Facilitating Settlement: The Use of Settlement Counsel and Risk Analysis

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Dispute Resolution 101

PEARLES BEFORE SWINE

Hey, Pal... were you the guy in the black S.U.V. who took my parking space?

Yeah, sorry. I didn't see you were waiting for it 'til after I had pulled in.

Yeah, well 'sorry' isn't good enough.

Listen, Pal, it's a parking space. What do you want to do about it?

This seems extreme.
What is Settlement Counsel?

- Litigators litigate
- Settlement Counsel settle
  - Engagement is to focus exclusively on resolution of the dispute outside of the litigation arena
Why Separate Roles?

- Different task
- Different focus
- Different tools
Different Task

• Role of Settlement Counsel:
  – Focus is exclusively on problem solving and negotiated resolution
  – Develops options, settlement goals and strategy with client
  – Orchestrates settlement events
  – Prepares client for and participates in settlement events
  – Zealous pursuit of settlement goal
  – Does not participate in the litigation process
Different Task

• Role of Litigation Counsel
  – Litigators (colleagues inside or outside the firm) litigate
  – Zealous pursuit of litigation / adjudication
  – Legal analysis of the case (opinions and risk factors)
  – Does not participate directly in the settlement process
No Confusion of Roles

• Client controls both settlement and lawsuit
  – Separate reporting
• Three party agreement
  – Settlement Counsel may not offer stand-still agreement or get involved in discovery or other litigation steps
  – Litigation Counsel must refer all settlement overtures to Settlement Counsel and client
Different Focus

Litigation Counsel
• Past (rear-view mirror) – what happened?
• Facts
• Positions
• Legal adjudication

Settlement Counsel
• Future (windshield) – how do we move forward?
• Relationships
• Interests
• Problem solving
Not Duplicative

• Litigation is a rights based process focusing on the application of the law to historical facts
• Settlement is an interest-based process focusing on the future, parties’ interests and options
  – Facts for litigation are only partially relevant to the settlement process
    • discovery vs. disclosure
  – Legal “rights” are rarely resolved in settlements
Information Flow is Usually One Way

• Settlement discussions are confidential
• Client and Settlement Counsel agree NOT to use information in litigation or share it with Litigation Counsel
  – Having separate Settlement Counsel makes this a believable undertaking
• Conversely, discovery in litigation is intended to inform decision maker and is available for use in settlement discussions
• Client and Settlement Counsel use and rely upon Litigation Counsel’s opinions and risk analysis
Different Tools

• Settlement Counsel
  – Well schooled in dispute resolution practices, problem solving and interest based negotiation
  – Orchestrates and prepares client for settlement events
  – Asks different (open, interest based) questions
  – Focuses on broader issues, not just legal aspects, to determine options
  – Value creating before value claiming
  – Uses different information sharing techniques
  – Uses risk analysis tools
  – Develops creative options for settlement
Advantages of Settlement Counsel

• Not invested (actual and/or perceived) in the analysis of the underlying rights
• Achieving a fair and durable settlement early in the process
• Avoids / minimizes the escalation of conflict
• Can reduce the need for formal discovery
• Opportunity for savings are substantial
Perceived Disadvantages and Responses

- Increased cost with second set of counsel
  - Up front investment to achieve early and beneficial resolution
  - Virtually all cases go through settlement efforts - a significant portion of the costs likely to be incurred in any event
  - Frees both litigation counsel and settlement counsel to focus on their respective roles
  - Settlement Counsel operate under creative alternative fee structures
Perceived Disadvantages and Responses

• Increased dedication of client internal resources
  – Yes, in the short term
  – More productive than senior executives and employees spending weeks in discoveries
  – Longer term cost savings
  – Builds relationships
Why Use Settlement Counsel

• “Early and effective resolution” are welcome words to clients
• Demonstrates a commitment to the client’s business interests
• Flexible – resolution options not limited to binary result of adjudicative process
• Prompts opponents to focus on settlement
• Can result in true cost savings
Settlement Counsel – Ethics

• Use of Settlement Counsel should satisfy requirement for consideration of ADR
• May present some challenges when Settlement Counsel and Litigation Counsel are from same Firm – consider need for “Ethical Screen”
• Restrictions on marketing Settlement Counsel services?
Advanced Dispute Resolution

Appreciating your options (and risks!)
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• A client walks into your office…
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Your Client’s Legal Problem
- Wrongful dismissal claim by a former executive
- P was paid $1M salary; $1M annual stock options
- Our defence: mandatory retirement policy
- P’s arguments:
  - Didn’t know of policy
  - Policy didn’t apply to him as an executive
  - Legislation allowing such policies violates Charter
- P says he is entitled to 24 months
- D says, if any, 12 months
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To Settle or Not to Settle

• Claim seeks $4M in damages
• P has offered to settle for $1.5M
• The client’s question: is this offer to settle a reasonable one?
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Traditional Application of Professional Judgment: Gut feeling
- “good chance”, “almost a sure thing”, “some possibility”, etc.
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Advanced Application of Professional Judgment: Risk Analysis

Subjective judgment only → Applying subjective judgment systematically

“Just trust me” → Empirically supported conclusion
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How is Risk Analysis applied in Litigation?

- The application of “decision tree analysis” to litigation and lawsuits
- A method to systematically quantify the risks and uncertainties inherent in the litigation process
- Allows counsel to think about and express themselves as to the value of the case in a more rigorous, scientific manner
- Breaks down a complex legal proceeding into its basic parts
- Be objective – “garbage in, garbage out”
- Use assessments of litigation team
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Applied to our Wrongful Dismissal example...

A 5-Step Process
1. Identify Uncertainties
2. Define Outcomes
3. Assign Probabilities
4. Do the Math
5. Interpret the Results
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1. Identify Uncertainties (adjustable as the litigation progresses)
   - Availability and admissibility of evidence
   - Impact of performance of witnesses
   - Possible significant interlocutory determinations
   - Application of law to facts
   - Who will be the judge
   - Appeals?
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2. Define Outcomes
On Liability: wrongfully dismissed or not?
- P knew and agreed to retirement policy OR P did not know
- IF P didn’t know:
  - Policy did not apply to executives OR Policy applies to everyone
- IF policy applies to everyone:
  - Policy lawful OR Policy unlawful

On Damages: If P wrongfully dismissed…
- P entitled to 12 months notice OR 24 months notice
- P entitled to stock options OR P not entitled to stock options
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2. Define Outcomes: liability

Liability Outcomes in Decision-tree format*:

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3. Assign Probabilities: Liability
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4. Do the Math: Liability

60% chance of being found liable; 40% chance of no liability
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2. Define Outcomes: Damages

Damages Outcomes in Decision-tree format:

![Decision Tree Diagram]
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3. Assign Probabilities: Damages
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4. Do the Math: Damages
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5. Interpret the Results: Probability Distribution

Expected Value = $0(\times 40\%) + $1(\times 12\%) + $2(\times 12\%) + $2(\times 18\%) + $4(\times 18\%) = $1,440,000
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5. Interpret the Results: “Zone of Agreement” Analysis

Factor in:
- Legal costs, cost of parties’ time, “risk premium”, etc.
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Alternatively other hard and soft costs can be factored directly into the outcomes with risks assigned:

- Legal costs – incurred, payable to other side, recoverable
- Internal costs (actual plus opportunity costs)
- Time value of money – calculate present value of outcomes (after expected number of years in litigation)

These “transaction costs” can have a significant impact on both plaintiff’s and defendant’s expected values.

Also perform the Risk Analysis from the perspective of the other side (as best as you can)
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Advantages of Risk Analysis

• An indispensable tool for arriving at an informed settlement position
• Enhances counsel’s professional judgment
• “Gut feeling” analysis is difficult to explain to client, and does not always inspire confidence
• Enables strategic settlement offers: take advantage of Ontario’s Rule 49.10 more skilfully
• Helps to sort out relative importance of different issues in a case
  – Software programs can conduct “sensitivity analysis” on each issue
  – Identifies most important issues of which to persuade opposing counsel
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Risk Analysis in the ADR Context

- One of goals of ADR: to encourage each side to make a more realistic appraisal of the strengths/weaknesses of its case
- Asking parties to develop a joint risk analysis of the case advances this goal
  - Narrows issues and focuses debate over specific uncertainties
    - Issue-by-issue discussion vs. sweeping generalities
  - Focus on objective assessments and probabilistic thinking helps remove emotions from the process
  - Quantification exercise forces both sides to acknowledge that total defeat and total victory are unlikely
  - Helps to erode entrenched positions
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Risk Analysis in the ADR Context cont’d

• Can be used to better assess BATNA and WATNA, and likelihood of litigated outcomes in between

• A powerful tool to persuade settlement conference judge
  – Establishes counsel’s good faith and ability to compromise (as long as haven’t input 100% at every branch!)

• Effectively conveys the complexities of a case to a mediator
  – The more educated the mediator is of the case, the better
  – Visual, numeric advocacy far more powerful than verbal, qualitative advocacy
Further Reading

• The Honourable George W. Adams, Mediating Justice: Legal Dispute Negotiations (Toronto: CCH Canadian Limited, 2003)
• Evan Slavitt, “Using Risk Analysis as a Mediation Tool” (2005) 60 Disp. Resol. J. 18
• David P. Hoffer, “Decision Analysis as a Mediator’s Tool” (1996) 1 Harv. L. Negot. L. Rev. 113
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Questions?