

by Jack Montgomery
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Litigation is a burden to business. While at least 90% of all cases settle, it is often after money is spent on fees, valuable internal resources are diverted and good will is lost. In many instances, the battle is fought until the eve of trial or after an adverse verdict, only to see the case settle.

Companies are now looking to reduce litigation costs by seeking ways of bringing about an (almost) inevitable settlement earlier. Thus a new player has entered the scene: "settlement counsel," a lawyer whose sole job is to get the case settled as early and fairly as possible.

Diplomats, not generals

While we don't ask generals to be diplomats, and we don't ask diplomats to be generals, in the traditional world of litigation, the same person often plays conflicting parts. While litigating lawyers recognize the likelihood of settlement, their role is often incompatible with achieving it early. The lawyer who proposes settlement might fear that he or she will look weak to the client, to the court or to his or her adversary. Many businesses now see the wisdom of separating the roles to get to settlement earlier.

Once a lawsuit is brought, and particularly as trial approaches, the litigating lawyer has one focus: winning the case. In cases involving defense counsel whose fees are paid by an insurer, the lawyer might be reluctant to vigorously advocate with the insurer for settlement for a number of reasons, including fear of losing future appointments if he or she appears irresolute. Threatening the insurance company with the consequences of passing up a settlement might be difficult under these circumstances.

Enter settlement counsel

Settlement counsel is generally hired before the suit is filed or after the suit has continued to the point where one or all adversaries are looking for a way to end to the case. The sole focus of settlement counsel is the resolution of the dispute as early in the process as is practical. In some instances, settlement counsel functions as coverage counsel as well, engaging in arm-twisting with the insurance company to increase its offer to get the job done.

The advantage to the client is that settlement counsel has every incentive to resolve the claim without litigation, with no compunction about taking aggressive positions with insurance companies. The advantage to litigation counsel is that he or she 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.

This does not mean that settlement counsel's job is to make unilateral concessions, or to run from litigation when a beneficial settlement cannot be achieved. In many instances, settlement is impossible or too costly for the client, or the case has proceeded to the point where settlement is impossible.

How it works

As an example, we were retained by a sophisticated client of our firm that had a dispute brewing with a customer. The customer was represented by a somewhat erratic lawyer who had fanned the flames of the dispute by making vague threats suggesting "embarrassing" litigation if our client did not capitulate. Once retained, we actively intervened to set up meetings that included both the unhappy customer, our client's key official who had responsibility for the file, and counsel for both sides. No outside mediator was used. By enabling direct communication at the meeting between the client and customer, and by creative resolution of some discrete issues, the dispute was resolved quickly and relatively affordably.

Total cost to the client to get the matter resolved through settlement counsel was approximately \$6,000. Had the matter not settled, the legal fees for a lawsuit would have conservatively run between \$20,000 and \$40,000. The case was resolved within a few weeks after we were engaged. Litigation would have taken six months to two years (or more) to resolve through the normal judicial process.

Advice to businesses

There are several types of cases that might warrant the use of settlement counsel, including:

- Simmering disputes that have not boiled into litigation
- Ongoing aggressive litigation where costs are spinning out of control, acrimony is growing among parties and the distance between the parties' position is growing
- Cases on the eve of trial, where litigation counsel is focused on winning, not settling.

In considering settlement counsel, look for a lawyer with the maturity, experience and aptitude for resolving conflict. Your selected settlement counsel should have patience and be able to view settlement as a victory.

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