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REGULATING LAW FIRMS FROM THE INSIDE: THE ROLE OF COMPLIANCE OFFICERS FOR LEGAL PRACTICE IN ENGLAND AND WALES

I. INTRODUCTION

Legal professional regulation is changing.[1] Whereas traditionally it has focused on regulating individual lawyers, increasingly there is a shift to law firm regulation (entity regulation).[2] In Australia[3] and England and Wales this has taken the form of compliance-based regulation, a type of meta-regulation that involves regulators setting regulatory objectives for firms, but leaves it to firms to design systems to meet these outcomes.[4] Such regulation recognises that law firms' organisational structures can

[1] For an overview of the common law world see N. Semple, R. Pearce and R. Knake, 'A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England and Wales, and North America' (2013) 16 Legal Ethics 258.

[2] The Law Society of Upper Canada, Consultation on Compliance based Entity Regulation at https://www.lsuc.on.ca/better-practices/; Nova Scotia Barristers' Society, Legal Services Regulation at http://nsbs.org/legal-services-regulation; The Law Society of British Columbia, Law Firm Regulation Consultation at https://www.lawsociety.bc.ca/page.cfm?cid=4195&t=Law-firm-regulation; The Prairie Law Societies, Innovating Regulation at http://www.lawsocietylistens.ca/.

[3] S. Mark, 'View from an Australian Regulator' (2009) Journal of the Professional Lawyer 45, 49.

[4] On meta-regulation see S. Gilad, 'It Runs in the Family: Meta-Regulation and its Siblings' (2010) 4 Regulation and Governance 485.

undermine individual ethical conduct[5] and seeks to provide firms with incentives to institute 'ethical infrastructures', that is, systems that support ethical conduct.[6]

Entity regulation was introduced in England and Wales by the Legal Services Act 2007 (the Act) for Alternative Business Structures (ABSs)[7] and subsequently extended to all firms regulated by the Solicitors Regulation Authority (SRA). The SRA also adopted outcomes-focused regulation (OFR) which leaves it to firms and individuals to determine how to achieve the outcomes set out in the Code of Conduct. OFR recognizes that 'one size does not fit all' and that the regulated are best placed to determine what systems need to be put in place to achieve the prescribed outcomes in their particular circumstances.[8]

Literature suggests that the presence of compliance personnel within firms who are charged with promoting the regulatory agenda is key to the success of entity and compliance based regulation.[9] In England and Wales, all SRA regulated firms are

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[5] See for example, S. Fortney, 'Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements' (2000) 69 UMKC L. Rev. 239; M. Regan, Eat What You Kill: The Fall of a Wall Street Lawyer (2006); C. Parker, D Ruschena, 'The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms' (2011) 9 U. St. Thomas L.J 619; C. Van Sandt, J. Shephard and S. Zappe, 'An Examination of the Relationship between Ethical Work Climate and Moral Awareness' (2006) 68 Journal of Business Ethics 409, 424-425; K. Dean, J. Beggs, T. Keane, 'Mid Level Managers, Organizational Context and (Un)Ethical Encounters' (2010) 97 Journal of Business Ethics 51.

[6] T. Schneyer in 'Professional Discipline for Law Firms?' (1991) 77 Cornell Law Review 1; E. Chambliss and D. Wilkins, 'A New Framework for Law Firm Discipline' (2003) 16 Georgetown Journal of Legal Ethics 335, 338; C. Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible' (2004) 23 The University of Queensland Law Journal 347, 348.

[7] The Act Pt 5. ABSs are legal service firms that, unlike traditional law firms, can be owned and managed by non-lawyers and consist of multi-disciplinary partnerships.

[8] SRA, Outcomes Focussed Regulation at a Glance (October 2011) paras 3.2 and 5.1.

[9] J. Braithwaite, Corporate Crime in the Pharmaceutical Industry (1984) 352-354; J. Rees, Reforming the Workplace: A Study of Self-Regulation in Occupational Safety, (1988) Ch 4; L. Edelman, 'Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law' (1992) 97 American Journal of Sociology 1531, 1565; V. Braithwaite, 'The Australian Government's Affirmative Action

required to appoint a Compliance Officer for Legal Practice (COLP) [10] who must take reasonable steps to ensure that their firms comply with regulatory obligations.[11] The SRA has described COLPs as playing a key role in its scheme of OFR and as 'instrumental in creating a culture of compliance throughout a firm, becoming its focal point for the identification of risk, and the key point of contact for the SRA'.[12]

Yet despite their importance to this form of legal regulation, little is known about how compliance roles operate within legal service firms. This article addresses this gap through a a series of 24 semi-structured qualitative interviews with COLPs[13] that explored COLPs' views of their roles, their attitudes to regulation, and in particular to OFR, and to achieving compliance.

More specifically this study explores the interaction between two regulatory techniques, that is, between COLPs and OFR. Our analysis shows that COLPs are influential in constructing the meaning of OFR for their firms, and that their influence, and willingness to exert it, is reinforced by the regulatory framework. Less positively, the ambiguity of OFR was exploited by some COLPs to read down professional obligations and regulatory goals in order to pursue commercial objectives. Nevertheless COLPs play a critical role in promoting and supporting professional values in the face of commercial pressures in both ABS and non-ABS firms.

The article is structured as follows. Section II provides an overview of the study's methodology. Section III describes how the COLP role developed and its link

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Legislation: Achieving Social Change through Human Resource Management,' (1993) 15 Law & Policy 327, 350; C. Parker, The Open Corporation (2002) 53-56; B. Hutter, 'Understanding the New Regulatory Governance: Business Perspectives' (2011) 33 Law and Policy 459, 467.

[10] SRA, Authorisation Rules for Legal Services Bodies and Licensable Bodies 2011 (hereafter Authorisation Rules) r 8.5.

[11] Authorisation Rules r. 8.5 (c) (i) (A) and (B).

[12] SRA, 'COLPs and COFAs' at http://www.sra.org.uk/complianceofficers/ (last visited 27 November 2016).

[13] In two firms the interviewees were persons to whom the COLP had delegated responsibilities. We nevertheless obtained useful information in relation to some aspects of the study.

with entity regulation. The next sections explore how COLPs function as a regulatory mechanism. Thus Section IV examines COLPs' role as communicators of regulatory norms, and the strategies they adopt to promote compliance within their firms. Section V identifies the factors which enable COLPs to promote regulatory compliance in line with their interpretations of OFR. SectionVI explores concerns that the ethical judgment of individual lawyers is, inadvertently, being eroded by the introduction of the COLP role. We argue that, on the contrary, COLPs can encourage individual practitioners to take greater responsibility on matters of ethics. In our concluding section, we highlight the wider implications of our findings for national and international policy makers.

II. RESEARCH DESIGN

Our primary research method comprised two periods of semi-structured qualitative interviews undertaken with COLPs between September to December 2013, and January to March 2014. Interviews ranged from 45 minutes to an hour and a half. All interviews were digitally recorded and analysed using NVivo 10.

In phase one, our sampling frame comprised the online register of ABSs maintained by the SRA,[14] which identifies the firm's COLP, as we wished to explore whether these COLPs were experiencing particular challenges in promoting compliance in non-traditional legal practices. Adopting a purposive sampling approach[15], we identified a subset of firms of interest (90) from the total ABS population, which at that time (August 2013) totalled 169 entities. Our selection criteria combined two purposive sampling techniques: heterogeneous sampling[16] to reflect the diversity of ABS firms, and critical case sampling[17] to include firms where, due to their characteristics, one may expect COLPs to be experiencing challenges in enacting their

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[14] SRA 'Search for a licensed body (ABS)' at http://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page

[15] J, Ritchie., J Lewis, and G. Elam, 'Designing and Selecting Samples' in Qualitative Research Practice A Guide for Social Science Students and Researchers, eds. J. Lewis, and J. Ritchie (2003)

[16] C. Robson, Real World Research (2002)

[17] M. Patton, Qualitative evaluation and research methods. (1990).

role. These included ABS firms that are subsidiaries of, or part owned by, a quoted company; high-profile new entrants to the legal sector including leading brands from other jurisdictions; firms receiving considerable media attention for their innovations. We excluded ABSs in which the COLP was the managing partner. We wrote to all 90 ABS firms and followed up the initial letters with a phone-call and secured 13 interviews.

In phase two, aiming for a mix of practice size, practice area, geographical location and the COLP's position in the firm, we identified 30 firms, including firms that represented key archetypes such as the high street firm, the City firm, and the criminal practice. We contacted them by phone and secured eight interviews. Two interviews were secured by following up contacts suggested by the authors' personal networks. Another was a contact suggested by a respondent.

Table 1: Firm characteristics

Firm characteristic		**No in sample**
Business structure	ABSs	13
	Non-ABSs	11
Firm size by number of solicitors	Small (less than 10)	4
	Medium (11 to 80)	9
	Large (81 and over)	11
Legal aid contract		2
Practice area: Mainly [but not exclusively]	Mainly private client	14
	Mainly commercial – inc. public and third sector	7
	Niche, boutique or specialist	3
Location	London	7
	Regional	16
International		2

The COLP sample comprised fifteen males and nine females. Fourteen were equity partners, four non-equity partners and two were sole practitioners. As well as occupying senior positions before their appointment, the majority (18) had entered the profession over fifteen years ago. Fourteen COLPs had a fee-earning role; two-fifths did not. In three firms lawyers were out-numbered by non-lawyers.

Our sample was small, but the 'confirmability' and 'credibility' of research findings[18] occurred in two ways. First, we presented to, and discussed our findings with, COLPs at a number of COLP forums in 2016-2017. We received feedback that many of our findings reflected the COLP experience. Second we compared our research findings with similar studies[19] on non-lawyer compliance roles, in-house lawyers and US law firm General Counsel (GCs). COLPs share various similarities with these groups but they are also a unique composite. Like a number of non-lawyer compliance personnel, but unlike GCs and in-house lawyers, they have a mandatory compliance role; like GCs and in-house counsel, but unlike other compliance personnel, they are licensed lawyers subject to professional discipline; like GCs, they primarily deal with other lawyers similarly subject to professional discipline, but a minority are more akin to in-house lawyers in that they are engaged in promoting compliance to non-lawyers.

We found that many of our findings are consistent with the literature on compliance personnel, GCs and in-house lawyers, and we link this to similarities between COLPs and these groups. However we also found differences that we attribute to the uniqueness of the COLP role.

Thus studies of non-lawyer compliance personnel supported our findings on the importance of the COLP role being mandated by regulation, and on the factors that support the COLP role. However the studies also highlighted differences that we attribute to the fact that COLPs are lawyers subject to professional discipline. The GC and in-house counsel literature enabled further exploration of the relevance of a lawyer identity and the relevance of context. As explored in Section VIII a number of our findings on the COLP experience was reflected in the GC literature, which we argue is because GCs and most COLPs promote compliance with professional regulation to fellow lawyers with shared professional norms who are subject, on both sides of the Atlantic, to similar market conditions. This is reinforced by our findings in Section V

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[18] id.

[19] c.f. N. King, The Qualitative Research Interview in Qualitative Methods in Organizational Research: A Practical Guide, eds. C. Cassell, and G. Symon (1994).

on COLPs in non-lawyer dominated firms who had more challenging experiences of communicating regulatory requirements. However the literature also flagged up an important difference between how COLPs approach compliance and enforcement and that adopted by GCs and in-house lawyers: as we discuss, COLPs are more robust, and we attribute this to the mandatory nature of the role.

When interpreting study findings, caution must be exercised due to sample size, developments since we gathered the data, and social desirability bias that is, the tendency to deny socially undesirable traits, [20] which we sought to mitigate by assuring anonymity.[21] However whilst we highlight the study's limitations in our discussion, nevertheless, the interviews enabled us to elicit information about problems that interviewees themselves did not see and observe the rationalizations interviewees adopted to justify the approaches they took.

III. THE COLP AND ENTITY REGULATION

When the Clementi Report, which laid out the framework for the current regulatory structure in England and Wales, advocated the introduction of Legal Disciplinary Practices (LDPs) it recognised that regulating only individuals would result in different lawyers in the same firm being subject to different regulatory regimes.[22] It therefore recommended firm-based regulation and a designated compliance role termed a 'Head of Legal Practice' (HOLP) 'with overall responsibility for the conduct of the legal business'.[23]

Clementi did not advocate ABSs, but they were nevertheless introduced by the Act. To address fears that ABSs were less likely to observe professional standards

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[20] M. Fernandes and D. Randall, 'The Nature of Social Desirability Response Effects in Ethics Research' (1992) 2 Business Ethics Quarterly 182, 191.

[21] D.L. Paulhus, 'Two-component models of socially desirable responding'. (1984) 46(3) Journal of Personality and Social Psychology, 598.

[22] D. Clementi, Report of the Review of the Regulatory Framework for Legal Services in England and Wales (2004) 6.

[23] id., 112.

than traditional law firms and that their lawyers would face pressure from non-lawyer owner-managers to violate professional obligations,[24] safeguards were introduced including the requirement for ABSs to appoint a lawyer HOLP.[25] The HOLP is responsible for taking all reasonable steps to ensure that: the entity[26] and its lawyers[27] comply with regulatory requirements; and that non-lawyer managers, employees or owners do not do anything that causes or substantially contributes to a breach by the ABS or its lawyers of their regulatory obligations.[28] The HOLP must also report regulatory breaches as soon as reasonably practicable to the SRA.[29]

The SRA subsequently extended entity regulation to all firms it regulates, together with the requirement to appoint a COLP.[30] The COLP and HOLP's duties are very similar, though COLPs need to report only material regulatory breaches to the SRA,[31] whereas the Act requires HOLPs to report all breaches.[32] The SRA requires firms to institute 'suitable arrangements' to ensure that firms, managers, owners and employees comply with their regulatory obligations.[33] As COLPs must take reasonable steps to ensure that a firm, its managers, employees or owners comply with their regulatory requirements,[34] they have particular responsibility for overseeing that firms put in place these 'suitable arrangements'.

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[24] Joint Committee on the Draft Legal Services Bill Draft Legal Service Bill Report HC 1154-I HL Paper 232-I, (July 2006) 76-81.

[25] See the Act s. 91 and Sched. 11 para. 11(2).

[26] id., s. 91(1) (a).

[27] id., s. 91(3) (a) and s. 176

[28] id., s. 91(4) (a).

[29] id., s. 91(1) (b), (3) (b) and (4) (b).

[30] Authorisation Rules r. 8.5(b) (ii).

[31] id., r.8.5 (c)(iii)

[32] The Act, s. 91(1) (b); id, r. 8.5(c)(ii)(A).

[33] Authorisation Rules, r. 8.2. See also SRA Code of Conduct 2011 Outcome 7.2.

[34] id., r. 8.5 (c)(i) A and B.

Research suggests the presence of compliance professionals charged with responsibility for developing and implementing compliance systems is critical for successful firm based regulation.[35] Without such individuals, an organisation's commitment to compliance is likely to be symbolic only.[36] Empirical studies outside the legal context bear this out[37] as does research on law firms. When New South Wales permitted non-lawyer ownership of legal service firms and multi-disciplinary practices, the firms were required to implement 'appropriate management systems' that addressed objectives set by the regulator in ten areas that had given rise to significant numbers of client complaints.[38] The firms had to evaluate and self-report on their performance against these objectives,[39] a process that led to a decrease in client complaints against these firms by two thirds.[40]

While the precise mechanism by which this was achieved has not been established,[41] the self assessment process was usually done by the Legal Practitioner

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[35] see n 9 above.

[36] C. Parker and S. Gilad, 'Internal Corporate Compliance Management Systems: Structure, Culture and Agency' in C. Parker and V. Nielsen, (eds) Explaining Compliance: Business Responses to Regulation, (2011) 181-182.

[37] Parker op. cit., n 9, Ch 7; K. Bamberger and D. Mulligan, 'New Governance, Chief Privacy Officers, and the Corporate Management of Information Privacy in the United States: An Initial Inquiry' (2011) 33 Law and Policy 477, 478. See also L. Edelman and M. Suchman, 'The Legal Environments of Organizations' (1997) 23 The Annual Review of Sociology 479.

[38] S. Fortney and T. Gordon, 'Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation' (2012) 10 University of St Thomas Law Journal 152, 153-154, 162-163.

[39] Mark op. cit., n. 3, 49.

[40] C. Parker, T. Gordon and S. Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37 Journal of Law and Society 466, 485.

[41] For a review of possible explanations see Parker, Gordon and Mark, id., 493- 494. See also Fortney and Gordon, op. cit., n. 38, 173-178.

Director (LPD)[42] who had similar duties to the COLP in England and Wales.[43] By virtue of their regulatory responsibilities, they may have taken the lead in addressing shortcomings in a firm's compliance systems. Given their similar obligations, COLPs could perform a similar role. However they may also play an active role in interpreting what regulation requires of their organisation, as the next section discusses.[44]

IV. THE COLPS' ROLE AS A COMMUNICATOR AND TRANSLATOR OF REGULATORY NORMS[45]

This section examines the extent to which COLPs reported communicating and translating regulatory norms in the light of the discretion afforded by OFR. We considered that this might be particularly important in ABSs given that the compliance role had been introduced in these firms as a safeguard against conflicts of interest between lawyers and non-lawyers, and outside owners and clients. According to the Government, the HOLP (COLP) was to be charged with 'ensuring that the principles of the professions are upheld',[46] despite warnings that '(i)t would be onerous for a single person…to define the culture of a firm or be expected to bear the entire weight of upholding the legal ethics of the practice'.[47]

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[42] Fortney and Gordon, id., 164.

[43] Legal Profession Act 2004 (NSW), s. 140(1) (2)(3) and s. 143, repealed by the Legal Profession Uniform Law Application Act 2014 s. 167(a).

[44] As the literature again suggests is the case with compliance specialists in other contexts: Edelman, op. cit., n. 9, 1544; Edelman and Suchman, op. cit., n. 37, 499; Parker op.cit., n 9; E. Chambliss and D. Wilkins, 'The Emerging Role of Ethics Advisors, General Counsel, and other Compliance Specialists in Large Law Firms' (2002) 44 Arizona Law Review 559, 560.

[45] The idea of compliance officers communicating and translating regulatory norms is borrowed from Parker op. cit., n. 9, 176

[46] Joint Committee on the Draft Legal Services Bill Draft Legal Services Bill at http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/232i.pdf, paras 267-269 (last visited 30 November 2016)

[47] Clementi, op. cit., n. 22, 115.

Generally, however, the ABS COLPs reported that their role was no different to what they conceived it might be in non-ABS firms. Primarily this is because many ABSs were law firm conversions with minimal or no non-lawyer involvement. However two COLPs did experience challenges that differed from those presented in traditional law firms. These were operating in firms at either end of the scale in size but in both, lawyer-managers (including, or solely, the COLP) out-numbered non-lawyers. COLPs in both firms needed to explain that conduct that was legitimate in the unregulated sector was prohibited now that the business was regulated by the SRA. In the small firm the COLP had to educate non-lawyer managers – who had previously worked in unregulated markets – about regulatory compliance per se. She reported the ensuing tension and conflict:

> I think it is probably harder for me coming into that commercial and non-lawyer environment than it would be for a COLP in an existing legal practice, where everyone is more *attuned*…here, the existing organisation was not a solicitors' practice, and so I have had to come in and try to impose those requirements on *to others.'* (COLP-6)

In the larger firm, it was not unfamiliarity with working in a regulated industry that created challenges for the COLP, but rather that the non-lawyers had difficulties with the regulatory norms of the legal profession:

> I*f they were all lawyers, it would be easier, but they're not. The majority of them are not lawyers and they've run businesses where there's a lot less regulation; some where there's equal amounts of regulation. So it's getting* across to them. They understand it now more than they did when we first *started.'* (COLP-7)

This highlights a difference in ethos between lawyers and non-lawyers, an issue that was also raised in the smaller firm. Nevertheless the COLPs reported that when necessary they took a hard line on enforcement issues and were successful in protecting professional values. As such, they performed precisely the regulatory function that had been planned for them. Their experience though raises the possibility that firms dominated by non-lawyer managers pose a higher regulatory risk than solicitor-dominated firms, and that the COLP role is important in ensuring that regulatory objectives are adhered to in these firms.

By contrast, COLPs in non-ABS firms and in ABS law firm conversions reported that since lawyers had already been socialized into accepting professional regulation, their role centered on educating individuals about what the Code of Conduct and OFR required of them. The majority of COLPs in this study viewed OFR as more demanding than the previous rules-based regime, because it required firms and individuals to exercise more judgment in determining what constituted compliance.[48] For some COLPs, this presented problems. For example, in two firms where COLPs were not equity partners,[49] OFR's lack of clarity made it easier for their decisions to be challenged and harder for them to insist on compliance**.** In contrast, in two other firms, partner COLPs reported that the ambiguity encouraged others in the firm to defer to their professional judgment, increasing their power: OFR thus supported and underpinned their authority.[50]The next section explores further how COLPs exercised their authority to achieve compliance when they encountered challenges, and the role played by OFR.

V. NAVIGATING TENSIONS BETWEEN COMMERCIAL AND REGULATORY OBJECTIVES AND LEVERAGING COMPLIANCE

In the highly competitive environment in which law firms operate, tensions exist between running a business commercially and adhering to the Code of Conduct. When COLPs offer an interpretation of regulatory norms that is contrary to the interests of a fee-earner or the firm, it was not uncommon for them to encounter resistance. This section examines how they sought to overcome this and achieve compliance using

[48] See also SRA's reform of continuing professional development that requires solicitors to reflect on and identify their learning and development needs: SRA Continuing Competence http://www.sra.org.uk/solicitors/cpd/tool-kit/continuing-competence-toolkit.page

[49] In one of these the COLP was an associate, in another, a lawyer to whom the COLP had delegated the compliance role.

[50] See also Bamberger and Mulligan, op. cit., n. 37, 490-491.

strategies similar to those identified by Parker in a study of non-lawyer compliance personnel.[51]

Depending on the context, compliance officers in Parker's study adopted one of two mutually reinforcing approaches to managing tensions between regulatory and business objectives. The first sought to harmonise the two sets of objectives by either articulating a business case for compliance or by finding 'a solution,' that is, a means of achieving business objectives that remained compliant with regulatory goals.[52] This approach does not necessarily entail promoting business objectives to the detriment of regulatory norms, though this is a risk.[53] However as Parker argues, a commitment to professional norms must be combined with a sensitivity to the commercial requirements of the organisation in order for compliance efforts to be successful.[54]

There was evidence of COLPs adopting the harmonizing strategy in which they acknowledged the conflict between commercial and regulatory goals and acted as problem-solving consultants to reconcile the differences. Notably, as COLP-10 explained, this was facilitated by the flexibility of OFR:

> *OFR's all about outcomes*-focussed and risk-*based approach, so I'm not just sat there saying (bangs desk), 'No, you have to do this.' It's, 'Let's look at what we need to do, let's look at what's right to do, what's best practic*e, and le*t's* find a solution that works.

Others talked about balancing commercial objectives with compliance objectives, and of taking account of economic as well as professional considerations when

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[51] Parker op.cit., n. 9, 180. There were also parallels between the COLP approaches and the 'cops' and 'counsel' roles identified in Nelson and Nielsen's study of in-house counsel: R. Nelson and B. Nielsen, 'Cops, Counsel and Entrepeneurs: Constructing the Role of Inside Counsel in Large Corporations' (2000) 34 Law and Society Review 457, 463-464, 474.

[52] Parker id., 118-119.

[53] See for example B. L. Edelman, S.R. Fuller and I. Mara-Drita 'Diversity Rhetoric and the Managerialization of Law' (2001) 106 American Journal of Sociology 1589; S. Gilad, 'Institutionalizing Fairness in Financial Markets: Mission Impossible?' (2011) 5 Regulation & Governance 309, 327.

[54] C. Parker, 'Compliance Professionalism and the Regulatory Community: the Australian Trade Practices Regime' (1999) 26 Journal of Law and Society 215, 232

interpreting OFR. Thus COLP-14 said that OFR 'makes firms take responsibility for *themselves'* but that 'you really need to be thinking about your business as well as you *know, the technical points…I think it's served to make businesses think'*.

COLPs' second strategy was to adopt a political or enforcement approach whereby they used their 'clout' to ensure compliance.[55] This occurred when it was not possible to bridge the gap between regulatory and commercial objectives. Resonating further with Parker's findings, COLPs in this study were able to successfully adopt this approach partly because they usually adopted the harmonising strategy, and partly because of the authority associated with their role and formal status in the firm.[56] One respondent, for example, described how *'you've got to be able to take people along* with you in terms of believing [in compliance] *so that it isn't only happening when it's enforced'* (COLP-15). However when it was not possible to devise a solution that met both regulatory and commercial objectives, nearly all COLPs reported adopting an enforcement strategy. This involved them either insisting on a course of action that met regulatory goals on the basis of their individual enabling conditions, that is, the authority linked to their role, their status in the management structure, and their expertise in compliance or, if that failed, threatening to report inappropriately resolved conflict to the SRA. As COLP-13 said:

> *Compliance is one area where if I say, 'We're not doing it,' we're not doing it. If I say, 'It has to be done this way,' it should be done this way.*

The prevalence of this approach distinguished the COLPs from other groups. In-house lawyers are less likely to adopt a 'cop' style to enforcement[57] and general counsel

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[55] Parker op. cit., n. 9, 189-191. See also J. Braithwaite and J. Murphy, 'Clout and Internal Compliance Systems' (1993) Corporate Conduct Quarterly 52.

[56] Parker, id., 180-181.

[57] Nelson and Nielsen op.cit., n 51, 468-469; R Moorhead, V Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' (2015) 42 Journal of Law and Society 387, 394

emphasise suasion and relationship building to obtain compliance.[58] We explore in the next section why this might be so.

Although there was little difference in approach between COLPs in ABS and non-ABS firms, in the two ABSs where the COLPs had encountered difficulties with non-lawyer managers, the COLPs' approach had evolved over time: they began with the enforcement strategy and later moved to a harmonisation one. COLP-7 remarked:

> *'at the beginning, it was eit*her black or white with my own view on something; *we either could or couldn't do it.… and now the way I do it is…'Well look, this might be an area of contention, but have you thought about this?' So I try to* provide a solution which might not be the ideal solution, might not make them *[Board] as much money, or cost them a bit to do, but it's a solution. So, that's the way I look at things now. We don't just say 'no' unless we have to'*

This occurred following intensive high-level executive coaching which he sought specifically in order to help him 'cope' with the conflicts he encountered with the non-lawyer board members. Likewise, the second COLP (COLP-6) reported that she had become more sympathetic to the commercial aspirations of the non-lawyer managers and would seek a regulatory compliant solution that met these aspirations; in turn the non-lawyers had become more attuned to the SRA's requirements. She described how 'there has been a movement to them becoming more solicitor-like in their outlook on things and me becoming more commercial' (COLP-6).

While this could indicate a weakening of the COLPs' willingness to challenge actions that prioritised commercial consideration, what they described is in line with the problem-solving approach adopted in other firms. None of the COLPs reported making a 'business case' for compliance, and nor were they aware of underplaying conflict. This could be due to social desirability bias or because compliance is viewed as simply the right thing to do.

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[58] M Regan, Z Hutchinson and J Aitken, 'Lawyer Independence in Context: Lessons from Four Practice Settings' (2016) 29 Georgetown Journal of Legal Ethics 153, 172-174.

In support of the latter view, in a number of more innovative ABSs, there was evidence of COLPs prioritising professional over commercial values, by proposing 'solutions' that were more costly for their firms than the original non-compliant proposals, or by insisting on courses of action that firms had been seeking to avoid because they were contrary to the firms' commercial interests. Thus COLP-13 reported 'issues' with a partner over the closure of a department but nevertheless insisted '*We're* not doing it, [that way].*'* As a result the course the firm adopted was *'*a hell of a lot more expensive and time-consuming, but we have to do it [to be compliant]'.

In another firm there was disagreement over providing prospective clients with information about reforms to fee arrangements and giving clients the choice to determine which fee regime they wished to adopt: one was more favourable to clients, another to the firm. The lawyers did not wish to provide a choice in case clients opted for their claim to be processed under the former regime, resulting in the firm making less 'profit'. This led to a confrontation between the COLP and the lawyers, with the COLP prevailing:

> But we had this tension with the Jackson reforms[59] in that, well, what do we tell *our clients? …So in the end, though, they all succumbed to my will [laughter]* and we sent letters to all of our clients and we explained it to them when they called *through in the contact centre. They [lawyers] didn't like it and it was a* heck of a battle because there was a huge disadvantage to the business if people *opted [for the new rules]…. (COLP*-10).

The clashes between commercial and regulatory goals also occurred at a strategic level in ABSs, perhaps reflecting a tendency to take a more innovative approach to developing the business and therefore one that tested regulatory boundaries. For instance, in one firm, the board wished to acquire a new business and exclude it from SRA regulation. The COLP reported that this would be non-compliant and insisted that

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[59] These prohibited the payment of referral fees, and the recovery of a claimant lawyer's 'success fee' and 'after-the-event' (ATE) insurance premium from an unsuccessful defendant: Ministry of Justice, Review of Civil Litigation Costs: Final Report (December 2009).

the firm should either be incorporated into the business and subject to regulation or not acquired. A decision was made not to acquire the business.

In sum overall our data was positive from a regulatory standpoint, indicating that the COLPs wielded significant authority, and were prepared to exercise it, in order to require compliance with their interpretation of regulatory norms.

VI. FACTORS SUPPORTING THE COLPS' AUTHORITY

The previous sections suggest that the ambiguity of OFR reinforces COLPs authority, but also allows COLPs to find solutions that avoid the need to assert that authority. This in turn preserves their political capital which protects that authority from being eroded. However, OFR's ambiguity also made it easier to challenge more junior compliance personnel. This indicates that other factors also underpin the COLPs' authority. Studies in other contexts indicate that these include position and power within the firm structure, access to, and support by, senior management, and external regulatory support.[60] The COLPs' responses suggested that this held true for them.

1. THE POSITION OF COLPS IN THE FIRM HIERARCHY

Regulatory literature suggests that compliance personnel will be most effective when they are senior employees.[61] While the SRA does not require COLPs to be partners they are required to be senior enough to have sufficient responsibility to discharge the role.[62]

The consensus amongst respondents in this study was that the COLP role should be performed by actors occupying a senior position within the firm. There were three reasons for this. Firstly respondents often demarcated themselves from firms that they

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[60] See for example, C. Parker, 'How to Win Hearts and Minds: Corporate Compliance Policies for Sexual Harassment' (1999) 21 Law and Policy 21, 39; Bamberger and Mulligan, op. cit., n. 37, and 489-491; E. Chambliss, 'The Professionalization of Law Firm In-House Counsel' (2006) 84 North Carolina Law Review 1515 1556-1557.

[61] Braithwaite, op cit., n. 9, 354; R. Rosen, 'The Inside Counsel Movement, Professional Judgment and Organizational Representation' (1989) 64 Indiana Law Journal 479, 503; Parker, op. cit., n. 54, 230.

[62] Authorisation Rules r 8.5(b)(iii)

envisaged had appointed junior lawyers to the role, indicating that such firms could not be taking the issue of regulatory compliance seriously and the COLP would be having a difficult time. Secondly, respondents emphasised that a senior position in the management structure provides COLPs with formal authority and clout[63] to help ensure their advice is taken into account, particularly given that they might need to persuade or coerce partners on compliance issues. Formal authority was also considered important in order to be viewed as credible by the rest of the management group. Finally, respondents talked a great deal about the need for COLPs to possess 'gravitas', which they attributed to a combination of their position in the management structure and personal qualities such as assertiveness, confidence and knowledge. Virtually all respondents thought that, because of their relative inexperience, junior lawyers lacked 'gravitas' to perform the role and it would therefore be unfair to confer such responsibility upon them.[64]

While studies of in-house lawyers suggest seniority can support independent judgment,[65] COLPs identified potential risks to independence indirectly linked to seniority. Thus an equity partner COLP who did not sit on their firm's management board stressed the need to have a degree of independence from management. Two non-equity partner COLPs asserted that their position outside the equity supported their role by enhancing their autonomy and objectivity. They perceived that not having a direct financial interest in the firm minimised potential conflicts of interest between meeting COLP obligations and acting in the interests of the firm. Not being an equity partner gave them greater freedom in the sense that should major disagreements arise over the interpretation of OFR, then as COLP-3 said '*my backstop is, if I don't like anything, I*

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[63] On 'clout' see n. 55 above.

[64] Interestingly 'gravitas' is also important for US GCs.: Regan, Hutchinson and Aitken op.cit., n 58 above, 153.

[65] R. Moorhead, C. Godinho, S. Vaughan, P. Gilbert, S Mayson, Mapping the Moral Compass (June 2016) at https://www.laws.ucl.ac.uk/wp-content/uploads/2016/06/ELIHL-Survey-Report-Final-.pdf p 72.

can walk out tomorrow, whereas with a partner, they can't, and what's more, it might affect profit-share and everything else.' In fact, COLP-3 argued that owners and equity partners, especially in smaller practices, should not be appointed COLPs on the basis that '*they have a vested interest in sometimes covering up, don't they?'*

However COLPs who were not equity partners or who did not sit on boards could feel that they were 'out of the loop' and needed to strive to open channels of communication to ensure compliance was kept at the forefront of peoples' minds**.** A few reported being challenged by partners over their interpretation of what was required to comply with regulatory obligations. While COLPs often reported being able to escalate matters to senior management when disputes arose, and receiving support, in one instance challenges to a non-partner came from the Managing Partner and other equity partners. On the other hand, COLP-10 indicated that despite not being an equity partner she was successful in promoting compliance across the firm. COLP-16 suggested that there was a balance to be struck:

> *'between having someone who's got – who knows enough about what's happening, and who's got enough clout to do something about it if something* needs to be done. But also maintaining I think, a degree of separation from the direct management of the firm*.'*

These concerns are consistent with Chambliss' work which suggest that GCs who were long term partners may have had their independence compromised, but they had special authority to insist on compliance.[66]

The findings from this study are also backed by research that suggests that when people identify with a group and its values, their sense of self is linked to acting in compliance with the group's norms,[67] so when a conflict arises between the group's norms and

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[66] Chambliss, op. cit., n. 60, 1524-1525.

[67] Parker, op. cit., n. 60, 37; M.A. Hogg, S. Reid 'Social Identity, Self-Categorization, and the Communication of Group Norms' (2006) 16(1) Communication Theory 7, 12; C. Amiot, S Sansfaçon, W. Louis and M. Yelle 'Can Intergroup Behaviours be Emitted Out of Self-Determined Reasons? Testing the Role of Group Norms and Behavioural Congruence in the Internalization of Discriminatory and Parity Behaviors' [2012] 38(1) Pers Soc Psychol Bull 63, 67.

regulatory norms, the former prevail. Thus a COLP's approach to a conflict between the firms' interests and regulatory norms may be influenced by whether the COLP identifies with being a member of the firm, or as having an external facing role and responsibilities. COLPs who are senior management with a long history at their firm, are more likely to fall into the first category, though the fact that they will be personally accountable for breaching their personal professional obligations if they overlook non-compliance may mitigate this risk. Future research could explore in more detail in what ways, if at all, ownership amplifies the tensions between commercial and regulatory goals for a COLP and whether this influences strategies they employ to resolve these tensions, particularly in the light of SRA reforms that encourage owner-managers in smaller firms to be COLPs. [68]

2. THE REGULATORY FRAMEWORK

Seniority and social capital alone cannot explain why COLPs reported being comfortable with an enforcement strategy in cases of conflict, given that in-house lawyers and GCs, who also rely on these factors, are less likely to adopt this approach.[69] However unlike these, the COLPs' role is institutionalised and supported by the external regulatory framework, something that has been found relevant in other compliance contexts.[70] Thus the fact that it is compulsory to have a COLP,[71] and to report a COLP's departure from the firm to the SRA,[72] which acts as a red flag; and

[68] In firms with an annual turnover of under 600,000, sole practitioners or managers can be deemed suitable to be COLPs: Authorisation Rules r.13.3.

[69] See text to n. 57 above. Regan, Hutchinson and Aitken, op. cit., n 58, 189-190. C.f. T. Rostain, 'General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions' (2008) 21 Georgetown Journal of Legal Ethics 465, 473-474.

[70] Rees, op. cit., n. 9, 64.

[71] Authorisation Rules r. 8.5 (b)

[72] Authorisation Rules r. 18.1

that it is mandatory for COLPs to report material breaches,[73] provides COLPs with regulatory leverage to insist on compliance. As a result COLPs are under less pressure to compromise, as they do not have to 'sell' themselves in order to safeguard their positions, unlike in-house lawyers, who are perceived as cost centres and so strive to be seen as adding value in order to safeguard their power and even their posts,[74] or GCs who must be carefully deferential to persuade partners to comply.[75]

The mandatory reporting requirement was also generally viewed by COLPs as supporting their role. Even those who were managing partners had found it to be 'a *useful tool'* which gave them (additional) leverage for requiring partners to comply with the COLP's interpretation of regulatory requirements.[76] Some COLPs emphasised their colleagues' professional obligations and exposure to discipline if they failed to comply. For example COLP-2 told colleagues: '*I'm going to have to report you to the SRA and this isn't the firm being reported, this is YOU being reported to the SRA, is that what* you want?'. She found this 'quite a good stick to beat people with because why would they want to be reported?' Other COLPs softened their threats by suggesting they had no choice to report if they wished to avoid personal liability. Thus COLP-12 said : *'(i)t's useful for me to say, look you've got to do this, otherwise I'm in trouble. It j*ust *saves an awful lot of persuasion and so on, and so forth. You've just got to'*. This tactic allows COLPs to pass responsibility for decisions to report to the regulator, reducing confrontation between COLPs and individual lawyers. This in turn can protect the COLPs' political and social capital and consequently their authority.

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[73] Authorisation Rules r. 8.5 (c) iii. HOLPs in ABS entities must report all breaches: r. 8.5 (c) ii.

[74] Nelson and Nielsen, op. cit., n. 51, 471, 477-478; S. Hui Kim, 'The Banality of Fraud: Re-Situating the Inside Counsel As Gatekeeper', (2005) 74 Fordham L. Rev. 983, 1005-06.

[75] Chambliss, op cit., n. 60, 1552-1553.

[76] Similarly in Australia mandatory self assessment gave LPDs leverage to examine and revise firm systems: Fortney and Gordon, op. cit., n. 38, 182.

Other COLPs expressed concerns about their exposure to personal discipline if they failed to insist on compliance or did not report regulatory breaches. Thus COLP-3 said :

> *It is a big ask actually [being a COLP], it is a big ask because you're professionally… your practicing certificate's at stake for a mistake that* somebody else made, which you might not have any control over

COLPs cited fears of personal responsibility as their motives for insisting that they would not be intimidated into refusing to report if others in the firm would not comply with regulatory requirements:

> Oh, absolutely not. The way that I always look at it is – *it's my job. It's my* practicing certificate. If the firm sacked me for it, they sack me for it, but in *terms of my practicing certificate, I'm not willing to put myself on the line for* other peop*le in the business who won't do what's required of them* (COLP-10)

COLPs also reported being prepared to leave the firm before they were knowingly party to a regulatory breach, but they were more ambivalent about whether they would also report the matter to the SRA in such circumstances.

Against this overall picture, detailed analysis reveals several nuances. In later interviews there were fewer references to 'heads being on the line', and no referenc**e** to fears of losing the ability to practice. It is likely that these fears lost salience as the role embedded. This is concerning because actual reporting levels were low, which does not support COLP claims that they were prepared to take a robust approach to reporting. Out of the 24 COLPs interviewed, only seven said that they had reported regulatory breaches, 16 had not, and one refused to answer. Larger firms were more likely to report than smaller. Furthermore even though COLPs' formal authority to challenge partners with power does not depend on management support, COLPs did seek, and obtain, management support to pressurise recalcitrant lawyers, and subsequently negotiated with management regarding reporting material breaches. COLPs had not faced situations in which they had not been supported by management and their reporting obligations had brought them into conflict with the firm. How COLPs would respond in this situation, and whether concerns over personal exposure to professional discipline would lead them to insist on compliance as they claimed-particularly if those concerns have diminished over time-was unresolved.

COLPs also commonly referred to conflicts over regulatory obligations as arising with individual partners, demonstrating a tendency to frame non-compliance in terms of individual rather than entity breaches. In a similar vein, COLPs who described being under-resourced did not acknowledge that this could constitute a material breach of the firm's obligations. This is consistent with other literature which suggests that it is easier for compliance personnel to overlook systemic problems and focus on individual misconduct.[77] Thus Kirkland found GCs denied the relevance of institutional incentives that could lead to wrongdoing, preferring to see wrongdoing as purely a matter of individual failings.[78] Similarly Moorhead and Hinchly found that in-house and external lawyers focused on individual character rather than systemic risks to ethical conduct.[79] Problematically as this can be an unconscious process, fear of regulatory accountability would not address the problem.

3. PROFESSIONAL NETWORKS.

Professional networks support the development of shared understandings of professional norms[80] and compliance personnel's 'clout' in asserting their interpretation of those norms, and reinforces their sense of professional identity.[81] At the time of the fieldwork such networks had not developed. One COLP described her role as 'quite lonely. *There's* no COLP network.' (COLP-21) She had attempted to link up with other COLPs through Linked-in but found this to be ineffective. The Law Society Compliance Reference Group, formed in 2012 for the top 100 firms, was

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[77] A. Tenbrunsel and D. Messick, 'Ethical Fading: The Role of Self Deception in Unethical Behaviour' (2004) 17 Soc Just Res 223.

[78] K. Kirkland, 'Self-Deception and the Pursuit of Ethical Practice: Challenges Faced by Large Law Firm General Counsel' (2011) 9 University of Saint Louis Law Journal 593, 612-613.

[79] Moorhead and Hinchly, op.cit., n 57, 403.

[80] L. C. Levin, The Ethical World of Solo and Small Law Firm Practitioners, (2004) 41 Hous. L. Rev. 310, 3131; Regan, Hutchinson and Aitken, op. cit, n 58, 168;

[81] Parker, op.cit., n 9, 177-178, 185-186

disbanded after failing to receive substantive queries from COLPs. Informal networks are likely to have developed more recently following events such as the Clyde & Co Annual Compliance and Risk Forum, open to compliance personnel in the largest firms, and the annual SRA conference open to all. However COLPs have reported that concerns over confidentiality limit the extent to which they can discuss difficult cases with other COLPs, which could limit the capacity of networks to assist them.

VII THE COLPS' ATTITUDE TO COMPLIANCE AND OFR

Compliance professionals bring normative and political commitments to the task of identifying what responses their firms must adopt to regulation.[82] These commitments not only shape their own response to regulatory norms but can also influence the attitudes of their firms and those within their firms to compliance,[83] particularly when, as with OFR, regulatory norms are ambiguous and compliance professionals are key figures in translating their requirements. Therefore as Parker and Gilad argue, it is important to understand the 'values, perceptions and motivations' compliance personnel bring to their role.[84]

The majority of COLPs interviewed had undertaken their role willingly, with one describing it as a 'privilege'. Nearly all had already been performing a compliance function in their firm and were comfortable in taking up the formal COLP position, viewing it as a natural extension of their existing role. Previous experience relating to practice management, managing risk, or handling complaints and professional negligence claims, or being the money laundering officer were the most common routes to being appointed the COLP.

COLPs' willingness to carry out their role suggests a normative commitment to compliance. However research in other contexts has demonstrated that even when

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[82] Edelman, op. cit., n. 9, 1544; Edelman and Suchman, op. cit., n. 37, 499.

[83] L.B. Edelman, H.S. Erlanger J. Lande, 'Employers Handling of Discrimination Complaints: the Transformation of Rights in the Workplace' (1993) 27 Law and Society Review 497, 513-515.

[84] Parker and Gilad, op. cit., n. 36, 183.

compliance professionals express a positive commitment to regulatory goals, they can still translate those goals into business discourse and undermine their effect, particularly when these conflict with business objectives.[85] OFR is designed to impede cosmetic and creative compliance of this nature, and to deter the kind of game-playing and tick-box approach that often results from a rules-based regime, and which could enable the pursuit of commercial objectives at the cost of regulatory goals. [86] Nevertheless as Gilad found in the financial services sector, open-textured norms can also be 'read down' to comply with business goals, particularly when, as with OFR, it is left to firms to determine whether their internal practices and systems meet regulatory outcomes.[87]

Empirical work indicates that both external and in-house lawyers 'read down' regulatory obligations.[88] Moreover Parker et al found that lawyers can influence clients to adopt a game-playing approach to the law, characterised by resistance to the objectives of regulation. However lawyers are also influenced by their clients' attitudes to the law:[89] thus when clients were committed to obeying the law, lawyers reinforced that commitment.[90] Meanwhile other research Parker et al conducted did not find that

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[85] Parker, op. cit, n 60, 29-30.

[86] It functions similarly to principles based regulation: J. Black, 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3 Capital Markets Law Journal 425, 426 and 432-433

[87] Gilad, op.cit., n 53, 326-327; See also K. Bamberger, 'Regulation as Delegation: Private Firms, Decision-making, and Accountability in the Administrative State' (2006) 56 Duke Law Journal 377, 427-429; K. Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81 Washington University Law Quarterly 487, 523 and 533.

[88] D. McBarnet, 'Financial Engineering or Legal Engineering? Legal Work, Legal Integrity and the Banking Crisis' in I. MacNeil and J. O'Brien, (eds) The Future of Financial Regulation, (2010); C. Parker, R. Rosen and V. Nielsen, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation' (2009) 22 Georgetown Journal of Legal Ethics 201, 224-227; D. Langevoort, 'Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk and the Financial Crisis' (2012) 2 Wisconsin Law Review 495, 501; Moorhead, Godinho, Vaughan, Gilbert, Mayson, op. cit. n 65, 39-40.

[89] Parker, Rosen and Nielsen, id., 240.

[90] id., 238.

lawyers' professional identity materially differentiated lawyers from non-lawyers in their approach to compliance roles.[91]

Conversely, Chambliss and Wilkins found that GCs, like COLPs, expressed a strong normative commitment to the goals of professional regulation, which, they suggested, might reduce the tendency to subvert professional regulatory goals in favour of business objectives.[92] Parker et al's adverse findings could result from the fact that lawyers typically do not feel accountable for what they do on their clients' behalf and believe that they should remain neutral vis a vis the clients' goals and methods (provided clients stay within the bounds of the law).[93] It is notable that whilst similar views as to neutrality and non-accountability have been expressed by in-house lawyers, it appears that they do seek to influence their clients' decisions,[94] and can be prepared to say no to their organizations.[95] One reason may be that, unlike external lawyers, they are closer to the consequences should things should turn out badly, and risk being held to account.[96]

Given that COLPs have been assigned responsibility for taking reasonable steps to ensure that their firms comply with regulation, and a failure to do so could put their licence to practice at risk, they are even less able than in-house lawyers to hide behind the principle of non-accountability. This may explain why COLPs reported that they did not permit business objectives, or the firms' interests, always to take priority over

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[91] R Rosen, C Parker, V Nielsen, 'The Framing Effects of Professionalism: Is there a Lawyer Cast of Minds?' (2012) 40 Fordham Urban Law Journal 297, 363-364, finding that lawyers are more likely to put in place paper based compliance systems and to stress the risks of litigation.

[92] Chambliss and Wilkins, op. cit. n. 44, 584.

[93] G. J. Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 New York University Law Review 63, 73; T. Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's* Role (2009) 5-11.

[94] Moorhead, Godinho, Vaughan, Gilbert and Mayson, op. cit., n 65, 41 and 45.

[95] id., 46.

[96] Regan, Hutchinson and Aitken, op. cit, n 58, 185.

compliance objectives. It might therefore be expected that they would also avoid a game-playing approach to OFR.

Yet we found divergent approaches. On the one hand, COLP-12 thought that OFR reduced game-playing, asserting that:

> ... the thing about rules based regulation is that lawyers, almost by definition, *if they see a rule, they're interested in seeing if they can find a legitimate way* around it. ... it was a game really... *Under the old system, you didn't really have* to think about w*hether you were behaving ethically. If the rules didn't say you couldn't do it, then you could do it.*

On the other hand COLP-9 demonstrated a game-playing attitude:

> *'Well, I mean as a firm, you know, we're always going to be pushing the* boundaries a bit in terms of what we can do to get round the referral fee ban and what we can in terms of marketing, what we can do in terms of *publicity….we're always going to be pushing the boundaries a bit….* And yeah, *we're doing that within an OFR framework where t*he boundaries are frankly *blurred. And so, it's inevitable that some of the stuff that we do is going to be* challenging, because we have no guidelines (COLP-9)

The tendency to 'read down' obligations is also evidenced in the approaches some COLPs took to determining whether breaches were material, and so reportable, or not. For example one COLP failed to report theft of client money through internet fraud on the basis that there was nothing wrong with the firm's processes and it had reimbursed the client immediately. Another only reported a breach after a client complained, rationalising that the complaint demonstrated that the impact on the client was such as to render the breach material.

The fact that COLPs displayed divergent approaches to interpreting OFR indicates that the problem does not necessarily lie with OFR itself: rather responses also depend on factors such as character and context. Whilst the sample size means it is not possible to say how common a game-playing approach is, it is striking that some of the COLPs interviewed admitted to this behavior, given that social desirability bias would be expected to inhibit such responses.

VIII. THE COLP, OFR AND THE ETHICS OF INDIVIDUAL LAWYERS

This final section explores concerns that the COLP role, entity regulation and OFR have combined to produce a perverse impact on the ethics of individual practitioners. It has been argued that entity regulation has led to lawyers in large law firms having very poor knowledge of the SRA Handbook and to them 'insourcing' their professional obligations to COLPs, such that COLPs have 'become the holders of professionalism for the firms, which devalues and depersonalises the sense of individual responsibility of individual practitioners'.[97]

Our data indicates that COLPs do receive large numbers of queries on conduct matters from other lawyers. As this COLP recounts:

> *I made the mistake of taking a fortnight's holiday. I will never do that again in* this role, never. Because t*hey're so used to me dealing with all their queries they'd actually saved up a fortnight's queries when I got back. It was just very, very, very busy when I got back. So I'm just going to take a week at a time this year, hopefully it won't be so bad (COL*P-21).

Another said:

> *… somebody likened my job to a doctor's surgery because I could literally sit there and have people coming to me or sending emails, 'What would I do in this situation?' or, 'This doesn't seem quite right,' or, 'How do I deal with this?' So it's very much providing* support to fee earners and that can be on anything (COLP-5).

A COLP in a large City firm suggested that the exercise of discretion required by OFR contributed to this trend:

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[97] N. Rose, 'City Lawyers have "very poor" knowledge of SRA Handbook' at http://www.legalfutures.co.uk/latest-news/city-lawyers-poor-knowledge-sra-handbook (last visited 3 December 2016); C. Coe and S. Vaughan, Independence, Representation and Risk: Am Empirical Exploration of the Management of Client Relationships by Large Law Firms (2015) 10.

> *'…there's a danger about outcome*-focused regulation that the average lawyer is less aware of their ethical and regulatory duties. You see, when I was growing up as a lawyer, we all had our Handbook. We all had the Rules that we could look at and you could find quite quickly the answer to most things. *Now it's much more a case of* judgment. (COLP-23)

It does not follow however that the introduction of the the COLP role and OFR has eroded lawyer responsibility: as US research on GCs demonstrates, there are alternative explanations. In a qualitative study involving 48 US law firm GCs,[98] Chambliss found that GCs also reported a large workload of queries from individual lawyers on ethical issues.[99] However this has been attributed to a breakdown in collegial control as firms grow larger and competitive pressures increase;[100] pressure on lawyers to work quickly and to maximise billable hours, which leaves them little time to think through ethical issues;[101] increased specialisation within law firms which has led to ethics and professional conduct being viewed as areas of specialist expertise; and, finally the complexity of professional conduct rules that arguably makes it difficult for individual lawyers to understand what is required of them.[102]

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[98] Chambliss, op.cit., n 60, 1526-1528

[99] id., 1529 and 1545-1546 and 1554-1555. See also J. D. Glater, 'In a Complex World, Even Lawyers Need Lawyers' at http://www.nytimes.com/2004/02/03/business/in-a-complex-world-even-lawyers-need-lawyers.html?_r=0 (last visited 6 December 2016)

[100] M. Suchman, 'Working Without the Net: The Sociology of Legal Ethics in Corporate Litigation' (1998) 67 Fordham L. Rev. 837, 864-866 M. Galanter and W. Henderson, 'The Elastic Tournament: A Second Transformation of the Big Law Firm' (2008) 60 Stanford Law Review 1867, 1908-1913.

[101] M. Raymond, 'The Professionalization of Ethics' (2005) 33 Fordham Urban Law Journal 153, 155-157.

[102] id., 158-164.

Similar pressures exist in England and Wales.[103] For example a COLP who was a managing partner in a High Street firm indicated that he sought to minimise the time the firm's lawyers spent on compliance because it distracted them from their job, which was fee-earning:

> *What we try not to do is disturb people all the time because they've got a job to do.* So if we can – *unless it's kind of urgent, a bit like the hacking of the client's computer, immediately we send an email …But otherwise, if it's something that can* wait, we wait till a meeting and that would be my preference (COLP-14).

Compliance was not treated as central to the activity of these lawyers. Meanwhile the City firm COLP who had suggested that OFR was problematic also acknowledged that increased bureaucratisation had played a part in increasing lawyers' desire for guidance:

> *'…. we're probably exacerbating the problem here in firms like this because we do centralise so much that the average lawyer probably doesn't think about these things as much as they used to'* (COLP-23)

Many COLPs in our study also indicated that they had been performing a compliance role prior to the introduction of the COLP role. Consequently even if the introduction of the COLP role and OFR increased the demand for in-firm advice and guidance, it did not create it. On the contrary, it is likely that an in-house advice role meets a need created by exogenous pressures.

Furthermore the long standing debate in the US over the impact of entity regulation and firm-based compliance systems demonstrates that seeking advice from the COLP (or GC) does not necessarily signal an abdication of professional responsibility. For sure, some, such as Alfieri, have argued that systems that focus on compliance and risk management rather than ethics, diminish 'the appreciation of the

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[103] See J. Faulconbridge, D. Muzio, 'Organizational Professionalism in Globalizing Law Firms' [2008] 22 Work, Employment and Society 7, 8-9; J Kembery, 'The Evolution of the Lawyer's Lawyer' (2016) Legal Ethics 112, 113-116.

moral choices facing lawyers in practice'[104] and lead to lawyers transferring responsibility for these choices to in-house ethics advisors.[105] Regan warned that such systems reduce the necessity for individuals to exercise discretion and, by focusing on the influence of the organisational context, 'de-emphasize(s) character'.[106] However Paine, in her seminal article, dismissed arguments that firm based systems necessarily diluted individual moral responsibility. On the contrary, although those that focus on deterrence to influence behaviour endorse 'a code of moral mediocrity',[107] appropriately designed systems that promote aspirational values are necessary, because of organisational influences on behavior.[108] Others, such as Davis, argue that compliance processes support ethical decision making, by alerting individual lawyers to ethical issues they might not otherwise identify and guides them towards ethically correct decisions.[109]

The fact that lawyers are turning to COLPs indicates that they are in fact alert to, and concerned about, ethical problems. Moreover, as Davis has argued, in the context of GCs, dialogue between individual lawyers and the GC provides an opportunity for ethical deliberation, with individual lawyers benefiting from the GC's broader ethical perspective. Such dialogue promotes, rather than retards, lawyers' ethical development. COLPs similarly report being used as 'sounding boards' to talk through matters before

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[104] A. Alfieri, 'The Fall of Legal Ethics and the Rise of Risk Management' (2008) 93 Georgetown Law Journal 1909, 1910 and also 1940.

[105] id., 1937

[106] M. Regan, 'Risky Business' (2006) 94 Georgetown Law Journal 1957, 1962.

[107] L. Paine, 'Managing For Organizational Integrity', (1994) 72 Harvard Business Review 106, 111.

[108] id., 109 and 111. CF F Gino and J Margolis, 'Bringing Ethics into Focus: How Regulatory Focus and Risk Preferences Infleunce (Un) ethical Behavior' (2011) 115 Organizational Behavior and Human Decision Processes 145.

[109] A. Davis, 'Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation' (2008) 21 Georgetown Journal of Legal Ethics 95, 113.

lawyers reach independent decisions about what to do.[110] Furthermore, as COLPs seem to frame compliance issues in terms of individual breaches, and report taking a robust approach to non-compliance, this focus on individual accountability can off-set attempted transfers of responsibility by individual lawyers.

Nevertheless problems exist for some. A small number of COLPs did appear to perceive themselves, and described themselves as being perceived, as solely accountable for regulatory breaches within their firms. One COLP, for example, spoke of being treated as a safe-harbour:

> We [i.e. COLPs] *are the ultimate 'get out of jail free' card. If somebody sends something to me and says, 'Is this okay?' and if I say, 'Yes,' then it's my problem, isn't it?* (COLP-2)

Another reported that:

> ... you worry have we messed up by failing to do x, y and z? Is that going to land us in difficulties with the SRA? Because if it lands us in difficulties with the SRA, then it's my head on the block. (COLP-6)

Again, whilst several COLPs welcomed queries because it enabled them to monitor what was going on, which reduced the risk that they would miss reportable breaches, and enabled them to identify and address problems, an enormous workload and over-reporting creates 'noise', making it more difficult for COLPs to detect and pay attention to important issues. For example one COLP in a new entrant ABS which employed large numbers of paralegals found that, having raised the importance of compliance, the para-legals then turned to him to check minute details and mundane issues. This problem could be more acute in firms employing large numbers of non-qualified fee-earners. Although the SRA has emphasised that all individuals are personally responsible for complying with the requirements of the Handbook and that

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[110] Comments of COLP at Clyde & Co Seventh General Counsel Compliance and Risk Forum 2016, London: others present agreed.

'compliance is the responsibility of the firm',[111] exhortations alone cannot resolve these issues. An emphasis on individual accountability does not address the structural pressures that have been linked to the demand for professional support and advice. On the contrary the need for COLPs to support individual lawyers and to reinforce professional values will increase given that the SRA intends to introduce revised Codes of Conduct for individual solicitors and firms that will require the exercise of even greater discretion and judgment than the version in place at the time of our interviews.[112]

IX. CONCLUSION

The bureaucratic nature of the modern law firm, the pressures its business practices create for the lawyers within it, and the increasing heterogeneity of its work-force, has created a need for entity regulation of legal service firms to safeguard professional standards. As more jurisdictions adopt entity regulation and permit non-lawyer participation in legal services firms, a compliance role is becoming an increasingly important regulatory mechanism in legal service firms. This article raises important questions about how such a role operates. A significant finding is the vital contribution of the regulatory structure in supporting and incentivising COLPs to promote compliance, combined with the COLPs' position as solicitors subject to professional discipline, factors which distinguish COLPs from other compliance groups. We therefore conclude that a mandatory compliance role is likely to be more effective in promoting the regulatory agenda and professional values within firms than leaving the development of such a role to the market or voluntary initiatives.

The study also demonstrates how one meta-regulatory technique, in this case OFR, can interact with another, the compliance role, to support or undermine

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[111] SRA 'What is COLP and COFA' at http://sra.org.uk/solicitors/colp-cofa/ethos-roles.page (last visited 3rd December 2016)

[112] SRA, Draft Code of Conduct for Solcitors, RELs and RFLs (June 2017); SRA, Draft Code of Conduct for Firms (June 2017) at https://www.sra.org.uk/sra/consultations/code-conduct-consultation.page#download (last visited 31 August 2017).

compliance. Thus the majority of COLPs, including those in ABS entities, reported that their views on compliance were deferred to by partners and management, in part because of the ambiguity of OFR. This is significant given that the SRA proposes to not only retain OFR but also reduce detail in the Code of Conduct. [113]

However the study also highlighted concerns. The perceived ambiguity of OFR gave some COLPs a licence to push boundaries in order to pursue commercial objectives whilst others appeared to read down their obligations to avoid reporting breaches, something that they seemed entirely unaware of. In addition, despite bearing particular responsibility for promoting entity compliance, the COLPs seemed to frame compliance in terms of individual lawyer conduct. This suggests a need for education and dialogue with COLPs regarding what might constitute regulatory breaches by firms.

The study also drew attention to risks to professional values in non-lawyer dominated practices. The COLPs reported overcoming pressures to compromise on these values because of the authority they derived from the regulatory framework. This is concerning because the SRA has decided to permit solicitors to deliver legal services to the public through unregulated firms. Despite well documented evidence on the influence of organisational context on individual behavior,[114] the SRA believes that professional values can be sufficiently safeguarded by regulating solicitors on an individual basis and ensuring that they are educated and tested on their professional obligations.[115] However without the COLP's clout and regulatory authority, individual solicitors in non-lawyer dominated contexts will be ill-placed to resist organisational pressures to disregard or read down professional obligations. It might be argued that these pressures also face in-house lawyers in commercial organisations, and they do not have access to a COLP. However the fact that they currently work only for their client-employer removes the potential conflict of interest between the firm's interests

[113] SRA, Response to Consultation Looking to the Future –Flexibility and Public Protection (2017),.pp 3-4.

[114] See literature at n. 5 above.

[115] SRA, op. cit., n. 113, 8.

and client interests that can arise in legal service firms. This mitigates, though does not eliminate, the commercial pressures that may affect their judgment, and may also give them authority to insist on compliant courses of action.[116] In any event research suggests that in-house lawyers are also subject to ethical pressures, and may require support through ethical infrastructures.[117]

As for concerns over whether personal accountability for ethics is being transferred to COLPs, our data shows that lawyers are turning to COLPs for advice in large numbers. However the creation of the COLP role did not create the need for ethical advice within firms: this is a response to other factors including increased commercial pressures on lawyers. Proposals to ensure that solicitors receive training in OFR and professional conduct rules, whilst welcome, will not address these pressures.[118] In fact these are only likely to increase given that the SRA intends to change to its regulatory regime to places greater emphasis on the exercise of professional judgment.[119]

However when COLPs are seen as solely or primarily responsible when things go wrong or if they are warned not to be 'business obstructers' by powerful partners, this does signify a problematic failure by partners to take personal responsibility for compliance. One solution might be to name other senior individuals-such as the Senior or Managing Partner-as personally accountable for ensuring that the COLP is supported and resourced, and as responsible for compliance, in addition to the COLP. Emphasising that compliance is everyone's responsibility, as the SRA presently does,[120] is unlikely to address the problem because once responsibility becomes everyone's, it quickly becomes no one's.[121] In contrast, assigning responsibility for

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[116] J. Loughrey, Corporate Lawyers and Corporate Governance (2011) 54-55.

[117] Moorhead, Godinho, Vaughan, Gilbert and Mayson, op. cit., n 65, 7-8, 89-90, 103.

[118] Though the SRA plans to address this: SRA Solicitors Qualifying Examination: Draft Assessment Specification (October 2016) 11-12.

[119] SRA, op.cit., n 113., p 3.

[120] Authorisation Rules, Guidance to Rule 8, para. vi and vii; SRA, op. cit., n. 77.

[121] Chambliss, op. cit., n. 60, 1524.

compliance to specific individuals can promote a broader appreciation of regulatory objectives within firms because, as this COLP put it:

> *I think they understand it a lot more now. I don't think that it used to be at the forefront of their minds, if I'm honest. I think people* – unless you have a compliance culture – *I'm not saying that we didn't before we had a COLP, but* there was nobody focusing on it. Nobody whose role and absolute responsibility was to make sure that there was compliance across the firm. (COLP-10)

In sum we conclude that COLPs are a key regulatory mechanism in the context of entity regulation and OFR and have a critical role to play in protecting and promoting professional values in both ABS and non-ABS entities.