

LAWYERS' ETHICAL OBLIGATIONS, INNOVATIVE MODELS OF LEGAL SERVICE, AND A TIME OF REGULATORY UPHEAVAL: SETTLEMENT COUNSEL AS AN INSTRUCTIVE MODEL

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Current models of professional regulation still embody traditional norms around the lawyer's role. This article explores the constraints of reactive, rule-based ethical frameworks, using the example of Settlement Counsel, an innovative negotiation structure to advance settlement in commercial litigation. Settlement counsel work alongside litigation counsel, on the same side of the litigation file, but with carefully bifurcated roles. Drawing on interview data, the authors discuss the tensions encountered by settlement counsel as they fit their work into traditional obligations around competence, loyalty, confidentiality, candour, and lawyer-client cross-communication. The authors present pathways chosen by settlement counsel to ensure compliance. In today's environment, however—with its emphasis on “accessible” outcomes and innovation—regulatory frameworks need to be more flexible and responsive. The emerging model of compliance regulation is explored, and is offered as a framework with capacity to evolve alongside innovations in the delivery of legal services.

Les modèles actuels de réglementation professionnelle continuent de refléter les normes traditionnelles établissant le rôle de l'avocat. Se fondant sur la fonction d'avocat spécialisé en règlement (Settlement Counsel) et une structure de négociation novatrice qui permet de promouvoir les règlements dans le contexte commercial, cet article examine les contraintes inhérentes à des cadres déontologiques réactifs et fondés sur des règles. L'avocat spécialisé en règlement collabore avec son homologue spécialisé en litige alors qu'ont été tracées avec minutie les lignes de démarcation entre leurs attributions respectives. Se fondant sur des données d'entrevues, les auteurs discutent des tensions auxquelles sont confrontés les avocats spécialisés en règlement alors que leurs activités sont circonscrites par les obligations traditionnelles concernant la compétence, la loyauté, la confidentialité, la franchise et la communication mutuelle entre l'avocat et son client. Ils présentent les moyens choisis par ces avocats pour s'assurer du respect de la conformité. Cependant, dans le milieu actuel qui met

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particulièrement l'accent sur « l'accessibilité » des résultats et de l'innovation, les cadres de réglementation doivent être plus souples et mieux adaptés. Ils se penchent sur le modèle émergent de réglementation axée sur la conformité et le proposent comme cadre capable d'évoluer au rythme des innovations connexes à la prestation des services juridiques.

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1. Introduction

The trend toward segregation in modern legal practice has led to intra-professional dependence among lawyers who must learn to respect each others' areas of expertise as they protect their place in the commercial marketplace.¹ Negotiation skills are emerging as their own area of legal expertise as commercial litigators explore ways to facilitate early and economic solutions for business clients.² The Settlement Counsel ("SC")

¹ Among others, Duffy Graham makes this point in *The Consciousness of the Litigator* (Ann Arbor: University of Michigan Press, 2005) at 36–37 [Graham].

² Encouraged through professional obligations: The Federation of Law Societies of Canada, *Model Code of Professional Conduct*, (Ottawa: FLSC, 2016), online: <[www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-\(1\)/Codes-of-Professional-Conduct](http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Codes-of-Professional-Conduct)> [FLSC Model Code]:

3.2-4 A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

model is one such innovation. The model employs a unique separation of roles—an intra-professional dependence between negotiating and litigating lawyers, the mechanics of which need to be clarified contractually on a case-by-case basis.

Driving the SC model is a concern for client-centered outcomes, and for potential internal limitations in a traditional litigation service. The task of advancing a claim or defense in litigation can be all consuming, whether assigned to a corporate litigation lawyer or outside counsel. The litigation mission can compromise one's capacity to step back, consider possible creative outcomes, and pursue settlement.³ In some circumstances—perhaps situational—the litigation lawyer is not the one best placed to advance negotiation with the client's best interests at the fore. Even without the internal conflict between litigation and settlement roles,⁴ she may not have an intimate understanding of the corporate client's goals and priorities, with little opportunity to explore those in the normal process of preparing for stages in civil litigation.⁵

The appointment of SC means adding a specialized negotiator to the client's legal team. It allows for the advancement of litigation and settlement as divided tasks, which can proceed simultaneously on parallel tracks. In that they are “[r]etained and paid separately from litigators—and often [work] closely with clients—SC negotiate directly with the other side to resolve the file, while litigation counsel navigate a separate litigation process.”⁶ Operational details about how litigation and settlement negotiation roles are separated in the SC model—and its advantages and

Commentary

[1] A lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

Most Canadian law societies have now adopted the FLSC Model Code, or plan to do so. See also Stephen GA Pitel, “Counselling and Negotiation” in Alice Woolley et al, eds, *Lawyers' Ethics and Professional Regulation*, 3rd ed (Markham: LexisNexis Canada, 2017) ch 7 at 453.

³ Michaela Keet, “Settlement Counsel: An Innovative Strategy for the Management and Resolution of Commercial Litigation Files” (2017) 95:2: Can Bar Rev 357 [Keet].

⁴ This is a tension explored by Graham, *supra* note 1. He reports on a tongue-in-cheek phrase used in the “back hallways and private offices of litigation practice ... : The Client is the Enemy” (at 55). The phrase captures the tension between the litigator's desire for control (guided by her special judgment in the shaping of a successful litigation process) and the extent to which it is upended by a client focused on other interests, a reminder that “[t]he litigator's interests are not coextensive with the client's” (at 109).

⁵ Kathy Bryan suggests that even internal corporate counsel may not always be suited to take on the settlement role: “Why Should Businesses Hire Settlement Counsel?” [2008]:1 J Disp Resol 195 at 199 [Bryan].

⁶ Keet, *supra* note 3 at 359. Even allowing for the “aggressive” pursuit of litigation (*ibid* at 199).

practical challenges—are explored elsewhere.⁷ As with many innovations, the SC model shows potential in an environment with growing emphasis on “accessible” outcomes at the same time as it challenges assumptions about how lawyers ought to do their work.⁸ Through creative planning, lawyers (and clients) may look beyond conventional titles, consider individual skills and situational advantages, and design a set of corporate and legal relationships that make sense in the moment.⁹

SC is an example of commercial adaptation to the challenges of modern practice. Such innovations, however, are hampered by older normative frameworks around “the lawyer’s role”, located inside existing models of professional regulation. This paper builds on an earlier study of lawyers in Canada and the US with expertise in collaborative negotiation models and legal practice.¹⁰ In particular, the paper is inspired by worries SC lawyers shared: as they broke new ground, they were always attentive to ethics, but sometimes unsure of how this new format fit within “old” professional obligations, significantly grounded in “reactive” rule-based ethical frameworks.¹¹ We describe tensions, and review some existing provisions of professional conduct codes that present challenges and options for those wishing to experiment with the SC model.

Placing these issues, challenges, and opportunities in an evolving context of lawyer regulation, we also consider how such innovations in legal practice may be better accommodated through a proactive regulatory

⁷ Keet, *supra* note 3. That article, and the current one, are based on an interview-based empirical study. Participants included an equal mix of Canadian and US lawyers, ten in private practice and four in-house. Six had accumulated experience in formal SC files ranging from one to hundreds of files. Concerns with the SC model center on notions of file ownership, fee arrangements, and lines of communication. These “resistance points” and some solutions located in the SC structure (including creative billing arrangements) are explored in that earlier paper.

⁸ National concern for a crisis in civil justice is captured in the following two reports: Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change*, (Ottawa: Canadian Forum on Civil Justice, October 2013), and CBA Access to Justice Committee, *Reaching Equal Justice Report: An Invitation to Envision and Act*, (Ottawa: Canadian Bar Association, November 2013).

⁹ Danny Ertel & Mark Gordon, “Points of Law: Unbundling Corporate Legal Services to Unlock Value” (2012) 90:7 Harv Bus Rev 126 at 129, 132.

¹⁰ Keet, *supra* note 3.

¹¹ An ethical issue not explored here is the question of billing arrangements. Creative outcome-oriented billing arrangements may be seen as instrumental and effective components of the SC model, and yet may also give rise to deeper questions around the ethics of billing—how lawyer behaviour is influenced by financial incentive. For further discussion, 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].

framework based on compliance-based regulation, which is currently under active consideration in many Canadian jurisdictions.

2. How do Current Ethical Codes Accommodate the Settlement Counsel Model?

When collaborative negotiation models first began to find their way into legal practice, questions were raised about the different ethical frames that ought to accompany such shifts.¹² The introduction of collaborative law into family practice did bring this to a head, with questions being raised among US bar associations about whether the contractual commitment by lawyers and clients to advance the file through four-way negotiations (while suspending litigation) created conflicts of interest for lawyers.¹³ For the most part, those wranglings have been resolved, and it is now generally accepted that settlement-only roles are not antithetical to codes of conduct responsibilities.¹⁴ Recent legislative changes now require some family lawyers to advise clients of “the collaborative law services ... that might be able to assist the spouses in resolving [their] matters.”¹⁵ Because the SC model means a settlement-only role for one lawyer but not for the file as a whole, SC escapes the controversy first created by the introduction

¹² The rise of ADR processes in the 1990s inspired Carrie Menkel-Meadow's influential work, “Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities” (1997) 38:2 S Tex L Rev 407. Many years later, the introduction of collaborative law stirred up questions about whether variations on Rules of Professional Conduct would be needed to support such a collaborative (non-adversarial) conception of the lawyer's priorities. See Larry R Spain, “Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated Into the Practice of Law” (2004) 56:1 Baylor L Rev 141 [Spain]. This has occurred against a broader backdrop where concerns about access to justice have invited critical questions about the broader compass that ought to guide lawyer behaviour. See Trevor CW Farrow, “The Good, the Right and the Lawyer” (2012) 15:1 Leg Ethics 163.

¹³ Scott R Peppet, “The (New) Ethics of Collaborative Law”, *Dispute Resolution Magazine* (Winter 2008) 23 [Peppet]. See also Christopher M Fairman, “Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics” (2008) 30:2 Campbell L Rev 237.

¹⁴ See generally Judge Sandra S Beckwith & Sherri Goren Slovin, “The Collaborative Lawyer as Advocate: A Response” (2003) 18:2 Ohio St J Disp Resol 497; 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*, vol 1 (Eagan: Thomson West, 2008) (loose-leaf) vol 1 ch 41 [Hoffman & Tesler].

¹⁵ See e.g. Saskatchewan's *Family Property Act*, SS 1997, c F-6.3, s 44.1(1). Quebec's *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1, s 42 requires lawyers, “[t]hroughout the course of the mandate ... inform and advise the client about all available means for settling his dispute, including dispute prevention and resolution methods”.

of collaborative law.¹⁶ However, neither is the SC model helped much by the last 20 years of progress in the dispute resolution setting because of this model's peculiarities—its dual-process design. Even senior practitioners, experimenting with the SC model, feel the discomfort of “bumping up against” current codes of conduct.

It has been argued that current codes of conduct favour an adversarial model of negotiation, setting low standards for open information sharing and good faith bargaining.¹⁷ This larger question about the way ethical codes guide negotiation behaviour is not canvassed in this paper. A similarly philosophical question triggered by the SC model is whether different conceptions of morality may be seen as guiding the litigator and SC—whether the role morality has in defining the litigator's work in an adversarial setting may give way to broader, perhaps virtue-driven, ethics when it comes to SC, even on the same file.¹⁸ It may be that alternative conceptions such as the “responsible lawyer” or the “relationship of care” better suit the SC's tasks than does the “zealous advocate” ideal, even at a moral and philosophical level.¹⁹ It is also likely that “client-centered lawyering” as a model of professional ethics better explains the SC's role, centralizing the client perspective in the interpretation of obligations around the handling of the case.²⁰

¹⁶ And, perhaps, broader criticisms about the privatization of justice. See Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014).

¹⁷ George Tsakalis, “Negotiation Ethics: Proposals for Reform to the Law Society of Upper Canada's Rules of Professional Conduct” (2015) 5:4 *Western J Leg Stud* 3.

¹⁸ Adrian Evans, *The Good Lawyer* (Port Melbourne: Cambridge University Press, 2014) ch 4 [Evans] argues that a rule-driven role morality ought to be limited to certain instances of the lawyer's work—in adversarial settings. See especially at 92, where he observes: “While role morality can be personally costly to its practitioners, it does fulfil a social good in limited adversarial environments. However, it begins to look less good and less socially useful when it is applied to the vast number of transactional and corporate law environments that make up the work of most lawyers”.

¹⁹ *Ibid* at 103; see also Christine Parker, “A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics” (2004) 30:1 *Monash UL Rev* 49. This conception of lawyering has been advanced more generally in Allan C Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age* (Cambridge: Cambridge University Press, 2015); David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007).

²⁰ For a dialogue on the impact of client-centered lawyering models in other settings, see Susan D Carle, ed, *Lawyers' Ethics and the Pursuit of Social Justice* (New York: New York University Press, 2005) ch 4. See also Katherine R Kruse, “Fortress in the Sand: The Plural Values of Client-Centered Representation” (2006) 12:2 *Clinical L Rev* 369. At the very least, one can argue that participatory (rather than paternalistic) lawyering models are called for; see Andrew Boon, *Lawyers' Ethics and Professional Responsibility* (Oxford: Hart Publishing, 2015) ch 4 (for an introductory discussion of participatory lawyering models).

Although these bigger questions warrant exploration, we focus first on the narrower, more practical question of whether and how current codes of conduct limit the practice of SC (through boundaries and duties, aspirational as they may be). What current code provisions are relevant for lawyers wishing to adopt such a model, working across from each other with divided responsibilities on one file?

A) The Mechanics of Bifurcated Roles

The segregation of negotiation and litigation functions raises instant questions about the flow of information across each side of the file. Expectations have to be clarified and are usually negotiated from the start. Experienced SC recommend an initial three-way (or four-way) meeting among in-house counsel (and/or client or client representative), litigation counsel, and SC in order to define roles at the outset of the file. Creating a role for SC at the outset “permits time (for SC) to build a relationship with the other side and a better understanding of your role and that of the litigator ... [and] allows you 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.”²¹

Most SC adopt the same general rules. Each lawyer is expected to report separately to the client. The litigator must not present or receive settlement offers. There need to be “bright lines” when it comes to who handles settlement-oriented communication with the other side.²² The corollary rule is that formal information handling tasks (such as the formal discovery

²¹ Interview of Christopher Nolland (12 December 2013) by telephone. Christopher Nolland, a study participant, usually gets involved as SC within 3–6 months after litigation has started. Nolland has acted as SC in over 100 major business, probate, trust, intellectual property, and insolvency-related litigations. While 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](#),” *The Dallas Morning News* (26 May 2014), online: <www.dallasnews.com/business/headlines/20140526-meet-chris-nolland-the-master-at-settling-business-conflicts.ece>; see also John Lande, “Getting Good Results for Clients by Building Good Working Relationships with ‘Opposing Counsel’” (2011) 33:1 *U La Verne L Rev* 107 at 116 (describing the benefits of early and open communication between SC and the lawyer representing the other side).

²² Interview of James McGuire (6 July 2013) by telephone [McGuire]. James McGuire has acted as a dispute resolution professional since 1989, and has extensive experience in all aspects of ADR including mediation and arbitration. He has over ten years of experience as SC for firm clients in patent licensing, environmental insurance, securities, banking and finance matters. If the other side feels they can extend settlement offers to litigation counsel, they may play off the SC, deriving an advantage by exploiting the model: Interview of Christopher Nolland (8 May 2013) by telephone [Nolland].

steps or mechanisms attached to interim motions) must not be handled by the SC lawyer. From the outside, the division of tasks is immutably clear.

However, beyond these divisions, rules around the flow of information *between counsel on the same side of the file* are not so clear, and not preordained. These rules tend to be designed based on SC's own particular "theory of negotiation". For example, the confidentiality of negotiations—their "off-the-record" nature—is generally seen as vital to a settlement discussion in the litigation setting. Open information sharing, which some view as essential to effective problem-solving processes, is uncomfortable against the threat or reality of litigation, explaining why classic protective settlement negotiations often involve the exchange of bare offers and counter offers. Even in a collaborative context, "[t]he dilemma arises in deciding how to share information in a manner that ultimately does not compromise the client's ability to satisfy their interests by other methods should a settlement not be achieved"²³ or, in the case of SC, *while* a settlement is still being explored. Settlement processes have built-in confidentiality protections and are considered privileged, but, as most litigators will confirm, such formal protections do not guarantee candid interactions.

In the SC structure, the veil between the work of litigation lawyer and SC offers another level of protection. The opposing party can take a negotiating position, or float an offer based on certain assumptions, that is not meant to be read as an indication of strength, position, or strategy in the litigation itself. Within the SC model, the litigation lawyer on the receiving side of the file may not be aware of the offer. This way, more bright lines limiting the information flowing back from SC to the litigation lawyer may contribute to a more inviting negotiation environment for the other side.

Experienced SC have developed frameworks to accomplish this insulated flow of information. Generally, SCs are entitled to gather any information needed to analyze the case from the litigator,²⁴ and have the discretion over what developments to share in return.²⁵ SC may receive all

²³ Spain, *supra* note 12 at 169.

²⁴ For example, Nolland's template: the pleadings; important depositions; any important matters around discovery or expert evidence; briefings on important motions; the scheduling or outcomes of any important dispositive motions; and the scheduling of a trial.

²⁵ Interview of Gordon Tarnowsky (16 January 2013) in Calgary [Tarnowsky]: "these marching orders must be made very clear" and must be given to the litigation lawyer from the in-house counsel or client representative, given the politics that can be involved. 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 information pertaining to the assessment of legal and procedural risk (including internal research not necessarily shared with the client), but avoid receiving information relating to the overall administration of the file—aside from the overview and timing of significant events. For example, one SC lawyer describes information he requires as follows:

I need to form my own judgment about what's going on, substantively and procedurally, in the case—and what's an appropriate and realistic aspirational level for settlement. I also need to consider the timing of settlement opportunities or overtures, and the nature of those overtures. When I'm talking to the other side, the merits of the case are going to come up, in the context of any settlement that goes beyond a level 1 or 2 out of 10. If I am not up to speed on those, then my persuasiveness as a SC is undercut.²⁶

While SC lawyers agree on the type of information they need from litigation counsel, opinions vary (from lawyer to lawyer and case to case) about the nature and amount of information that should flow back the other direction. On one hand, the shielding or protection of information to support settlement conversations is unapologetically claimed as an important feature of SC.²⁷ Relevant and discoverable information may become available to SC and litigation counsel at different times. In one example, it took a year for the litigation lawyer to receive the same information readily provided to SC from the client, as there were different triggers in each process.²⁸ The separation remains important for the integrity of the process: “[t]hat credibility and confidence will drive the SC process.”²⁹

The extent to which SC allow information to flow back the other way will depend on how they see the nature of the relationship between the two: “arms-length” or a “cross-fertilized team approach.”³⁰ An example of the former:

We [SC] ended up, essentially, asking for everything we could get from litigation counsel ... an assessment of damages and liability, a full risk analysis and so on. We were asking for as much as we could get, so we could understand the case as much as possible. But ... the process doesn't really let [the litigation lawyer] get much in return. Or, anything. We spent a lot of time trying to work out those ground rules.³¹

²⁶ Nolland, *supra* note 22.

²⁷ McGuire, *supra* note 22; Tarnowsky, *supra* note 25. Kathy Bryan, *supra* note 5 at 200, describes it as an advantage that SC can define a reasonable information exchange process shielded from disclosure in litigation.

²⁸ McGuire, *supra* note 22.

²⁹ *Ibid.*

³⁰ Keet, *supra* note 3 at 372.

³¹ Tarnowsky, *supra* note 25.

However, where SC is brought in on a file as a part of a SC/litigation team, with a “cross-fertilization” approach, expectations may differ: “[i]n terms of the information [that] flows from me—unless the client says otherwise—I will keep the litigators advised of all significant settlement discussions and communications ... We very much cross-fertilize each other.”³²

On some files, SC do not attempt to create a shield at all, viewing obligations to the litigation lawyer as an extension of obligations to the client:

It would be hard for me to say “you can tell me something, but the litigators will not know it.” Virtually every code of professional responsibility creates a fiduciary duty to your client, of full disclosure. To some degree, litigators are just agents of the client. Unless the client says “don’t tell the litigators,” I am not going to agree to any constraints on what I can tell the litigators.³³

It may also depend on timing. For example, there may be cause for more information flow between the lawyers early on in the file. David Hoffman and Pauline Tesler suggest:

Deploying settlement counsel at the beginning of a case creates the greatest opportunity for cost savings. However, in many cases, not enough is known about the case at that stage to make a reasoned judgment about settlement. In those cases, it may be important for settlement counsel to work closely with litigation counsel to obtain through informal discovery the information that both attorneys will need in order to do their jobs. A structured, reciprocal information exchange may be the first step in a negotiation that ultimately leads to resolution.³⁴

Although there are variations in style, all SC practice styles allow SC to gather information from the litigation lawyer, but use discretion in deciding what information to pass back. Each actor—litigation lawyer and settlement lawyer—can assume that some responsibilities will be taken care of by the other, and each will differ in the nature of their consultation with the client. While SC convey confidence that they can operate within the parameters of current professional obligations, they do experience tension around the issue of lawyer-client and lawyer-lawyer communication.

B) How Existing Code Provisions Govern Bifurcated Roles

Codes of conduct do not address how two lawyers on the same file—on the same matter, but with divided tasks—should communicate. They address the lawyers’ relationships with the client, opposing counsel, court/tribunal, and

³² Nolland, *supra* note 22.

³³ *Ibid.*

³⁴ Hoffman & Tesler, *supra* note 14, §41:14.

to some degree, the public. A formal hierarchy of lawyer obligations might rank systemic duties (to law, society, and the court) as having primacy over individual duties to the client, but the latter tends to dominate in practice.³⁵ Essentially, “[t]he main thrust of lawyers’ rules of professional conduct is loyalty to and zealous advocacy on behalf of the client, within broad limits.”³⁶ How SC and litigation counsel should handle client information and communication must therefore be viewed through the lens of each counsel’s individual ethical duties to a shared client. Some rules are worth considering, but none speak directly to bifurcated relationships on the same legal matter (limited scope retainer rules veer in a different direction, and are explored further below in Part C).³⁷ The lack of clarity around potentially relevant rules—viewed through the SC prism—may warrant some careful planning by the SC lawyer, and possibly also by the litigation lawyer.

1) Competence, Quality of Service, and the Duty to Encourage Settlement

Read together, general rules about the nature of legal services offer a rationalization for the SC model:

3.1-1 “Competent lawyer” means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including ...

(h) recognizing limitations in one’s ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served ...

3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil ...

Commentary ... [3]: A lawyer has a duty to communicate effectively with the client ... [which varies] depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions ...

3.2-4 A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible.³⁸

³⁵ Evans, *supra* note 18 at 115–16.

³⁶ Graham, *supra* note 1 at 8–9 [footnotes omitted].

³⁷ The FLSC Model Code, *supra* note 2, first adopted in 2009, is the starting point for the rules worth considering. The FLSC Model Code was intended to create uniformity across the provinces, and it is moving in that direction. Significant differences in particular jurisdictions, where they exist, will be noted.

³⁸ *Ibid*, r 3.1-1, 3.2-1, 3.2-4.

“Competence” envisions that lawyers are not well placed to accomplish all tasks or deliver all skills. “Quality of Service” allows obligations to be seen as contextual depending on “the nature of the retainer” and client needs. Finally, the overarching obligation to encourage a client to consider settlement endorses negotiated approaches. The Duty to Encourage Settlement should be read together with the criteria of the client’s informed decision making (a value that appears throughout the Model Code, and ought to be a priority in all dispute resolution processes).³⁹ Where the settlement responsibility has been delegated to a different lawyer, it can be argued that the litigation lawyer’s obligation is *prima facie* met by the adoption of the SC structure itself.

The SC model may be seen, generally, as consistent and even encouraged by these general rules, but nuances appear when one inquires further as to what would be required of each lawyer operating within the model. Consider, most importantly, that only one of the lawyers—the litigator—has access to the evidence as it relates to issues in litigation. This unequal access to information may mean that the litigator must do more to cooperate (an attitude one hopes would exist, but depending on how the SC model was introduced, may not be assumed). A look at Alberta’s robust commentary may help:

Determining whether settlement or compromise is a realistic alternative requires objective evaluation and the application of a lawyer’s professional judgment and experience to the circumstances of the case. The client must then be advised of the advantages and drawbacks of settlement versus litigation. Due to the uncertainty, delay and expense inherent in the litigation process, it is often in the client’s interests that a matter be settled.⁴⁰

There may be an implicit obligation on the litigation lawyer to engage in good faith—to give SC *all* information relevant to the assessment of litigation success and support the construction of a thorough Risk Assessment on the file, which flows from the Duty to Encourage Settlement.⁴¹

While “competence”, generally, seems to endorse the SC arrangement, the commentary language around the rule still contains traditional and uni-dimensional visions of competence. For example:

³⁹ Michaela Keet & Brent Cotter, “Settlement Conferences and Judicial Role: The Scaffolding for Expanded Thinking About Judicial Ethics” (2013) 91:2 Can Bar Rev 363.

⁴⁰ Law Society of Alberta, *Code of Conduct*, (Calgary: LSA, 2015), r 2.02(7).

⁴¹ 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 [Heavin & Keet].

[10] In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.⁴²

One of the attributes of the SC lawyer is her commitment to understanding internal corporate interests, commercial relationships and market dynamics, the client's business strategy, and developing a complimentary settlement plan. A strict reading of competence requirements may restrict the lawyer from offering firm guidance on that level, or at the very least, requires caveats.⁴³ This is reinforced by the commentary on multi-disciplinary practice:

[11] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.⁴⁴

Are SC lawyers in a "multi-discipline practice"? Arguably not, but the influence of traditional and narrower legal roles is evident in the explanation of this rule.

Ethical tension around consultation on the borders of legal and business advice may be alleviated by the team approach used for discussion and decision making in the SC model. While a SC brings considerable experience to the inquiry, the model likely guides her to ask strategic questions and engage in collaborative planning with business representatives, rather than strict "advice-giving". To be on the on the safe side, however, protective language (the caveat) might go in the SC-client retainer agreement.

⁴² FLSC Model Code, *supra* note 2, r 3.1-2, commentary 10.

⁴³ See Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham: LexisNexis Canada, 2011), where Woolley describes codes as allowing lawyers to advise on non-legal matters, but requires that they be careful not to exceed areas of competence and be clear with the client as to when advice veers outside "matters of law" (at 60) [Woolley].

⁴⁴ FLSC Model Code, *supra* note 2, r 3.1-2, commentary 10.

2) Duties of Loyalty, Confidentiality, and Candour

The duties of confidentiality and candour, two central elements of the lawyer's loyalty to her client, materialize in interesting ways inside the network of relationships around SC. Those rules, as described in the Model Code, are as follows:

3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client ... and must not divulge any such information unless: (a) expressly or impliedly authorized by the client ...

3.2-2 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.⁴⁵

Confidentiality rules, on their face, require that neither SC nor the litigation lawyer disclose information to the other without implied or express client authorization.⁴⁶ The degree to which an expectation of disclosure is inferred may depend on the terms of the retainer agreement. If the litigation lawyers and SC are retained by the client at the outset of a file, within a team approach, then the capacity to communicate openly with each other about the affairs of the client, and the waiver of confidentiality as between them, could be inferred.⁴⁷ Although an implied waiver of confidentiality may arise where the waiver "seems to follow logically from the fact of the representation," Alice Woolley suggests that the concept of implied waiver must be invoked "with caution."⁴⁸ The safer approach would be to plan for an express waiver. SC could develop and circulate minutes of a SC planning meeting, or, better yet, draft a written tripartite agreement clarifying undertakings and expectations. This is especially important where the litigation team and SC

⁴⁵ *Ibid*, r 3.2-2, 3.3-1.

⁴⁶ Little or no case authority exists for this conclusion, and yet it seems a logical interpretation of the rule and its application to two separate lawyers (unless, perhaps, the two lawyers are working within the same firm, an arrangement that is possible but problematic, given the SC model's presumption of a triangulated relationship among the two lawyers and the client). See Keet, *supra* note 3. Neither lawyer would be viewed as having the capacity to waive the client's right to confidentiality without express authorization by the client. Although not directly parallel, in *Law Society of Alberta v Clark*, [1998] LSDD No 152, a lawyer who had been acting for a client was disciplined for improperly disclosing information to a trustee in bankruptcy who had taken over the client's affairs.

⁴⁷ The commentary to the rule directs that disclosure to other partners or associates is inferred. This is consistent with the position taken in *MacDonald Estate v Martin*, [1990] 3 SCR 1235, 77 DLR (4th) 249.

⁴⁸ Woolley, *supra* note 43 at 128.

are not retained as part of the same originating service package, for example, where SC is introduced later in the process.⁴⁹

The litigation lawyer and SC need to be able to share information with each other, and will be left to clarify how that will be done, as described above. Once the conditions that allow information sharing are confirmed, to what extent is each lawyer *required* to disclose information to the other? Commentary 1.1 of the candour rule states the following: “[a] lawyer has a duty of candour with the client on matters relevant to the retainer.”⁵⁰ The nature of the service each lawyer is providing (presumably captured in the retainer agreement) may have different implications for candour on either side of the file. Because of the need for informed decision making in negotiation (and the need for accurate BATNAs and the need for transparency on all matters affecting evolving views of litigation risk), Rule 3.2-2 could also be seen as creating an obligation for the litigating lawyer to keep the SC informed of all significant developments.⁵¹ As discussed above, ethical obligations are owed to the client, but in the presence of a SC arrangement, *de facto* obligations may be seen as extending to SC as well (the information would have to be passed directly to SC, or to the client with a recommendation that it be forwarded). However, the litigation lawyer may not be entitled to the same level of information in return about developments on the negotiation side. Given the bifurcation of roles in the retainers, and the strong value placed on safe and protected conversations in negotiation theory, it is likely sufficient if the SC keeps the client—but not necessarily the litigation lawyer—informed of all significant developments in the settlement dialogue.⁵²

3) Communication “Across the Table” When Proposing Settlement Counsel

Since the SC model involves unconventional relationships among litigation lawyers and clients, the stage has to be properly set for its introduction. Even at this introductory point, old rules may get in the way. Once a client has decided to use a SC structure, the idea has to be proposed to the other side, a step that is slightly more complicated if litigation has begun:

⁴⁹ As in the case of “XYZ Resources”, a case study explored in Keet, *supra* note 3.

⁵⁰ Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: LSUC, 2000), r 3.2-2, commentary 1.1.

⁵¹ See Heavin & Keet, *supra* note 41; Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 3rd ed (New York: Penguin Books, 2011) ch 6.

⁵² A mitigating factor may be formal offers to settle, which are often used tactically to position each side to argue for or against awards of costs. A case on the verge of trial may require communication between litigation counsel and SC on this point.

Is it appropriate for me to speak to this client about a dispute matter, when I know they already have counsel? In-house counsel indicated that she had spoken to litigation counsel to advise that they were looking at this option. I said, "I'm glad you've done that. Can I speak to your litigation counsel directly?" She said, "Absolutely." He [the litigation lawyer] was very supportive.⁵³

Had the litigation lawyer not been supportive, Tarnowsky indicated that they would have offered a full discussion of the proposal in a joint meeting including litigation counsel and client representatives.

Communication with the other side in the early stages of the SC model can be complicated, and corporate decision making structures may call for a different communication structure than ethical rules allow. One dilemma is that if the other side has hired external litigation counsel, the idea of SC has to be pitched to them; the initiating side cannot approach the other party's business representatives, or even their in-house counsel, to discuss the management of the file using this different approach.

7.2-6 Subject to rules 7.2-6A and 7.2-7, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

- a) approach, communicate or deal with the person on the matter; or
- b) attempt to negotiate or compromise the matter directly with the person.

7.2-8 A lawyer retained to act on a matter involving a corporate or other organization represented by a lawyer must not approach an officer or employee of the organization:

- a) who has the authority to bind the organization;
 - b) who supervises, directs or regularly consults with the organization's lawyer;
- or
- c) whose own interests are directly at stake in the representation, in respect of that matter, unless the lawyer representing the organization consents or the contact is otherwise authorized or required by law.⁵⁴

The commentary adds: "[t]his rule prohibits a lawyer representing another person or entity from communicating about the matter in question with persons likely involved in the decision making process for a corporation or other organization."⁵⁵ Ironically, this may be the purpose for proposing SC

⁵³ Tarnowsky, *supra* note 25.

⁵⁴ FLSC Model Code, *supra* note 2, 7.2-6–7.2-8.

⁵⁵ *Ibid*, 7.2-8, commentary 1.

in the first place. Selling the concept to the people who really matter can be a challenge.

What if the litigation lawyer on the other side, for personal or strategic reasons, refused to consent to any contact with his client to explore the adoption of a SC model? It could, perhaps, be argued that “lawyer” in rule 7.2-6 (“with the consent of the person’s lawyer”) may be broadly interpreted to include both an external litigation lawyer and that party’s in-house counsel (which increases the potential paths for productive discussion).⁵⁶ In the end, the Duty to Encourage Settlement could mean that a belligerent litigation lawyer on the other side (refusing to engage with SC and refusing to allow contact with his client for the same purpose) might be seen as in violation of this very rule.

C) Do Recent Developments Help? Unbundling and Limited Scope Retainers

A recent trend in civil practice encourages lawyers to complete “unbundled” or discrete tasks for their clients.⁵⁷ This is a trend worth examining, even though it does not appear to cover the SC scenario. Unbundling has had traction in the US for some time now, with accompanying changes in codes of conduct,⁵⁸ and many resources are now being developed to help guide lawyers and clients in that arrangement.⁵⁹ Canadian law societies have followed suit in “the adaptation of the legal profession to an evolving

⁵⁶ *Ibid*, 7.2-6.

⁵⁷ Law Society of Upper Canada Professional Regulation Committee, *Report to Convocation* (Toronto: LSUC, 2011) at 4 identifies the modernization of the legal profession in the growing use of “unbundled” services [Professional Regulation Committee Report].

⁵⁸ The American Bar Association’s Standing Committee on The Delivery of Legal Services has many resources on unbundling at [Pro Se Unbundling Resource Center](http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/), online: ABA <www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/>. The “Rules” link summarizes the rules on limited scope retainers in all fifty states. See the “Ethics Opinions” link for American commentary on limited scope retainers and unbundling ethics.

⁵⁹ See e.g. University of Denver’s Institute for the Advancement of the American Legal System, “[Unbundling Legal Services](http://iaals.du.edu/honoring-families/projects/ensuring-access-family-justice-system/unbundling-legal-services/)”, online: IAALS <iaals.du.edu/honoring-families/projects/ensuring-access-family-justice-system/unbundling-legal-services/>.

marketplace.”⁶⁰ The first evolution of rules around unbundling have been labelled as “limited scope retainer” (“LSR”) rules:⁶¹

The concept of [a] limited scope retainer means taking a legal matter apart into discrete tasks and having a lawyer or paralegal perform some of those tasks, that is, provide legal services for part, but not all, of a client’s legal matter by agreement with the client. For other parts of the legal matter, the client is self-represented.⁶²

SC is clearly an “unbundled” or “limited purpose” engagement,⁶³ but LSRs were not designed with SC in mind. LSRs’ emphasis is on the otherwise self-represented client. For the most part, LSR rules focus on ensuring that clients make informed decisions when entering into a limited arrangement with a lawyer, and that parties and lawyers on both sides of a file (and, sometimes, the court) are aware of the scope of the representation.⁶⁴ The client must be fully informed of the scope of the representation, and what is and is not expected and required of the lawyer.⁶⁵ The Saskatchewan Code is worth noting. Rule 2.1(2) and commentary 8 emphasize that the client must be fully informed of the “nature of the arrangement” with a clear understanding of how the scope works.⁶⁶

There are some special rules for communication with the other side, under a LSR, though considerable deference is shown to the retainer. The commentary calls for such a lawyer to “consider how communications from opposing counsel in a matter should be managed,”⁶⁷ and contemplates “notice”. Rule 7.2-6A states:

Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services

⁶⁰ Canadian Bar Association, *The Future of the Legal Profession: The Challenge of Change*, (Ottawa: CBA, 2000), cited in Professional Regulation Committee Report, *supra* note 57 at 15.

⁶¹ Saskatchewan’s LSR rules and commentary address lawyer competence in this context as well: The Law Society of Saskatchewan, *Code of Professional Conduct*, (Regina: LSS, 2016), ch 3.1-2, commentary 8 [LSS, *Code*].

⁶² Professional Regulation Committee Report, *supra* note 57 at 4.

⁶³ Collaborative law has been labelled a “limited purpose” engagement as well: Spain, *supra* note 12 at 158–59.

⁶⁴ Rule 2.27 of Alberta, *Rules of Court*, AR 124/2010, vol 1, requires lawyers inform the court if the lawyer is retained for a limited or particular purpose.

⁶⁵ See FLSC Model Code, *supra* note 2, r 3.2-1A (and various provincial codes adopting the exact, or similar, language).

⁶⁶ LSS, *Code*, *supra* note 61, r 2.1(2), commentary 8.

⁶⁷ FLSC Model Code, *supra* note 2, r 3.2-1A, commentary 4.

being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.⁶⁸

Where the opposing lawyer has knowledge of the retainer, the scope of that agreement controls whether that lawyer must communicate with someone working under an LSR or if they can speak with the client directly: “the opposing lawyer is required to communicate with the person’s lawyer, but only to the extent of the limited representation as identified by the lawyer.”⁶⁹ The fact that LSRs are permissible means that there are no special concerns over the duty of loyalty where a lawyer’s representation is limited in scope. LSR rules are driven by a desire to balance access and innovation on one side, and transparency and informed decision making on the other.

The trend toward LSRs is instructive primarily in that it focuses on the following priorities: clear advice on the nature and parameters of the lawyer’s role, “external transparency” so that other professionals in the justice system know whom to deal with and on what aspects of the case, and emphasis on the client’s right to information and self-determination. In the early days of collaborative law, controversy circulated around US states on whether the unique retention agreement “saved” collaborative law lawyers from apparent conflicts of interest in the negotiation arrangement. The details of the debate are not important here, but the result is that carefully constructed retention agreements—with documented informed consent—were seen to be key.⁷⁰ Conflicting decisions by US law societies “[taught] us that collaborative law is a creature of contract, and that it is ultimately dependent on the validity of these limited retention agreements.”⁷¹

In this respect, both collaborative law and the newer LSR arrangements operate as creatures of contract (in their relationship to codes of ethics), and arguably SC should as well. Although it might be said that the “stakes are lower” with SC than with either of these two examples (where litigation is either off the table or being handled by the client herself), guiding principles and client entitlements correlate. That may not mean that every SC file needs to begin with a detailed agreement signed by all in the network (SC, litigation lawyer, in-house lawyer, and business representative). However, some written confirmation—covering the issues discussed above, confirming the

⁶⁸ *Ibid*, r 7.2-6A.

⁶⁹ *Ibid*, r 7.2-6A, commentary 1. James McCauley suggests going a step further, saying “[l]awyers who are ‘coaching’ an ‘unbundled’ client should not allow his or her client to negotiate directly with an opposing party represented by counsel unless the coaching lawyer obtains consent from the opposing counsel”: James M McCauley, “Some Basic Ethical and Practical Rules Relating to Unbundling of Legal Services” [2004] Professional Lawyer Symposium 63 at 64.

⁷⁰ Peppet, *supra* note 13 at 24–27.

⁷¹ *Ibid* at 27.

custom-made structure of relationships and roles as well as undertakings around communication—is advisable.

3. The Ethical Obligations of Settlement Counsel in a “Compliance Regulation” Environment

As will be evident from this examination, SC face various challenges in ensuring compliance with their ethical duties. In some cases, codes of conduct seem to impede the legitimate advancement of client objectives; sometimes, administration of justice interests—in particular the benefits to administration of justice as a result of fairly achieved settlements—may be jeopardized. This is both ironic and problematic, since codes of conduct are mandated in Canadian provinces in order to ensure that the public interest—associated with the interests of clients and the goal of the proper and efficient functioning of the administration of justice—is protected and advanced.⁷² In some cases, the requirements of codes of conduct may unintentionally compromise these public interest objectives. Part of this is a result of the degree to which codes of conduct have evolved, particularly in the present Model Code, to establish more of a “rules orientation”. While these developments have been well motivated, they have created a potential “straight jacket” approach that, in some circumstances, may work to the disadvantage of clients and the justice system, particularly where innovative models of legal service delivery are under development.

One example from the previously cited scenarios will make this point. The rule that prohibits counsel for one party from approaching another party, except through that party’s counsel, is designed to ensure that the other client’s autonomy and resolute representation are not compromised by “end running” their counsel. Though a perfectly legitimate rule, it could have the unintended consequence of making it more difficult to initiate a SC process. For example, where one party appoints SC to approach the client in opposition to appoint a counterpart SC, the Model Code requires that such an approach occur only through the other party’s (litigation) counsel. Where litigation counsel opposes such a process and/or counsels the client against such an approach, the potential for a targeted settlement exploration may be lost. In some cases, this will be to the disadvantage of the clients and the administration of justice more generally. While situations like this might invite the development of a specific rule or commentary to accommodate specific situations, it is possible that recent developments in

⁷² Typical of the legal framework governing lawyers in Canadian provinces and territories, Ontario’s *Law Society Act*, RSO 1990, c L-8, s 4.2, provides that “[i]n carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles: ... 3. The Society has a duty to protect the public interest”.

the professional regulation of lawyers may come to address these and other potential dilemmas in a more systematic and organized way.

In recent years, law societies have begun to consider a fundamental shift in their regulatory model. Presently, the regulatory model is reactive and punitive. That is, law societies establish rules, and then when a lawyer or law firm is found to be in violation of a rule they sanction the lawyer or law firm. This approach has limited benefits. As the Law Society of British Columbia's Interim Report of the Law Firm Regulation Task Force stated:

25. “[R]eactive” regulation focuses on establishing specific prohibitions through prescriptive legal requirements (rules) and instituting disciplinary action when rules are violated. This is the approach law societies have traditionally taken when regulating lawyers: complaints are addressed individually in response to past misconduct.

26. A major criticism of this rules-based, complaints-driven model of regulation is that rather than taking steps to prevent the conduct from occurring in the first place, the regulator intervenes after the fact, and then only to sanction the lawyer for conduct that has already occurred. This creates little, if any, latitude for regulators to proactively manage behaviours of concern before they escalate ...

29. Under [a “proactive” regulatory approach], firms would implement internal policies and procedures addressing high-level principles established by the Law Society (“professional infrastructure elements”). The focus would be on outcomes, working in partnership with firms to support them in developing and implementing these policies to create a robust infrastructure that promotes the professional, ethical behaviour of their lawyers.⁷³

This approach, sometimes referred to as “compliance-based regulation”, is borrowed from evolving approaches to the regulation of lawyers in Australia, England, and Wales. It is rapidly gaining traction in Canada. Aside from the work under way at the Law Society of British Columbia, noted above, the law societies of the three prairie provinces have undertaken a project entitled “Innovating Regulation: A Collaboration of the Prairie Law Societies”, whose most recent Collaboration Report is available on the respective websites of the Law Societies of Alberta, Saskatchewan, and Manitoba.⁷⁴ Similarly, the Law Society of Ontario (“LSO”) has undertaken consultations and received approval from Convocation to develop a proactive compliance-

⁷³ Law Society of British Columbia, *Interim Report of the Law Firm Regulation Task Force*, (Vancouver: LSBC, 2016), online: <www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/LawFirmRegulation-2016.pdf> at 8–9.

⁷⁴ Prairie Law Societies, *Innovating Regulation: Consultation Report*, (Calgary: Law Society of Alberta, 2016), online: <www.lawsociety.sk.ca/media/153823/Innovating_Regulation_Consultation_Report.pdf> [Prairie Law Societies, “Innovating Regulation”].

based regulatory framework.⁷⁵ The Nova Scotia Barristers' Society has been the most advanced in its work on this approach. To date, Nova Scotia has adopted six "Regulatory Objectives" and a requirement that law firms develop a Management System. The purpose, as described in reference to its Regulatory Framework, is to "have an effective management system for ethical legal practice, and demonstrate that the lawyer or firm is engaged in and committed to [ten specific objectives]."⁷⁶

Compliance-based regulation was described in the following way in the LSO Task Force on Compliance-Based Entity Regulation Report to Convocation:

Compliance-based regulation emphasizes a proactive approach in which the regulator identifies practice management principles and establishes goals, expectations and tools to assist lawyers and paralegals in demonstrating compliance with these principles in their practices. This approach recognizes the increased importance of the practice environment in influencing professional conduct and how practice systems can help to guide and direct professional standards.⁷⁷

As prairie lawyers noted in their comments in the consultation, "[t]he benefits of compliance-based entity regulation to the profession and public should form the basis of future communication and be supported by facts."⁷⁸ In a similar vein, Nova Scotia notes that the goal of its regulatory objectives is to "enhance public protection."⁷⁹ Provided that these commitments are met, lawyers, and law firms appear open to "compliance regulation". In Nova Scotia's consultations:

- There was strong support for approaches that are designed to allow lawyers, firms and other legal service providers to reflect on matters in a way that is tailored to their own practices and circumstances ...

⁷⁵ Law Society of Upper Canada, [Report to Convocation: Compliance-Based Entity Regulation Task Force](#), (Toronto: LSUC, 2016), online: <www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2016/convocation_may_2016_cber.pdf> at 23 [LSUC, "Entity Regulation Report"].

⁷⁶ Nova Scotia Barristers' Society, "[Management Systems for Ethical Legal Practice \(MSELP\)](#)", online: <nsbs.org/management-systems-ethical-legal-practice-mselp>.

⁷⁷ LSUC, "Entity Regulation Report", *supra* note 75 at 26–27.

⁷⁸ Prairie Law Societies, "Innovating Regulation", *supra* note 74 at 3.

⁷⁹ Nova Scotia Barristers' Society, "[Legal Services Regulation: The Policy Framework](#)", online: <nsbs.org/legal-services-regulation-policy-framework>.

- There is strong support for approaches that will allow legal entities to deliver legal services in whatever way they determine appropriate and through lawyers and other staff in law firms, so long as the standards are the same for all.⁸⁰

Indeed, it has been suggested that the move to compliance regulation has been beneficial to the profession and the public and is supported by evidence. In New South Wales, Australia, the combination of a new regulatory approach and rigorous self-assessment has resulted in a dramatic decline in complaints against lawyers. In an empirical assessment of the new approach in New South Wales, Tahlia Gordon, Steve Park, and Christine Parker found that:

[T]here is empirical evidence that the NSW legislation requiring ILPs [Incorporate Legal Practices] to implement appropriate management systems combined with the NSW OLSC's self-assessment regime for encouraging firms to actually put this into practice may have made a substantial difference to ethics management in firms as indicated by a dramatic lowering in complaints rates after self-assessment. On average, the complaint rate for each ILP after self-assessment was one third the complaint rate of the same firms before self-assessment, and also about one third the complaints rate of firms that have never incorporated and therefore never self-assessed.⁸¹

In what ways might these regulatory developments be relevant to the ethical duties of SC? As noted above, despite the benefits that can be achieved through the use of SC, aspects of the role of SC do not fit easily within the existing adversary-oriented, rules-based framework of lawyers' professional responsibilities. What a new "compliance-based" model offers is the opportunity for lawyers to shape the details of their professional roles to achieve benefits for clients and the justice system in ways that preserve ethical principles but adapt ethical responsibilities to the practice setting.

An example of this is the way in which lawyers' duties associated with client communications and client confidences might be addressed in a "compliance regulation" environment. Rather than a focus on extensive and prescriptive rules, a firm could adopt different approaches that meet, and perhaps exceed, regulatory minimums adapted to the particular role that lawyers perform as SC. This might include unique models for SC's communication with clients and the client's litigation lawyer that vary from communication norms. In such ways, lawyers could adapt their ethical duties to the unique kinds of work that they do for clients, provided that

⁸⁰ Nova Scotia Barristers' Society, "[Legal Services Regulation: The Consultation Process](https://www.nsbbs.org/legal-services-regulation-consultation-process)," online: <[nsbbs.org/legal-services-regulation-consultation-process](https://www.nsbbs.org/legal-services-regulation-consultation-process)>.

⁸¹ Christine Parker, Tahlia Gordon & Steve Mark, "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37:3 *JL & Soc'y* 466 at 493.

they adhere to key principles and meet the regulatory standard. SC would organize their work and relationships to the maximum benefit of clients while adhering to their principled obligations as professionals, acquiring the flexibility to tailor their professional duties to client and justice system needs, within the existing framework.

Such approaches along these lines would obviously be of benefit and create opportunities for SC to address, in a principled way, the ethical dilemmas cited earlier. SC could, as a form of law practice, develop and vet law firm policies in advance that articulate the ways in which these dilemmas will be addressed. They could be tested against principles—client confidentiality and client communication principles are good examples—and shared with clients, other counsel, and the law society. Finally, this approach has the added benefit of providing comfort to SC in their pursuit of innovative ways to serve clients better, confident that they are not off side their profession's ethical expectations.

4. Conclusion

At the heart of SC is its adaptability, creativity, and the way it escapes traditional and scripted negotiation behaviour inside litigation. Any innovation needs “wind beneath its wings” to continue, and we are not suggesting that a concern for rigid adherence to codes of conduct slow down creative thinking and action. While the issues raised in this paper warrant attention, the SC lawyers we interviewed for this study observed that ethical problems have generally not interfered with the model's success.⁸²

However, the search for “immutable” ethical principles⁸³—that do not accidentally constrain innovation—requires critical reflection. As the Model Code states, “[t]he practice of law continues to evolve ... The ethical guidance provided to lawyers by their regulators should be responsive to this evolution.”⁸⁴ Read together with the commentaries, the above rules still encrypt a traditional conception of litigation services, which legitimately creates discomfort for lawyers exploring innovative roles and models. With transparent contracting, the SC lawyer can meet code rules—but a policy driven response is warranted. Law societies could

⁸² Tarnowsky, *supra* note 25: “[b]ecause litigation counsel was supportive, he was fine to take the cue from us as to how we thought this had to work. He knew the client was committed to it. Working out the flow of information was not an issue ... In the end, there was no “smoking gun”; Nolland, *supra* note 22: “We usually get by the control-freak issue, or the subconscious-sabotage issue, particularly on intense and complex cases. The biggest problem around the flow of information is that they are just so busy they forget. They mean to do it, but get caught up on something else”.

⁸³ FLSC Code, *supra* note 2, Preface at 7.

⁸⁴ *Ibid.*

continue expanding commentary language to settle questions around such creative and unconventional approaches. However, the evolution of legal regulation toward compliance-based regulation offers unique opportunities for a wide ranging policy response that could address ethical requirements in many unique or evolving practice settings, including that of SC. Provided that such a response is grounded in principle and attentive to law societies' foundational duty to protect the public interest, it offers liberating opportunities for legal professionals—SC and others—looking for innovative ways to deliver legal services that better respond to client needs and the needs of the administration of justice.