

SETTLEMENT COUNSEL: AN INNOVATIVE STRATEGY FOR THE MANAGEMENT AND RESOLUTION OF COMMERCIAL LITIGATION FILES

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Settlement Counsel is a negotiation structure that separates litigation and settlement roles—allowing for the simultaneous advancement of litigation and negotiation on parallel tracks, by different lawyers. Although widely viewed as successful among its proponents, the settlement counsel model is not yet common in Canada. This article discusses the results of an interview-driven study of a small cohort of lawyers in Canada and the United States, describing the diverse ways that the settlement counsel model has been employed and highlighting its benefits and “resistance points” that have impeded widespread use. Reflections are offered as to how settlement counsel ideals might be used to construct responsive, client-centred approaches in lawyers’ work: using client interests as a compass and employing risk assessments, mutual incentives, and accountability for results inside negotiation.

L'assistance juridique en vue d'un règlement est une structure de négociation qui distingue le contentieux du règlement du différend, qui permet le choix simultané du litige et de la négociation et leur progression parallèle avec l'assistance d'avocats différents. Bien que considéré comme extrêmement positif par ses défenseurs, le modèle de l'assistance juridique en vue d'un règlement n'est pas encore la norme au Canada. Cet article examine les résultats d'une étude fondée sur des entrevues menée auprès d'un nombre restreint de juristes au Canada et aux États-Unis, et décrit les diverses façons dont ce modèle a été utilisé, soulignant ses avantages et les « hésitations » qui ont freiné son adoption à grande échelle. L'auteure commente la façon avec laquelle les concepts de base de l'assistance juridique en vue d'un règlement pourraient être utilisés pour intégrer dans le travail du juriste des approches sensibles aux besoins du client. En utilisant les intérêts de ce dernier comme point de mire et en se fondant sur l'évaluation du risque, cela permet d'y trouver les incitations mutuelles et la responsabilité des résultats dans le cadre de la négociation.

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1. Introduction

A scorpion once asked a frog for a ride across a lake. The frog pointed out that he feared the scorpion’s deadly sting. “Now why would I do that?” retorted the scorpion “after all if I sting you we both drown.” Having won the argument, the scorpion hopped on the frog’s back and into the water they went. Halfway across the lake the scorpion stung the frog. “Why did you do that?” screamed the frog “now we’re both going to die!” “I can’t help it,” said the scorpion apologetically, “it’s in my nature.”¹

It is the scorpion’s nature to sting, and—according to some experienced lawyers—the litigator’s nature to litigate, even at the expense of the optimal and efficient resolution of the file. Inherent tensions in the lawyer’s role (e.g.,

¹ Michael J Beatty & James C McCroskey, “It’s in Our Nature: Verbal Aggressiveness As Temperamental Expression” (1997) 45:4 *Communication Quarterly* 446 at 446–47. See also John DeGroote, “[Why Settlement Counsel? A Lesson from the Scorpion and the Frog](#)” (29 May 2012), *Settlement Perspectives* (blog), online: <www.settlementperspectives.com/2012/05/why-settlement-counsel-a-lesson-from-the-scorpion-and-the-frog/>. Some criticize the use of the scorpion fable to justify seemingly “natural” but irrational behaviour, a tension that is explored in Karen Silverman & Jaret Kanarek, “The Scorpion and the Frog: A False Narrative of Human Nature” (2013) 2:1 *The Intellectual Standard* 6.

preparing for trial vs. preparing to settle) have motivated developments in dispute resolution processes and strategies in Canada over the last three decades, particularly in family and general civil litigation. Commercial litigation is not generally perceived to be a site of creative advancement in this area, and yet, the recent use of the Settlement Counsel (“SC”) model is an example of this innovation, revealing lessons that can be applied to the management and settlement of litigation files. Applied formalistically, SC has its limitations. Applied as a series of values and strategies, it may better align the management of litigation with settlement goals.

In a 2013 article, “Skating to Where the Puck Will Be”: Exploring Settlement Counsel and Risk Analysis in the Negotiation of Business Disputes,” we posited that the introduction of SC onto the Canadian business litigation scene was a sign of a maturing, second-generation negotiation practice—an example of the unbundling of legal services and the “planned early negotiation” trend that might offer particular benefits for larger commercial files.² Although related to Collaborative Law in the separation of litigation and settlement roles for lawyers, the SC model differs in that it allows for the simultaneous advancement of litigation and negotiation on parallel tracks.³ Retained and paid separately from litigators—and often working closely with clients—SC negotiate directly with the other side to resolve the file, while litigation counsel navigate a separate litigation process.⁴ Roles and information management are clarified contractually at the outset.

Although widely viewed as successful among its proponents, the SC model is not yet common, and has been subject to little treatment by academic literature.⁵ To explore its application we embarked on an interview-driven

² Heather Heavin & Michaela Keet, “Skating to Where the Puck Will Be: Exploring Settlement Counsel and Risk Analysis in the Negotiation of Business Disputes” (2013) 76:2 Sask L Rev 191 (in that article, we describe SC generally, and locate it within a larger trend toward specialization in negotiation skills at 210–11) [Heavin & Keet]; “[P]lanned early negotiation” was a term labelled by John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (Chicago: American Bar Association, 2011) [Lande, *Lawyering*], cited in *ibid* at 194.

³ *Ibid* at 193–94.

⁴ Kathy A Bryan, “Why Should Businesses Hire Settlement Counsel?” [2008] 1 J Disp Resol 195 (the use of SC even allows for the “aggressive” pursuit of litigation at 199) [Bryan].

⁵ Steven Brine, (Paper delivered at the American Bar Association Alternative Dispute Resolution Conference, 2003) [unpublished] [Brine]. Brine stated that “[N]o settlement counsel practice currently exists in Canada and there are only a handful operating within the U.S. Additionally, many of the U.S. attorneys practicing as settlement counsel are not even aware of each other” (*ibid*). One of the earliest articles on SC is William F Coyne Jr, “Using Settlement Counsel for Early Dispute Resolution” (1999) 15:1 Negotiation J 11 [Coyne].

study of a small cohort of lawyers in Canada and the United States, each known for their leadership in the area of collaborative negotiation models and legal practice.⁶ Seven participants in the cohort were Canadian lawyers and seven were American, resulting in a contrasting mix of experiences across jurisdictions.

This article begins with a description of SC rationale in the commercial setting and why such a model might be used. It then explores the structure of SC and its variations, a diversity not previously captured in the literature. Drawing from the observations of experienced lawyers, this paper analyzes obstacles to the widespread use of SC—why it is not being used more frequently as well as innovations adopted by successful SCs to overcome those obstacles. Although the SC model has not taken off in Canada, it has been successful in important and large cases across North America. Rather than end with a prescription for SC practice, the paper concludes with lessons—ideals that may enrich negotiation methods in the commercial litigation arena and move litigation practices more generally towards a responsive, client-centred framework.

A) Study Methodology

The sparse literature on SC is populated with claims about its benefits. However, descriptions are generalized, leaving curious candidates unsure of the model's mechanics, whether advantages pan out in practice, and what

⁶ Study participants were identified as “key informants,” and these key informants will be the participants referred to throughout this paper. The interview template identified general and open-ended questions, guiding participants through a discussion that allowed them to identify issues of relevance. Most interviews were one to two hours in length, via telephone. Four lawyers were interviewed in person, resulting in up to eight hours of interview time per lawyer. Results were analyzed using a grounded theory method, with issues (and the resulting theoretical framework) emerging from the data—the lawyers’ stories. For reference, see Karen Henwood & Nick Pidgeon, “Grounded Theory in Psychological Research” in Paul M Camic, Jean E Rhodes & Lucy Yardley, eds, *Qualitative Research in Psychology: Expanding Perspectives in Methodology and Design* (Washington: American Psychological Association, 2003) 131. Participants will be referred to throughout this paper by number to protect their identities: Interview of Study Participant #1 (17 January 2013) [Participant 1] (Participant 1 is based in Alberta); Interview of Study Participant #2 (8 May 2012) [Participant 2] (Participant 2 is based in the United States); Interview of Study Participant #3 (21 June 2012) [Participant 3] (Participant 3 is based in Saskatchewan); Interview of Study Participant #4 (30 April 2012) [Participant 4] (Participant 4 is based in the United States); Interview of Study Participant #5 (6 July 2013) [Participant 5] (Participant 5 is based in the United States); Interview of Study Participant #7 (16 May 2012) [Participant 7] (Participant 7 is based in the United States); Interview of Study Participant #10 (10 December 2014) [Participant 10] (Participant 10 is based in Ontario); Interview of Study Participant #12 (16 January 2013) [Participant 12] (Participant 12 is based in Alberta); Interview of Study Participant #14 (4 May 2013) [Participant 14] (Participant 14 is based in the United States).

challenges are to be expected along the way. The existing gap in information about operational details of SC may be deterring prospective settlement lawyers and clients from taking full advantage of the model. Our study was motivated by an interest in delving deeper to understand how the model operates—its evolution, successes, and barriers—and to suggest guideposts for those wanting to experiment further.

All interviewees in Canada and the United States had developed law practices that were intentionally settlement-focused, ten in private practice and four as in-house counsel. All Canadian lawyers we interviewed observed that the practice of SC in commercial files is more common in the United States than in Canada.⁷ Some of the Canadian lawyers we interviewed had experience with settlement roles (such as Collaborative Law) but not necessarily with SC. The six lawyers who had worked on formal SC files had accumulated experience ranging from one to hundreds of files.

The study is not designed to capture the quantitative incidence of SC, nor present a rigid template for its adoption. Instead, it captures and analyzes a set of engagements with an innovative approach. We used a qualitative methodology, exploring the deeper subjective experiences of the 14 participating lawyers. Information collected from the initial round of interviews highlights general observations and is presented in a way that preserves the anonymity of study participants. In a subsequent phase of the research, we engaged in more extensive interviews of two lawyers, one American and one Canadian: Christopher Nolland (Dallas, Texas)⁸ and Gordon Tarnowsky, QC (Calgary, Alberta).⁹ Their experiences—in depth and breadth—have served as unique windows into the artistry and design of

⁷ Speculative reasons for the higher use of SC in the United States include multiple differences in the economies of the countries, culture and realities of litigation, and size of damage awards and legal bills. Canadian litigators, even on large files, may be accustomed to moving back and forth between settlement and litigation roles (Participant 1, *supra* note 6).

⁸ Interview of Christopher Nolland (8 May 2013) by telephone [Nolland]. Christopher Nolland has acted as SC in over 100 major business, probate, trust, intellectual property, and insolvency-related litigations. While serving as SC is a major focus of his practice, he has also served as mediator in over 2,000 cases to date, and regularly acts as an arbitrator. For further information, see Mark Curriden, "[Meet Chris Nolland: The Master at Settling Business Conflicts](http://www.dallasnews.com/business/headlines/20140526-meet-chris-nolland-the-master-at-settling-business-conflicts)," *The Dallas Morning News* (26 May 2014), online: <www.dallasnews.com/business/headlines/20140526-meet-chris-nolland-the-master-at-settling-business-conflicts.ece> [Curriden].

⁹ Interview of Gordon Tarnowsky (16 January 2013) in Calgary [Tarnowsky]. Gordon Tarnowsky is the co-leader of the Dentons Canada Litigation and Dispute Resolution Group. Based in Calgary, his practice focuses on the resolution of corporate, commercial, and energy industry disputes. In addition to his work as litigation counsel, he has served as counsel in numerous domestic and international arbitrations, in the mediation of commercial disputes, and has been retained by clients to act as SC in the resolution of significant litigation matters.

the SC model. To bring to life the practical dimensions of the model, quotes are used throughout and the story of one Canadian file is used to illustrate the SC model.¹⁰

B) Rationale: Why Bifurcate Negotiation and Litigation Roles?

Since most cases settle before trial, how they settle must be examined closely to explain the pockets of sudden and passionate interest in SC. Proponents of the model point out that litigation settlements typically occur after the investment of significant resources in the management of pre-trial litigation, without full and thoughtful exploration of client needs.¹¹ They argue that SC files settle sooner with lower legal and internal business costs, even in consideration of SC fees.¹² Proponents of the model also claim that the quality of SC outcomes are superior to litigation outcomes. Practitioners employ techniques to get earlier, relationship-oriented settlements in a commercial world where relationships are increasingly valued:

[M]uch of U.S. companies' litigation portfolios concern employees, customers, vendors, suppliers, contractual partners, etc., where continuing relationships are paramount—especially when conflict erupts. In fact, when surveyed, corporate counsel describe the need to preserve relationships as one of the top reasons for using mediation.¹³

The model's success is usually attributed to the bifurcation of responsibilities between settlement and litigation lawyers, described by one leading SC lawyer as the “magic” that makes SC work.¹⁴ The scorpion and the frog fable gives the impression that something intrinsic and inescapable makes litigation lawyers allegiant to positional and protective strategies that hinder settlement. This starting point may be unfair to the current commercial

¹⁰ This file is presented anonymously as the *XYZ Resources* dispute [*XYZ Resources*].

¹¹ David A Hoffman & James E McGuire, “Lawyers Who ‘Just Say No’ to Litigation: Practitioners of ‘Collaborative Law’ Seek a Handshake, Not a Court Date,” *Boston Sunday Globe* (1 April 2001), reprinted in Boston Law Collaborative, “[David’s Articles and Publications](#)”, online: <blc.law/wp-content/uploads/2016/12/2005-07-lawyers-who-just-say-no-branchmainlanguagedefault.pdf> at 3 [Hoffman & McGuire]. See also Lande, *Lawyering*, *supra* note 2.

¹² James E McGuire, “Why Litigators Should Use Settlement Counsel” (2000) 18:6 *Alternatives to High Cost Litigation* 107 at 121–22 (over a ten year period ending in 2001, Toro, an American manufacturer of lawn care equipment, saved \$76.9 million with their new SC program) [McGuire]; Miguel A Olivella Jr & Andrew R Byers, “A New Approach: How One Company Cut Escalating Litigation Costs” (2001) 43:7 *For the Defense* 33 (Toro reportedly enjoyed a 73% reduction in the legal fees paid to its litigation firm at 36); Brine, *supra* note 5.

¹³ Bryan, *supra* note 4 at 196–97.

¹⁴ Participant 2, *supra* note 6.

practitioner. Indeed, it is hard to defend in today's justice environment of consumer-orientated services, growing awareness of clients' diverse needs, litigation costs, and "accessible justice".¹⁵ Today, most commercial litigators would say that settlement is in their mandate and that they negotiate wherever possible, which is a stance that must be encouraged.¹⁶

Yet, the structured separation of roles is intriguing and worthy of deeper exploration.¹⁷ The impetus for SC is justifiable in light of the systemic demands of litigation coupled with cultural expectations about the litigator's role. Several lawyers we interviewed mentioned the conflict facing the litigator who is attempting to balance both settlement and litigation activities: concurrently preparing for both might mean doing neither well.¹⁸ Negotiating for settlement often becomes an afterthought among

¹⁵ [Access to Civil and Family Justice: A Roadmap for Change](#) (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013), online: <www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> (in what is commonly known as the "Cromwell Report," Supreme Court of Canada Justice Thomas Cromwell and the Action Committee issued several calls for action to improve access to justice in Canada at 3, 23–24). The Canadian Bar Association followed suit with their own recommendations, see Canadian Bar Association Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013).

¹⁶ See e.g. Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (Vancouver: University of British Columbia Press, 2008) (for an example of scholarship that reinforces this transition towards more negotiation and settlement).

¹⁷ Even large aboriginal land claims have been handled using such a division of responsibilities, see Jerome Slavik, "Aboriginal Communities: Negotiating with the Crown and Industry" (Guest lecture delivered at the College of Law, University of Saskatchewan, 26 September 2011) [unpublished].

¹⁸ Participant 2, *supra* note 6; Participant 3, *supra* note 6; Participant 4, *supra* note 6. See also David Hoffman & Pauline Tesler, "Collaborative Law and the Use of Settlement Counsel" in Bette J Roth, Randall W Wulff & Charles A Cooper, eds, [The Alternative Dispute Resolution Practice Guide](#) (Eagen: Thomson West, 2005) (loose-leaf revision) ch 41 at 15, online: <bostonlawcollaborative.com/blc/65-BLC/version/default/part/AttachmentData/data/2005-07-collaborative-law-and-settlement-counsel.pdf?branch=main&language=default> where the authors discuss an experiment that divided lawyers into two groups in the break-up of a business partnership and one group prepared for a deposition, the other a settlement meeting. The facts given to each group were identical, but the results different: the settlement group focused on relationships and interests, and the litigation group developed a "theory of the case" (at 15). For further discussion about the conflict in dual roles, see Coyne, *supra* note 5; Ralph Cuervo-Lorens, "[Settlement Counsel: Another Approach to Resolving Disputes](#)" (18 January 2010), Commercial Litigation Update (blog), online: <www.blaney.com/newsletters/commercial-litigation-update-january-2010>; Tre Morgan, "[Is Your Divorce Attorney Wearing Two Hats?](#)" (4 February 2014), *The Law Office of Randolph Morgan III* (blog), online: <www.tremorgan.com/is-your-divorce-attorney-wearing-two-hats/>.

the systematic efforts that go into litigation preparation.¹⁹ Disincentives to settle in litigation are very real, with continued litigation producing financial benefit for the litigator.²⁰ Even if faded, images of the “champion” still overshadow the litigator’s image,²¹ and “[l]awyers may worry that they may lose their clients’ confidence—and business—if they do not retaliate.”²² Following from those concerns, lawyers might avoid being the first to mention settlement because of the “fear that proposing settlement suggests weakness.”²³ In their roles as litigators, lawyers can be affected by cognitive bias and commonly make overly optimistic predictions of litigation success.²⁴ Against such a backdrop, the conflict facing litigation lawyers is that they are also tasked with settlement responsibilities.

¹⁹ Robert F Cochran Jr, “Collaborative Practice’s Radical Possibilities for the Legal Profession: ‘[Two Lawyers and Two Clients] for the Situation’” (2011) 11:2 *Pepperdine Dispute Resolution LJ* 229 at 235–36 [Cochran]; see also J Patrick O’Malley, “Settlement Counsel: (An overview)” ([50 Shades of Settlement Counsel—What Role Is Best for Your Client?](#) lecture series delivered at the The American Bar Association Section of Litigation Section Annual Conference, Scottsdale, Arizona, 9–11 April 2014), online: <www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/settlement_counsel_1.authcheckdam.pdf> [O’Malley].

²⁰ Cochran, *supra* note 19 at 234–36; Andrew J Wistrich & Jeffrey J Rachlinski, “How Lawyers’ Intuitions Prolong Litigation” (2013) 86:3 *S Cal L Rev* 571 (“[h]aving incurred sizeable costs in pursuit of some endeavour, people want to believe that the undertaking will ultimately succeed...desire to avoid cognitive dissonance induces them to believe that they have undertaken the right course of action, and people like to be consistent in their support for an undertaking and to follow through with commitments” at 615 [footnotes omitted]) [Wistrich & Rachlinski]. Behavioural psychologist, Daniel Kahneman, also discusses how this cognitive dissonance contributes to decision-making errors, such as “sunk-cost fallacy”, Daniel Kahneman, *Thinking, Fast and Slow* (Toronto: Doubleday Canada, 2011) at 345.

²¹ Participant 1, *supra* note 6; David A Hoffman, “Collaborative Law in the World of Business” (2004) 6:3 *The Collaborative Law Review* 1 (trial work, conducted on a more public stage, is historically considered “one of the highest forms of work done by ‘real lawyers’” at 6) [Hoffman].

²² John Lande, “Getting Good Results for Clients by Building Good Working Relationships with ‘Opposing Counsel’” (2011) 33:1 *University of La Verne L Rev* 107 at 109 [Lande, “Getting Good Results”].

²³ Wistrich & Rachlinski, *supra* note 20 at 577; see also Jack Montgomery, “[The Case for Settlement Counsel](#)” (2012) *Maine Lawyers Review*, online: <www.bernsteinshur.com/wp-content/uploads/2012/07/montgomery.pdf>; William Crenshaw, “The Potential Benefits of Using Settlement Counsel” (2007) 7:15 *Mealey’s Litigation Report* 15.

²⁴ Wistrich & Rachlinski, *supra* note 20 at 579–81; see also Jennifer K Robbennolt & Jean R Sternlight, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation and Decision Making* (Chicago: American Bar Association, 2012) at 254; Don A Moore, Lloyd Tanlu & Max H Bazerman, “Conflict of Interest and the Intrusion of Bias” (2010) 5:1 *Judgement & Decision Making* 37; Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* (New York: Springer-Verlag Berlin Heidelberg Dordrecht, 2010) (“most plaintiffs obtain an award that is less [at trial] than the defendant’s settlement offer” at 27); Kiser claims that a lawyer’s rate of decision error

C) Structure: Defining and Gauging the Settlement Counsel Model

How are these pressures mitigated in the SC model? As a starting point, “confusion exists about what SC is. Even those who are fairly experienced confuse the SC model with mediation or with collaborative law.”²⁵ The SC model employs the interest-based theory of negotiation, using skills and techniques to pursue open communication and creative options for settlement.²⁶ SC ask different questions of a client from those commonly asked at the onset of litigation, and their approach when communicating with the other side is fundamentally different in tone.²⁷ They can draw on specialized knowledge of an expanding range of processes and service providers, tailor an approach focused on resolving the dispute, and develop extensive plans to guide negotiation.²⁸ Where effective, they use apology and other methods to repair “broken lines of communications.”²⁹ Their concern can be the creation of an environment where commercial relationships can be healed rather than alienated, even where the clients are not eager for reconciliation. By “choosing lawyers with reputations for cooperation, [business] clients might be able to commit to cooperative litigation strategies in circumstances where the clients themselves would not otherwise trust each other.”³⁰

increases with length of practice (*ibid* at 78). Further, people’s predictions are more biased towards optimism when the outcome of these predictions is not to be revealed for longer periods of time, a pattern that is likely present in litigation, Thomas Gilovich, Dale Griffin & Daniel Kahneman, eds, *Heuristics and Biases: The Psychology of Intuitive Judgment* (New York: Cambridge University Press, 2002) at 339–41.

²⁵ Participant 2, *supra* note 6.

²⁶ Participant 5, *supra* note 6, at the beginning of the SC relationship, asks: “What are your goals?”; “What are you trying to accomplish?”

²⁷ McGuire, *supra* note 12 at 107, 120. For a discussion of how formal collaborative mandates allow advocates to bring something different “to the table”, see David A Hoffman & Dawn Ash, “Building Bridges to Resolve Conflict and Overcome the ‘Prisoner’s Dilemma’: The Vital Role of Professional Relationships in the Collaborative Law Process” [2010] 2 J Disp Resol 271.

²⁸ McGuire, *supra* note 12 at 120; Curriden, *supra* note 8 (from one client’s perspective, “[Nolland] analyzed the case from all sides, put together a 15-page settlement negotiation plan that literally became [their] road map”).

²⁹ Hoffman & McGuire, *supra* note 11 at 4. The value of apology is noted in John C Kleefeld, “Thinking Like a Human: British Columbia’s Apology Act” (2007) 40:2 UBC L Rev 769.

³⁰ Ronald J Gilson & Robert H Mnookin, “Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation” (1994) 94:2 Colum L Rev 509, cited in Hoffman, *supra* note 21 at 9.

SC also employ an accountability structure designed to achieve results in shorter periods of time.³¹ Indeed, “[I]n litigation, time is money. The longer the period of time that elapses between the filing of a lawsuit and its settlement, the more resources the parties are likely to invest in the litigation process.”³² With SC, priorities shift: “Establishing a [settlement] process includes developing a timeline for implementation. It is part of the SC’s role to apply consistent pressure on himself and all other parties to adhere to that timeline and to avoid unnecessary delays.”³³

In our efforts to define the model through this research, we found a number of differences in the ways that the practice of SC has come to life. Differences turn primarily on the SC’s degree of integration into the file, the formality of their retention, and compensation arrangements.

2. Scope and Formality of the Engagement

Interviews revealed three general conceptions of the SC role, falling along a spectrum of formality and scope. Fee arrangements tend to follow suit. At one end of the spectrum, SC may be an integrated member of a larger legal team, with SC’s sole mission to work towards settlement for as long as is required. This is the model usually adopted by Nolland in the approximately one hundred SC cases he has handled (typically on a contingency fee arrangement).³⁴ Some of those cases settled prior to significant steps in the litigation, others as late as midway through a trial or on appeal.³⁵ The second conception of SC sets it up as a time-limited formal engagement, usually between 90 days and six months.³⁶ Time-limited interventions are focused, intensive involvements, often built on an incentive for resolution. A common fee structure for this kind of file is the fixed monthly contract fee with bonus. Finally, on the informal end of the spectrum, SC may provide assistance through minor engagements such as “settlement coach” or resource person, providing consultative advice on a file, and attending a one-time engagement at a settlement meeting.³⁷ Minor engagements are more likely where there has been a past productive working relationship between the litigation lawyer and proposed settlement lawyer, and hourly billing

³¹ John O’Sullivan, “[Settlement Counsel](#)”, *Slaw* (15 June 2015), online: <www.slaw.ca/2015/06/15/settlement-counsel/>.

³² Wistrich & Rachlinski, *supra* note 20 at 574.

³³ McGuire, *supra* note 12 at 120.

³⁴ *Supra* note 8.

³⁵ *Ibid.*

³⁶ Participant 5, *supra* note 6, most commonly uses this model, with a preference for 90 days.

³⁷ Participant 5, *ibid.*, designed and delivered training clinics to lawyers that were both internal and external to his firm.

arrangements may best suit this arrangement.³⁸ While we encountered examples of informal SC engagements, this paper focuses on the examinable differences between the first two formal conceptions of the model.

3. At the Threshold: Resistance Points in the Settlement Counsel Arrangement

Interview data suggests that SC models are usually smooth and productive once operational; barriers are generally found at the threshold. Using interview feedback, I will describe three such threshold areas of resistance: traditional notions of file or client ownership and service delivery, fee arrangements, and communication structures. Drawing on the illustrations of experienced SC, I will also present strategies for successfully navigating threshold challenges.

A) Traditional Notions of File Ownership

The SC model challenges traditional economic ownership of litigation files and relationships of power in the delivery of legal services. Whether or not the firm retains full ownership of the file, the litigation lawyer necessarily relinquishes control over settlement strategy and communications. This feature challenges the lingering “lone wolf” image of the litigation lawyer,³⁹ and—practically—may threaten the lawyer’s individual economic stake⁴⁰ or that of the firm.⁴¹ Firms compete for good clients and are threatened by the possibility of diluting client loyalty: “Why would they send that business ‘down the road?’”⁴²

Compounding this tension—and quietly threatening traditional views of the lawyer’s role—is the client authority that can accompany the adoption

³⁸ Participant 5, *ibid*, provided an American example of a lawyer providing the service for free when clients were either first-time or long-term clients.

³⁹ Participant 1, *supra* note 6; Participant 2, *supra* note 6. For a discussion of the changing image of the litigator, see J Michael Dwyer, “Twilight of the Gunslinger: The Changing Role of the Civil Litigation Lawyer” (2007) 26:1 Oregon State Bar 1.

⁴⁰ Participant 7, *supra* note 6. See also George W Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: Commerce Clearing House Canadian, 2003) at 145.

⁴¹ Danny Ertel & Mark Gordon, “Points of Law: Unbundling Corporate Legal Services to Unlock Value” (2012) 90:7 Harvard Business Rev 126 (traditional economic incentives in full-service private law firms do not tend to reward the unbundling of services at 133) [Ertel & Gordon]. However, Participant 5, *supra* note 6, indicated that SC fee structures can be lucrative (e.g., a SC fee was the largest received by Participant 5’s firm).

⁴² Participant 7, *supra* note 6; Hoffman, *supra* note 21 (the concern of losing clients is especially pertinent in law firm environments, as “litigation is often a primary engine for producing revenue” at 7). For a discussion of how in-house lawyers can encourage private firms to be less possessive over clients, see Ertel & Gordon, *supra* note 41.

of the SC model. Presumptively, the use of the SC model involves key engagement by the client. Sometimes, it is the client who decides to add SC when a litigation lawyer is already engaged on the file.⁴³ This was the case in the matter of the *XYZ Resources* litigation file.⁴⁴ Tarnowsky became engaged on the file as SC after a marketing presentation by the firm's Dispute Resolution Group attracted the client's attention:

The client had recently acquired another business, which came with a very significant piece of litigation, representing significant exposure—combined, about \$150 million. This came as a cold call from the client's in-house counsel, who had attended the presentation. We were not the firm acting on the litigation matter. It was in the relatively early stages of litigation, with some skirmishes, in the throes of fights over document production—very acrimonious. After initial discussions with the lawyer, she requested that we make a presentation to her general counsel. She predicted resistance: “Understand that this will be an uphill battle, but I've got you an audience.”⁴⁵

In the United States, we found pockets of longer-standing use of the model, with signs of cultural shift and acceptance among lawyers. In the beginning of Nolland's now-established SC practice, it was typical for clients to bring him in for SC services.⁴⁶ Now, in 75% of his cases, the litigation team retains him with the agreement of the client: “Once they've tried it, they realize how liberating it is, for them not to have to deal with settlement.”⁴⁷ Where the litigation lawyer initiates the retention of SC, in contrast to having SC brought in “over top” of the litigation team, the dynamics are less threatening and require less deference.

Where cultural change must accompany changing methods of legal practice, organizational and community support is integral, especially inside law firms. To support internal leadership within, some firms have established Dispute Resolution sections or groups. The Dentons' story is illustrative. In the mid 2000's, the firm began an initiative exploring trends in dispute resolution and implementing internal training programs on related topics, including the newly developing SC model.⁴⁸ Inner-firm practice structures such as this reward personal leadership, enrich the environment, and set the stage for the adoption of less conventional initiatives.

⁴³ Participant 5, *supra* note 6.

⁴⁴ *Supra* note 10.

⁴⁵ *Supra* note 9.

⁴⁶ *Supra* note 8.

⁴⁷ *Ibid.*

⁴⁸ Participant 12, *supra* note 6.

B) Fee Arrangements

For SC to be attractive, it must be presented with a rationale that makes sense to corporate decision-makers, offering benefits such as cost-savings, greater efficiency, and a better net result; this fits with a growing ethos of financially accessible legal services.⁴⁹ The proposition that the SC model—with its retention of two separately paid lawyers or legal teams—would save the client money is, on its face, counter-intuitive. All lawyers we interviewed with formal SC experience recalled making initial presentations to clients about the model's prospective benefits. Tarnowsky and his team had been invited to present to the General Counsel of *XYZ Resources*, the in-house lawyer, and an appointed businessperson:

Knowing we would face resistance, we had spent time preparing. We explained the concept, what we see as the process, related it to the little we knew about the dispute, how we saw the initial steps occurring, and tried to anticipate questions. It took more than an hour. All the concerns that you see in the literature were raised: Why would we hire another set of counsel? Aren't we just doubling-up on our costs? How does your role differ from what litigation counsel would normally do? At the end of the meeting, General Counsel said thank you, but [that they] don't see it working in this case.⁵⁰

Patience can be key. Nolland also gave examples of initial resistance by corporate decision-makers, and the need for continued advocacy in advancing a concept that on its face seems to run counter to business objectives.⁵¹ In the *XYZ Resources* file, a second opening arose:

Over the next week or two, we remained in communication with the in-house lawyer who had initially contacted us. She asked whether we could put together a fee proposal. One of their greatest concerns was that they would double-up on legal fees. Working with in-house counsel, we then came up with a number of different concepts and ways to approach the fee arrangement. With her input, we settled on one which would have the greatest attraction.⁵²

Fee arrangements tend to be non-traditional, creative, and potentially lucrative for the SC lawyer as well as outcome-based for the client. Our study identified three general fee structures: hourly fees tied to results; fixed

⁴⁹ “[2012 In-House Counsel Barometer](http://www.ccca-accje.org/)”, *The Canadian Corporate Counsel Association*, online: <www.ccca-accje.org/> (three in ten Canadian in-house counsel had experience with alternative billing arrangements when outsourcing legal work, including fixed fees, percentage discounts, capped fees, blended rates, and bonus structures based on results at 113).

⁵⁰ *Supra* note 10.

⁵¹ *Supra* note 8.

⁵² *Supra* note 10.

fees over a specific span of time (with or without a bonus); and contingency (embedded in the litigation team's contingency, or free-standing). The first arrangement, a formula based on hourly fees, is the least common. One of the American lawyers we interviewed uses this approach on some files: a premium hourly fee (double the normal rate) payable only if a settlement is reached within ninety days.⁵³ A failure to obtain a settlement means that the client is not obligated to pay.

The second arrangement is a modest fixed monthly fee, designed not to over-burden the client (e.g., \$10,000/month), which may or may not be enhanced with a results-driven bonus. With or without a bonus, the appointment would span a certain term, the fixed monthly fee payable at the end of the term, regardless of whether a settlement was reached. Bonuses, if included, can be structured differently. In one example, the bonus was a percentage of the difference between a base-line settlement goal and the settlement actually achieved.⁵⁴ The client states a settlement goal, and if the outcome reached is better, then SC receives a share of the difference in the form of a bonus. In another results-driven example, the bonus is tied to savings on projected litigation costs (a percentage of the difference between budgeted cost, less actual cost). These types of bonuses tend to create incentive for *both* client and lawyer. To respond to client concerns over accelerated file costs, the bonus in such an arrangement can deduct monthly fixed fees paid to date. The final version of a fixed fee arrangement might be results-based in that it is tied to the achievement of results in a limited period of time. In this example, SC would be paid the fixed fee to achieve the settlement (perhaps a monthly fee over several months), and after the expiry of the term, the SC would continue to work on the file for no additional fees. For the lawyer, this increases the incentive to settle earlier.

The contingency arrangement is common on the plaintiff side in the United States, with an overall average contingency fee of 40%. SC's portion can be absorbed into that fee, or paid separately by the client. If the latter option is chosen, the client would typically pay the litigation team a contingency of 40% and SC another 4% on top of that. Alternatively, 10% of the overall contingency (or 4% of the settlement) can be directed to SC. Where the SC model is embraced from the beginning—and particularly where litigation lawyers propose it—SC fees are generally viewed as the litigation team's obligation, not the client's. Where a SC is brought in midway through litigation, a third option is proportionate sharing: the client pays 2% and the litigation lawyer redirects 2% of fees, freeing up a total of 4% for SC

⁵³ Participant 5, *supra* note 6; see also Hoffman & McGuire, *supra* note 11 at 3.

⁵⁴ Brine, *supra* note 5, provides a sample retainer agreement for SC, used by the Irell and Manella firm in 2003.

fees.⁵⁵ Nolland prefers full integration from the inception of the dispute, but notes that it is sometimes unavoidable that he is brought in after litigation has been filed, and in that case the conceptual sharing of his fee “is easier on both the client and the litigation lawyer.”⁵⁶

The search for the right fee formula can determine whether the client is comfortable proceeding, and can demonstrate whether client interests are fully understood.⁵⁷ In the *XYZ Resources* file,

We were trying to make sure that the hard cost of employing us as SC would be minimal. Ultimately the arrangement we agreed upon, after some iterations, was a flat fee for a period of time, then a “success fee” linked to time and success: a formula. The longer we took, the less we would get. The flat fee was important to help build the investment of the client. But the offset was that the client would save on litigation costs, with a resolution. It felt risky to us, because we had to absorb some expenditures before a prize could be obtained, but it was designed to be attractive to the client. And it was.⁵⁸

Measurable outcomes are key:

The issue is whether I will do one of three things: Will I get a settlement done that otherwise the client would not have received? Will I increase the value of the settlement, on the plaintiff side, or decrease the cost of the settlement, on the defense side? Or, if it doesn't settle, will I add value by not having the litigators distracted by the settlement so that they can do a better job at trial?⁵⁹

All fee-for-service work introduces inherent tensions into the lawyer-client relationship (lawyers striving to maximize profits and clients to lower costs)—tensions that on a superficial level are seemingly compounded with

⁵⁵ Another SC fee variation is proportionate sharing: if the lawyer's fee is 40% (meaning that the client gets 60% of recovery), then they share SC fees in the same ratio—the client pays 60% and the lawyer pays 40%.

⁵⁶ Nolland, *supra* note 8, agrees that it is a “hard sell” for clients to increase fees partway through a litigation process. Resistance lessens when SC fees are viewed by the client as part of the cost of managing the file from the outset: “[if] a file would take 10, 000 hours to do over the course of two years and a thousand hours of that would be spent on settlement, if the litigators don't have to do the settlement work there are 1000 hours they can use to pay settlement counsel.” (*ibid.*)

⁵⁷ Nolland, *ibid.*, gave the example of a case involving a multi-million dollar bankruptcy litigation claim, wherein the prospect of a SC/litigation team combination was used to distinguish the bidding firm as offering something distinct that centered on client needs and reducing overall litigation costs. The firm bidding with the SC component won the bid.

⁵⁸ *Supra* note 10.

⁵⁹ *Ibid.*

two parallel payment contracts.⁶⁰ However, alternative and results-sensitive billing arrangements, strategically chosen, mitigate tensions by meeting client needs.

C) Structuring Lines of Communication

The segregation of functions in the SC model raises questions about the flow of information in different directions. Considering only one side of the file, the SC model creates a triangulated set of relationships among the two lawyers (or two legal teams) and the client. No standard communication template exists. The lawyers and client will need to negotiate lines of communication, accountability, and control: “It was a process that had to be worked out as we went along, because we didn’t have any specific model to which we could look. Very early on, we needed to create an understanding of what could be communicated, during the process, to litigation counsel.”⁶¹

Some achieve this through an initial three-way meeting among in-house counsel (or client representative), litigation counsel, and SC to define roles, reporting structures, and limits on communication.⁶² Planning early “allows [SC] to drive the settlement dynamic right from the beginning, to plan and strategize to create settlement opportunities—rather than being driven by last-minute events.”⁶³ An obvious rule is that the litigator must not present or invite settlement offers from the other side: “bright lines” avoid litigation and SC being “played off each other.”⁶⁴

Beyond the agreement of responsibilities as discussed above, rules about the flow of information are not preordained. Rules must be clear to the participants, but can be negotiated along different lines depending on the needs and dynamics of a particular case. Experienced SC lawyers describe structures along two modalities: the “cross-fertilization” approach and

⁶⁰ For a discussion on billing tensions, see Duncan Webb, “Killing Time: A Limited Defence of Time-Cost Billing” (2010) 13:1 *Leg Ethics* 39 at 44. Can certain billing arrangements trigger self-interested or manipulative behaviour—or, at the very least, judgment bias—in lawyers? The efficacy of contingency and flat- or task-based fees in the current context depends on the quality of the lawyer’s advice on settlement. For a discussion of this fundamental ethical question and the extent to which billing introduces irresolvable tensions in professional responsibility, see Adam North, *The Sale of Law: Ethical Advising and Advocacy in Light of Billing in Civil Litigation* (LLM Thesis, University of Saskatchewan College of Law, 2015) [unpublished].

⁶¹ *XYZ Resources*, *supra* note 10.

⁶² Participant 5, *supra* note 6.

⁶³ Nolland, *supra* note 8.

⁶⁴ Participant 5, *supra* note 6. Lines are more likely to be blurred if SC and the litigation lawyer are from the same firm, which risks a negative impact on negotiations (Nolland, *supra* note 8).

the “arms-length” approach.⁶⁵ Both presume an open flow of information from the litigation lawyer to SC, confirming that SC is entitled to obtain any information about litigation developments insofar as they affect the assessment of the case. The difference between the approaches centres on how much information flows the other way. With cross-fertilization, SC “will keep [litigation counsel] advised of all significant settlement discussions and communications.”⁶⁶ An arms-length structure, however, protects settlement developments and presumes that little information acquired or generated on SC’s side of the file will flow back to the litigation team. The rationale dips into negotiation theory: in a safe and confidential environment, parties can explore resolution without having negotiation positions or disclosures that negatively affect them in litigation. The difference between the cross-fertilization and arms-length orientation may be subtle. In the end, SC needs the discretion to decide what to share with and what to keep from litigation counsel to strategically advance the resolution of the file.

Codes of Professional Conduct may present constraints, especially given that all sides of the triangulated relationship mean the client is entitled to open disclosure on all matters of relevance. The vagaries of professional obligation are beyond the scope of this article, but warrant careful thought as the model continues to develop. Another factor is the question of whether one or two firms are involved. The relationships described above—and almost all examples provided by lawyers we interviewed—presume cross-firm relationships. However, litigation and SC lawyers could be appointed within the same firm, with extra care required in the construction of those relationships.

Once lines of communication are clarified on the SC’s side of the file, a decision must be made about how to engage the party on the other side. Here again, different practices exist and contrast with the Collaborative Law model in family law. A formal Collaborative Law file does not proceed unless each client has signed a Collaborative Law agreement and has retained a Collaborative lawyer. Rarely, however, would SC have the luxury of negotiating across the table with someone appointed under contract in this formal way. In most cases, SC on one side has to try to line herself up with an appropriate representative—ideally someone who views herself as a negotiator—on the other side. Sometimes initial groundwork needs to be done for this, as was the case in the *XYZ Resources* file:

Our client’s litigation counsel was known as very good, and could be an aggressive litigator. This was a matching “gun for gun”, in a sense. Part of the strategy we developed with the client was around, “How can we use this? How are we going to

⁶⁵ I borrowed this descriptive term from Nolland, *supra* note 8.

⁶⁶ *Ibid.*

convince the other side to engage in this process, and put their litigation counsel in the background?”⁶⁷

Conventions and rules preventing cross-file lawyer-to-client contact may make it difficult to “sell” the SC idea to the other side. Yet, the idea may have to get past the other litigator to the opposing client if it is going to take hold. How this might be navigated requires a strategy:

After throwing around a variety of approaches, we decided that the best approach was for our client’s in-house counsel to contact their in-house counsel to explain that we had been retained as settlement counsel. “Here’s what their role will be. Here’s how we think we can move forward. We encourage you to do the same.” Working together with in-house counsel, we prepared scripts to guide her in these conversations. We tried to canvass the waterfront of possibilities that might come up in the course of the discussion. Every one of these steps was undertaken with a great deal of careful thought.⁶⁸

Often, SC will begin by calling the opposing litigator, explaining his intention and role, and asking to engage directly with the person authorized to discuss settlement (usually in-house or general counsel).⁶⁹ Occasionally, the general counsel will identify another employee within the corporation to be the negotiator. With smaller corporations without in-house counsel, it may be the president or CEO who takes on this task. Finally, SC is not always matched with someone acting with an exclusive negotiation mandate. Acting as SC on the plaintiff’s side, Nolland usually deals directly with the opposing party’s litigation counsel.⁷⁰

Our study identified three different types of pairings: SC-to-in-house counsel, SC-to-internal business representative, and SC-to-litigation counsel. The process parameters—and in particular, expectations around cross-table communication—will vary from case to case according to the offices of those involved and the particular needs and concerns of the parties. Consider the care that went into framing the cross-table process in the *XYZ Resources* example.⁷¹ The SC team for *XYZ Resources* was lined up with the in-house lawyer for the other litigant, but in clarifying lines of communication, they obtained clearance to communicate both with the in-house counsel and the litigation lawyer on the other side of the file.⁷²

⁶⁷ *Supra* note 10.

⁶⁸ *Ibid* (prior to this, the SC team for *XYZ Resources* had contacted the litigation lawyer on the other side of the file advised that they had been retained, and the steps that would follow).

⁶⁹ Participant 5, *supra* note 6.

⁷⁰ *Supra* note 8.

⁷¹ *Supra* note 10.

⁷² *Ibid*.

They also negotiated assurances, from in-house counsel on both sides that there would be no direct or indirect conveyances of any information shared through the course of the settlement process with litigation counsel on either side.⁷³ So as to keep the tone collaborative, they did not seek a written agreement on disclosure issues at the outset, relying instead on conversations:

If we started getting into the disclosure of sensitive information that would be of benefit to litigation counsel, then we may want to put in more formality to the agreement, more restrictions. We never had to go there, but it was something we had planned for. I was putting my professional obligations and my reputation on the line, as was the other counsel. Where you start to lose a little comfort is with the business people involved: They don't necessarily have the same professional obligations. Though, they're bound by the word and the trust that people have in them. In the end, there needs to be a level of trust between the organizations.⁷⁴

In the end, one of the SC model's attractions is that it is malleable, a process that can be fully adapted to the organizational circumstances of a client and an opposing party.

4. Derivative Strategies: Features of Settlement Counsel That Can Enhance Negotiation

As the SC model challenges older constructs for litigation work, so it liberates. Since 1970 when Roger Fisher and William Ury introduced their idea of interest-based negotiation in *Getting to Yes: Negotiating Agreement Without Giving In*, theorists and practitioners have experimented with process models that protect the best of the collaborative ideal.⁷⁵ Pure problem-solving models are easy to design; the challenge comes when they are linked to an endemically adversarial legal system. The SC model is a unique joinder of these two systems. As a formal alternative, it has potential, especially in large or complex litigation. Lawyers interested in applying this model to particular files will need to work closely with the client and the rest of the legal team to identify the scope of the role, fee arrangements, and an ideal communication structure. The variations described above may assist in this process.

Even if the model does not take root in Canada, however, important lessons can be derived from the SC experience. In this way, I suggest, its

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ See Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 3rd ed (New York: Penguin Books, 2011) (for the most current edition).

real power is as a reminder that—even in the midst of litigation—problem solving can be accomplished. The SC model employs the following values, and in so doing, constructs a set of ideals for the resolution of legal disputes, inside or outside the formal SC process.

A) Front-and-Centre Concern for the Client's Corporate Interests and Business Strategy

Beyond the simple win-lose outcome framework on the surface of a legal action, a litigation lawyer may not have a deep understanding of his clients' business strategies.⁷⁶ SC's ability to focus exclusively on the settlement mission assists with this education process. A full understanding of corporate interests can help ensure that the litigation strategy compliments the client's overall business strategy, and this kind of discussion takes time.⁷⁷ One interviewee commonly sets aside up to a full day to have this deeper conversation with the client, bringing people in from different roles in the company.⁷⁸ Then, he invites the client to explore the corporate interests of the opposing party, asking someone from within the organization who knows the other side (most business disputes do not involve pure strangers) to take on the role of the other party for an hour of brainstorming.⁷⁹ Similar front-end work was conducted on the *XYZ Resources* file: "We spent a lot of initial effort doing an internal analysis with the client: What's gone on in the past? Who's been involved? What are our options? How do we want to start a process? Where do we want it to lead? We spent a lot of time figuring out their business interests."⁸⁰

This approach is reminiscent of in-depth workshopping, situating the legal case inside the client's business profile and current commercial priorities and correlating those to the profile and interests of the opposing party. Our study participants emphasized the value of this process, describing it as distinct from what typically goes on during the management of a litigation file. Yet the ideal—leading with an in-depth understanding of the client's business strategy rather than pre-programmed litigation procedure—is fully transferable.

⁷⁶ This possible lack of in-depth knowledge is in contrast to the depth of knowledge commonly acquired by in-house counsel; Participant 4, *supra* note 6; Participant 12, *supra* note 6; Participant 14, *supra* note 6.

⁷⁷ Bryan, *supra* note 4 at 199; Brine, *supra* note 5 (provides several examples of how large corporations facing compensation claims coordinated their business, settlement, and litigation strategies for significant benefit).

⁷⁸ Participant 5, *supra* note 6.

⁷⁹ *Ibid.*

⁸⁰ *Supra* note 10.

B) Commitment and Capacity to Conduct Risk Assessments

Perhaps because they have stepped outside of the litigation, SC pay close attention to the realities of what will unfold in that process, and use those realities to develop measurable criteria for settlement. In the vocabulary of negotiation theory, they develop BATNAs by carefully assessing probable outcomes of the litigation process, assessing litigation risks on both sides, fairly and comprehensively projecting litigation costs (legal fees, out-of-pocket costs, expert fees, and client opportunity costs), and using that information to project probable bargaining zones (ZOPAs).⁸¹ Trained and freed up to spend time on these methods, SC can use sophisticated approaches to help the client make informed decisions.

The boundaries between the litigation lawyer and SC must be carefully maintained. SC's role is not to second-guess advice or general assessments provided by the litigation lawyer, creating tensions across the legal team.⁸² Yet, even if the initial identification of strengths and weaknesses in a case are left to the litigation lawyers, the analytical and strategy-building dimensions of the risk assessment are often handled by the SC team. For example, in the *XYZ Resources* file, Tarnowsky took the detailed litigation opinions and

⁸¹ Robert Mnookin, Scott Peppet & Andrew Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge, Mass: Harvard University Press, 2000) at 19.

⁸² *XYZ Resources*, *supra* note 10: "We would get asked by the client to assess the litigation advice, and we had to keep reminding her that it's not our role. 'If you've got questions about that, sit down with your litigation counsel.' We could arrange a second opinion, but it would have to be distinct from what we were trying to do: taking the information from litigation counsel to assist us in developing a settlement strategy."

As noted by Nolland, *supra* note 8:

You get into situations where...the litigation is not going well, the client is unhappy and seeking your guidance and advice. You may need to talk with the client about issues with the litigators. The client may not understand the litigation process. You don't want to create hard feelings—you need to be able to work with the litigators. So, you may have to be the mediator between the client and the litigator, on some issues. That's not really your role, but it happens every once in a while.

Long-term professional associations between SC and litigation counsel help ease these pressures, as Nolland, *ibid*, states:

How I handle things may depend on who has brought me in, and the dynamics around that. If the client brings me in I feel a little more free to say to the lawyers: "What you're doing is counter-productive from the settlement point of view." If the lawyers bring me in, and they have a strong view on something which could impact the settlement, I might be a little more deferential. When I'm brought in by the client, I may need to educate the lawyers because I'm being imposed on them. When I'm brought in by the lawyers, there usually is not the same battle for control.

built a complete risk assessment document using computer decision-tree software:

The risk analysis decision tree that we developed in TreeAge was complex, and we spent time with our client going through it. As we looked at introducing it into settlement discussions, we realized that we needed to simplify and distill it. In negotiations, we presented a summary output: “Here are the key factors”. Towards the very end of the negotiation, we were actually getting the other side’s numbers and injecting them into our risk assessment program. On the last day of negotiations we could see that we had authority that overlapped with what their numbers indicated they were willing to accept.⁸³

Properly in-tune with their client’s corporate concerns, SC will be able to identify internal organizational costs of litigation,⁸⁴ and perhaps analyze process risks beyond the litigation itself in order to review the benefits and drawbacks of settlement avenues spreading in several directions:

Part of our function in the process was not just external risk analysis with respect to the litigation but also risk analysis with respect to the settlement. There were two sides of the Risk Analysis tree, the litigation side and the settlement side. If we settle it like this then there are all these risks and contingencies on the settlement side. On the flip side if we agree to that, what are the risks, and how does that impact the outcomes? That was really delving into the business of the client. They are much better at doing that, but we pushed them to undertake that process.⁸⁵

With increasing social concerns about the costs of litigation, the appetite among clients for formal and comprehensive risk assessments is growing, and SC appear to be among the few who have mastered this service.

⁸³ *Supra* note 10. Risk assessment approaches are described in Heavin & Keet, *supra* note 2; Heather Heavin & Michaela Keet, “[The Path of Lawyers: Enhancing Predictive Ability through Risk Assessment Methods](#)” (Paper delivered at the CIAJ 2016 Annual Conference, 5–7 October 2016) [unpublished], online: <ciaj-icaj.ca/en/research/research-papers/>. SC sometimes employ other tools to help in the assessment of risk, see Lande, “Getting Good Results”, *supra* note 22 (the joint development of a “third story”—how an outside observer might look at a case—can help both parties develop a more realistic assessment at 115). See [TreeAge Pro Decision Tree Software](#), online: <www.litigationrisk.com/frame-sw-full.htm> (for the risk analysis software).

⁸⁴ Two participants with experience both as in-house and external counsel explained that in-house lawyers are generally the ones who understand and assess internal organizational costs.

⁸⁵ *XYZ Resources*, *supra* note 10.

C) Value Placed on Settlement as a Distinct, Compensable Service

Fee arrangements that distinguish settlement and litigation roles may capture something important for conceptual as well as practical reasons. One senior litigator offered an example of a large multi-million dollar energy sector dispute headed for a six-week arbitration likely to cost his client one million in legal fees.⁸⁶ The governing procedure included a post-discovery mediation process with a renowned mediator. Drawing from the SC process, the lawyer decided to set up a settlement-focused stream for his litigation role: he bargained a fee structure with the client that included a bonus for early settlement within certain parameters.⁸⁷ He engaged in settlement goal-setting with the client and then used the mediation process to design a unique set of conversations (including client-led discussions in caucus).⁸⁸ He described it as setting up a SC structure “on one half of [his] lawyer’s brain.”⁸⁹ The file settled.

Embedded in the lawyer’s advocacy role is the obligation to explore settlement.⁹⁰ Against that broad obligation, a story of a lawyer’s commitment to resolution for his client may seem to offer nothing new. What is intriguing about this and the many examples described to us through the interviews, however, is how value was allocated at the onset of the files. In the case above, lawyer and client discussed settlement strategies at the outset and embraced a settlement-focused role for the lawyer to run parallel to the litigation, with a deliberate and separate payment rewarding that role. The design of an explicit service contract with fees geared to settlement advocacy is unique and transferable across other litigation contracts.

D) Clear Methods for Grounded Decision-Making, Using an Interest-Based Model and a Multi-Faceted Team

SC invest time upfront, exploring the client’s underlying goals and concerns and then using those to develop criteria for settlement and a range of outcome options. The interest-based focus also extends early on to the exploration of common ground between the litigants. The *XYZ Resources* approach was to pay equally careful attention to the *other side’s* interests: “A lot of what we were trying to do was to understand what we could do to meet the interests of the other side. At virtually every meeting, I would

⁸⁶ Participant 10, *supra* note 6.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2016, ch 3.2-4 (this rule has been adopted in various forms by most Canadian provinces).

turn to the businessperson and say ‘what possibilities might make the pie bigger?’ If we couldn’t meet the other side’s interests, we couldn’t develop an attractive settlement.”⁹¹

Brainstorming deeper interests on both sides of the file is best done inside a coordinated team: “There was a high level of understanding and communication among the businessperson, in-house counsel and ourselves [SC lawyers]. It enhanced our ability to work together and to develop new approaches, to be innovative and to break new ground.”⁹²

As negotiations progressed in *XYZ Resources*, each team member played his part: “Sometimes the businessperson for each side met in negotiation sessions, and we weren’t present at all of them. But we would develop a strategy with the businessperson, in advance. The majority of discussions occurred client-to-client, toward the end.”⁹³

In pockets where SC practices are maturing, the separation of settlement and litigation services is being used proactively to demonstrate sensitivity to client needs even before clients demand it. In Nolland’s current work, the litigation firm proposes a litigation/SC arrangement to the client even as relationships are first being established—and uses that as a way to attract clients or “win” litigation work on larger files.⁹⁴ This presumes lawyers have the ability to work together across areas of the profession, across and within firms, and to distinguish areas of strength and compose the team in a way that is financially and strategically attractive to the client.⁹⁵ It might even affect the skillsets that lawyers seek when staffing law firms.⁹⁶

5. Conclusion

The short-sighted scorpion, whose nature dooms both him and his companion, is admittedly not the best metaphor for the modern commercial litigator. Yet, even litigators who are sensitive to client needs and to the settlement mandate are still impeded by procedural pressures and cultural

⁹¹ *Supra* note 10.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Supra* note 8.

⁹⁵ See Forrest S Mosten, “Unbundled Legal Services Today: And Predictions for the Future” (2012) 35:2 Family Advocate 14 (Mosten predicts that lawyers will be required to discuss unbundling options with their clients before signing full-service legal service contracts at 14); Kristen M Blankley, “Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services” (2013) 28:3 Ohio St J Disp Resol 659.

⁹⁶ Charles B Craver, *Effective Legal Negotiation and Settlement*, 7th ed (New York: LexisNexis, 2012).

notions of expected litigation behaviour. Bifurcating “the war team and peace team” is an idea that warrants further exploration even as it challenges traditional notions around the exclusivity of legal service, the way lawyers are compensated, and the manner of communication on both sides of a litigation file.⁹⁷ Our interviews revealed many operational variations in the scope of such roles, and the fees and communication structures attached to them. No single prescription for SC exists, and this may be daunting for lawyers wishing to employ the model. On the other hand, its versatility is attractive. Creative proposals and clear dialogue can overcome threshold barriers and support a process that is uniquely client-centred and results-oriented.

For now, the SC experience contains important lessons about the settlement of commercial and civil files, endorsing and isolating the value of specialized negotiation skills. I have argued elsewhere that the greatest impact of formal collaborative processes might not be the discrete models themselves, but the increased capacity of lawyers trained in such models to integrate interest-based approaches throughout their work.⁹⁸ In this way, the SC framework sets a new standard. It calls for litigation management built around corporate interests (not *vice versa*), and prioritizing risk assessments and strategic negotiation. It offers a structure that openly values the “lawyer-client team” and creates mutual incentives for results. Its focus on outcomes and accountability is a reminder of what has often been missing in litigation practice, and its reconfiguration of lawyer-client roles is a central ingredient of accessible legal work in the future.

⁹⁷ O'Malley, *supra* note 19 at 2.

⁹⁸ Michaela Keet, Wanda Wieggers & Melanie Morrison, “Client Engagement Inside Collaborative Law” (2008) 24:2 Can J Fam L 145.