

Alternatives



DIGEST

PRACTICE TOOLS

James E. McGuire of Boston's Brown, Rudnick, Freed & Gesmer explains why he believes law firms serve their clients best when they offer a settlement counsel to help resolve litigation matters. **Page 107**

ADR ETHICS FORUM

The forum returns this month with a two-part feature.

I. Phoenix mediator and ethics expert **Bruce E. Meyerson** reacts to state ADR regulations, particularly those in Virginia which were detailed in the February *Alternatives*. **Page 107**

II. The author of the February article, **Geetha Ravindra**, who is director of the Virginia Supreme Court's Dispute Resolution Services office, follows up Meyerson's discussion with a defense of the intentions behind state ADR regulations. **Page 124**

MODEL RULES

Also on the regulatory front: frequent *Alternatives* contributor **Duane W. Krohnke**, of Minneapolis's Faegre & Benson, shares a comment letter he is sending to the American Bar Association's Ethics 2000 Commission, on the ADR portion of the commission's rewrite of attorneys' model professional conduct codes. **Page 108**

THE BUSINESS OF ADR

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CPR INSTITUTE FOR DISPUTE RESOLUTION WWW.CPRADR.ORG VOL. 18, NO. 6 JUNE 2000

Why Litigators Should Use Settlement Counsel

BY JAMES E. MCGUIRE

Settle business disputes fairly and efficiently.

Most business executives in our global business economy would agree that this statement reflects their approach to the resolution of disputes that affect them. There are many dispute resolution methods that can be used to achieve that objective. Knowing what these are and how best to use them requires special knowledge and skills. The role of settlement counsel in the modern law firm is to provide that service to the firm and its clients. This article discusses the role of settlement counsel:

- What is settlement counsel?
- What are the advantages of using settlement counsel?

- Why settlement counsel *and* litigation counsel?
- What does it cost?

Settlement counsel assists the client in considering and using all forms of dispute resolution processes and techniques to resolve business disputes fairly and efficiently. Settlement counsel asks some basic questions readily understood by business executives:

- What are our business objectives? Theirs?
- What information do we need to make a sound decision?
- What do they need to know?
- What are the alternatives?

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PRACTICE TOOLS

Mediation Should Not Be Considered the Practice of Law

BY BRUCE E. MEYERSON

This article was written in part as a response to "Balancing Mediation with Rules on Unauthorized Practice," by Geetha Ravindra, 18 Alternatives 21 (February 2000). Ravindra's follow-up comments appear at the end of the article on page 124.

Can mediation be the practice of law? Some state regulators believe that certain things mediators may do can constitute the practice of law. If this view continues, there will be serious, negative consequences for mediators and the use of mediation as a viable settlement option for litigants.

Some scholars believe that when mediators

evaluate the strengths and weaknesses of a case, or attempt to predict possible outcomes of a dispute, they are practicing law. This was an interesting point of view when expressed in academic debates. Now, at least two states have

taken this seriously. In Virginia, for example, guidelines have been adopted that prohibit mediators—lawyers and nonlawyers alike—from evaluating the parties' legal position and predicting possible outcomes of the dispute. The North Carolina bar also has adopted rules prohibiting mediators from giving

"legal advice." Ironically, it is this type of feedback from mediators that is consistently viewed

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ADR ETHICS FORUM

Why Litigators Should Use Settlement Counsel

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Based on the answers, settlement counsel will recommend and help implement a plan to achieve those objectives and resolve the dispute.

ADVANTAGES OF SETTLEMENT COUNSEL

Focus: The focus of settlement counsel is on how to settle the dispute at hand fairly and efficiently. The types of questions that are asked when focusing on settlement are different from the types of questions that a litigator needs to ask to prepare a complaint and commence a suit. Litigation remedies are limited to the type of relief that the legal system is empowered to award.

Business solutions to business disputes, however, have a much broader range of alternatives. Considering the complete range of options that could be used to meet the business objectives is critical. Settlement counsel does not filter to exclude options because a court might not be able to order the parties to do that which is in everyone's mutual best interest.

Approach: There is a difference in tone and approach when a lawyer calls counsel on the other side of a business dispute and introduces himself or herself by saying:

"Hello. My name is Jim. I have been asked by our client to serve as settlement counsel in this matter. It is the business philosophy of our client and the practice of our firm to have separate settlement counsel on matters of this type."

Contrast that with the type of introduction that litigators are trained to make:

"I would like to discuss settlement approaches with *whoever* has the power and responsibility to explore settlement of this dispute, if your client is interested in discussing settlement now or later."

Every lawyer would consider it his or her ethical obligation to discuss a settlement request with the client. Doing so permits and encourages the party to focus on settlement: Do we want to talk settlement? Who should be involved in settlement talks? If their litigator is not also settlement counsel, should ours be?

James E. McGuire is a member in the Boston office of Brown, Rudnick, Freed & Gesmer and chairman of the firm's ADR Practice Group. He serves as settlement counsel in civil disputes for corporate clients in the primary areas of intellectual property, commercial transactions, securities, finance, employment, insurance and general corporate law. He also is a trained mediator, serving on several CPR Panels of Distinguished Neutrals.

Mediators have learned through years of experience how critical it is to have the key decision makers at the mediation session. By definition, only the client has the power to say yes. More important, involving the business executive encourages the parties to focus on interest-based negotiations: What are your business goals? What solution(s) can best further those goals? For this reason, some companies employ outside counsel to litigate and assign settlement responsibilities to business executives and in-house general counsel. Settlement counsel can help the prospects for prompt settlement by getting the right people involved in the process.

Knowledge: Settlement counsel can help by suggesting approaches and techniques that

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may be new to the clients (on both sides) and to the lawyers on the other side. The dispute resolution specialist in a law firm knows the ever-expanding processes and service providers that might be employed in resolving a particular dispute. Settlement counsel can help tailor a process for exploring settlement that draws on all of this information.

Settlement counsel has extensive training in mediation and negotiation. There are distinct teachable skills that will improve the prospects for a mutually advantageous interest-based resolution of a business dispute. To an executive who has been trained at a business school, that statement is so self-evident as to be trivial. Yet only the most recent law school graduates have even taken one course in general area of negotiation, dispute resolution or conflict management.

Some firms now offer seminars for mediation advocacy training. Many agencies of the federal government offer such training as an

integral part of their efforts to promote the use of dispute resolution alternatives to traditional litigation. These are useful first steps that are improved by repeated use and practice. For settlement counsel, such training and experience are central to the practice and are not sideline ancillary skills.

In a global economy, disputes are transnational. The world economy seeks out U.S. technology and know-how. Ideas and intellectual property are a leading U.S. export. What does not sell well overseas is traditional American litigation. While formal international arbitration continues as the default mode for resolution of international disputes, mediation and other party-controlled processes are gaining new adherents every day. Settlement counsel can more quickly find a common international language in dealing with these disputes.

Effective Implementation: Settlement counsel applies this knowledge and focus to the goal of a fair and effective settlement. The dialogue with the client is central to this process. Promoting and maintaining a dialogue with decision-makers for the other party or parties is an integral part of that dialogue. Establishing a process includes developing a timeline for implementation. It is part of the settlement counsel's role to apply consistent pressure on himself and all other parties to adhere to that timeline and to avoid unnecessary delays.

Settlement counsel can be brought into a dispute before litigation starts. Early intervention creates more options for settlement. At this stage, there are more tools to work with to find a solution. The parties are likely less polarized than they will become after litigation commences. Settlement counsel need not break off communications just because one side or the other decides to commence litigation. It is difficult for the litigator to say convincingly, "We filed suit this morning, but we still want to talk this afternoon." Settlement counsel can say, "The litigation team started suit this morning, but my job is still to continue to talk settlement this afternoon."

Settlement counsel knows when and how to seek additional help. Mediation is a proven-effective tool to aid in the resolution of civil disputes. Settlement counsel can educate the client and other lawyer's mediation options. Settlement counsel can be an effective advocate for the use of this process.

Mediator selection is likely to be accomplished more efficiently and with a better match if it is directed by someone whose job is to be

a sophisticated consumer of dispute resolution service providers. This process is not like forum shopping for a favorable judge. Litigators who are oriented to think in those terms likely will describe the ideal mediator as "someone who is tough enough to beat up on the other side and persuade them that they have no case and should settle with us on our terms." Litigators who think in those terms are likely to distrust any mediator nominated by the other side for just that reason. Settlement counsel can employ techniques in the mediator selection process to avoid this type of reactive devaluation.

In preparation for and in participation in a mediation, using settlement counsel introduces a positive, results-oriented dimension to the process. This comes from a combination of mind-set and experience. Critical evaluations of the prospects of litigation success are more likely to be heard and evaluated with less ego involvement. The critique is less likely to be understood as an attack on the settlement counsel's professional skills since he or she would not be involved in trying the case in the event settlement fails.

Keeping the parties focused on continuously evaluating and considering settlement options and alternatives is the settlement counsel's job. When negotiations are strained, settlement counsel is less likely to get drawn into a discussion of how best to kill the other side in litigation once the mediation collapses. While every case is different, certain settlement techniques can be used on a repeat basis. Settlement counsel will have the experience to try these techniques to avoid an impasse.

WHY BOTH SETTLEMENT AND LITIGATION COUNSEL?

Why shouldn't a litigator or trial lawyer know all of this?

The short answer is the same as the development of other specialties in the law. There is just too much out there for one person to know it all. All litigators have heard of mediation; most no longer confuse it with meditation or arbitration. Some firms now provide mediation advocacy training, but the primary focus of most litigation training, not surprisingly, is training to be advocates in an adversarial process. Discussions with mediators about their sense of attorney's ADR knowledge and the effective use of dispute resolution processes leads to the conclusion that we still have a way to go before the typical litigator is as skilled in the mediation process as he or she is in the litigation process.

Both litigation and settlement skills are needed, even if performed by the same person. Development of an alternative to a negotiated agreement is a key component to a successful negotiating strategy. Without an alternative, negotiation becomes capitulation. Litigation may be the best available alternative. To make that alternative viable, work on the litigation process must be done. The litigation team must do the necessary factual and legal research to develop legal claims and defenses.

SETTLEMENT COUNSEL UPDATE

Author James E. McGuire discussed the role of settlement counsel on a panel at *Alternatives'* publisher CPR Institute for Dispute Resolution Winter Members' Meeting in New York in January 1998. See "Winter Meeting Supplement: III. ADR and the 21st-Century Law Firm," 16 *Alternatives* 47 (March 1998). See also William F. Coyne Jr., "The Case for Settlement Counsel," 14:2 *Ohio State Journal on Dispute Resolution* 367. McGuire notes that the Coyne article "provides very useful information on prior scholarship in this area and provides compelling arguments for the need for settlement counsel." McGuire is revisiting the subject in a session he is leading at this month's CPR Spring Meeting in Charleston, S.C.

Since most court-imposed solutions depend upon the facts and the law, litigators are trained to focus on developing a factual record that will strengthen the legal claims. Those facts are typically historical: What happened? What did they say? What did you say? What does the contract say? That information gathering is critical to the litigation process, but it may be substantially irrelevant to an interest-based business solution that focuses on future conduct.

Litigators do settle disputes. When? Later. Development of an alternative will frequently prompt the litigator to file the complaint as a prelude to any discussion. This prompts the other side to respond to a litigation process, not to a settlement process. Litigators will want factual discovery both to support the litigation claim and to help evaluate the strength of its claims for settlement purposes. Ineluctably, that process leads to delay.

When settlement counsel is employed, the litigation process can proceed independently. Settlement counsel coordinates with litigation counsel, but does not control that process. Whatever the formal litigation process dictates

for pleading and discovery proceeds on a parallel and independent track. While both parties may decide to stay litigation because of the substantive progress being made by settlement counsel, there is no necessity to do so.

The settlement process usually has a need for information as well. The focus may be quite different. What are they trying to accomplish? What information are we lacking to make or evaluate settlement proposals? Can we find a way to further both parties' business interests?

The methods for gathering that information typically will be quite different. An information exchange is part of a mediator's toolbox. Settlement counsel who is familiar with this protocol can advocate for an informal information exchange process. Settlement counsel can offer a further guarantee: Information produced by this process is for settlement purposes only, and will not be used or quoted in any further litigation proceeding and will not be shared with litigation counsel.

Settlement counsel can work whether the litigation team is from the same or a different law firm. There appears to be little difference in dynamics or results. This author has had several engagements where litigation counsel was from a different firm in a different city in a different state. In some cases, litigation counsels have participated in some aspects of the settlement process.

For example, as part of an information exchange, it may be useful to have litigation counsel make a presentation of the legal claims and defenses. While that presentation will not in itself create a settlement, it may be of some assistance to the parties and the process.

WHAT WILL THIS COST?

This author has been privileged to be a guest lecturer in Prof. Frank Sander's mediation course at Harvard Law School. When we discussed the settlement counsel's role, he joked, "Only a lawyer could say with a straight face, 'Our firm wants to save you money so we want you to hire two of us, not just one.'"

But the use of a settlement counsel has been proven to be a true source of cost-savings in resolving business disputes. Experience over several years has confirmed that:

- Cases settled sooner with the use of settlement counsel;
- Actual litigation expenses are less than budgeted for the same time period, and
- Fees paid for settlement counsel are a percentage of the cost savings.

Various alternate fee arrangements have been
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CPR NEWS • CPR NEWS • CPR NEWS • CPR NEWS

CPR FOUNDER WILL STEP DOWN

The CPR Institute for Dispute Resolution announced last month that its president, James F. Henry, will step down after a successor is found. Henry founded CPR in 1979, and has served as *Alternatives'* publisher since the monthly newsletter began in 1983.

Henry says that he expects "to remain on the CPR Board to contribute actively to the future success of the organization."

He formally submitted his resignation to the board April 20, at which time CPR Board Chairman Charles B. Renfrew told CPR's Executive Committee that New York-based executive search firm Russell Reynolds Associates had been retained to conduct a search for Henry's successor.

In his announcement, Renfrew notes that Henry's "vision and leadership are responsible in large part for the dramatic development of ADR . . . and for the high regard in which CPR is held." ■

DRAFT PRINCIPLES FOR ADR PROVIDERS NOW AVAILABLE FOR COMMENT

The comment period for the draft Principles for ADR Provider Organizations released last month by the CPR Institute for Dispute Resolution is open.

The draft principles appear in this issue on page 109. Next month, *Alternatives* will feature an appendix to the draft principles that defines ADR provider organizations.

A full-text version of the draft principles is available via a link from the CPR home page at www.cpradr.org. Comments may be sent to providerprinciples@cpradr.org.

The draft principles, developed by the CPR-Georgetown Commission on Ethics and Standards in ADR, were released on May 25. Comments may be sent to the commission until Dec. 1.

The draft principles are intended to provide guidance to entities that provide ADR

services as well as consumers of their services, the public and policy makers. The nine principles are designed to offer a framework for responsible providers' practices.

The CPR-Georgetown Commission is a joint initiative of the CPR Institute for Dispute Resolution and Georgetown University Law Center, with support from the William and Flora Hewlett Foundation. The draft principles were drafted by a committee chaired by Margaret L. Shaw of ADR Associates and Elizabeth Plapinger of the CPR Institute for Dispute Resolution. For more information on the drafting committee see page 109. ■

NEW ONLINE ADR FORM BOOK

In addition to the draft Principles for ADR Provider Organizations, also new on the CPR Web site is the CPR Online Form Book.

The form book is a compilation of model procedures, clauses, forms, pledges, and commitments that have been developed by CPR and its members. It has been created to provide counsel with convenient access to the materials in a high quality format.

The link to the form book is featured on CPR's home page at www.cpradr.org. All of the forms are in a searchable, downloadable PDF format. A link for an Adobe Acrobat reader to view and print the forms is available at the form book's page. ■

CPR AT THE ABA MEETING

CPR Vice President F. Peter Phillips will moderate a panel next month at the American Bar Association's annual meeting in New York.

The July 7 program, "New Applications, New Frontiers for ADR," is presented by the ABA's Section of Dispute Resolution. The program will examine new ADR applications to a variety of practice areas, including the entertainment and franchising industries, business-to-business E-commerce transactions, and large federal contracts.

Phillips will be joined by Donald A. Cohn, corporate counsel at E.I. duPont de Nemours & Co., Wilmington, Del.; Gerald Phillips, of Los Angeles's Phillips, Salman & Stein; Parsippany, N.J.-based Cendant Corp.'s Vice President-Legal Richard Wolf, and Richard C. Walters, dispute resolution officer in the Federal Aviation Administration's Office of Dispute Resolution for Acquisition, Washington, D.C.

Registration information is available at www.abanet.org/annual/2000/register.html. ■

CPR SELECTED AS A NEUTRALS PROVIDER FOR DOMAIN NAME DISPUTES

CPR last month announced that it had been designated as a neutral services provider for the dispute resolution processes used by Icann, the Internet Corporation for Assigned Names and Numbers.

Icann's dispute resolution apparatus was set up to decide trademark-related disputes over names of Internet sites, and is used for international disputes. Information on Icann's dispute resolution system is available at www.icann.org/udrp/udrp.htm, including its Uniform Domain Name Dispute Resolution Policy, providers, a list of proceedings and dispositions.

CPR's supplemental rules appear on the CPR Web site at www.cpradr.org/ICANN_RulesAndFees.htm. Members of the CPR Domain Name Disputes Panel, which will work on Icann matters, appear at www.cpradr.org/specplan_domain_name.htm.

"The Internet is increasingly the preferred means of a great deal of commerce and communications," says CPR President James F. Henry, "and it is only appropriate that CPR join in the lead to ensure quick, efficient and meaningful dispute resolution in this field."

The other providers are Montreal-based Disputes.org/eResolution Consortium, the National Arbitration Forum of Minneapolis, and the World Intellectual Property Organization, a United Nations affiliate organization based in Geneva. ■

Settlement Counsel

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used by settlement counsel. Some are based on usual and customary hourly rates. Some are totally contingent on achieving a result that exceeds client expectations. Some have been a fixed retainer with a premium based on cost savings. One alternative is to respond to the true con-

cern contained in Prof. Sanders' quip:

"Double or nothing. Based on my experience, I believe that I can settle this case within X months. If so, you agree to pay twice my hourly rate. If no, then you pay nothing."

Since the client retained control of the settlement and would settle only if the proposal made good business sense, it seemed a

safe bet for the client. When the case settled to the client's satisfaction, the fee and premium were cheerfully paid. Attorneys who act as settlement counsel agree that a concern for costs should not be an obstacle to using settlement counsel.

The use of settlement counsel to settle business disputes fairly and efficiently is now part of the legal landscape. Try it. You will like it. ■