Maine Lawyers Review

The Case for Settlement Counsel

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There is a relatively new player in the world of litigation and dispute resolution — the lawyer who is retained for the sole purpose of getting the claim settled. By definition, "Settlement Counsel" is not the litigator and is not the mediator. Rather, s/he is a lawyer hired by one of the parties and charged with the responsibility of getting the case resolved at the earliest opportunity, often before litigation breaks out, but sometimes after the case has dragged on without the prospect of resolution on the horizon. Dialogue, collaborative negotiation, and mediation are the most common means by which Settlement Counsel achieve resolution. The use of Settlement Counsel is an emerging trend, both in the United States and abroad. Sophisticated businesses are increasingly looking to Settlement Counsel as their first line of defense in the face of potential or pending claims. There is nothing new about lawyers trying to settle cases. What is emerging, however, is an increased inclination to retain a lawyer solely for purposes of instigating settlement, rather than relying upon litigation counsel to serve that role. This is not the model that was traditionally taught at law school. It is not the stuff of popular culture, which highlights the drama of litigation and trial. Rather, it is a realistic recognition that litigation and trial are rarely in the long term interests of the parties.

The Problem

No business or individual client who has lived through litigation needs to be told of the costs — economic and otherwise — that usually accompany it. Significant funds are often spent on the discovery, motion, and trial preparation that invariably flow from the filing of the complaint. Yet settlement occurs in at least 95% of all cases, usually after the clients' funds are spent, valuable internal resources are diverted from the core business purpose, and good will is lost. The tendency to settle late in the process is now being reduced to some degree due to mandatory ADR in the state Superior Courts, but cases are nonetheless being brought and fought until the eve of trial where they are settled on the courthouse steps. Litigators recognize the likelihood of settlement, but their role is often incompatible with achieving early resolution. First, there is often the concern that the lawyer who proposes settlement will look weak to the client, to the Court, or to their adversary. Secondly, litigators often experience a visceral response to the challenge of advocacy that does not always promote compromise. That competitive instinct is the stuff of great trial lawyers and a critical component to the mindset of the successful litigator, but it does not tend to promote early settlement. Thirdly, and unfortunately, the hourly billing model creates no financial incentive for early resolution. Fourth, once suit is brought, and particularly as trial approaches, the litigator increasingly has one focus: winning the case. It is difficult for many lawyers to sit down and counsel the client on settlement when trial is imminent and trial counsel is focused on preparation. Finally, in cases involving defense counsel whose fees are being paid by an insurer, counsel may not be unable to vigorously advocate with the insurer for settlement for a number of reasons, including fear of losing future appointments if they appear irresolute. Threats of claims for judgments in excess of policy limits may be difficult to make under these circumstances.

The Settlement Counsel Solution

Settlement Counsel are generally hired either before the suit is filed, or after the suit has continued to the point where one or all adversaries grow weary and are looking for a way to put an end to the case. The sole focus of Settlement Counsel is on early resolution (if hired early in the case) or closure (where protracted litigation appears endless). In some instances, Settlement Counsel functions as coverage

counsel as well, engaging in arm-twisting if not threats to bring the insurance company's offer up to the point where the claim can be resolved. The advantage to the client is that Settlement Counsel has every incentive to resolve the claim without litigation, and with no compunction about taking aggressive positions with insurance companies that are also potential participants in the settlement discussions. The advantage to litigation counsel of having Settlement Counsel engaged is that s/he is not tarred with the perceived appearance of weakness or lack of resolve if the case is not settled, and is not distracted from trial preparation. Additionally, settlement Counsel can also assist the client's case manager in defending the settlement to the corporation's senior management or board. This does not mean that Settlement Counsel's job is to make unilateral concessions, or to run from litigation where a beneficial settlement cannot be achieved. In many instances, settlement is impossible or too costly for the client, or the emotional and tactical spiraling of the case has proceeded to the point where settlement is impossible. In fact, it is only after lawsuits have been filed —and after months of legal fees and effort — that alternative dispute resolution (usually mediation) is required in the Maine Superior Courts. There is no standing requirement that mediation be undertaken in U.S. District Court in Maine. Thus, the employment of Settlement Counsel, using the dispute management model, will occur solely because informed parties who hire lawyers will see the wisdom of it.

Involving Settlement Counsel Early in the Process

I have served in the capacity of Settlement Counsel for several years in connection with large off-shore insurance and commercial claims and banks, working closely with a colleague in my firm. After a few successful and early outcomes, the clients 'concept of using lawyers changed. Rather than allowing disputes to spin out of control and then call in the lawyers when litigation was imminent, we are now engaged before the dispute even arises. We are able to sensitize the client to those situations where there is a substantial potential for conflict and litigation, and to become involved in the process at the outset. The earmarks for those situations are not difficult to identify, particularly in a business environment in which similar disputes tend to arise over time. In insurance cases (where we generally represent the insured party), we often work closely with adjusters, attempting to head off confrontations and misunderstandings. By arriving at an early consensus for a process to resolve differences, such as agreeing to a model for the computation of damages, we often avoid the posturing between the parties that can cause the settlement process to unravel and move forward collaboratively to a good and relatively prompt outcome for the client. In essence, the approach of Settlement Counsel is to understand the dynamics of the dispute and manage it. Settlement Counsel attempts to find strategies that will make settlement appear to the other party as a more favorable outcome than litigation, if not an inevitable outcome. It is often important for this process to begin early on. We have found that litigation often becomes inevitable when a disgruntled or threatened party puts itself into the hands of a lawyer who is wedded to the litigation model. Once this happens, discussions often become positional, with posturing on one side often triggering visceral and unproductive in-kind responses. Threats and counter-threats lead to increasing distance, mistrust, and misunderstanding between the parties. One side or the other ultimately feels compelled to file suit, often to preempt the other side from doing so. The Settlement Counsel model requires a very different mindset than the litigation model. The tone and consistency of communications requires great sensitivity to the context in which those communications are perceived by the non-client party. It is very easy for the process to go off-track and tumble into litigation if care is not taken to avoid gratuitous posturing. None of this is intended to disparage the aggressive litigator role. There are many times when early settlement and collaboration are either impossible or unwarranted. And there will always be an important place for jury or bench trials as part of the dispute resolution spectrum. Skilled and aggressive litigators are essential in some cases, but in the experience of many of my clients, that is now the exception rather than the rule.

Smaller Fees Translate to Loyal Clients

There are some financial considerations for the lawyer that must be recognized. As a general rule, our overall fees as Settlement Counsel are far lower than they would be as litigation counsel. While the

process involves substantial effort, the legal resources expended are far smaller than they would be in full-scale litigation or arbitration, with the attendant costs of discovery and trial. However, our firm has been very supportive of this approach, recognizing that it has built strong ties of loyalty with our clients who appreciate that we are taking a long view of our relationship and are attempting to save them money and the aggravation of litigation. Clients also have come to recognize that bridges are often burned in litigation and often suppliers, insurers, or other adversaries will pop up again and again in certain industries so that it is often not beneficial to follow a scorched earth approach to dispute resolution. In the vast majority of cases, clients are also very pleased with the value that we are able to deliver for the dollars spent on legal fees. Clearly, this approach will not work in every dispute. But in many instances it will succeed. The costs of attempting it are relatively low, and the potential for early resolution of disputes is real. The Maine Bar should consider educating clients about this approach. Use of Settlement Counsel is one more tool for our profession to use in providing service to our clients.

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