

Settlement Counsel: Answers to the FAQs

By James E. McGuire

Strategic use of settlement counsel can be an effective part of a company's conflict management strategy. The business of business is not litigation. Proper management of inevitable conflicts and effective use of techniques for efficient resolution of disputes that arise if they are not managed properly are critical risk management challenges of the 21st Century. This article addresses Frequently Asked Questions about the role of settlement counsel. The focus is on practical points that arise when using settlement counsel in a business context.

What Is Settlement Counsel?

Settlement counsel is an attorney engaged for the express and limited purpose of assisting a client to resolve a current dispute. Settlement counsel is not a member of the litigation team. Settlement counsel may be from the same or different law firm. Settlement counsel is a specialist who has developed skills and techniques in negotiation and mediation advocacy. Settlement counsel is conversant with all dispute resolution processes, the theory and practice of interest-based negotiations, effective mediation advocacy, risk analysis, and current developments in social psychology and other related disciplines. There is a lot of learning available about risk analysis, psychological barriers to good decision making, and management of conflict. Settlement counsel is expected to be an expert on these and advanced and effective negotiation and settlement techniques, usually not taught in law schools.

Why Settlement Counsel and Trial Counsel?

"Hire two teams to handle your business dispute and save money!" In response to a presentation on settlement counsel to students in his mediation course, Professor Frank Sander of Harvard Law School once quipped, "Only a lawyer could say that with a straight face." Nevertheless, experience over the last twenty-five years has demonstrated that true savings are available when settlement counsel is engaged early in the process, especially in complex cases. In simple cases, where the law is settled, where the facts are not in dispute and where the discovery and other transactional costs are predictable and proportionate to the dispute, one lawyer may effectively serve in both roles: an effective proponent for settlement and a skilled advocate if settlement is not available. As matters become more complex or more important to the parties, it may be most effective to have two different individuals (or different teams) focusing on each of the alternatives: settle or sue.

It is critical to recognize that the roles of trial lawyer and settlement counsel are fundamentally different. This

difference starts with the initial framing question. The trial lawyer asks, "What happened?" The focus of fact-gathering is on the past. Settlement counsel asks, "What do you want to have happen?" The focus of settlement is on the future. Since two different questions are being asked, the information needed to answer those questions is also fundamentally different. Trial advocacy is not the same skill as mediation advocacy. The skills needed to be the best trial lawyer are fundamentally different from the skills needed to be the best settlement counsel. Both are focused on achieving the best possible result for the client, using the tools they know best, and employing processes that are fundamentally different.

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Who Hires Settlement Counsel?

In my experience, settlement counsel has been hired by general counsel, in-house litigation counsel, risk managers, law firm corporate counsel, and sometimes trial counsel. General counsel usually has the ultimate responsibility to evaluate whether to settle or litigate a dispute. Smaller companies may rely on outside corporate counsel to assume these responsibilities. The individual responsible for monitoring costs and performing a cost/benefit analysis is usually the key decision-maker for engaging settlement counsel. Some corporations have made the role of settlement counsel an integral part of risk management. Other corporations have required that all law firms on a preferred provider list have both litigation and settlement counsel expertise so that on any given case the firm could be retained in either capacity.

From 1990 to 2004, when I worked as settlement counsel both with litigators in my firm and with other firms, I had engagements as settlement counsel every year. In the 1990s, certain major corporations embraced the use of settlement counsel to handle all product liability/personal injury cases with dramatic success. It has been applied in a wide range of cases including insurance coverage for environmental claims, intellectual property, closely held corporations, financial services, major commercial cases, and for States in the tobacco litigation. Since 2004 when I ended practicing law and became a full-time neutral, I have lectured and coached on the topic and have observed the increasing use of settlement counsel in all areas.