Settlement Counsel: Answers to the FAQs

By James E. McGuire

Strategic use of settlement counsel can be an effective part of a company's conflict management strategy. The business of business is not litigation. Proper management of inevitable conflicts and effective use of techniques for efficient resolution of disputes that arise if they are not managed properly are critical risk management challenges of the 21st Century. This article addresses Frequently Asked Questions about the role of settlement counsel. The focus is on practical points that arise when using settlement counsel in a business context.

What Is Settlement Counsel?

Settlement counsel is an attorney engaged for the express and limited purpose of assisting a client to resolve a current dispute. Settlement counsel is not a member of the litigation team. Settlement counsel may be from the same or different law firm. Settlement counsel is a specialist who has developed skills and techniques in negotiation and mediation advocacy. Settlement counsel is conversant with all dispute resolution processes, the theory and practice of interest-based negotiations, effective mediation advocacy, risk analysis, and current developments in social psychology and other related disciplines. There is a lot of learning available about risk analysis, psychological barriers to good decision making, and management of conflict. Settlement counsel is expected to be an expert on these and advanced and effective negotiation and settlement techniques, usually not taught in law schools.

Why Settlement Counsel and Trial Counsel?

"Hire two teams to handle your business dispute and save money!" In response to a presentation on settlement counsel to students in his mediation course, Professor Frank Sander of Harvard Law School once quipped, "Only a lawyer could say that with a straight face." Nevertheless, experience over the last twenty-five years has demonstrated that true savings are available when settlement counsel is engaged early in the process, especially in complex cases. In simple cases, where the law is settled, where the facts are not in dispute and where the discovery and other transactional costs are predictable and proportionate to the dispute, one lawyer may effectively serve in both roles: an effective proponent for settlement and a skilled advocate if settlement is not available. As matters become more complex or more important to the parties, it may be most effective to have two different individuals (or different teams) focusing on each of the alternatives: settle or sue.

It is critical to recognize that the roles of trial lawyer and settlement counsel are fundamentally different. This difference starts with the initial framing question. The trial lawyer asks, "What happened?" The focus of fact-gathering is on the past. Settlement counsel asks, "What do you want to have happen?" The focus of settlement is on the future. Since two different questions are being asked, the information needed to answer those questions is also fundamentally different. Trial advocacy is the not the same skill as mediation advocacy. The skills needed to be the best trial lawyer are fundamentally different from the skills needed to be the best settlement counsel. Both are focused on achieving the best possible result for the client, using the tools they know best, and employing processes that are fundamentally different.

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Who Hires Settlement Counsel?

In my experience, settlement counsel has been hired by general counsel, in-house litigation counsel, risk managers, law firm corporate counsel, and sometimes trial counsel. General counsel usually has the ultimate responsibility to evaluate whether to settle or litigate a dispute. Smaller companies may rely on outside corporate counsel to assume these responsibilities. The individual responsible for monitoring costs and performing a cost/benefit analysis is usually the key decision-maker for engaging settlement counsel. Some corporations have made the role of settlement counsel an integral part of risk management. Other corporations have required that all law firms on a preferred provider list have both litigation and settlement counsel expertise so that on any given case the firm could be retained in either capacity.

From 1990 to 2004, when I worked as settlement counsel both with litigators in my firm and with other firms, I had engagements as settlement counsel every year. In the 1990s, certain major corporations embraced the use of settlement counsel to handle all product liability/personal injury cases with dramatic success. It has been applied in a wide range of cases including insurance coverage for environmental claims, intellectual property, closely held corporations, financial services, major commercial cases, and for States in the tobacco litigation. Since 2004 when I ended practicing law and became a full-time neutral, I have lectured and coached on the topic and have observed the increasing use of settlement counsel in all areas.

The legal market has responded to the increase in demand from corporate clients for alternatives to traditional litigation approaches. Some sophisticated law firms have developed settlement counsel expertise and will use that capability as part of the law firm's marketing and business development strategy. Google "settlement counsel" and you will see how pervasive the marketing and use of settlement counsel expertise has become.

When Should Settlement Counsel Be Engaged?

Now. Settlement counsel has the most impact if engaged early. The litigation process rarely induces goodwill between the parties. As positions harden and resources are spent on litigation, opportunities for creative, constructive settlement proposals are squandered. The true value of settlement counsel should be measured, in part, by how quickly the matter is resolved. Early engagement makes early resolution more likely.

The vast majority of civil disputes settle before trial. In the federal system, fewer than two percent (2%) of all filed cases will end with a verdict after trial. The statistics for state courts are not significantly different. It is both common knowledge and common sense that the longer a case remains in the litigation process, the more it costs both sides in legal fees, disbursements, and lost executive time. Equally true, but perhaps less well known, is the fact that about three out of four cases in mediation settle. This statistic holds true, ***regardless*** of when the case enters the mediation process, in those cases where the parties enter the process voluntarily and use a trained mediator. The potential for true cost savings by stopping the litigation process is greatest at the earlier stages of a dispute. In the 21st century, this simple truth becomes urgent when parties are faced with the enormous costs of electronic discovery. Perhaps more than any other single factor, the high cost of electronic review and production has prompted many to look to alternatives to the traditional litigation process. The information needs of the parties when focusing on settlement are fundamentally different from the litigation discovery process.

Even with respect to electronic discovery, obtaining relevant emails and electronic documents that are truly important for the settlement dialogue can be done easily and efficiently because the parties can focus narrowly on material needed for effective settlement discussions. When all material will be produced and stamped, "For settlement purposes only," parties share more freely. Some information can be accepted in summary form. Settlement counsel or a mediator can limit the scope and quantity of requested information by posing this question: "How does that information aid your client in settlement discussions?"

All of these factors combine to suggest strongly that the time to engage separate settlement counsel is at the earliest possible stage, sometimes even before formal filing of a civil action.

Who Is in Charge?

This answer to this question is simple: the client is in charge and remains in charge throughout the settlement or litigation process. Settlement targets are usually part of the engagement process. This is particularly important if the fee is in any way contingent on the result achieved. Where the engagement is based on fixed monthly retainer or hourly rates, the discussion of goals and objectives can be more flexible. It is still important, however, to establish goals and objectives. Without those, the process may resemble retreating goal posts: the better the settlement offer, the more the client wants. But the client must retain flexibility to accept or reject any settlement proposal based on the client's determination of what is in the best interests of the company.

Where no settlement targets were established at the time of engagement of settlement counsel, the process of setting the negotiation parameters is a team effort. In this process, settlement counsel performs this risk analysis, but litigation counsel provides the inputs. Establishing negotiating parameters requires consideration of trial as alternative to settlement. The litigator says, "Strong case." Using risk analysis/decision tree tools, settlement counsel helps quantify for the client what that really means. Even when an initial settlement target had been established, changing facts and circumstance may require that the client re-evaluate. This is a collaborative process.

How Do We Coordinate Work Effort Between the Teams?

Successful relations between trial counsel and settlement counsel require clear demarcation of roles and good channels of communications. Simply put, "litigators litigate; settlement counsel settles." In a three-way meeting or conference call with the client, basic ground rules can be established. The essential rule is that litigation or trial counsel must refer any settlement communication to settlement counsel. Settlement counsel must have direct access to the decision-maker with authority to settle the suit. The settlement process should be directed with one voice—that is the role of settlement counsel.

Clear instructions must also be given to settlement counsel. Settlement counsel must defer and refer to litigation counsel any question or communication dealing with the litigation process. The other side may state: "We will only talk settlement if there is a stay of litigation." That is a question for the client and the litigation team and settlement counsel should refer the question to them. The litigation and trial effort should be directed by one voice—that is the role of trial counsel.

The flow of information is usually in one direction only. Settlement counsel should learn directly from litigation counsel the relevant facts and the litigator's views on the strengths and weaknesses of various claims and defenses. Information about the settlement process and information exchanged as part of that process is usually confidential. Confidentiality is the hallmark of mediation. When settlement counsel is mediation counsel, it is easier to keep the pledge that information exchanged will be used for settlement purposes only if there is a prior understanding that settlement counsel need not or shall not disclose confidential settlement information with litigation counsel.

How is Settlement Counsel Paid?

There are many different models available to consider in discussing an appropriate fee arrangement for settlement counsel. Any good fee arrangement will align the interests of the client and settlement counsel. The hourly rate model is available and may be preferred by some clients. If the engagement is for a fixed time or if there is fee cap, clients retain control of costs.

Pioneers in the settlement counsel arena developed different approaches when there was initial skepticism about settlement counsel and whether it would yield true cost savings. Some clients were offered a dramatic fee proposal: "Double or nothing." "Engage me as settlement counsel for a period of 90 days. We will agree on the settlement value of the case. I will keep track of my time. If we reach a settlement satisfactory to you, you agree to pay double my hourly rate. If no settlement is reached, you pay nothing and the settlement engagement will terminate."

Closer alignment of interests may be achieved by an engagement for a fixed monthly fee for a fixed period. Since a successful settlement will predictably lead to good referrals and future business, settlement counsel has significant incentives to work diligently toward a mutually satisfactory settlement.

It may make sense to provide a premium to be earned if the settlement achieved is more favorable than the settlement target. In some cases, a premium may also be earned if settlements occur earlier in the retention period. The retention period is determined by settlement counsel and client. Providing for a premium may permit a lower fixed monthly fee since the success factor will compensate for any difference between the monthly fee and the time value of settlement counsel's work at hourly rates. This approach rewards both the client and settlement counsel for settlements at better than the settlement target. In a complex multi-party matter, variations can be used to tailor the fee arrangement to the particular challenges of that engagement.

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Usually, it is best to have a termination date for the engagement as settlement counsel. If ultimate settlement is inevitable, there may be little value added to the late achievement of settlement. Moreover, if credibly informed that there is a 90-day window for settlement discussion with settlement counsel and that an effective settlement must meet the needs of both parties, the other side is often motivated to sincerely explore settlement within that time frame. However, in some cases, right before trial is precisely when settlement counsel is most critically needed, so that trial counsel can focus on preparing for the true alternative to settlement, trial.

Conclusion

The use of settlement counsel has been increasingly well-received as businesses have focused on effective conflict management. Settlement counsel is a proven resource to help meet business' best practice of providing prompt and fair resolution of those disputes that arise when conflicts degenerate.

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