the bar.” Supra note 21 at 634-36. He concludes that the absence of enforcement supports his conclusion that these types of multidisciplinary practices should not be restricted. Professor Cramton has also concluded that “the organized bar largely acquiesces in activities carried on by powerful occupational groups such as accountants in providing tax advice or realtors in real estate transactions.” Cramton, supra note 6 at 569.

179 Report, supra note 27 Appendix C at 10.
unauthorized practice are vulnerable to criticism as coercive attempts by lawyers at economic protectionism.\textsuperscript{180}

Nevertheless, unauthorized practice of law prosecutions might be possible against some non-lawyers in multidisciplinary practices either on the basis that they practised law\textsuperscript{181} or that they represented themselves as lawyers. Although most prosecutions are taken against individuals, they could also be pursued against companies.\textsuperscript{182} Given the economic stakes in some multidisciplinary practices, however, the current maximum fines in many jurisdictions might be insufficient to deter any unauthorized practice.

Law societies can also regulate lawyers within multidisciplinary firms. These lawyers may be "soft targets" who could then play an important role within the organization in enforcing the rule against unauthorized practice. Much recent literature on corporate wrongdoing suggests that regulators are more likely to be effective when they attempt to induce compliance within organizations and that there are a multiplicity of actors within organizations who can help ensure compliance.\textsuperscript{183} Although law societies only have jurisdiction over lawyers and lawyers may be a minority within multidisciplinary practices, the ability to persuade lawyers to be become agents of compliance within organizations may also serve to strengthen the effectiveness of enforcement. As discussed above, Rule 17 provides that lawyers should assist in preventing the unauthorized practice of law. The Commission on Multidisciplinary Practice has strengthened the possibility of disciplinary proceedings against lawyers by recommending that following the instructions of non-lawyer supervisors will not be an excuse for professional misconduct by lawyers.\textsuperscript{184}

Under any approach, however, prosecutions are unlikely to be effective where the contours of the prohibition against unauthorized practice are unclear. There may be over-deterrence. If the rules are vague, risk-averse professionals may adopt an overly cautious approach that fails to capture fully the gains that could accrue from more aggressive, yet legal, behaviour. There could also be

\begin{itemize}
\item \textsuperscript{180} The Ianni Task Force on Paralegals found that only 13\% of unauthorized practice files opened by the Law Society between 1986 and 1989 originated from consumer complaints, \textit{supra} note 11. An American study revealed that only 2\% of unauthorized practice prosecutions arose from the complaints of injured consumers and that most were undertaken by representatives of lawyers who might have an economic interest in restricting the activities of non-lawyers. D. Rhode, \textit{supra} note 8. See also B. Christensen, \textit{supra} note 8.
\item \textsuperscript{181} Expert evidence concerning whether an impugned matter was the practice of law could be adduced by both sides: \textit{R. v. Manuel} (1982), 136 D.L.R. (3d) 302 (Ont. C.A.) A reasonable doubt about whether the matter was within the practice of law would lead to an acquittal.
\item \textsuperscript{182} \textit{R. v. Lawrie and Pointts Ltd.} (1986), 32 C.C.C. (3d) 549 (Ont. C.A.).
\item \textsuperscript{184} Report, \textit{supra} note 27 Appendix A Proposed Rule 5.2(a).
\end{itemize}
under-deterrence. If the rules are vague, adjudicators may be reluctant to find against an accused party, and as a consequence, professionals may be more willing to “push the envelope”. The case law at present provides little guidance concerning when accountants, actuaries and other professionals and consultants might practice law or how multidisciplinary firms might improperly hold themselves out as practising law. Regardless of its enforcement policy, it may be sensible for law societies to articulate their own view of what constitutes and does not constitute unauthorized practice by outlining, for example, what tax related activities constitute the practice of law and what type of advertising would constitute holding out or representing oneself as a lawyer.

Law societies could also adopt a rule that lawyers employed in organizations which offer services to clients should be required to make clear that they are not entering into a solicitor-client relationship with the firm’s clients and that the normal attributes of that relationship, including solicitor-client privilege, mandatory professional liability insurance, rights with respect to the assessment of bills, rules respecting the handling of trust monies and the availability of compensation funds, do not apply. Any factors that may impinge on the lawyer’s independent exercise of judgment in the client’s interests should also clearly be disclosed. Such disclosures could prevent client confusion about whether the lawyer providing services to them in an existing multidisciplinary practice is their lawyer. This approach may well represent current best practice, but it may be valuable to mandate it clearly in the rules of professional conduct. Of all the reform proposals, the Commission on Multidisciplinary Practices goes farthest in regulating lawyers in existing multidisciplinary practice. It suggests that such lawyers may well be practising law and as such be subject to regulation or else they should clearly disclose to the firm’s clients the need for independent legal advice. In our view, there is a pressing need for existing multidisciplinary practices such as the Big 5 accounting firms to make clear the exact nature of the relationship between their clients and their firm’s lawyers.

2) Maintaining the Status Quo: Inertia or De Facto MDPs?

Another regulatory option is to maintain the status quo not only in terms of the ethical rules restricting MDPs, but also to maintain the relatively lax enforcement policy that has given rise to various forms of multidisciplinary practice. As examined above, the current enforcement regime does not preclude multidisciplinary alliances in the form of captive law firms or lawyers working for accounting and other firms, but it does impose additional transaction costs. The rules also deprive the clients of accounting and other multidisciplinary firms of the benefits of a formal solicitor-client relationship with lawyers in the firm’s employ. This option can only be justified to the extent that the existing rules serve valid public interests by curbing mischiefs such as the inability of law societies to govern non-lawyers, threats to the independence of legal
advice, and confidentiality problems created by closer integration of lawyers and non-lawyers. Many of the lawyers interviewed for this project supported this option and saw it as an attempt to maintain the traditional attributes of the solicitor-client relationship in the face of competing business pressures.

A case can be made that captive firms minimize the problems associated with confidentiality and loss of solicitor-client privilege. Robert Brown of Price Waterhouse, for example, has observed that despite a good deal of managerial and administrative integration, captive law firms “usually devote special efforts to preserving client confidentiality - even from the affiliated accounting organization - and in meeting other professional requirements”\(^{185}\). A lawyer in a captive firm may be more sensitive to the danger that solicitor-client privilege will be lost by the exchange of information with affiliated professionals in a separate firm than a lawyer who works in an integrated team under the same management with those other professionals. Similarly, the fact that captive firms generally cannot bear the name of their affiliated accounting firm may also help prevent client confusion about when they enjoy the attributes of a solicitor-client relationship in their dealings with various arms of the larger entity. The actual effects of the separate firm structure on client perceptions and professional behaviour is ultimately an empirical question beyond the scope of this paper. We would note, however, that the promotional material of captive firms, however, tends to emphasize their integration with, not their separation from, the accounting firm.

Captive law firms might also help contain conflict of interest problems. It could be argued that the captive firm structure will allow the separation of legal work from the audit function as required by the International Bar Association’s reform proposal. It remains to be seen, however, whether courts will attribute to a captive law firm or its affiliated firm clients that are represented by the other entity. The Commission on Multidisciplinary Practice recommends a stringent imputation rule that would make all the clients of both captive and affiliated firms the clients of lawyers in a captive firm. This approach would require frequent disclosure and waiver of conflicts by the concentrated clientele of the Big 5. If captive firms are collapsed into one large multidisciplinary firm, the firm might not be able to accept audit and advocacy work from the same client because of such conflicting duties. Captive firms may allow this work to be divided.

The White Paper prepared by American lawyers with experience with affiliations between law firms and organizations of non-lawyers acknowledged the value of keeping law firms separate and distinct. Its authors suggested several functions that could be served by separate organizational structures. For example, “[a] separate entity may clarify and enhance the attorney-client relationship by helping the client to distinguish between the role of the

\(^{185}\) R. Brown, supra note 30 at 30.
consultant and the role of the attorney.” Clients would also know that lawyers’ insurance, compensation and trust funds obligations apply to the work done by the captive firm, but not the affiliated organization.

Captive law firms, however, do not solve all conflict of interest problems. Both the White Paper and the Commission on Multidisciplinary Practice suggested that law firms and affiliated organizations should be treated as one organization for the purpose of determining conflicts. The White Paper suggested that the law firm, because of its experience with conflicts and access to confidential information, should determine when both it and the affiliated organization should decline work because of a conflict. This approach may reflect the fact that the authors of the White Paper generally had experience with multidisciplinary alliances that were dominated by law firms. It is not clear that smaller captive law firms affiliated with larger accounting or actuarial firms would be able to determine conflicts of interest for the larger organization. At a minimum, a captive firm should be required to inform clients of its affiliations. Again, disclosure of the captive firm’s interest in the affiliated organization would allow sophisticated clients such as corporate counsel to evaluate the independence of the captive firm’s legal advice and attempts at steering.

The captive firm approach avoids some of the problems created by the limits of law societies’ disciplinary jurisdiction. Lawyers in captive firms are obviously responsible to their law society for their work. The status quo, however, does not address concerns that lawyers within accounting and actuarial firms actually provide legal advice to the firm’s clients. As discussed under the last option, a disclosure and waiver approach with respect to the absence of a solicitor-client relationship responds to these concerns, but may encourage accounting and actuarial firms to move their legal talents into captive firms which could then enter into a solicitor-client relationship with its clients. As long as clients were aware that the captive firm’s affiliations might affect the independence of its legal advice, this might minimize the risk that consumers would be misled into assuming that lawyers in accounting, pension and other multidisciplinary firms were acting as their lawyers.

Captive firms pose a disadvantage in that the present rules preclude direct sharing of profits and impose transaction costs by not allowing closer or seamless integration between professional service providers. There is also a concern that captive firms are an expensive and indirect means to circumvent the rules. Professor Andrews, for example, has expressed concerns that elaborate schemes to circumvent rules preventing MDPs will favour “the large, powerful urban law firms at the expense of smaller law practices” and provide “a classic

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186 White Paper, supra note 14 at 54 of addendum. The White Paper also seemed to support MDPs that would collapse these separate organizational structures.

187 In part, this would depend on each firm’s judgment about the increased transaction costs of separate firm structure as set off against the benefits of their clients having a formal solicitor-client relationship.
example of a case when official action does not match the declared rules,” thereby weakening the value of the rules. 188 One response to this criticism is that the existing rules may serve legitimate purposes related to the preservation of solicitor-client privilege and other attributes of the solicitor-client relationship.

On the other hand, it could be argued that current enforcement of existing rules effectively prohibiting MDPs, but allowing captive firms and other multidisciplinary practice, may not reduce many of the mischiefs examined in part four of this paper. The unauthorized practice of law that Andrews and others claims presently takes place in accounting firms might, in fact, be more effectively reduced by explicitly allowing lawyers to partner with accountants and to provide legal services for the clients of the firm. In this scenario, the lawyer or the accountant would no longer have to pretend that he or she was not the client’s lawyer and make often unheeded warnings that the client should obtain independent legal advice. Lawyers and other professionals might be able to divide more appropriately legal and non-legal work within an MDP. In this vein, the White Paper argued that MDPs might lessen the unauthorized practice of law by allowing the lawyers in the firm to “focus on the legal issues while leaving nonlegal judgments to qualified and trained nonlegal professionals.” 189

It is not clear that the existing rules adequately respond to the concerns examined above about the governance of non-lawyers. At present, law societies can only assert jurisdiction over non-lawyers by an unauthorized practice prosecution, which, as discussed, rarely occur in the multidisciplinary setting. If MDPs were allowed, non-lawyers, as under the D.C. and Ontario rules, might have to agree to abide by the law society’s rules and lawyers or the firm itself could be made responsible for ethical breaches by non-lawyers. Licensing schemes, which will be examined below, could require non-lawyers to carry insurance and pay into funds for a compensation scheme. Recognizing and regulating MDPs opens the door to more creative approaches to ensuring that the actions of non-lawyers do not harm the consumers of legal services.

It has also been suggested that improper steering to other professionals and ancillary businesses and services is more likely to occur when the relationships

188 Andrews, supra note 21 at 627 and 636. See also Meeks, supra note 78 at 1041. Andrews relies upon Lon Fuller’s arguments about the importance of “congruence between official action and declared rule”. L. Fuller, The Morality of the Law (1969) at 81. As discussed in the introduction, Coase takes a different approach to this issue and sees negotiation around the rules as a means of limiting their social cost: Coase, supra note 19.

In response to Andrews’ distributional concerns about smaller law firms not being able to circumvent the rules, it is not clear whether smaller firms necessarily want to develop more formal affiliations with other service providers or if the present rules necessarily preclude such arrangements. Mid size law firms at least establish separate partnership structures for lawyers and patent agents and it is not clear that smaller law firms could not form closer relationships with other service providers short of formal partnership.

189 White Paper, supra note 14 at 75.
between lawyers and these other service providers are informal and not transparent. In this sense, MDPs might actually decrease improper steering and other threats to the independence of legal advice by promoting disclosure of the possibility that the independence of their lawyer's advice might be affected by the lawyer's financial interests in the larger partnership or affiliated business. Fee splitting and hidden commissions might also be less of a problem if the client were fully aware of the formal relationship between the lawyer and other service providers. Like other forms of disclosure and waiver, much would depend on the sophistication of the clients.

In summary, the separate firm structure may allow law societies to regulate lawyers more easily and prevent consumer confusion about whether the attributes of the solicitor-client relationship apply. Captive firms may be in a better position than MDPs to preserve solicitor-client privilege. One weakness of captive firms is that it is unclear whether they will be bound by conflicts produced by their affiliated firms. The independence of their legal advice may also be adversely affected by the affiliations, but this can perhaps be dealt with by full disclosure. At the same time, the status quo as represented by lawyers working in accounting, actuarial and other multidisciplinary firms may create consumer confusion if the lawyers within those organizations do not make clear to their firm's clients that they do not enjoy the attributes of the solicitor-client relationship. The above strengths and weaknesses of the status quo are relevant not only as a regulatory option, but as a possible exit or avoidance strategy should other regulatory regimes be adopted, but be perceived by the relevant actors as too restrictive, unrealistic or cumbersome.

3) Lawyers in Control of MDPs: Safety in Numbers?

So far the most popular alternative to outright prohibition of MDPs has been to require lawyers to control MDPs. As examined above, the New South Wales rules require lawyers to be in control by forming a majority of the partnership and receiving the majority of billings. The District of Columbia rules contemplate lawyers being in control by restricting MDPs to the provision of legal services and only allowing non-lawyers who contribute to these services to have a financial or managerial interest in the firm. The Ontario rules both limit MDPs to the provision of legal services and require lawyers to be in control. Control is defined not to refer to a numerical majority but the ability of lawyers unilaterally to ensure that their non-lawyer partners comply with lawyers' rules. The legal regulators that have allowed MDPs so far have required in various ways that lawyers control the new entity.

An "in control" approach has not only been popular with lawyers. In 1995, the Canadian Chartered Accountants' Interprovincial Task Force argued that chartered accountants must be in control of public practice firms in order

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190 Andrews, supra note 21.
to ensure that ethical and professional standards\textsuperscript{191} are observed; that the public's confidence in and the reputation of the accountancy profession is maintained and because "the chartered accountancy profession cannot realistically claim jurisdiction over professional activities within a public practice firm that its own members are not controlling."\textsuperscript{192} David Ward, Q.C. has matched this argument by suggesting that lawyers should control any MDP: "In the absence of such a restriction, lawyers who are employed by or partners of a multidisciplinary practice firm will be in the position of being controlled in their work in offering legal services to the public by non-lawyers and the management of the firm may be in the hands of non-lawyers making it difficult, if not impossible, for the Law Society to govern the activities of the firm in the public interest, and very likely making it equally difficult for the lawyers to meet their duties to the Court, to society and to the Law Society."\textsuperscript{193}

Competing demands for control place professions on a collision course and are often viewed through the lens of economic competition between the professions, but it may be a mistake to characterize control requirements simply as crude attempts to ensure the economic dominance of particular professions. Lawyers and accountants often believe in good faith that without control, the fundamental attributes and governance of their professions are threatened. Some lawyers are genuinely concerned that the independence of legal advice and ethical obligations of lawyers can only be preserved if lawyers control MDPs while some accountants believe that the objectivity and reliance functions of their profession can only be preserved through control mechanisms. Even the Commission on Multidisciplinary Practice, which did not demand that lawyers control MDPs, decided to subject MDPs not controlled by lawyers to a firm licensing and undertaking regime that is not imposed on MDPs controlled by lawyers.

Thus, arguments that control is necessary for proper governance, as opposed to economic protectionism, deserve scrutiny. Regardless whether lawyers control an MDP, they will remain subject to law societies' regulation of their personal behaviour. Problems might emerge, however, when the activities of non-lawyers adversely affect the consumers of legal services.

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\textsuperscript{191} This includes the somewhat intangible notion of professional or organizational culture as demonstrated by the Task Force's argument that "the profession must retain the power to initiate and direct professional activities - such as research and development, continuing professional education, and cultivation of rewarding careers - that are essential to its long term health." CICA Task Force, \textit{supra} note 18 at 11.

In his 1979 study, Professor John Quinn argued that at least 10\% of the partners in multidisciplinary firms should represent any function that the firm performed. This would ensure "that at least some of the owners will share the professional values and goals which arguably provides some protection for consumers." while "any significantly greater minimum ownership requirement (e.g. actual majority control) would create substantial impediments to multi-disciplinary innovation." Quinn, \textit{supra} note 12 at 73.

\textsuperscript{192} ICA Task Force, \textit{supra} note 18 at 11.

\textsuperscript{193} D.A. Ward, Q.C. Memorandum to Futures Task Force Working Group of the Law Society of Upper Canada on Multi-Disciplinary Partnerships (12 November 1997) at 7.
Although it may create that illusion, a requirement that lawyers be in control does not make the limits of the law society’s jurisdiction go away. As discussed above, there are a range of strategies, such as mandatory contractual commitments to abide by lawyers’ rules, or vicarious liability, or firm licensure, that allow legal regulators indirectly to govern non-lawyers. Putting forward the strongest case for control requirements, internal firm discipline and vicarious liability may work best in cases where lawyers predominate. Disciplinary committees may be reluctant to discipline lawyers if they did not know about the misconduct of their non-lawyer partner or associate or if lawyers were in the minority.\textsuperscript{194} A requirement that lawyers be in control might marginally increase the chance that lawyers will know about this misconduct and might leave committees less reluctant to discipline, but it is hardly a guarantee. Even with lawyers in control, where misconduct originates with non-lawyers, there remain problems with the disciplinary reach of law societies.

Control requirements may be motivated by a sense that only control can ensure that a particular profession’s ethical obligations will prevail. This assumption does not address problems created by conflicting ethical duties. For example, the problems created by the conflict between a lawyer’s duty to keep confidences and an auditor’s duty to produce an objective audit are not solved by control requirements. Ethical lawyers and accountants should maintain their professional standards whether or not they form part of the control group. The D.C. rules and the Québec reform proposals perhaps respond to these concerns by forcing non-lawyers to agree to abide by all the ethical rules imposed on lawyers. Nevertheless, the rules cannot be directly enforced by legal regulators and they may simply transfer ethical conflicts so that a non-lawyer who abides by contractually imposed rules may be in conflict with his or her own professional standards, and a non-lawyer who follows his or her own professional standards may be in breach of the employment contract.

Control requirements are not responsive to many other ethical and practical problems associated with MDPs. Control might be thought to respond to concerns about the independence of legal advice, but it is no guarantee. Lawyers in control of a firm would still have an incentive to steer clients to their non-lawyer partners or affiliated organization. In a world concerned with marginal profits, independence can be adversely affected by lawyers’ financial interests in the success of non-lawyer partners even though non-lawyers constitute only a minority of the firm. A firm controlled by lawyers could be expected to be sensitive to conflicts of interest, but again might face resistance based on the standards of other professions. Control also does not guarantee that solicitor-client privilege will not be lost when a non-lawyer, who happens to be a minority in the firm, applies his or her professional skills to information provided by a client.

\textsuperscript{194}Note, however, that the Commission on Multidisciplinary Practice recommended that following the instructions of a non-lawyer supervisor be precluded as a defence to a charge of professional misconduct and that this rule would apply regardless of whether an MDP was controlled by lawyers or not.
Despite being a centrepiece of the reforms actually implemented in New South Wales and Ontario, control requirements do not solve most of the problems presented by law societies’ inability to govern non-lawyers, threats to the independence of legal advice or confidentiality presented in MDPs. At best, control requirements can ensure some sensitivity to issues such as privilege and conflict of interest and make it somewhat easier to impose lawyers’ rules on issues such as insurance and trust accounts. Nevertheless, they will not solve problems concerning loss of privilege or conflicting ethical duties. In our view, requirements that lawyers control MDPs are underinclusive in the sense that they do not address the most pressing ethical problems such as the loss of privilege. Moreover, control is overinclusive because it limits MDPs either directly as in D.C. and Ontario or indirectly as in N.S.W to the provision of legal services, whereas both corporate and individual consumers may want to obtain non-legal services from MDPs. Control does not buy ethical security and it comes with a high economic price. We predict that multidisciplinary alliances short of partnerships will prevail in those jurisdictions that only allow MDPs if they are controlled by lawyers.

4) Overarching Rules: Racing to the Top, Or Over It?

A more tailored alternative to control requirements would be to articulate before the formation of an MDP which profession’s rules would prevail in various contexts. As will be examined below, this could be done as a condition of licensing the firm or as a precondition for forming all MDPs. For example, British Columbia recommended that lawyers’ ancillary businesses carry liability insurance equal to the minimum required for lawyers. The Barreau du Québec also suggested that non-lawyers in an MDP contractually agree to be bound by many ethical rules imposed on lawyers. The advantages of the overarching rule approach would be that each profession would be encouraged to articulate particular ethical rules that it believed should prevail rather than competing in a winner-take-all fashion for control.

Overarching rules would exert some control over non-lawyers and thus would provide some of the ethical assurances of the New South Wales approach, without some of the economic disadvantages of requiring lawyers to be in control of the firm. Even though lawyers might articulate many overarching rules, the result would still be more tailored than the D.C. or Ontario approach which requires all members of an MDP to agree to abide by all the rules governing lawyers and there would be no need to restrict the MDP to the provision of legal services. In addition, other professions could articulate overarching rules that would bind lawyers. For examples, accountants’ rules prohibiting investment in audit clients might prevail and lawyers who wished to join an MDP might have to resign directorships and relinquish investments. This would be an example of racing to the top by selecting the most stringent ethical rule and the one most conducive to consumer protection from among the professions which are involved in the MDP. Of course, there exists the risk of
racing "over the top": there may be a concern that a regime consisting of the most stringent rules from each profession may provide more consumer protection than the consumer herself would want.

Another area that would be amenable to an overarching rule or double majority approach is conflicts of interest. As suggested in the White Paper submitted to the A.B.A., lawyers have the most stringent rules concerning conflicts of interests in large part because of their concerns about preserving confidentiality. Confidentiality concerns also suggest that in some contentious matters, a law firm caught by a conflict of interest would have to decline to act for both sides. In this context, lawyers' rules might prevail by, for example, giving lawyers, regardless whether they constitute a majority, a veto on declining employment because of conflicts. Lawyers' rules against referral fees, direct solicitation and association with disbarred lawyers may all be examples of stricter standards which could prevail under an overarching rules approach. On the other hand, accountants' more stringent rules concerning investment and directorships may apply through an overarching rules approach. Should the costs of compliance with overarching ethical standards be too high (if there is indeed a race "over the top"), then an MDP would not be formed.

Overarching rules themselves do not solve the problems of legal regulators not having jurisdiction over non-lawyers, who indeed may not be subject to discipline by any regulatory authority. One possibility is to have participants in the firm agree to be bound contractually by the highest standards produced by the overarching rules. This process could encourage the firm itself to pursue internal measures to ensure compliance, which may in turn bring about compliance through education, audit and rewards, as well as discipline. The Québec reform proposal contemplates that non-lawyers would contractually agree to submit to the regulatory and disciplinary authority of the legal regulator.

Overarching rules provide a process by which some, but not all, conflicts between the ethical rules governing professions could be resolved. For example, limiting lawyers' investment in audit clients is a relatively simple proposition because the accountants' rules in this regard are more stringent. Reconciling an auditor's duty to render an objective audit and a lawyer's duty to keep confidences, however, is a much more difficult problem. In this case, the rules conflict so that compliance with one results in violation of the other. Articulation by each profession of its fundamental overarching rules may, however, put the firm in a position where it will decide that some kinds of work should be declined because of foreseeable ethical conflicts. An MDP involving lawyers and accountants might decide, for example, that it would not accept audit and advocacy work for the same client.

Overarching rules also do not solve all the problems identified above with respect to the independence of legal advice and confidentiality. Lawyers in an MDP may still have a financial interest in directing their clients to their partners. Similarly, solicitor-client privilege might still be lost when lawyers provide information received from their clients to other professionals. It is possible,
however, that standards of disclosure and waiver adopted from lawyers’ ethical rules could prevail. It is to these that we now turn.

5) Disclosure and Waiver: The Informed Client?

A disclosure and waiver approach requires that clients of an MDP be informed that many of the attributes of a solicitor-client relationship do not exist and then agree to proceed. This is an attractive and simple regulatory approach because the ethical rules governing lawyers already contemplate that clients can make informed waivers of many of the rules and privileges that could be jeopardized in an MDP. For example, clients can and frequently do waive conflicts of interest. They can also be informed that a lawyer’s outside interests might affect his or her advice.\(^{195}\) Rules restricting fee splitting can be waived in the case of hidden fees. Perhaps most importantly, clients can authorize lawyers to disclose information to others and they can waive solicitor and client privilege. The 1979 Report of the Professional Organizations Committee’s Research Directorate contemplated that clients might “be willing to forgo some of the protection provided by solicitor-client privilege in exchange for the opportunity to purchase services from a mixed professional firm, and this option should be afforded to them.”\(^{196}\)

Disclosure and waiver approaches would allow the consumer to decide on a case by case basis whether the advantages of one stop shopping in an MDP outweigh the advantages of a traditional solicitor-client relationship. The disclosure and waiver approach is also easy to administer and enforce compared to requiring lawyers to be in control, imposing overarching rules, or requiring the firm to be licensed. It does, however, assume that the circumstances in which attributes of the solicitor-client relationship would be at risk, such as privilege, can be articulated in advance. Moreover, disclosure and waiver assumes clients are sophisticated enough to determine their own best interests. Presumably this would not be a problem in the Big 5 context in which clients are corporations with their own counsel.\(^{197}\) At the same time, however, an MDP could also be used by banks, real estate companies, super-markets, and chain stores who provide services to clients with much less familiarity with legal services.

The Law Society of Alberta has proposed disclosure and waiver as the main approach to regulating lawyers who have ancillary businesses. Clients should be informed of the lawyer’s interests in the business as well as the unavailability

\(^{195}\) Normalizing lawyers’ relationships with other services providers may itself serve as a form of disclosure. Professor Andrews has argued that “the client who is aware of the lawyer or non-lawyer’s business connections with other professionals should be in a better position to resist inappropriate solicitation and conflicts than one who is not”: Andrews, supra note 21 at 614.

\(^{196}\) Trebilcock et al., supra note 9 at 374.

\(^{197}\) At the same time, however, some lawyers interviewed by the authors suggested that even sophisticated corporate clients might not fully understand the implications of waiving solicitor-client privilege in the MDP context.
of confidentiality, privilege, and insurance in their dealings with the business. The Alberta committee suggests that "detailed restriction or regulation of ancillary business activities would be philosophically undesirable as well as impractical and perhaps unenforceable."\(^{198}\) The White Paper submitted to the ABA also relied quite heavily on the idea of full disclosure and waiver as a solution to possible problems concerning conflict of interest and solicitor and client privilege.\(^{199}\) They suggested that "clients who require the services of a multidisciplinary team of professionals are frequently large corporations, non-profit institutions, or governmental entities" who would be well informed and often guided by in-house counsel.\(^{200}\) At the same time, the interim report of the Canadian Bar Association characterized waiver as a "laissez faire" approach\(^{201}\) and Law Society of Upper Canada's Task Force went so far as to conclude that "waiver is a totally impractical device with which to confront these problems." Indeed, a solicitor offering a waiver to a client in order to facilitate the provision of service might well be criticized on professional grounds.\(^{202}\) In our view, this latter criticism is excessively harsh. It would not be applied to lawyers who rather routinely seek and obtain client waivers to conflicts of interest. It also disregards the fact that the concept of waiver is embedded in both professional rules of conduct and the law.\(^{203}\)

The Research Directorate of the Professional Organization Committee contemplated a partial waiver of solicitor-client privilege to the extent that disclosures were "required by the legal or ethical obligations of the non-lawyer professionals involved in the engagement."\(^{204}\) A waiver worded in this way might, however, not make clear to clients exactly when they were waiving the privilege. In the somewhat analogous context of waiver of the constitutional right to counsel, the Supreme Court has insisted that a waiver would not be valid unless the waiving party was given full information about the right and was fully aware of the consequences of waiving the right.\(^{205}\) It might not always be possible for a client to provide a fully informed waiver of solicitor-client privilege. There is some support, however, for the idea that clients can limit their waivers of solicitor-client privilege to the extent of legal obligations.\(^{206}\) Disclosure and waiver is an attractive and simple regulatory device, but one

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\(^{199}\) White Paper, supra note 14 at 5-8 of transmitting letter, at 45-6 of addendum.

\(^{200}\) Ibid. at 45-46 of addendum.

\(^{201}\) Interim Report supra note 149 at 4. The final report, supra note 150 at 34, however, contemplates that lawyers in an MDP will "advise their clients specifically of the potential that the privilege may be lost."

\(^{202}\) Futures Task Force, supra at 44 para 114.

\(^{203}\) The right to counsel can be waived in constitutional law and solicitor-client privilege can be waived by positions taken in litigation: R. v. Whittle (1994), 92 C.C.C.(3d) 11 (S.C.C.); R. v. Shirose, supra note 96.

\(^{204}\) Trebilcock et al., supra note 9 at 374.


\(^{206}\) Interprovincial Pipeline v. The Queen, supra note 112.
that relies upon the ability of those within the firm clearly to anticipate what attributes of the solicitor-client relationship are in jeopardy and the ability of clients to make informed choices about whether they will waive those attributes.

Disclosure and waiver does not solve all problems with respect to the governance of non-lawyers. Rights and benefits that are intended solely for the benefit of the individual can be waived, but this does not address those rights and benefits that are intended to benefit the public. Thus it is possible that individual clients could be informed and agree to proceed knowing that they will not have the benefits of insurance, compensation and assessment. At the same time, individual clients should not be able to waive restrictions on advertising and solicitation if those restrictions are designed to protect the public interest as well as the interests of individual clients.\(^\text{207}\) The waiver approach does not solve the problems created by the inability of legal regulators to enforce rules against non-lawyers when the rules are intended to protect the public interest.

The ability of disclosure and waiver to respond to problems affecting the independence of legal advice may vary with the context and the sophistication of the client. Corporate counsel should be in a good position to decide what effect, if any, an MDP may have on the independence of legal advice and steering attempts. Less sophisticated clients, perhaps those who rarely require legal assistance and therefore do not invest in learning about the attributes of their relationship with lawyers, may have more difficulty understanding how their lawyer's financial interests might affect the independence of his or her advice. An individual preparing a will, closing a real estate transaction closed or receiving financial and tax advice might be understandably confused that the person acting as his or her lawyer is also employed by a larger organization, such as a bank, which has its own interests. It is difficult to draw hard and fast rules concerning when it will be safe to rely on disclosure and waiver and when consumer protection concerns remain despite disclosure and waiver.\(^\text{208}\)

In summary, disclosure and waiver can play an important role in informing consumers that not all the attributes of the solicitor-client relationship can be protected in an MDP. Clients should, at a minimum, be in a position to make informed choices about what, if anything, will be lost by one stop shopping in an MDP. The utility of disclosure and waiver as a means of consumer protection depends on the sophistication of clients who will receive the information and the ability of the firm to anticipate and define exactly what attributes of the traditional solicitor-client relationship will be in jeopardy. Even if clients can make an informed choice, disclosure and waiver do not solve problems related to rules that protect a broader public interest as opposed to individual clients.

\(^\text{207}\) While we have some questions about the public benefits of restrictions on advertising, we reiterate that we take the concerns evinced by the present rules as given for the purposes of this paper.

\(^\text{208}\) One virtue of the licensing approach we discuss below is that it allows regulators to decide in a contextual way what reliance should be placed on disclosure and waiver.
6) Licensing: Regulating Lawyers or Regulating Firms?

Licensing is a flexible form of regulation that can draw on many of the above techniques. For example, some overarching rules could be imposed as a condition of licensing, and some standard disclosure and waivers approved. Insurance and trust fund standards could be required. Non-lawyers in the firm could be required to abide by some or all of the ethical requirements imposed on lawyers. Law societies could continue to prohibit MDPs but make exceptions and license, on a firm by firm basis, MDPs with other regulated professionals and perhaps with other service providers. Licensing may provide a valuable half-way house between restricting MDPs to licensed professionals\(^{209}\) and allowing lawyers to partner with all non-lawyers without prior regulatory approval.\(^{210}\) Law societies are used to licensing individual lawyers, but the concept of licensing firms is relatively novel. In our view, the complex ethical problems and risks created by MDPs involving non-lawyers not directly regulated by law societies, as well as the organizational determinants of much behaviour, suggest that law societies should seriously consider licensing MDPs as firms while not relinquishing their jurisdiction to regulate lawyers within the MDPs as individuals.

A licensure requirement was an important aspect of the otherwise permissive reforms recommended in 1979 by the Professional Organizations Committee’s Research Directorate. It was also central to the recommendations of the A.B.A.’s Multidisciplinary Practice Commission which recommended that MDPs not controlled by lawyers make annual undertakings to legal regulators that they would respect and protect their lawyers’ independent exercise of professional judgment; establish procedures to segregate client funds; ensure that members of the MDP involved in the delivery of legal services abide by lawyers’ rules of professional conduct; respect the role of lawyers in society including pro bono obligations; and submit and pay for administrative audits by legal regulators. The Québec bar also proposed a quasi-licensing approach based on mandatory contracts or agreements within the MDP to adhere to lawyers’ rules and the law society’s jurisdiction. The Ontario scheme for MDPs, in addition to requirements that lawyers control the MDP and that the MDP only provide legal services, also imposes an extensive licensing regime which requires MDPs to apply to the law society and satisfy the law society that non-lawyers in the firm are qualified and of good character. The Law Council of Australia and the Canadian Bar Association, however, rejected firm licensure and argued that law societies should only regulate MDPs by regulating individual lawyers working within them.

The greatest virtue of the licensing approach is that it allows regulators a considerable degree of flexibility in imposing conditions on MDPs. Applicants for licensing could be encouraged to play a part in devising their own regulatory regime by, for example, articulating which rules would have overarching status

\(^{209}\) This option will be examined below.

\(^{210}\) This option will also be examined below.
among all its members and how the members of the firm would be encouraged to comply with such rules and disciplined for their breach. For example, a Big 5 accounting firm seeking approval from accountancy and legal regulators could draft a proposal in which all members of the new partnership would agree to abide by accountants’ rules concerning investment in audit clients and lawyers’ rules concerning conflicts of interest. Licensing is best seen as a reciprocal process between the licensee and the licensor and the first step of the licensing process would require a prospective firm to reflect about possible conflicts and to engage in self-policing. This process will draw on the expertise of the members of the proposed firm. It may well produce a greater likelihood of compliance with the eventual terms of the license than the imposition of detailed rules or the often distant threat of discipline or civil liability.

A licensing approach could address in a multi-faceted way, the problems of regulating non-lawyers. As required in Ontario and D.C., all within the firm could agree to abide by lawyers’ rules. In addition, the firm itself could clearly accept responsibility for the behaviour of non-lawyers. Licenses could be denied if the firm employed disbarred lawyers or those with a past history of unethical behaviour and fraud. The self-regulation of the legal profession could be protected by requiring that law societies approve and continue to license an MDP regardless of whether lawyers controlled the firm. An MDP without a licence would be vulnerable to prosecutions for unauthorized practice and other legal or ethical violations, while licensing would give the firm a defence against such claims. As Professor Quinn has observed: “the firm licensure approach should provide the professional bodies with effective regulatory control; the threat of license revocation would be a strong deterrent to misconduct by non-professionals who might not otherwise be subject to discipline by regulatory agencies. Licensing allows flexible yet meaningful regulation.

Client interests might be protected by a licensing system that developed standard disclosure and waiver forms on issues such as the availability of insurance and compensation and factors that might affect the independence of legal advice. These waivers could be developed in the first instance by the applicants subject to approval by the regulators. The firm might also agree as a condition of licensing to forgo certain retainers that could result in conflicts of ethical duties.

Licensing would also allow the firm to address what steps it would take to protect confidentiality and solicitor-client privilege and guard against conflicts

211 Another option was presented by the Commission on Multidisciplinary Practice: only impose firm licensing requirements on MDPs not controlled by lawyers. However, many of the functional and organizational concerns of that licensing regime - for example the segregation of client funds held by lawyers, ensuring that non-lawyers follow lawyers rules when assisting in the delivery of legal services - would apply even if the MDP were controlled by lawyers.

212 Quinn, supra note 12 at 91.

213 A more intrusive licensing approach would be to require as in Ontario that non-lawyers maintain insurance coverage as required by the law society. By-law 25 s.19.
of interest. The procedures developed by the firm or required by the regulator would not guarantee that problems would not emerge, but they could guard against such possibility. For example, firms could agree to abide by lawyers’ rules with respect to conflicts of interest and to give lawyers a veto over conflict matters even if the lawyers did not otherwise control the firm. Solicitor-client privilege problems would be more difficult to solve, but could be addressed by the firm agreeing to forgo work in which its professions might have conflicting duties and warning clients of the dangers of the loss of solicitor-client privilege.

A requirement that a prospective MDP seek regulatory approval from at least two or perhaps more regulatory bodies might seem overly bureaucratic. It would impose costs on regulators who would be responsible for approving applications for MDPs and for approving the renewal or cancellation of the license. Regulators who license MDPs would have duties to regulate them and could be exposed to liability claims arising from under-regulation of MDPs. Some of the costs of licensing MDPs could be internalized by requiring the firm to pay for the costs of licensing. More importantly, some of the costs of licensing could be minimized by eschewing overly onerous requirements, such as the requirement under the Ontario regime that the law society certify the qualifications of non-lawyers or the manner in which non-lawyers practice their trade outside the confines of the MDP.214 Regulators would have to develop expertise in multidisciplinary issues and might share information and co-ordinate their consideration of licensing applications with other regulators. Despite its costs as a regulatory technique, the complexity of ethical and practical problems involved with MDPs may invite licensing.

It can be anticipated that some firms would seek a licence to avoid the risk of subsequent prosecutions and to be able to offer its clients the benefits of a direct solicitor-client relationship, while others may find the regulatory burden to be a deterrent. Licensing schemes should be developed so as to allow exit strategies.215 A prospective firm that found licensing to be too cumbersome or bureaucratic could simply decide to forgo licensing (and the certainty of prior regulatory approval) and form whatever multidisciplinary alliances short of

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214 The Ontario by-law requires the law society not only to judge the qualifications of non-lawyers to practice a profession, trade or occupation that supports or supplements the practice of law, but regulates the way non-lawyers practice outside of the MDP context by requiring them to operate from separate premises and to comply with the law society’s conflict of interest guidelines. By-law 25 ss.4(1)(4)(5)(6)(7).

215 A much more ambitious licensing scheme would be one that would also attempt to regulate at least some exit strategies. In this scenario, law societies would license not only MDPs, but also would require additional licences (outside of the usual licences to practice law) for lawyers who practice in accounting firms and in captive firms affiliated with accounting or other multidisciplinary firms. Such an extensive licensing scheme could only be justified on the basis that consumers of legal services were at risk in the readily foreseeable exit positions. As discussed above, captive firms seem to lower some of the dangers to clients while lawyers working in accounting or multidisciplinary firms should take care to make sure that the firms’ clients understand that they do not enjoy the attributes of a solicitor-client relationship. Moreover, regulating exit removes a potentially important discipline on the regulators.
partnership were permissible under the existing rules. We predict that this will occur under the Ontario regime in part because of some of its more onerous licensing requirements, but also because of requirements that to be approved by the Law Society, non-lawyers agree to unilateral control by lawyers to ensure compliance with lawyers' rules and agree to limit their activities to the support of legal services. Retaining an exit option may play a valuable role in disciplining regulatory bodies who may be inclined to establish a restrictive regime to govern MDPs. If the licensing process in particular becomes too inflexible or burdensome, parties will bypass the regulator and establish an alliance that would not require approval. This could serve as a valuable check on the regulator.

In summary, licensing is a flexible regulatory strategy which could be used to encourage applicants to address what rules should govern MDPs. It allows regulators to select what rules should have overarching status in a particular firm and what issues can be subject to disclosure and waiver. It also allows regulators to authorize lawyers to partner with other service providers on a case by case basis and to address how the behaviour of non-lawyers should be controlled. Licensing may not, however, solve all problems related to solicitor-client privilege. If it becomes overly intrusive, it will result in exit and avoidance strategies such as the formation of unlicensed multidisciplinary alliances short of partnerships.

7) Open Partnerships with Other Professionals

One version of an open permissive scheme would allow lawyers to partner with other professionals without prior licensing approval or requirements that lawyers control the partnership. Various rules concerning delegation, outside interests, fee splitting with non-lawyers, and advertising would have to be changed to allow MDPs, as might the statutory prohibition against unauthorized practice. Lawyers within the MDP would still be responsible to the law society for their own breaches of ethical rules. Firms could be restricted to those that actually provide professional services, but would not have to be limited to the provision of legal services. In addition, a list of approved self-regulating professions similar to that compiled by the British Department of Enterprise could be compiled. Unlike under the previous option, partnerships between lawyers and the list of approved professionals could be entered without prior licensing or approval by the various regulators.

Such a permissive scheme would rely on individual lawyers within the firm to decide whether and how to warn clients about possible conflicts of interest or impingements on the independence of legal advice. It would be up to individual firms to decide whether they would adopt overarching rules. Firms would inform clients about possible conflicts of interests. They could attempt to obtain waivers and/or establish institutional separations to satisfy clients and courts that confidential information had not been misused. Lawyers might take a leading role in informing the firm about conflict issues, but there would be no
guarantee that their rules would prevail or that lawyers would have a veto in deciding conflict of interest problems.

Lawyers would have to decide how they would deal with the possible loss of solicitor-client privilege when information provided to them by their clients was conveyed to non-lawyers. Lawyers might obtain specific authorization from clients to share their information with non-lawyers, including, perhaps, a waiver by the client of solicitor-client privilege. Law societies could aid this process by preparing recommended waiver forms, but lawyers in MDPs might resist standard and blanket waivers of solicitor and client privilege and prefer to argue on a case by case basis that they had maintained privilege. Accountants and lawyers interviewed by the authors were candid that solicitor-client privilege is an attractive attribute that lawyers would bring to MDPs and fears have been expressed that lawyers will essentially sell solicitor-client privilege as a new and valuable product. Following law firm practice, lawyers might assume that unless the client instructs otherwise, they could share information with non-lawyers in the firm. Such sharing of information, however, could jeopardize solicitor-client privilege without even sophisticated clients being aware of what was being lost.

Lawyers would remain subject to the disciplinary jurisdiction of law societies for their own ethical breaches and those of the employees that they supervise, but without a licensing scheme there would be fewer ways to discipline the firm if non-lawyers breached ethical rules. Following the D.C. and Ontario regime, lawyers could be made vicariously responsible for breaches by non-lawyers, but this might be difficult to implement especially if the firm was not, as under those regimes, confined to the provision of legal services with non-lawyers being a minority of the firm. Disciplinary panels might be reluctant to discipline lawyers for conduct by non-lawyer partners that the lawyers may not have been aware of and realistically could not supervise or control. An open professional model, however, would contemplate that all partners would be subject to discipline by some professional body. This would ensure general ethical standards and the basic governability of all members of the firm, but it would not solve the dilemmas previously identified when the ethical rules of the various professions differ or conflict.

Insurance and compensation problems might be manageable in a firm composed exclusively of self-regulated professionals. All partners would carry some form of insurance, but the firm itself might provide some services that could fall between the cracks of the various insurance and compensation schemes. For example, legal work performed by lawyers might be insured, but not consulting that resulted in general business advice. Lawyers could be disproportionately targeted for liability suits and compensation claims if their insurance or compensation funds were more generous than those of other professionals or they were held in court to higher standards of care. Lawyers

\[216\] Watson and Au, supra note 95 at 321-22.
who practised in an MDP could eventually be subject to experience rating, but the liability exposure might be difficult to predict at least in the short run.

Issues concerning the independence of legal advice would be left to the decisions made by individual lawyers. Lawyers might inform their clients that their advice and steering could be affected by their financial interests in the MDP. On the other hand, the connections might be obvious to more sophisticated clients.

In summary, an open partnership with other professionals would require the amendment of several rules effectively prohibiting MDPs. Lawyers would still be regulated by law societies, but non-lawyers would not. Much would depend on how individual lawyers within the firm chose to handle issues that might affect the independence of their legal advice or result in a conflict of interest or the possible loss of solicitor-client privilege. Unlike licensing, overarching rules or disclosure and waiver approaches, the focus of regulation would be on discipline after the event and the discipline of individuals and not firms. There might be an understandable reluctance to discipline lawyers for the conduct of non-lawyers that depending on the structure of the firm, they may not supervise and could not control. Such a model would be more inflexible than licensing in another important respect: it may limit the types of service providers with whom lawyers may associate. We turn now to the prospect of a regime that would allow non-professionals to associate formally with lawyers:

8) Open Partnerships

This would be an even more permissive scheme that would not restrict lawyers to partnerships with other self-governed professionals. This scheme could be limited to partnerships with other service providers, but could also allow passive investment in the law firm. Partnership and investment may also be most congruent with incorporation of law firms.

Many of the same considerations would apply as under the last option. However, particular regulatory problems might emerge from the inclusion of non-regulated service providers within the firm. For example, common ethical precepts shared by the professions such as confidentiality and submission to disciplinary authority might be lacking. Moreover, the problem of regulating non-lawyer partners is particularly acute if the non-lawyer service providers are not subject to discipline by any professional body. Control requirements either by lawyers or other professionals may in this context be more compelling than where lawyers associate with other regulated professionals. The control group could then be held responsible for misconduct by non-professional partners without the difficulties that might result if the lawyers or professionals only constituted a small minority of the firm.\footnote{At the same time, control requirements may not be realistic in contexts such as a real estate MDP that would likely be dominated by real estate agents.}
The open model may also lead to non-lawyer, passive investment in law firms, which is now generally prohibited. Arguments have recently been made that law firms should be allowed to “go public” in order to obtain resources for expansion and investment in technology and litigation. The most telling concern about passive investment in law firms is not the “fear of Sears”, but rather its possible effects on the independence of legal advice. Outside managers and owners might attempt to pressure lawyers to cut corners and accept retainers that they might otherwise not accept. Lawyers would, however, remain subject to discipline by law societies, as well as liability suits and the possibility that a license to incorporate could be revoked. It has also been suggested that “to the extent that the law firm’s reputation is tarnished because it provides inadequate services, the stockholders stand to lose.

Like the last option, the open partnership and investment model would rely on after the fact discipline of individuals. There might be a reluctance to hold lawyers responsible for the misconduct of non-lawyers unless the non-professional partner was treated by the regulator as an employee subject to the lawyer’s supervision. Open partnerships would not guarantee the commonality of ethical standards observed by the professions, but they also would not produce a risk of conflicting ethical standards. Investment or management by non-service providers might result in distinct challenges to the independence of legal advice, but lawyers would remain subject to discipline for breaches of their rules of conduct.

VI. Conclusion

The last section outlined a wide range of regulatory options. In this concluding section, we present our thoughts about which options should be pursued and which should be discarded. In evaluating the options, we will account not only for the efficiencies that may result from MDPs, but also for the concerns expressed in the ethical rules presently governing the legal profession. As will be seen, the options are closely interrelated so that some options (e.g., licensing

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218 The question whether law firms should be allowed to incorporate and seek non-lawyer investment is an old one and has attracted significant commentary. See J.R.S. Prichard, “Incorporation by Lawyers” in R. Evans and M. Trebilcock, eds., Lawyers and the Consumer Interest (Toronto: Butterworths, 1982); more recently, see E. Adams and J. Matheson, Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms (1998) 86 Calif. L. Rev. 1. We will not engage in an extensive discussion of such an option. Our focus here is on multidisciplinary practice, rather than passive investment, although, as set out below, we advocate a licensing regime which could account for passive, non-lawyer investment. This is similar to Prichard’s recommendation. He suggests that incorporation of law firms be permitted, but that along with individual licensing of lawyers, the firm should obtain a licence to incorporate which, while issued as a matter of right, would be revocable in the event of misconduct: Prichard, supra at 314-15.

219 Adams and Matheson, supra note 219.

220 See Prichard, supra note 219 at 314-15.

221 Adams and Matheson, supra note 219 at 16.
or overarching rules) become attractive in light of the deficiencies of other options (e.g., lawyers in control or disclosure and waiver). Selecting the optimal regulatory regime is in no small part a process of elimination. Although we divided regulatory approaches in the above section for purposes of analytical clarity, in this section we collapse some of the categories, particularly with respect to licensing, which has the virtue of being able to combine various regulatory approaches.

The analysis is complicated by the fact that intrusive or unrealistic regulatory schemes will result in adaptive behaviour. Legal regulators might require lawyers to be in control of MDPs only to find that few firms take up the option. This has been the experience in New South Wales. Legal regulators might limit MDPs to the provision of legal services only to find that this does not satisfy the market for multidisciplinary services. This has been the experience in the District of Columbia and with the possible exception of intellectual property firms that involve non-lawyers in the provision of legal services, we predict that it will be the experience in Ontario. Law firms can maintain separate organizational structures while aligning with accounting and other firms in multidisciplinary practices short of partnerships. Concerns about adaptive behaviour should not necessarily dictate regulatory responses, but they should also not be ignored by regulators. Indeed, adaptive behaviour may serve a useful role in disciplining attempts at overly intrusive and insufficiently tailored regulations. All regulatory options concerning MDPs must be carefully examined against the backdrop of multidisciplinary practices and alliances that can be formed short of formal partnerships.

Getting tough by more rigorous enforcement of existing rules is in our view not advisable, in part because of the limits of unauthorized practice prosecutions and disciplinary proceedings against lawyers. Such prosecutions are untested in the multidisciplinary context and vulnerable to criticism as a form of economic protectionism. They will be strongly resisted and an unsuccessful prosecution may suggest that nothing is amiss, whereas the accused might only have been given the benefit of a reasonable doubt.

More fundamentally, enforcing the existing rules may not address many of the mischiefs at which the rules are targeted. For example, explicit MDPs may be more transparent to clients than less specified alliances with non-lawyers. The same would be true with respect to rules that prohibit naming a captive law firm after its affiliated firm. Making inter-disciplinary associations more explicit may itself address some concerns about fee splitting and steering and other possible impingements on the independence of legal advice. Moreover, it is arguable that less, not more, unauthorized practice will take place in MDPs because the lawyers in the firm will be able to assume responsibility for the provision of legal services to the firm’s clients.

In some cases, prosecutions or disciplinary proceedings may occur in order to maintain the integrity of the rules, but legal regulators should devote more of their energies to preventing abuses by clarifying and amending the rules. For example, the rules of professional conduct could be amended so that lawyers
within accounting, actuarial and other multidisciplinary firms would be encouraged or required to inform the firms’ clients that the traditional attributes of the solicitor-client relationship, such as solicitor-client privilege, insurance and compensation funds, do not apply in their dealings with lawyers in the firm. Clients of these firms should be informed about the benefits of independent legal advice. Legal regulators should be clearer about what they believe to be the limits of proper practice.

Neither is an open permissive scheme that would allow passive investment in law firms without prior licensing advisable. Passive investment in law firms could detract from the independence of legal advice. Lawyers working for Sears or a bank and offering services to the public might find themselves in a conflict between the business imperative of their employers and their duties to their clients. Some have argued that the pressures faced by lawyers in such positions would not be fundamentally different from those faced by associates in large firms; by lawyers who are the employees of governments or corporations; or by law firms which have a major investment in a case or have a major creditor. It is certainly true that many lawyers have a status closer to an employee than an owner/partner, but there remain important differences between the present situation and passive investment in law firms. Associates may work in a hierarchical corporate structure, but they are responsible to partners who are lawyers subject to the law society’s jurisdiction. Lawyers may be employed by governments and corporations, but they do not generally offer legal services to third parties. In light of these differences, a rule that gives blanket permission for passive investment in law firms would potentially represent a significant departure from the current ethical framework. However, such investment should not be rejected entirely on this basis. Under the flexible licensing approach, such investment would be permitted so long as there were sufficient protection of the independence of legal advice.

We are also uneasy with the prospect of simply allowing lawyers to partner with all non-lawyers who provide services to the public. Consultants, financial advisors and real estate agents, to name a few, are not subject to the same entrance and regulatory control as lawyers, accountants, engineers and architects. As the experience with paralegals demonstrates, governments are often slow to license or regulate new service providers. Law societies should be cautious about filling the gap by assuming jurisdiction over unregulated professionals in MDPs. At the same time, we do not believe that open partnerships with other regulated professions are without problems. The regulated professions may share certain ethical standards and traditions of governance, but they can have conflicting ethical duties such as the duties placed on auditors and health care professionals to disclose what for a lawyer would be confidential information subject to solicitor-client privilege. In addition, lawyers have unique obligations relating to solicitor-client privilege and independent legal advice.

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222 We reiterate that we take the current framework as given.
We are, however, reluctant to contemplate a blanket rule restricting MDPs only to the self-regulating professions. Such a rule would, for example, allow lawyers to partner with accountants and satisfy a perceived demand by large corporations for one type of one stop shopping. It would not respond to the perhaps no less compelling needs of large corporations for jointly provided legal and business advice, nor of other consumers, such as the middle class seeking financial and real estate services, for one stop shopping. In our view, it is difficult to make judgments in the abstract about what services should and should not be provided with legal services. A licensing approach has the virtue of allowing regulators to make contextual decisions about when lawyers should be able to partner with other service providers.

Any regime allowing MDPs must confront the difficulties that law societies may have in governing non-lawyers. Law societies could make lawyers within the firm responsible for the conduct of non-lawyers. There may be a place for these indirect forms of control, but they remain largely untested in the disciplinary context. More importantly, indirectly binding non-lawyers by lawyers’ rules may not in all cases be appropriate; a more nuanced approach is called for. Requiring all non-lawyers within an MDP to agree to abide by lawyers’ rules might have the benefit of encouraging the firms to develop their own internal methods of education, prevention and discipline, but it would not solve all the problems associated with conflicts between ethical duties or the limits of the law society’s disciplinary authority.

Another option would be to require lawyers to control MDPs. Lawyer in control approaches such as those in New South Wales and Ontario are in our view too rigid and likely to produce adaptive responses. A requirement that lawyers be in control may be motivated by laudatory concerns about preserving the ethical standards of the legal profession, including the independence of legal advice and traditions of self-regulation. Although control requirements might mitigate some of these concerns, they do not solve them. Whether they control a firm, it is doubtful that lawyers can supervise non-lawyer partners as if they were employees or act unilaterally to ensure that their non-lawyer partners do not breach lawyers’ rules. Non-lawyers remain outside the direct control of legal regulators. Most importantly, control requirements do not respond to most of the ethical and practical problems identified in this paper. Problems concerning conflicts of interest, solicitation, advertising, steering, insurance and compensation, assessment of bills or the loss of solicitor-client privilege can be produced by non-lawyer partners, even when they constitute a minority of the partners. The lawyer in control approach runs the danger of creating an illusion that lawyers’ ethical standards will prevail and discounts the prospect of ethical conflicts.

Control requirements are not only ineffective in addressing ethical concerns, but they also run the practical risk that few organizations will form MDPs and that access to legal services will not really be expanded by MDPs. Large accounting firms are providing much of the impetus for MDPs with lawyers, and it is unlikely that their ambitions are compatible with a lawyer in control
approach. Consumers who may benefit from closer multidisciplinary integration may suffer from a lawyers in control approach. They may be better off receiving financial, real estate and counselling services from organizations that contain lawyers but are not controlled by lawyers. Another practical shortcoming of the lawyer in control approach is that it promotes conflict between the professions. Every profession should be encouraged to articulate its bottom line not in terms of irreconcilable demands for control, but in terms of fundamental overarching rules that must bind all members of the firm in order to ensure the integrity of the particular profession’s services. Any other approach is likely to result in the multidisciplinary issue being politicized into turf wars.

Limiting MDPs to the provision of legal services, as under the District of Columbia and Ontario regime, may lower the dangers of conflicts of interest, loss of solicitor-client privilege or adverse effects on the independence of legal advice, but it does not provide a guarantee of these essential attributes of the solicitor-client relationship. Information passed on by a lawyer to an accountant or a trademark agent for the purpose of obtaining legal advice may not always be subject to solicitor-client privilege. Litigation privilege will not apply in all contexts. Limiting MDPs to the provision of legal services invites thorny questions about what constitutes the practice of law. A broad reading of “legal services” could render the requirement relatively unimportant, while a narrow reading may limit MDPs unduly; that is, to the detriment of consumers. The whole purpose of multidisciplinary practice is to draw on a variety of skill and knowledge sets; requiring MDPs to offer legal services alone undermines their reason for existence.223 Experience in the District of Columbia supports the view that such a regulatory proposal may be doomed to irrelevance. Restricting MDPs to the provision of legal services may simply result in adaptive responses and multidisciplinary organizations short of full partnerships.

Another approach that we have reluctantly concluded as inadvisable is one which solely relies on full disclosure and waiver by informed clients. This approach is attractive because it is recognized in lawyers’ ethical rules that fully informed clients can waive conflicts of interests, hidden fees and authorize the disclosure of solicitor and client confidences. It is the simplest regulatory regime and the one that would be easiest to administer. Legal regulators could develop standard disclosure and waiver forms that would be signed by all clients of an MDP. The form would explain what attributes of the traditional solicitor-client relationship could not be guaranteed and clients would have the choice of deciding whether these costs outweighed the benefits of one stop shopping. The costs might include the absence of insurance, compensation, fee assessment and solicitor-client privilege and the prospect that the independence of legal advice might be adversely affected by the lawyer’s interest in the MDP.

Blanket waivers of so many attributes of the solicitor-client relationship, however, would deprive consumers of many of the benefits of receiving legal services in an MDP. Narrower waivers present problems because of

223 See Trebilcock and Csorgo, supra note 12.
difficulties in predicting, for example, when solicitor-client privilege could be lost. They could result in clients not fully appreciating when the attributes of the solicitor-client relationship would be in jeopardy. A disclosure and waiver approach is constrained by the ability of regulators and firms to articulate in advance what might be lost in an MDP and of clients to appreciate the information disclosed and the consequences of waiver. The approach assumes a sophisticated consumer who can decide whether the benefits of MDPs outweigh their costs. This assumption may be true with respect to corporate counsel but not with respect to clients off the street who rarely require legal services. A licensing approach would allow regulators to decide when it was not safe to rely on disclosure and waiver.

In the end, we prefer a licensing approach in which MDPs with lawyers would have to be licensed by law societies and other regulatory bodies whose members offer services to the public through the firm. Licensing is the most flexible of regulatory techniques examined and it allows regulators to apply various combinations of overarching rules, disclosure and waiver and even control requirements. For example, conditions of licensing could include agreements that accountants' rules concerning investment in audit clients would apply to all members of the firm; that clients agree that they would not have claims against the insurance and compensation funds of lawyers within the firm; and that the lawyers in the firm would control decisions relating to conflicts of interests. Licensing also does not force regulators to articulate a bright line list of a limited number of professions or emerging professions who can partner with lawyers. As discussed above, such a list could be under- and over-inclusive and preclude possible combinations of services that might serve the public well.

The requirement that an MDP as an entity seek a licence, rather than relying simply on the licensing of the individual lawyers within the firm, is appropriate for several reasons. Most importantly, many of the ethical and legal problems presented by multidisciplinary practice are intrinsically organizational problems. An example is confidentiality. Keeping confidences may have significant implications for solicitor-client privilege and is one of the foundations for rules against conflicts of interest. It is also dependent on the organization. A variety of factors, such as knowing that a particular client was on retain, or overhearing a conversation in a corridor, suggest that information is much more likely to travel within a firm's borders than outside it, even if members of the firm attempt to keep confidences. As demonstrated by the Supreme Court of Canada's approach to conflicts of interest in Martin v. Gray, it is normally presumed as a matter of law that information is shared between all members of a law firm. It is easy to imagine a situation where information is circulated within an MDP to non-lawyers, with the consequence that solicitor-client privilege is lost, yet

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224 An analogous example in the securities regulation context is the law on insider trading, where there is a presumption that all officers and directors have access to a corporation's confidential information.
it may be difficult to pinpoint a single lawyer who can be held responsible for the loss of privilege. An inadequate set of rules within the firm safeguarding confidences may be responsible, not an individual. The advantage of firm licensure is that breaches resulting from organizational breakdowns may be brought home to the firm as an entity, thereby avoiding disputes over individual responsibility that may not only be costly, but may result in the exoneration of all individuals for what was a shared mistake. Moreover, firm licensure allows legal regulators to ensure that the MDP complies with the terms of its licence without undue concern about the limits of the regulator’s jurisdiction over non-lawyers.  

If non-lawyers were immune from discipline, there would be a temptation for lawyers and non-lawyers within the firm to leave dealings of questionable ethical integrity to the non-lawyers. Firm licensure, however, gives all members of the firm an incentive to comply with the licence, and to monitor their colleagues to ensure compliance.

It may be argued that even if individual lawyers were not subject to discipline in a particular set of circumstances, the threat to the firm’s reputation and the threat of civil liability for negligence would serve as sufficient discipline on an MDP. If this contention were true, however, then there should be little need to license individual lawyers at all: the threat of a lost reputation and/or civil liability would suffice to deter irresponsible behaviour. Given that the present framework recognizes the importance of licensing as a disciplinary tool, and given that we take the present framework as our starting point, in our view firm licensure as well as individual licensure is appropriate. If one wished to treat civil liability and reputational costs alone as sufficient discipline, this would suggest a radical overhaul of the legal regulatory framework.

We wish to emphasize that although licensing gives regulators considerable control over MDPs, it need not be unduly intrusive or bureaucratic. Those applying for a license should be encouraged to use their own expertise to devise workable and practical standards to protect consumers. Regulators should be satisfied that applicants have thought through issues such as insurance, conflicting rules, conflict of interests and loss of privilege. They should not attempt to micro-manage MDPs by, as under the Ontario regime, regulating the competence of non-lawyers. The most effective and creative controls are likely to be those that the firms devise themselves in an attempt to satisfy regulators that they have addressed the problems associated with multidisciplinary practice. The Commission on Multidisciplinary Practice contemplates a relatively flexible licensing scheme which would give MDPs (not controlled by lawyers) an opportunity to establish, maintain and enforce their own procedures designed to protect a lawyer’s exercise of independent professional judgment or

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225 This consideration is central to approach adopted by the Barreau de Québec, with its mandatory contractual agreement to abide by lawyers’ rules.

226 See the comments of the dissenting Chair in, “Striking a Balance”, supra note 150 at 32: “[L]icensing would not be overly expensive or time-consuming, and, if at any time it was determined to be unnecessary, it could be eliminated. It would be very difficult to introduce licensing at a later stage.”
professional obligations to segregate client funds. If regulators are not satisfied that the public would be protected under the procedures established by the MDP, the appropriate response is not to issue a license exempting the entity from the present restrictive rules or having issued a license, to revoke it.

This leads to the issue of adaptive behaviour. Intrusive regulatory regimes, such as those which require lawyers to be in control or limit MDPs to the provision of legal services, present the risk that actors will not enter the regulatory regime, or having entered, will exit it. Regulators must therefore concern themselves not only with MDPs, but with multidisciplinary alliances short of partnerships. In our view, regulators should not eliminate the exit option provided by the existing rules for several reasons. Under the present rules, law firms can align with other service providers. The separate organizational structure of the law firms, although it imposes transaction costs, may serve valid public interests by preserving many of the attributes of the solicitor-client relationship, including solicitor-client privilege, and by avoiding the difficulties of governing non-lawyers. Declining to regulate these other forms of practice dispenses with the potential problem of distinguishing multidisciplinary practices from independent legal practices. For example, if a law firm has an informal relationship with an accounting firm, but they do not share locations, are they in multidisciplinary practice together? Moreover, allowing exit options can discipline and check over-zealous regulators. If MDP licensing requirements become too onerous, firms may simply establish captive firms or other organizations short of MDPs.

At the same time, we recognize that aspects of the status quo are not without problems. There is a danger that clients might assume that lawyers working in accounting and pension firms and other presently existing multidisciplinary firms are their lawyers. The clients of these firms should clearly be advised that the attributes of the solicitor-client relationship including solicitor-client privilege do not apply even though they may be dealing with a lawyer in the firm. If the benefits of the solicitor-client relationship are great enough, then these firms can, under existing rules, establish separate law firms that could then enter into a solicitor-client relationship with its clients. While some fine-tuning of the status quo may be appropriate, we remain of the view that different regulatory regimes should apply to MDPs and other forms of multidisciplinary practice.

In summary, our proposal would unambiguously liberalize the approach to MDPs beyond current regimes which permit limited forms of MDPs in New South Wales, the District of Columbia and Ontario. We would not require lawyers to control MDPs nor would we not restrict MDPs to the provision of legal services. Such blunt and confining regulatory requirements do not target specific mischiefs precisely enough. Control does not guarantee that privilege will not be lost or conflicts will not be produced. Limiting MDPs to the provision

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227 This contrasts with both the Canadian and American Bar Associations’ reports which do not make a distinction between multidisciplinary partnerships and other forms of practice, such as captive firms.
of legal services minimizes dangers to the solicitor-client relationship but may not provide the efficiencies and synergies and increased access to legal services that could come from true MDPs. Moreover, restrictive regimes that only allow MDPs if they are controlled by lawyers and restricted to the provision of legal services are doomed to irrelevance given the availability of exit options. The flexible licensing regime we propose would permit a variety of MDPs that are not permitted at present while ensuring that concerns about the governance of non-lawyers, the independence of legal advice and the protection of confidentiality and privilege would be carefully considered and addressed on a firm by firm basis and through the use of the widest spectrum of regulatory techniques. Should regulators impose overly restrictive licensing requirements for MDPs, the status quo of multidisciplinary practice through captive law firms and lawyers working within accounting and actuarial firms will continue. In the end, the interests of consumers and the public may be better served by a more liberal regime that licenses a wider range of MDPs.