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What Is Settlement Counsel and Why Do You Care?

BY CHRISTOPHER NOLLAND

The concept of Settlement Counsel—engaging a skilled negotiator to be the point person for settlement on behalf of one party *in a non-neutral role*—is becoming the norm for sophisticated clients and their trial counsel in significant litigation. Settlement Counsel are now regularly engaged on both sides of the docket in the most critical matters, including complex business and multi-party disputes, intellectual property and patent disputes, trust and probate matters, and other significant litigation, including class actions, high-stakes personal injury or mass tort cases, and employment matters.

The dynamic of engaging Settlement Counsel (or Negotiation Counsel) is both simple and nuanced. At its core is the separation of litigation efforts from negotiation and settlement responsibilities. It requires litigators to be secure enough to recommend to the client that they add another team member with distinct skill sets and experience and astute enough to recognize that doing so strengthens their litigation power.

The Settlement Counsel model allows the trial lawyers to focus solely on the critical tasks required by high-stakes litigation, prevents the litigation team from being distracted by settlement matters, and sends the right signals to the opposing side that the litigators are ready and willing to bring the matter to trial.

Why Settlement Counsel – Can't Trial Counsel "Do It All"?

Litigators are focused on litigation concerns—pre-trial matters, preparing for trial, the trial itself, and pursuing post-trial and appellate matters. There is little time to develop and implement a thoughtful settlement strategy.

Different skill sets are involved in litigating versus developing and implementing a settlement strategy, conducting the negotiations, and consummating a settlement. Although it is possible to have both formidable litigation skills and the requisite nuanced negotiation skills, experience, and temperament, this is not usually the case.

Hard positions may be required in the litigation. Litigation tensions may create "bad blood" or other personal issues between the litigators—undermining negotiation efforts.

Settlement overtures by the litigators may be misread as weakness. Settlement Counsel, whose sole role is to pursue settlement, is simply "doing their job."

Litigators may have their judgment distorted by litigation events. For Settlement Counsel, the usual "ups and downs" of the litigation have little impact.

The litigators' perspective may become clouded because they are physically, emotionally, or psychologically tired. Their communication and body language during negotiations could inadvertently reflect that attitude.

Litigators may become "true believers" in their case. They may be so anxious to go to trial that they lose sight of the litigation downside and the potential benefits of settlement.

Progress in settlement discussions may cause the litigators to become less focused on the litigation because they believe a settlement is imminent or simply because the time spent in negotiation takes away valuable time from litigation and trial preparation.

The litigators will likely not have the time to fully focus on settlement; it will become a "stepchild." Successful settlement efforts require a carefully planned and executed negotiation strategy, not a "shoot from the hip" approach squeezed in between litigation and trial responsibilities.

Best Practices for Engaging Settlement Counsel

Negotiation Counsel and the litigators should be from different law firms. **First**, their roles and functions are different, and being from different firms underscores this dynamic. **Second**, if from the same firm, there is a tendency for Settlement Counsel to be drawn into litigation activities or roles—or perceived to be doing so by the other side. **Third**, by not being too closely identified with the litigators as a member of their firm, any hard feelings or other issues that may develop among the litigators are less likely to bleed over into the negotiation process.

Settlement Counsel should be brought into the process as early as possible.

There must be sufficient time and opportunity to develop and implement a thoughtful settlement strategy and plan, not simply commence negotiations on short notice.

Developing a rapport with the other side's counsel is typically useful before the "hardcore" negotiations.

A settlement opportunity may arise unexpectedly. Negotiation Counsel must be fully prepared and "up to speed" to recognize and exploit a "window of opportunity."

Early involvement allows Negotiation Counsel to properly time and coordinate their activities and schedule consistent with their other professional obligations rather than being driven by events or undue time constraints.

Bringing Settlement Counsel in at the case's inception underscores that it is part of the ordinary course. If Settlement Counsel first appears as negotiations are "heating up," it may convey an undue anxiousness to settle.

The litigation strategy and the negotiation strategy should be coordinated from the inception of the litigation or even earlier. **HN**

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