

Colloquy with ...

Chris Nolland

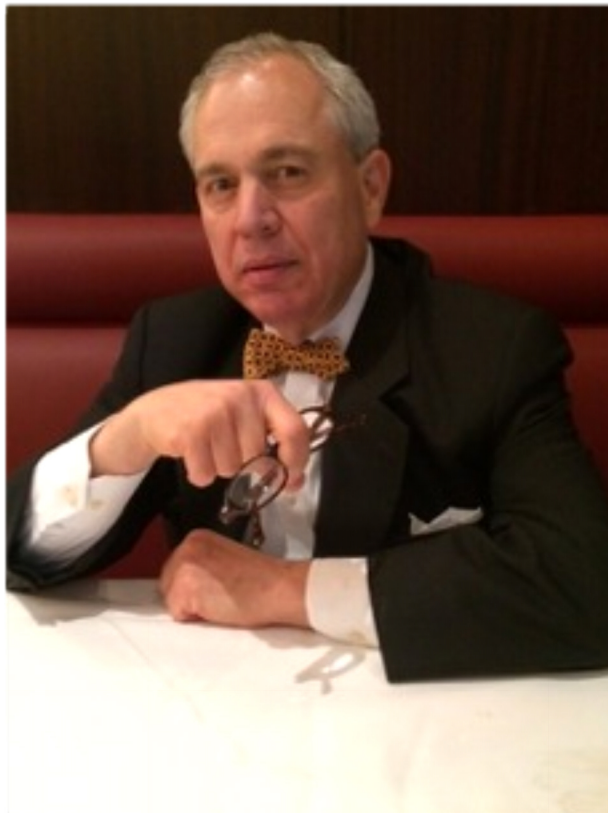
by Lynne Nash

Entering Chris Nolland's offices on the 55th floor of the Comerica building in Dallas was intimidating. Yet I forged ahead, prepared to ask questions and seek answers. What I received was a great lesson from an attorney and professor, albeit a condensed course.

One of Nolland's joys is teaching negotiation. He has shared his knowledge on the subject at SMU Dedman School of Law for 20 years.

In his early years, Chris practiced litigation in New York before moving to Texas. Now Chris is developing a new area of ADR, as well as preparing young lawyers for a career where negotiation skills are vital.

Thunder shook downtown Dallas as I left Nolland's offices. Spending an hour discussing the life and loves of a



gentleman who is an innovator in his field was an electrifying experience. It was a lot like trying to bottle the sound of thunder.

What's a Settlement Counsel?

Chris is pioneering a new area of law practice—Settlement Counsel. When Settlement Counsel is engaged, they work as co-counsel in a non-neutral advocate role for one of the parties in conflict seeking settlement prior to trial. This differs from the more familiar role of mediator, who, when engaged, enters a conflict as a neutral party. In Chris' law practice, he offers services in both areas, yet is quick to

establish with attorneys and clients what the role differentiators are. When present as a mediator, he takes no side within the conflict. When engaged as Settlement Counsel, Chris has one job: find the best possible options to negotiate an optimal settlement between his client and the opposition party.

How Did You Decide To Do This?

It was the right time, right place, right case. Chris became involved with a major litigation case assisting McKool Smith in the mid-1990s.

In 1993, Chris had hung his own shingle. His goal: to be a full-time mediator. Quickly, Chris found that

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“only so many mediations can be done effectively each week because if done right, they’re exhausting.” He also found he has “only so much of a patience bank to draw on to deal with

unreasonable or difficult people.” So his mediation practice was complemented with a continuation of front-line litigation work. To this day, Chris finds 10 days of mediation a month is about the right balance for him.

In the early 1990s, Chris was assisting McKool Smith, and was tasked with the responsibility to pursue and manage settlement matters, while the litigation team pursued the case in a traditional format. At the conclusion of this successful experience, Chris was asked to help on other cases. Mother Necessity asked, and Chris answered.

When Should a Litigator Think About Settlement Counsel?

Victor Vital, a partner at Barnes & Thornburg in Dallas, once said: “To be a good trial lawyer, one must give an honest, clear-eyed view of the case to the client, laying out all the risks, and assessing what the chances of winning or losing may be.” A truly successful trial lawyer knows what their skills are and when it’s time to bring in assistance.

This new type of attorney, Settlement Counsel, should be brought in to assist on settling the case. This bifurcation of responsibilities permits the trial attorney to fully focus on the trial presentation and, as Chris puts it, on “the stuff of litigation.”

In his opinion, Settlement Counsel should be brought in at the beginning of a case. In Chris' experience, this allows him to:

- 1) get up to speed early;
- 2) keep his own calendar open and flexible to deal with developments arising on short notice in the case;
- 3) learn the case in real time; and
- 4) avoid a late entrance which may send the wrong signal to the other side."

Bringing in Settlement Counsel at the beginning of a case makes that dynamic simply a part of the "normal course of business," with everyone within the team being able "to focus on their core skills."

Who Hires You?

Throughout the years Chris has worked repeatedly with many firms on different major litigation matters. When asked who typically hires him, Chris said

It depends. At times a client reaches out, other times it's a firm or a lawyer with whom I've done work for in the past. And, from time to time, it's a lawyer who has been on the opposite side on a prior case and experienced first-hand the value added by engaging dedicated Settlement Counsel.

Chris overwhelmingly agreed that Settlement Counsel work is a small specialty. However, he believes the field of Settlement Counsel is not dissimilar to where the field of mediation was 25 years ago. Just 15 years ago, when Chris told someone his practice was focused on serving as Settlement Counsel, the response

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was often "what the [] is a settlement counsel?" But now, the response is more likely, "I've heard of that, but I've never used one. Tell me about it."

What's the Career Path to Settlement Counsel?

What does it take to develop a practice as Settlement Counsel? Is there a path? Can a person just hang a shingle? Is there business to be had?

There is no direct or clear path to developing a Settlement Counsel practice. Chris recommends gaining a firm foundation in litigation and in negotiation—each of which require disparate skills and mind-sets.

Chris believes there are 5 mandatory requirements to becoming successful as Settlement Counsel.

1 The person needs to have “front line, high level, sophisticated litigation experience.” Without this, they “cannot understand the dynamics, process, and structure involved in moving such a case forward.” Lacking litigation experience, a person “cannot know where, when, or how to apply the right kinds of pressure to advance settlement.”

2 The person must have a “negotiation skill set.” “Most litigators simply don’t have a deep and refined negotiation skill set. Negotiation skills and ability must be learned through focused and dedicated study and practice.” “Litigators usually don’t have the time to do so. The negotiating they have done previously worked out ‘okay’ so they don’t see the problem or the potential (or even the need) for improvement.” A foundation in negotiation theory allows the individual to build a strong, comprehensive negotiation plan. “This plan establishes the clients BATNA (Best Alternative To a Negotiated Agreement) as well as

determining pressure points for settlement.”

3 Chris says a person must “practice at it.” Not just taking the same sub-optimal approach and getting the same sub-optimal results, but truly work at growing and improving negotiation skills. “Negotiation is like golf and sex: first, everybody thinks that if they just do more of it, they’ll get better; and second, no one has complained too much (at least to their face) so they must be doing something right.” “The practice of negotiation requires a person to focus on expanding his or her understanding of the theory, structure, and phases of the negotiation process, not simply practicing the same (often bad) habits over and over.”

4 A person doing settlement work “must be patient.” These individuals recognize that negotiation can’t be rushed, and the best way to do it well is to understand the ebbs and flows of how people work, and the dynamics and pressures of litigation. “It’s a dance.” It’s also a place where “litigation attributes—typically high pressure tactics, aggressiveness, and dominant behaviors—aren’t likely to be terribly helpful.” “Settlement

Counsel must be self-aware,” and not rush to judgment about the case. The best approach to settlement is to exercise high levels of emotional intelligence (EQ) with the understanding of the case (IQ).

5

Settlement work requires “time, temperament, training, and preparation.” For Nolland, preparation is key. Litigators ought to prepare for trial—not settlement. Settlement Counsel must focus on finding the points in the case where settlement is possible and exploiting those opportunities. This skill set is a major departure from the world of litigation. The settlement plan is developed separately, but in coordination with the goal of winning by litigation at trial. The settlement and negotiation plan developed by Settlement Counsel focuses on how far the opposing side can “voluntarily” be pushed.

What’s It Like To Work with Settlement Counsel?

Litigators working with Chris have to give up some “control and be willing to defer on settlement matters. At times, they’re required to pull back on their hyper-aggressiveness.”

Chris admits aggressiveness is often an asset in the courtroom and in other litigation activities, but can be a liability in settlement work. When

asked what he does when a litigator won’t give up control or rein in hyper-aggressiveness in the settlement context, Nolland said he “talks to them.” And if that doesn’t work? “Use it to your advantage—play good cop, bad cop.”

When acting as Settlement Counsel, Nolland says he works through virtually all of the potential negotiation and settlement strategies:

- ◆ “Analyze the case”—know what you’re dealing with and who you’re dealing with;
- ◆ Be the person who can “save face” for the attorney, or client, or the other side—at times, be the individual who makes the first overture, allowing the opposing litigator to not appear weak;
- ◆ “Use understatement”—be careful not to “overplay your cards.” It’s essential to know the case well enough that you aren’t pushed or pulled into a situation which puts the client at a disadvantage; and
- ◆ “Keep reason in the room.” Chris’ mediation skills and people skills shine the brightest here. When he acts in the non-neutral role of Settlement Counselor, he still retains and uses some of the tactics he would utilize as a mediator.

In working with attorneys as co-counsel, Chris emphasizes that

utilizing Settlement Counsel “eliminates the elephant in the room”—attorney’s fees. This allows the “litigation attorneys to remove the question of fee churning driving parties into the court room.” At the end of the day, “the threat of trial is what motivates and compels settlement.”

Yet, in thinking through an entire case, trial itself isn’t the “dog.” Because most major business disputes settle, Nolland maintains “negotiation isn’t the tail of the dog—it’s the dog itself! BATNA drives the *whole* of the dog—the tail is litigation and only wags if the case actually makes its way into a courtroom.”

With fewer than 5% of cases going to trial, it is important to have a member of the team focusing solely on developing and implementing the optimal strategy to settle the case.

Credibility

When promoting his services as non-neutral Settlement Counsel, Chris points out he’s been in over 2,000 mediations. “When using the well-known “10,000 hour rule” as a guide to develop a skill set—I believe there’s rarely something I haven’t seen.”

Also, Chris asserts he knows how to “get around obstacles to settlement and use strategy to optimize results for the client” making the most of his

negotiation skills, mediation skills, and thousands of hours of experience.

But most importantly, Chris focuses on the trust and credibility he’s established with lawyers through the years. “I know how to play the game and the lawyers and mediators I deal with know I understand the game and its dynamics.” He also knows how to utilize his “natural inclination” for how to get things settled.

When asked what parts of his job Chris finds to be most satisfying, he quickly answered “doing a good day’s work.” As Settlement Counsel, Chris defines a good day’s work as giving “good counsel” to clients, and “developing good options under the circumstances.” Ultimately for Chris, this means he found options which were:

- within reason,
- timely, and
- “didn’t miss out on an opportunity to settle because of a miscue, poor negotiation strategy, or other dynamics.”

The Coach

Chris says he doesn’t really have a hobby to speak of, even though he travels, enjoys movies, and tends to “read everything in sight” about history and human behavior. What he

truly enjoys doing in his free time is teaching both his law students and anyone else who will listen about money, management, personal development, and finding ways to structure their lives which provide for greater negotiating power. This is definitely the gift that keeps on giving.

When asked what field he would have enjoyed other than law, he quickly answered “investment banking combined with behavioral economics,” because he loves “doing deals.” If not that, then a “hot dog shop or deli guy& .”

Chris was reluctant to name a favorite word. But when asked if he had a least favorite word, Chris said, “not a word per se, but rudeness. I am intolerant of disrespectful, demeaning, and hurtful behavior.” Specifically, Chris elaborated on how angry he gets when he sees someone in a position of authority speak to someone of lesser ‘rank’ in a demeaning way. Again, Chris demonstrates the skill of seeing the people within the problem, instead of the problem of the people.

At the end of the day, Chris finds it personally satisfying when he has had the opportunity to “create better dynamics” in the negotiation process by “changing expectations in the process, giving good counsel to the client, and obtaining optimal results.”

When asked, “If heaven exists, and you meet your maker face-to-face, what do you hope he says?” Chris replied simply, “You did okay.”



Lynne Nash is a 3L at Texas A&M University School of Law. She holds an undergraduate degree from Texas A&M University in Speech Communication, and a Masters degree in Conflict Resolution and Restoration from Abilene Christian University. In law school, Lynne has competed negotiation, mediation, arbitration, and client counseling. Lynne’s client counseling team competed at Nationals finishing in the top 6 in 2015. Lynne has interned for the U.S. Office of Special Counsel, for Judge Don Pierson, Judge Martin Hoffman, and Judge Bonnie Lee Goldstein. In September, Lynne was awarded the Jim Gibson scholarship by the Texas Mediator Credentialing Association (TMCA). Lynne is currently interning for U.S. Magistrate Judge Paul Stickney and will spend the remainder of the summer with the Office of the Attorney General of Texas in the Consumer Protection Division as a Fellow.