

SETTLEMENT COUNSEL – VALUABLE ADDITION TO THE DISPUTE-RESOLUTION TOOLKIT

Posted on March 28, 2023

Categories: [Insights](#), [Publications](#)

Introduction

It is almost trite to say that litigation has been steadily losing ground as a tool for resolving legal disputes. Uncertain in cost and outcome and burdened by an increasingly complex web of requirements and rules, the value and appeal of litigation has been diminishing across a wide range of sectors, type of dispute and type of client. The various forms of alternative dispute resolution in use today (mediation, arbitration, private judge, med-arb in its various forms, etc.) attest to the ever-present need to devise practical and effective ways to better resolve legal disputes. In this Bulletin, I discuss a less well known but valuable addition to the dispute-resolution tool kit across all areas of law and types of dispute.

What is Settlement Counsel?

Settlement Counsel is litigation counsel engaged for *the sole purpose of resolving a dispute or settling a case*. The key premise of the role is that litigation advocacy is not the same as settlement advocacy and that the task of resolving a dispute without a trial or hearing is also not the same as the task of litigating it. While the objectives may be the same, the approaches are not.

How does it work?

Settlement Counsel does not participate in the litigation or hearing process. He or she 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 whether behind the scenes or at the forefront. His task will be on finding a creative solution to the dispute and minimizing the time, cost and loss of goodwill that are often an unavoidable part of traditional litigation.

An important feature of the role is that Settlement Counsel report directly and exclusively to the client and focus solely on negotiation, settlement analysis, mediation (formal or informal), risk management, strategic goal development and on the unconstrained generation of settlement options. Settlement Counsel will accordingly need to be well versed in the client and in its business as well as in the client's risk tolerance and long-term interests. She will have timely direct access to key client decision-makers as well as to the client's

resources.

Settlement Counsel can work with or without litigation counsel. If litigation counsel is involved, Settlement Counsel takes the lead in any settlement discussion that arises from the litigation but will not be constrained by it. While all settlement overtures are to be referred to Settlement Counsel, he can initiate settlement discussions at any point, including before the proceeding starts and through any viable channel, and will be able to do so without the loss of credibility that might result if the litigator were to do it. Settlement Counsel will also be able to pursue settlement free from the structure and rigidity of the litigation or hearing process (timetables, motion outcomes, procedural rules, institutional delay, posturing, incomplete information, unexpected disclosure, case management, etc.). When working in parallel with the litigator, the two-track approach allows each to exploit the best features of their respective roles.

Settlement Counsel will certainly need to understand the merits and demerits of the case. The litigator therefore shares information with Settlement Counsel but not the other way around, another key feature of this role. The information flow to Settlement Counsel will thus involve such things as case evaluation, identification of key factual and legal issues, overall strategy for the case and the outcome of interlocutory proceedings. To be most effective, however, the work of Settlement Counsel will need to remain confidential and separate from the litigation process.

What can take significant time and resources in a typical proceeding, such as ascertaining historical facts and sorting out the applicable law, is of lesser importance in the Settlement Counsel process because often it is facts quite different from those that a party obtains through litigation that are the ones that ultimately matter in resolving a dispute. Settlement Counsel is more likely to be able to obtain the “settlement facts” than the litigator would be through the established fact-finding mechanisms in legal proceedings, circumscribed as they generally are by probative relevance framed by a set of pleadings drafted long before and with something entirely different in mind.

Settlement Counsel will lead a free-ranging problem-solving exercise, less rights-based and more interests-based, unbound by what happened, by whose fault it was or by what can be proved, all with an eye firmly on the client’s fundamental future-looking interests. Willing to cut to the chase and without the need to posture, her single goal is not a legal remedy grounded in law but an early and particularized business solution to the matter and the relationship from which it arose. The driving concern will ultimately be less on what happened and more on what the client would like to see happen.

Advantages of Settlement Counsel

One of the main weaknesses of the standard litigation model is that the litigator is in most cases required at the same time to pursue as well as to settle a case. The Settlement Counsel role works precisely because it

doesn't ignore the fundamental inconsistency between trying to win and trying to generate alternate outcomes and/or compromise. Different tasks, different focus and different tools. With Settlement Counsel the two tasks are kept distinct (it will often help drive a settlement if they are also seen to be distinct).

With Settlement Counsel, the interests of counsel and those of the client can be made to align perfectly. Particularly if an early success fee is built into the settlement counsel retainer, there can be no opportunity for a conflict to arise between the interests of the client in resolving the matter early and cost effectively and those of counsel in, for example, proving himself right, besting opposing counsel, making a point, backstopping an earlier opinion, garnering publicity or continuing to earn fees. By virtue of the separation of settlement and litigation functions, Settlement Counsel can in fact strengthen the ability of the litigator to focus on obtaining the most favorable outcome for the client within the established rules of that process.

The primary advantage of the role comes from the freedom to engage in the widest-ranging critical evaluation of the case at any stage of the matter. Unhindered by procedural rules, precedent and a court or hearing process often at its institutional limits, Settlement Counsel is able to bring a different tone, a broader range of alternatives and a broader frame of reference to any dispute and to the exercise of judgment that is involved in generating acceptable resolution outcomes for the client. In this way, Settlement Counsel is uniquely able to help the *client* avoid the dangers that result from too close an identification with one's narrative or position, and *litigation counsel* avoid the dangers that result from too close an identification with one's client or with one's case.

Clearly there are cost implications to the two-track approach, all the more so if the case does not settle early. Particularly in cases where litigation goes with the client's territory, however, the use of Settlement Counsel can save money in the long run as both client and Settlement Counsel develop familiarity and expertise in risk assessment and risk management and in generating workable outcomes in different types of cases. It stands to reason that more cases will settle earlier with the use of Settlement Counsel than without, resulting in savings that would not have been realized through the efforts of litigation counsel alone.

Conclusion

Not every case can or should be settled. But for those where a negotiated solution is practicable, appropriate, attainable and preferable, Settlement Counsel represents a valuable tool at the disposal of the client and its counsel regardless of the type of case or area of law. In the right case, Settlement Counsel offers a more effective way to obtain what often lies at the bottom of most disputes which is the desire to obtain a measure of vindication, relief or redress in a manner that is cost and time effective while limiting damage to the company and its business to the greatest extent possible.

Ralph Cuervo-Lorens is a member of McMillan's Complex Dispute and Regulatory Regimes group. He is a

qualified arbitrator, has acted as Settlement Counsel in complex multi-party disputes and been court-appointed as Supervising Counsel in multi-million dollar commercial litigation.

by [Ralph Cuervo-Lorens](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2023