REIMAGINING LEGAL ETHICS: CO-EXISTENCE OF DOMINANT AND ALTERNATIVE PRINCIPLES IN LAWYERING

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Abstract: The dominant model of legal professionalism requires lawyers to advocate zealously for their clients, regardless of personal moral objections. This role, stemming from the adversarial system, positions lawyers as resolute representatives who must prioritize client interests above all else. However, as instances where lawyers have justified or facilitated egregious acts come to light, there is growing resistance from the public and newer legal practitioners against the notion that unwavering client advocacy is a professional necessity. Critics like John Kennedy, Trevor Farrow, Robert Vischer, and Allan Hutchinson argue for a reevaluation of this antiquated ethical stance, advocating for a model that considers the broader societal impact of legal practice. This paper explores the ethical dilemmas of the dominant model, proposing a new regulatory framework that balances the merits of both dominant and alternative views. The proposed system divides the legal profession into three segments: Advocates, Juridical Scriveners, and In-House Advisors. Advocates, akin to traditional trial lawyers, would operate under a modified dominant model, employed and regulated by an independent body to ensure fair distribution of cases and mitigate financial pressures. Juridical Scriveners, responsible for transactional and advisory work, would have ethical guidelines encouraging moral reflection and accountability, acknowledging their role in shaping legal documents with significant social impact. In-House Advisors, balancing roles of both Advocates and Scriveners, would require tailored regulations to address their unique client-employer relationship. This trichotomy aims to create a sustainable legal profession that respects individual practitioner needs while maintaining ethical integrity and access to justice.

Keywords: Legal Ethics, Dominant Model, Sustainable Lawyering

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INTRODUCTION

Traditionally, lawyers have been conceived as "amoral technicians" whose loyalty lies only with their clients.[1] Under this view, otherwise known as the "dominant model,"[2] lawyers act as a resolute mouthpiece for their clients regardless of their personal views.[3] However, as cases where lawyers have justified or aided heinous acts committed by their clients are exposed,[4] the public and younger generations of legal practitioners alike have grown averse to the idea that a "pact with the Devil" is a necessary rite of passage for a career in law.[5] To address the ethical dilemmas posed by the dominant model, legal theorists like John Kennedy, Trevor Farrow, Robert Vischer, and Allan Hutchinson have called on the profession to exercise introspection and review the antiquated mantras of modern legal ethics.

This paper aims to enhance the sustainability of the legal profession by harmonizing the dominant model with aspects of its proposed alternatives. The paper will start by explaining the appeals of the dominant view by identifying the principles embedded in the dominant view. The paper will then discuss rightful objections to the dominant view raised by its critics before finding common ground between the dominant and alternative views of the legal profession. Finally, this paper will propose a new regulatory regime for the legal profession that embodies the merits of the dominant model and its proposed alternatives.

I. THE CASE FOR THE DOMINANT MODEL

The dominant view of professionalism requires a lawyer to advocate wholeheartedly for their client's position, regardless of how "distasteful" the position may be.[6] The role of lawyers as but a learned mouthpiece, coupled with solicitor-client confidentiality,[7] paints the relationship between a lawyer and their client as one secluded from the rest of the world. Indeed, Lord Henry Brougham famously proposed a romanticized mantra of the dominant model: A lawyer "knows but one person in all the world, and that person is [their] client."[8] Under this view, a good lawyer is one who places their clients above all else, including their own interests and the interests of any moral or political causes.[9]

A. The Adversarial System

The dominant model finds its philosophical backdrop in the adversarial legal system. In the adversarial system, parties are in charge of conducting their own litigation with minimal intervention from the judge.[10] Each party is expected to present

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[1] Robert K. Vischer, "Legal Advice as Moral Perspective," SSRN Scholarly Paper (Rochester, NY, August 10, 2005), https://papers.ssrn.com/abstract=771006, 36.
[2] Vischer, 36.
[3] Vischer, 36; Trevor C. W. Farrow, "Sustainable Professionalism," *Osgoode Hall Law Journal* 46, no. 1 (January 1, 2008): 51–103, https://doi.org/10.60082/2817-5069.1207, 56-7.
[4] Vischer, "Legal Advice as Moral Perspective," 1-2.
[5] Farrow, "Sustainable Professionalism," 53-4.
[6] Farrow, 63-7.
[7] Farrow, 56n28.
[8] Lord Henry Brougham qtd. in Farrow, 63-4.
[9] Farrow, 57.
[10] Neil Brooks, "The Judge and the Adversary System," in *The Civil Litigation Process Cases and Materials*, ed. Janet Walker et al., 7th ed. (Toronto: Emond Montgomery Publications, 2010), 91.

all relevant factual and legal arguments before the court, whose power is limited to adjudicating disputes brought by the parties.[11] Under this system, the parties—rather than the court—are at the heart of the justice system.[12] This emphasis on party autonomy reinforces the sacrosanct relationship between a lawyer and their client.

One main argument used to support the adversarial system of justice is that it prioritizes the agency of parties.[13] This principle is reflected in the dominant model of legal ethics by allowing a litigant ultimate control over what is presented in court. Although the adversarial system, in its ideal form, welcomes all to advocate for their causes, the complexity of the legal system often makes effective advocacy a cumbersome task for an average citizen. A lawyer's role in the system, therefore, appears to be a professionally trained counselor who helps their clients find ways to exercise their autonomy as an individual and as a party to the litigation.[14] As such, advocacy for "distasteful" ideas is a necessary price to pay for living under a system where individuals retain full autonomy over the arrangement of their lives.

Another bedrock of the justification for the adversarial system lies in its venue: an impartial tribunal.[15] Because the judge in the adversarial system is a qualified individual who maintains a professional distance from both parties, the system is expected to produce correct judgments through the competition of rival ideas proposed by the parties.[16] This aligns with one of the foundational assumptions of modern economics: The optimal allocation of goods arises when all parties strive to advance their self-interest to the fullest.[17] Because an independent arbiter watches over the marketplace of arguments inside the courtroom, the negative effects of "distasteful" positions are—from a theoretical point of view—confined to the four walls of the courtroom.

The dominant model of professionalism, where lawyers are free to advocate any position they receive instructions on, arises from these two tenets of the adversarial system. Conversely, the adversarial legal tradition makes it difficult to divorce our judicial system entirely from the dominant model.

B. Access to Justice

In addition to the underlying design of the adversarial legal system, concerns with access to justice also warrant some support for the dominant model. Although an unlikely scenario, it raises bona fide concerns vis-à-vis access to justice if the last lawyer in town refuses to take a client on the basis of differences in opinion.[18] This issue is particularly manifest in criminal cases. Since the accused is facing prosecution by the State—who possesses more investigative, financial, and legal resources than an average citizen—and may lose their liberty as a result of the trial, it is a generally

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[11] Brooks, 93-4.
[12] Brooks, 94.
[13] Brooks, 98-101.
[14] Farrow, "Sustainable Professionalism," 64-5.
[15] Brooks, "The Judge and the Adversary System," 103.
[16] Brooks, 103.
[17] Brooks, 99.
[18] Farrow, "Sustainable Professionalism," 92.

accepted maxim that they deserve the "best defense and representation possible," regardless of their character and the nature of their charges.[19]

I argue that the same principles that protect the dominant model in criminal cases extend to civil litigation as well. Although the State does not intervene in private matters between two subjects with no invitation,[20] the judgment made by the State's judicial organ is given the weight of law. Since the State can be engaged in the enforcement of adjudicated private matters, the lack of proper representation in private law litigation puts individuals in a vulnerable position when later faced with the aftermath of the trial. It would be a matter of fiction to say that the foreclosure of someone's only home and the repossession of their only car are categorically less important to their lives than spending a fortnight in jail. The dominant model, thus, has a legitimate place in private law litigation on grounds of access to justice as well.

II. CHALLENGES TO THE DOMINANT MODEL

A. Lack of Consideration for Non-Partisan Interests

One of the major setbacks of the dominant model shares its roots with the best arguments in favor of it—the adversarial legal system. In a classic courtroom setting, only two parties are present: the prosecution and the defense. The real-life problems underlying the legal disputes, however, rarely deal only with the interests of two parties.[21] The framework where the dominant model finds home is unfit to accommodate the interests of the lawyers, of the legal profession, of other affected parties, and of society at large.[22] Although third parties and public interest groups can sometimes find their way to a day in court, the adversarial system reserves the center stage exclusively for the two parties to litigation. This problem, however, is rooted in the misalignment of interests for the lawyers and for the courts.

Our current legal scene features lawyers practicing as competitors offering legal services to the public. Lawyers are unable to sustain themselves financially if they fail to maintain a reputation of being loyal to their clients and likely to win cases. The current professional landscape, therefore, incentivizes lawyers to only look at client interests, often at great expense to the image of the legal profession and to the lawyer's own developmental needs.[23] For similar reasons, many litigators dispense patently overboard litigation strategies with the sole purpose of burdening the other party and driving them out of participation.[24] These practices come at the expense of the public interest as well. Nevertheless, the reputation of the profession, the needs of the lawyer as a socialized person, and the needs of society are hardly relevant when caring for these needs might cost one their source of income.

Judges and jurors, on the other hand, are being forced into having tunnel vision by the mainstream narrative of litigation that the only interests relevant to adjudication

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[19] Farrow, 65.
[20] Brooks, "The Judge and the Adversary System," 95.
[21] Farrow, "Sustainable Professionalism," 87.
[22] Farrow, 87.
[23] Farrow, 89-90.
[24] Allan C. Hutchinson, "Fighting Fair - A Call to Ethical Arms," *The Professional Lawyer* 23, no. 3 (2016): 12–16.

are those presented in court.[25] It is particularly hard to escape this tunnel vision created by societal narrative when lawyers from both sides try to limit the discourse only to the facts favorable to their clients.[26]

These problems, however, do not mitigate the centrality of the dominant model to the adversarial system of justice. It remains highly unfeasible to dismantle the dominant model in the courtroom without destroying the very courtroom setting itself. Therefore, solutions to the neglect of diverse interests should come from a reform of the incentive structure of litigators.

B. Appropriation and Misapplication

Although the dominant model is closely intertwined with the adversarial system, not all lawyers specialize in courtroom advocacy. The safeguards against "distasteful" positions held by clients spilling over into society are not present in transactional and advisory matters. Because there is no opposing counsel pushing back on articles of incorporation nor an independent arbiter throwing out egregiously unfair distribution of an estate, the lawyers become the gatekeepers of justice in these situations. Similarly, when a lawyer drafts a memorandum justifying cruel and unusual punishments for the State,[27] they are not countered by judges or with civil rights lawyers that would otherwise serve as checks and balances on the legal opinion.

In these situations, a lawyer is more than a legal technician.[28] In private law matters, the shaper of deals is also a legislator[29] in the sense that the very document they prepare will serve as the basis for future litigation. Although proponents of the dominant model eschew this conception of lawyers,[30] law practitioners are the judge, the jury, the opposing counsel, and the legislature in transactional and advisory matters. As Kennedy points out, there is no room for the façade of neutrality when the lawyer is molding rules with their bare hands.[31]

The dominant model, however, provides a scapegoat to the lawyers willingly drafting morally reprehensible legal opinions.[32] This blame-shifting initiates a vicious cycle where the name of the profession becomes ever more tarnished as transactional and advisory lawyers appropriate and abuse the moral protection extended to their litigator counterparts. The less reputable the profession, however, the more justified it is for its members to misbehave and blame it on the industry.

The professional regulators, however, do not seem to have come to terms with this factual division in roles that lawyers play. Canadian and American jurisdictions feature a uniform set of ethical rules for all practitioners.[33] The evils of protecting "distasteful" legal craft in transactional and advisory operations, however, are not

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[25] Brooks, "The Judge and the Adversary System," 98-100.
[26] Farrow, "Sustainable Professionalism," 84.
[27] Vischer, "Legal Advice as Moral Perspective," 1-2.
[28] Duncan Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes," 1987, https://hdl.handle.net/2346/87006, 1160.
[29] Kennedy, 1160.
[30] Farrow, "Sustainable Professionalism," 64-5.
[31] Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes," 1160.
[32] Vischer, "Legal Advice as Moral Perspective," 1-3.
[33] Farrow, "Sustainable Professionalism," 66-7.

outweighed by the philosophical underpinnings of the adversarial system. I argue that the real culprit is the appropriation and misapplication of the dominant model rather than the model itself.

III. PROPOSED RESTRUCTURING OF THE PROFESSION

Because the nature of legal work is diverse in the real world, a sustainable regulatory scheme should account for—instead of willfully ignoring—this reality. I propose a legal profession divided into three segments: Advocates, Juridical Scriveners, and In-House Advisors. I have chosen these terms with the intention of not borrowing any existing concept in the Canadian legal tradition, lest there be any confusion as to the content of each segment's work. Different rules will apply to each segment of the profession that corresponds with the nature of their work and the status they play both in the legal and societal landscapes. In this paper, I will focus on the role and regulatory scheme for Advocates, which will be based on a modified version of the dominant model.

A. Advocates

1. General Parameters

Under my proposed system, Advocates are lawyers specializing in conducting trials and appellate hearings. They appear exclusively on behalf of a party to the legal matter before an adjudicator. Although no type of adjudication is excluded from this definition, *only* Advocates are allowed to speak on behalf of a party. Under this system, an Advocate becomes a resolute warrior of their client in the purest form. Although this segment of the profession bears some semblance to English barristers, Advocates can take instructions either directly from clients or from other lawyers. This design is to ensure that the legal system does not become more cumbersome for people seeking remedies. Advocates will remain largely under the command of the dominant model of professionalism since their work is conducted entirely in the adversarial arena.

2. Compensation Scheme

Although the dominant model applies philosophically to the adversarial courtroom, pragmatic problems of unethical competition exist. One of the ways that the proposed system seeks to optimize the dominant model is by revamping the compensation scheme for Advocates. As discussed above, the current system of litigators being competitors in the same market encourages vicious competition at the expense of professional collegiality and the public interest. Under my proposed system, all Advocates will be salaried employees of an independent body that assigns cases, at random, to Advocates with relevant experience. Because Advocates are salaried, they are no longer under the pressure of billable hours or the amount of dispute.

Furthermore, because clients are assigned at random, Advocates are not subject to financial pressure from their clients (in the United States and in Canada) or from solicitors (in England). Since an Advocate's career advancement is no longer tied to their comparative reputation, there is no incentive to use shady means to "get ahead." Therefore, Advocates are able to perform their duties as true technicians of advocacy.

Finally, the employer of Advocates will charge clients rates that are geared to their income level and the amount of dispute. This will make sure that justice remains accessible to the people and help the professional body of Advocates be financially sustainable.

3. Disciplinary Regime

Another main cause of unethical competition is the low price of non-compliance. As illustrated in cases like *Groia v. Law Society of Upper Canada*,[34] professional regulators and courts are reluctant to step in and correct litigators from dubious practices. This low cost of infractions often leads to a false sentiment that "all is fair in love and war." As Hutchinson observes, the fact that a lawyer *is able to* effect a certain maneuver does not imply that they *ought to* do it.[35] On the other hand, because litigators do not share an employer, regulators are limited to suspending, limiting, or revoking a lawyer's ability to practice.[36] The severe nature of the punishments does not seem applicable to minor infractions of litigation ethics, leading to infractions being normalized.

Under the proposed system, however, the employer of Advocates can assume some level of disciplinary control in the form of pay deductions and other intermediate punishments available to corporate employers. Because the employer is the sole provider of Advocate services, it is driven by self-interest to maintain a good reputation for the profession, which leads to strong incentives to pursue internal disciplinary actions. This new internal disciplinary system should feature elements of military ethics as outlined by Hutchinson, such as proportionality and considerations of necessity. The disciplinary scheme, thus, incentivizes Advocates to internalize professional and public interests in their practice.[37]

4. Adherence to Individual Development

Finally, the employer under the proposed system will respect the individual will of practitioners. There are two layers to this claim. The first is that Advocates are free to choose their specialization while working for the general employer. Because the assignment of cases is based on a random draw among lawyers who have experience in the relevant legal field, it is up to individual practitioners to develop their niche. The personal circumstances and aspirations of lawyers cannot be overlooked, as a profession that systemically dissociates its members from their senses of self is not sustainable nor desirable.[38] Because Advocates are valued as individuals, they are more empowered to engage in critical reflections on their litigation strategies and their development as a lawyer.

Moreover, lawyers freely choose to become an Advocate under the proposed system. There are always going to be aspiring lawyers who resolutely embrace the lures of the adversarial system and the dominant model that comes with it.[39] Becoming an Advocate is a sustainable route of professional development for them. For those whose

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[34] Groia v. Law Society of Upper Canada, 2018 SCC 27, accessed December 1, 2023.
[35] Hutchinson, "Fighting Fair - A Call to Ethical Arms."
[36] Ontario, "Law Society Act," R.S.O. 1990 c. L.8, s. 35.
[37] Farrow, "Sustainable Professionalism," 89-96.
[38] Farrow, 99.
[39] Farrow, 100.

personal ethical goals gravitate towards only taking specific clients or only making money, however, the proposed system gives them room to thrive in the other two segments of the profession. The professions of Juridical Scrivener and In-House Advisor would both allow more liberty in terms of the financial and ethical considerations involved in the practice of law. As Farrow comments, a sustainable legal landscape is not one where all values of the dominant model are subverted but one where different developmental needs of legal practitioners can be accommodated.[40]

B. Juridical Scriveners

1. Case Study: England and Québec

a. English Barristers and Solicitors

The United Kingdom has three independent legal systems: England and Wales, Scotland, and Northern Ireland. Each legal system retains a distinct set of professional regulators that oversee the legal profession. This section will look at the legal profession as it is structured and regulated in England and Wales. Unlike in most Canadian jurisdictions, barristers and solicitors are two separate and independent professions in England and Wales. An English lawyer must choose between practicing exclusively as a barrister or a solicitor. As a result, there is a clear professional boundary between the work done by barristers and that done by solicitors.

Traditionally, English solicitors draft instruments of conveyance and provide general legal advice to their clients. While conducting their main duties as transactional lawyers, solicitors in England may appear before subordinate courts to assist their clients in making simple appearances before a justice of the peace. Nevertheless, English solicitors are generally barred from conducting litigation since they do not hold the right of audience before senior courts. If litigants need trial representation, they must hire a barrister.[41] Generally speaking, members of the public can *only* hire a barrister *through* their solicitor, making it imperative to instruct two lawyers at the same time.[42]

Although the barrister-solicitor distinction appears to resolve the tension between transactional lawyers operating under rules meant for trial lawyers, the reality in England provides no satisfactory answer to sustainable professionalism in the United States and Canada. There are two major flaws in the English system *vis-à-vis* sustainable lawyering: the hegemony of adversarial ethics in regulating solicitors and the obstruction of access to justice.

Although England's legal profession recognizes the distinction between trial lawyers and transactional lawyers by requiring practitioners to choose between one and the other, regulators of both professions operate under the set of ethical principles derived from the trial process. Indeed, solicitors are required to act "in the best interests of each client."[43] The wording used by the Solicitors Regulation Authority mirrors

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[40] Farrow, 98-100.
[41] Pye Tait Consulting and Bar Standards Board, "Provision of Legal Services by Barristers," May 2017, https://www.barstandardsboard.org.uk/asset/C551BDF1-4C2E-404C-B7A11B802F31A2C3/, 8.
[42] Pye Tait Consulting and Bar Standards Board, 8.
[43] Solicitors Regulation Authority, "SRA Standards and Regulations" (2019), https://www.sra.org.uk/solicitors/standards-regulations/, Principle 7.

precisely the language used to regulate barristers.[44] In other words, although English solicitors undertake transactional work exclusively, they are nevertheless accorded the same professional shield from moral scrutiny. The English system, therefore, leaves the door open for transactional lawyers to co-opt and appropriate adversarial ideals to justify morally reprehensible actions.

Another important lesson from studying the English system is that a restructured legal profession must not be set up in a way that deprives trial lawyers of access to their clients. A direct consequence of such a system is that instructing two lawyers at the same time causes financial and emotional strain on litigants.[45] There is, however, also an alarming trend that barristers tend to keep their instructing solicitors more informed than their clients.[46] Both issues create substantive barriers to justice since the end consumer of legal representation is being pushed out of the core decision-making circle.[47]

b. Québec *Avocats* and *Notaires*

Unlike other provinces and territories, Québec has two law societies: the *Barreau du Québec*, which regulates *avocats*, and the *Chambre des notaires du Québec*, which regulates *notaires*.[48] There are some ostensible similarities between the English and Québec systems at first glance. Like English barristers, Québec *avocats* have the exclusive right to appear before a court on behalf of a client.[49] Furthermore, only *avocats*—and not *notaires*—are allowed to conduct litigation by filing documents related to court proceedings.[50] Similar to English solicitors, Québec *notaires* can prepare conveyances,[51] draft articles of incorporation,[52] issue letters,[53] give legal advice,[54] and administer affidavits.[55] While English solicitors retain a limited right of appearance before subordinate courts for simple matters, Québec *notaires* can only represent their clients in non-contentious private law proceedings.[56] Although the *avocat-notaire* distinction bears semblance with the solicitor-barrister divide, Québec's regulatory scheme provides for two distinct sets of professional ethics for legal practitioners.

c. Comparison: *Notaires* vs. Solicitors

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[44] Bar Standards Board, "The BSB Handbook" (2023), https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance/the-bsb-handbook.html, Core Duty 2.
[45] Pye Tait Consulting and Bar Standards Board, "Provision of Legal Services by Barristers," 20.
[46] *Ibid* at 20.
[47] Although the Bar Council recently started a pilot program allowing barristers practicing in certain areas the ability to be retained by clients directly, most cases are still handled under the barrister-solicitor model.
[48] Although Québec law provides an official English translation for the terms *avocat* and *notaire*, the words "notary" and "advocate" are avoided because notary has a common-law meaning that is distinct, and advocate is used as a part of the system proposed in this paper.
[49] Québec, "Act Respecting the Barreau du Québec," CQLR c B-3, s. 128(2)(*a*).
[50] Québec, s. 128(1)(*b*).
[51] Québec, "Notaries Act," CQLR c N-3, s. 15(2).
[52] Québec, s. 15(3).
[53] Québec, s. 15(6).
[54] Québec, s. 15(5).
[55] Québec, ss. 15(1) and 9.
[56] Québec, s. 15(7).

In Québec, a *notaire* is a "public officer" who must consider the interests of *all* parties, including those of society at large.[57] The primary missions of a Québec *notaire* are defined as to "serve the public interest" and look out for "the good repute of the profession."[58] In fact, Québec's *Notaries Act* provides that a *notaire* is vested with "public authority" and must "act impartially" towards their clients.[59] In practical terms, this means that a Québec *notaire* must consider the interests of all parties that would be impacted when drafting legal instruments, even if the concerned parties may not appear before the *notaire*.[60] When offering legal advice, Québec *notaires* are required to act as "disinterested, frank, and honest" legal advisors rather than partisan counselors for their clients.[61]

As such, if a person wishes to set up a trust that would funnel all of his wealth into his lover's control and disallow his partner from accessing the money, a Québec *notaire* would have the professional obligation to advise the client against the decision. If the client should insist, the *notaire*'s duty to act with "probity, objectivity, and integrity" would likely preclude them from drafting the requested instruments.[62] Similarly, if a company hires a *notaire* for assistance in evading taxes, the *notaire* must consider the negative image that their complicity would cause to the ranks of *notaires* and not just their personal financial interests. Moreover, the argument that "if I don't do it, someone else will"[63] is rendered futile under the professional ethics governing *notaires*—since everyone is responsible for the entire profession's reputation, no one would be that *someone else* that follows through with morally questionable acts.

d. Comparison: *Avocats* vs. Barristers

The role of a Québec *avocat* is not dissimilar to that of a trial lawyer under the dominant model: Québec law provides that *avocats* are "officer[s] of the court"[64] and that they "must act at all times in the best interests of the client."[65] As legal professionals, Québec *avocats* have the duty to discourage clients from engaging in frivolous legal strategies that would result in an abuse of judicial resources. Should a client insist, the *avocat* must prioritize their allegiance to the court before that to their client and refuse to comply.[66] This duty applies equally to counsel in common law jurisdictions, where frivolous and vexatious claims invite sanctions. Otherwise than this formalistic constraint, however, Québec *avocats* are free to "act for a client no matter what [the *avocat*'s] opinion may be on the client's guilt or liability."[67] Notably, Québec *avocats* are allowed wide discretion to refuse acting for a particular client.[68] This freedom is not enjoyed by English barristers, who must accept instructions barring few exceptions.[69] However, as long as a Québec *avocat* retains their mandate from a client,

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[57] Éducaloi, "Notaire," Éducaloi, accessed January 27, 2024, https://educaloi.qc.ca/capsules/notaire/.
[58] Québec, "Code of Ethics of Notaries," CQLR c N-3, r 2, s. 1.
[59] Québec, Notaries Act, s. 11.
[60] Éducaloi, "Notaire."
[61] Québec, Code of ethics of notaries, s. 7.
[62] Québec, s. 13.
[63] Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes," 1160.
[64] Québec, Act respecting the Barreau du Québec, s. 2.
[65] Québec, "Code of Professional Conduct of Lawyers," CQLR c B-1, r 3.1, s. 23.
[66] Québec, s. 41.
[67] Québec, s. 32.
[68] Québec, s. 33.
[69] Bar Standards Board, The BSB Handbook, rC29.

it must act resolutely in the interest of that client, no matter their personal opinion about the client's cause.[70]

Although Québec *avocats* who practice as trial lawyers have similar professional obligations and expectations as their English counterparts, current Québec law also allows *avocats* to practice in transactional matters. In fact, Québec's *Act respecting the Barreau du Québec* explicitly acknowledges the overlap between the practice areas of *avocats* and those of *notaires* in non-contentious, private law situations.[71] When discharging the same duties as a *notaire*, however, an *avocat* is not subject to the rules regarding impartiality and public interest. In this sense, Québec *avocats* who practice as transactional lawyers have professional ethical expectations similar to those of English solicitors. Although the *Civil Code of Québec* provides that certain legal instruments must be executed by a *notaire*,[72] most clients may choose to visit a partisan *avocat* or an impartial *notaire* based on their personal needs and preferences.[73]

e. Adversarial vs. Inquisitorial Ethics

Although Québec's *avocat-notaire* separation offers valuable lessons to the construction of a restructured legal profession, one must acknowledge the inquisitorial ethics that underlie Québec's regulatory regime. In Québec, both *avocats* and *notaires* assume a secondary position in the administration of justice, which is led primarily by judges. In fact, Québec law expects *avocats* and *notaires* to "*collabore[r] à l'administration de la justice*."[74] *Larousse* defines *collaborer* as "*Travailler de concert avec quelqu'un d'autre, l'aider dans ses fonctions ; participer avec un ou plusieurs autres à une œuvre commune*."[75] As such, Québec's legal system defines *avocats* and *notaires* as collaborators in the justice process, reflecting the inquisitorial system's emphasis on delivering substantive justice over partisan adversaries.

Furthermore, Québec *notaires* are strictly regulated as holders of public office. The idea that *notaires* are agents of the State also shows influence from the civil law tradition. Therefore, copying and pasting Québec's *notaire* system into common law North America would lead to issues of incompatibility between the adversarial values underpinning the common law and the heavy civil law influence guiding Québec's regulatory regime for lawyers.

2. Professional Parameters and Ethics of Juridical Scriveners

a. Areas of Practice

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[70] Québec, Code of Professional Conduct of Lawyers, s. 23.
[71] Québec, Act respecting the Barreau du Québec, s. 129(*e*).
[72] Québec, Notaries Act, s. 15(1).
[73] In addition to different professional ethics, *notaires* do not act *on behalf of* a client since they are public officers. Clients with complex legal situations that may require representation must retain an *avocat*. See Éducaloi, "Notaire."
[74] Although the English version of the statutes provides that an *avocat* "participates in" and a *notaire* "takes part in" in the administration of justice, the French version use the identical expression of "*collabore à*." Supposing the legislature means for the same expression to express the same idea, one should look at the word "*collaborer*" to interpret the meaning of the statutes.
[75] "Working together with and helping someone else in their duties; participate with others in a common work" (translation by author).

In my proposed legal profession, the right of appearance before any adjudicator is reserved for Advocates. This arrangement enables an Advocate to be a "resolute warrior of their client in the purest form." Advocates, and *only* Advocates, can practice in adversarial settings because the professional ethics of Advocates are tailored to the adversarial system. Naturally, Juridical Scriveners focus their practice on non-adversarial situations (e.g., drafting of conveyances, general legal advice, notarization). Just like current transactional lawyers, Juridical Scriveners are able to issue letters on behalf of their clients and are free to explore alternative dispute resolution with their clients.[76] Unlike current transactional lawyers, however, Juridical Scriveners are under the *obligation* to refer their client to an Advocate once a file is court-bound, similar to how English solicitors must refer their clients to a barrister when a trial is inevitable. Unlike in the English system, however, clients in the proposed system need not keep both the Scrivener and Advocate on retainer once the litigation commences.

Besides clearly adversarial settings like trials and non-adversarial settings like commissioning an affidavit, there is a gray area of contentious legal affairs like negotiation. I propose that this gray area remains the exclusive practice area of Juridical Scriveners. One of the main fail-safes in the adversarial system is the existence of an impartial adjudicator. Generally speaking, the adjudicator's decision can be further reviewed for correctness. This feature of the adversarial system mitigates the risks of putting Advocates in a position where they have to defend the distasteful positions of their clients. This safety valve, however, does not exist in contentious situations like negotiation or mediation. Even though a third party may exist, they do not have the same level of authority and reviewability as arbiters and judges. Therefore, this type of case is best left to Juridical Scriveners who are not governed by pure adversarial ethics. Furthermore, ADR processes (other than arbitration) require the drafting of mutually agreeable terms of resolution, an area that falls conveniently into Juridical Scriveners' expertise.

b. Professional Ethics

Since Juridical Scriveners act without the check of an adjudicator (and without pushbacks from opposing counsel in non-contentious cases), a Scrivener must not hide behind adversarial ethics and supposed "ignorance" of the social and moral consequences of their professional conduct. Since the nature of the work undertaken by Juridical Scriveners lays the foundation of consequent legal relationships and subsequent litigation, Scriveners cannot be morally ambivalent to the content of their work. The new regulatory framework will loosen the requirements that Juridical Scriveners must take or retain a client *vis-à-vis* the moral values of the client's cause. Under the new scheme, Juridical Scriveners will be personally invested (not *fully* accountable since the client is the one making orders) in the moral nature of the service they render. The new scheme will also ask Juridical Scriveners to step out of their "lawyer hat" and engage in candid moral conversation with their clients.

i. Moral Investment in Client's Cause

[76] Although arbitration is part of the general concept of ADR, it involves an impartial third party issuing binding decisions, thus falling into the exclusive competency of Advocates as they appear "on behalf of a party to the legal matter before an adjudicator."

Juridical Scriveners hold an informational advantage compared to their clients—the practitioner knows the law in that area and likely has experience dealing with similar situations. The informational asymmetry makes Juridical Scriveners not mere technicians but collaborators in achieving the goals of their clients. This is especially true in areas of law known to be convoluted, even for those with legal training, such as land law, estate law, and tax law. Unlike an individual trying to take advantage of their cash-stripped friend with a plain-language contract stipulating near-usury interest rates, those who seek to conceal their assets from their spouses, creditors, or the government are incapable of achieving anything resembling their goal without the help of a lawyer specializing in that field of law.

As Kennedy points out, "the better your legal skills, the less neutral you become."[77] If a Juridical Scrivener is extremely proficient at creating shell entities to conceal income and assets, their retainer with a cartel or a multi-billion-dollar company is less of a kitchen knife being used in a murder but more of a sniper rifle being used in an assassination. The same logic applies when the government seeks legal opinion on justifying torture or when a corporation seeks to legitimize its falsified operations.[78]

As such, a Juridical Scrivener is morally invested—not necessarily accountable, but at the bare minimum invested—in the professional service they render. The law routinely denies the façade of agnosticism to "inadvertent" drug traffickers[79] and those who "unknowingly" breach fiduciary duty,[80] accusing them of "willfully blindness." Lawyers, however, are rarely even *willfully blind* since clients are straightforward with their undesirable goals. Therefore, Juridical Scriveners must have some moral nexus to the fruits of their intellectual labor.

ii. Interests of Third Parties and Society

Since Judicial Scriveners are at least somehow aiding clients in achieving their causes, the practitioners ought to consider the implications of their work on people other than their clients. In adversarial processes, interested third parties and the State (the Crown in Canada) may choose to intervene, or a judge may appoint an *amicus* to lend a voice to the unheard stakeholders. In non-adversarial ones, however, no one other than Judicial Scriveners is in the position to bring in the voices absent from the table. This is true even in negotiations where an opposing party might be represented since terms of conflict resolution may have an indirect impact on third parties. The duty to consider third-party and societal interests is primarily procedural. It is a Judicial Scrivener's job to brief their client on the potential consequences of a given course of action, and this includes potential harm to third parties and to society.

The consideration for third-party and societal interests is not futile even when the client might have assessed the external impacts of their cause before retaining a Scrivener's service. Since the client's specialized knowledge tends to be in different fields, adding the Scrivener's analysis only complements the existing calculations undertaken by the client. However, Judicial Scriveners are private practitioners and not

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[77] Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes," 1160.
[78] Vischer, "Legal Advice as Moral Perspective."
[79] R. v. Lagace, 2003 CanLII 30886 (ON CA) (Court of Appeal for Ontario 2003); R. v. Farmer, 2014 ONCA 823 (CanLII) (Ontario Court of Appeal 2014).
[80] Y.R.C.C. NO. 890 v. RPS Resource Property Services, 2010 ONSC 3371 (CanLII) (Superior Court of Justice 2011).

public officers like Québec *notaires*. As such, they are not forbidden from continuing with any given course of action upon completing an analysis of social consequences.

iii. Scrivener-Client Candor

At common law, the communications between a person and their counsel are entitled to privilege. This protection enables clients to speak to their lawyer in utmost confidence, helping the lawyer devise legal strategies and advice for their client. This candor, however, should be a two-way street. While the client is expected to be candid and open about unfavorable facts and history, the Juridical Scrivener should be candid and honest about unfavorable opinions they may have formed against the client's cause.

This candor serves multiple purposes. The first is that it informs the client of a potential conflict of interest. Although legal training enables practitioners to wholeheartedly advocate for stances that would be personally unpalatable, the client may very well desire a lawyer who *actually* believes in their cause. In this sense, being candid with the client about one's moral assessment of the situation is a liberating exercise *both* for the Scrivener and for the client.

Secondly, just like with a lawyer's assessment of third-party impacts, a Scrivener's moral perspective may be novel to a client, thus contributing to a conducive conversation about the ethical implications of the client's cause. Just like a normative discussion with a friend, however, it befalls upon neither the Scrivener nor the client a duty to convince. Even if a Scrivener and a client decide to "agree to disagree," they have engaged in a meaningful exploration of moral possibilities, thus enhancing the mutual trust they hold in each other.

iv. Conclusion

Developing a moral investment in a client's cause is not meant to *forbid* or *dissuade* Scriveners from representing clients with distasteful causes. Instead, the new scheme asks Juridical Scriveners to account for their decision to represent a particular client in a particular way. If a lawyer has just been admitted to the Order of Juridical Scriveners and is drowning in student debt, they are free to take on affluent clients with distasteful causes so long as the practitioner is willing to admit "I chose my clients according to their ability to pay."[81] Similarly, if a lawyer attempted to discuss the moral implications of a client's cause with the client to no avail, all that moral investment asks of the Scrivener is an *honest* "I have tried my best."

Although sounding perfunctory, this process of morally "coming clean" puts the fraction of transactional lawyers habitually evading moral responsibility outside their comfort zone. Now that the excuse of being bound by the "cab rank rule" to be a "zealous advocate" is rightfully unavailable, transactional lawyers need to re-examine the relationship between their work and their morals. It is worth emphasizing that it is always an individual's responsibility to assess whether their conscience is clean, and the new professional ethics regime only seeks to prevent lawyers from avoiding the moral question.

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[81] Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes," 1160.

IV. FUTURE RESEARCH

A. In-House Advisors

The last segment of my proposed legal profession is In-House Advisors. Under the current system, in-house counsel have multiple roles in a firm: legal consultant, counsel, and employee.[82] Since they have to advise the firm and may need to represent the firm in court, their duties are an aggregate of that of an Advocate and of a Juridical Scrivener. Furthermore, as an in-house lawyer is an employee, the nature of their relationship with the client is different than that of an Advocate and of a Scrivener.[83] The dominant model, however, refuses to acknowledge this set of unique circumstances facing in-house lawyers. Indeed, Lord Denning held that in-house lawyers "are regarded by the law as, in every respect, in the same position as those who practice on their own account."[84] As such, a new regulatory scheme must account for the conditions of in-house counsel and set appropriate boundaries for their professional ethics.

B. Compensation Scheme for Advocates

When I proposed the Advocate-Scrivenor-Advisor trichotomy, I suggested that all Advocates be employed by a single employer, who charges clients based on their means and pays Advocates on a predictable and merit-based scale. The financial viability of this scheme, however, warrants further investigation. Future research can borrow from Legal Aid programs and the current compensation scheme for medical doctors in Canada to refine the proposal for a centralized employer.

CONCLUSION

The dominant model of professionalism is rightfully critiqued for its rampant misuse by certain transactional lawyers to escape ethical responsibility for their clients' causes. This paper Advocates for a new set of professional ethics for the segment of the legal profession called Juridical Scriveners, who are limited to processing transactional accounts. The proposed scheme requires Scriveners to make a personal moral investment in the services rendered to clients. It is not the purpose of this proposed scheme, nor of any model of sustainable professionalism that values the different developmental needs of individual legal practitioners,[85] to annihilate the possibility of lawyers practicing for questionable clients with the *sole purpose* of profiting from the arrangement. However, it is important to transform the role of lawyers in non-adversarial settings from that of an agnostic laborer to a morally concerned holder of knowledge. This added moral perspective contributes to candid and honest

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[82] Shari L. Klevens and Alanna Clair, "Ethical Considerations for In-House Lawyers," *Dentons* (blog), October 5, 2023, https://www.dentons.com/en/insights/newsletters/2023/october/5/practice-tips-for-lawyers/ethical-considerations-for-in-house-lawyers.

[83] Gregory Richards, "Encountering and Responding to Ethical Dilemmas and Professional Challenges in the Role of In-House Counsel," *WeirFoulds LLP* (blog), April 14, 2009, https://www.weirfoulds.com/encountering-and-responding-to-ethical-dilemmas-and-professional-challenges-in-the-role-of-in-house-counsel.

[84] Ken B. Mills, "Privilege and the In-House Counsel," *Alberta Law Review* 41, no. 1 (2003): 79; Alfred Crompton Amusement Machines v. Customs and Excise Commissioners (No. 2).

[85] Farrow, "Sustainable Professionalism," 98-100.

communication between lawyers and clients while enhancing clients' autonomy by explicitly addressing any moral disagreements between the lawyer and the client.

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