



Settlement Counsel - Another Approach to Resolving Disputes

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Introduction

Among clients, it is almost trite to say that litigation has been steadily losing ground as the tool of choice for resolving legal disputes. Uncertain in cost and outcome, and burdened by an increasingly complex web of rules, the value and appeal of litigation has been diminishing across a wide range of sectors, type of dispute and type of client. The wide-ranging development of various forms of alternative dispute resolution (mediation, arbitration, negotiation, etc.) has been an attempt to expand the dispute resolution tool kit. In this article we introduce a recent addition to that tool kit.

What is Settlement Counsel?

Settlement Counsel is litigation counsel that is engaged for the sole purpose of settling a case. His role is to develop and implement a strategy that results in early settlement. The Settlement Counsel role rests on the premise that litigation advocacy is not the same as settlement advocacy and that the task of settling a case is also not the same as the task of litigating it. While the objectives may be the same, the approaches, clearly, are not. Trying to pursue both roles at the same time, as the traditional litigation models try to do, risks a loss of both credibility and effectiveness.

How would it work?

Settlement Counsel does not participate in the litigation. She reports directly and exclusively to the client and in the context of a given dispute focuses on negotiation, mediation (formal or informal), risk analysis, strategic goal development and in the generation of suitable settlement structures. Settlement Counsel will be well versed in the client, its business, risk tolerance and long-term interests, and will have timely and direct access to key client decision-makers and resources.

Settlement Counsel can work with or without litigation counsel. He can be engaged as early as the first possibility of a dispute arises and can get to work on a resolution as early as that point. Settlement Counsel working on his own from the onset of a dispute, behind the scenes or at the forefront, could well find a quick, creative solution that avoids the significant time and costs that are often unavoidable in full-blown litigation.

If there is litigation counsel, Settlement Counsel takes the lead in any settlement process that is part of the litigation but is not constrained by it. Settlement Counsel can initiate or pursue settlement discussions at any point, including before any lawsuit starts, without the loss of credibility that might result if the litigator did it. If working in parallel with the litigator, the two-track approach allows each to exploit the best features of their respective roles.

There clearly could be cost implications for the client in the two-track approach, all the more so if the case does not settle early. One way to address this is to structure the retainer of Settlement Counsel to include an early success incentive. If litigation regularly goes with the client's business territory, the use of Settlement Counsel will likely save the client money in the long run as both client and Settlement Counsel develop familiarity and expertise in risk assessment and management and in workable outcomes for the client in different types of cases. Experience south of the border so far suggests that more cases settle sooner with the use of Settlement Counsel, resulting in savings which would not have been realized through the efforts of litigation counsel alone.

Settlement Counsel obviously needs to understand the merits and demerits of the case. The litigator therefore shares information with Settlement Counsel, but not the other way around. This is a key component of this scheme. To be most effective, the work of Settlement Counsel needs to remain confidential and outside the litigation process. (This is one of the main weaknesses of the standard model of the litigator who at one and the same time is trying to settle the case: there can be a basic inconsistency between trying to win and at the same time trying to compromise). The two roles must remain distinct and be seen to remain distinct. All settlement overtures would be referred to Settlement Counsel and handled by him. The information flow to Settlement Counsel would involve such things as case evaluation, identification of key issues (both legal and factual), the overall strategy for the case and the outcome of any interlocutory proceedings.

Why two tracks? Different task, different focus and different tools. The focus of Settlement Counsel is less on what happened and more on what the client would like to *see* happen. It is less rights-based and more interest-based. It is a free-ranging problem-solving exercise, unbound by what happened or by what can be proved. What can often take significant time and resources, ascertaining the historical facts and sorting out what the applicable law is or might be, is of lesser importance in this process. For settlement purposes, often it is facts different from those that one can get through the litigation process that are the ones that matter. (These "settlement facts" often are in fact hard, if not impossible, to get in the litigation process.) Settlement Counsel is more likely to get open and timely disclosure than through the standard litigation process. By virtue of this separation of functions, having Settlement Counsel involved also strengthens the ability of the litigator to just litigate, meaning the focus of all energy in obtaining the most favorable outcome for the client within the established rules of the game.

Advantages of Settlement Counsel

The greatest value of Settlement Counsel comes from the freedom to engage in a critical evaluation of the case at every stage of the case. Settlement Counsel is better able to avoid the dangers that often come from too close an identification with one's client (and with the case) that can be a feature of the litigator-as-"hired gun" model. Unhindered by procedural rules, precedent and a court process often at its institutional limits, Settlement Counsel is able to bring a different tone, a broader range of alternatives and a much broader frame of reference to any given dispute and to the exercise of judgment that is always involved in generating acceptable litigation outcomes for the client.

Settlement Counsel is free to get opposing counsel to the table at any point, free as he would be from the dynamics of the litigation process (timetables, motion outcomes, posturing, incomplete information, unexpected disclosure, case management rules, etc.). Willing to cut to the chase and without the need to posture, the single goal of Settlement Counsel is not a legal remedy rooted in precedent, but an early and particularized *business* solution to the case.

Conclusion

Not every case can or should be settled. But for those where settlement is practicable and appropriate, Settlement Counsel represents yet another tool at the disposal of the client and its counsel. With Settlement Counsel the interests of legal counsel and those of the client can be made to align themselves perfectly. Particularly if an early success fee is built into the retainer, there can be no opportunity for a conflict to arise between the interests of the client in resolving the case early and cheaply and those of litigation counsel in, for example, proving himself right, besting opposing counsel, garnering

publicity or continuing to earn fees. And because settlement takes a lot less time than litigating, Settlement Counsel is able to handle a larger caseload for a client.

In the right cases, the use of Settlement Counsel can be a more effective and efficient way to manage the desire that is almost always present in all parties to litigation, whether stated or not: to obtain some measure of vindication while doing so in a manner that is cost- and time-effective and which limits damage to the company and its business to the greatest extent possible. ■