EFFECTIVE LITIGATION MANAGEMENT: DOING A GOOD JOB AT "HERDING CATS"

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State Bar of Texas
11th ANNUAL
ADVANCED IN-HOUSE COUNSEL COURSE
August 2-3, 2012
Dallas

CHAPTER 14

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EFFECTIVE LITIGATION MANAGEMENT: DOING A GOOD JOB AT "HERDING CATS"

I. INTRODUCTION

No short paper can cover effective litigation management in thorough detail.[1] Clients and their lawyers differ on how to approach disputes, which tools are the most effective, and how involved in-house counsel should be in litigation. This paper will explore two specific litigation management tools and several advanced settlement techniques in some detail, with hyperlinks to additional resources on each. They include:

A. Early Case Assessment;
B. Decision Tree Analysis; and
C. Advanced Settlement Techniques.

Each is addressed in turn below.

II. EARLY CASE ASSESSMENT

Early Case Assessment ("ECA") is defined as "a disciplined, proactive case management approach designed to assemble, within 60 days, enough of the facts, law, and other information relevant to a dispute to evaluate the matter, to develop a litigation strategy, and to formulate a settlement plan if appropriate." *See* John DeGroote, **Easier Said than Done: Early Case Assessments, Part I**. The **Law Department Management Blog** quotes two lawyers who define ECA as "making a concerted effort to complete all the major work within the first 90 to 120 days of a lawsuit's filing." Schering-Plough lawyer P.D. Villareal, quoted on the College of Law Practice Management Blog, says that "in 60 days . . . you will know 80 percent of what you will ever know about a case" with an effective Early Case Assessment. ECAs require discipline and investment at the outset of the dispute, and include 16 specific elements.

A. The Early Case Assessment Checklist[2]

1. The Facts

a. **A Claims Summary:** An executive summary of the plaintiff's claims and the defendant's response;
b. **The Other Side's Position:** The complaint, demand letter, response, or whatever you may have containing the other side's position and perspective unfiltered and in their own words;
c. **A Timeline:** A timeline showing the relevant facts and key dates, linked to supporting documents;
d. **Interview Summaries:** Summaries of, and witness evaluations from, all key witness interviews, including interviews of witnesses that might not be friendly;
e. **The Documents:** The 10 best and worst documents for each side of the case;
f. **Your Experts:** A summary of expert testimony required or desired for each side and likely candidates to serve as your consulting and testifying experts; and
g. **The Themes:** A concise statement of each side's likely themes.

2. The Law

a. **The Jury Charge:** A draft jury charge; and
b. **A Summary of Legal Issues:** A summary of additional legal issues and likelihood of success of salient legal motions (such as motions for summary judgment).

3. The Forum, Your Opposition and More

a. **A Venue Analysis:** An evaluation of the court, the jury pool, past verdicts in similar cases, and the applicable appellate court's rulings on similar issues;
b. **The Opposition:** A memo analyzing opposing counsel, his/her team, his/her trial experience and any cases of note;
c. **Your Insurance:** An understanding of your policies and your carrier(s) and what you have to do to protect your coverage (See Insurance Coverage: 4 Rules and 10 Tips for Policyholders and "'Bet the Company" Litigation from a Policyholder's Perspective" by John DeGroote and Wendy Toolin Breau); and
d. **Other Circumstances:** An analysis highlighting other circumstances affecting all parties and stakeholders (customer impact, potential for similar cases, etc.).

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[1] Several resources more broadly address these questions; including Taking a Proactive Approach to Catastrophic Litigation, written by two of the authors of this paper and others, and In-House Litigation Management, also presented by the Association of Corporate Counsel.

[2] This checklist originally appeared in The Early Case Assessment Checklist: Early Case Assessments Part II.

4. The Plan

   a. **Your Strategy:** An outline of the case strategy—recognizing that formulating this strategy must be an interactive process between counsel and client;
   b. **The Budget:** A realistic budget to take the case to (and through) trial, including relevant assumptions, a litigation timeline, and any potential for an alternative billing arrangement; and
   c. **A Settlement Plan:** A settlement plan and supporting analysis if appropriate.

B. Why do an Early Case Assessment?

1. ECAs allow you to make better choices to retain outside counsel.

Not all cases require outside legal help. Some matters that require the assistance of outside counsel may require only limited assistance on discrete legal issues, some matters may require the assistance of outside counsel only before or after certain procedural milestones, and some matters may be best handled by a combination of outside lawyers with complementary specialties. ECAs allow you to identify the nature of your matter before you commit to any particular legal team or engagement. *See* **Better Docket Management through Early Case Assessments: ECAs Part V**.

2. ECAs enable you to enter into more informed and predictable fee agreements.

No single billing arrangement is the most appropriate for every case. Some cases lend themselves well to straight contingent agreements, while others lend themselves better to hybrid, success fee, and/or milestone agreements. Still others are more appropriate for traditional hourly billable agreements. Some matters may lend themselves to being divided into procedural segments, each of which lends itself well to a different type of billing arrangement. ECAs help you determine what type of billing arrangement is best for each matter or each segment of each matter.

ECAs provide information that should allow you to negotiate a mutually advantageous fee agreement with outside counsel. Often negotiations over an alternative fee approach fail, not because the client or the lawyer refuse to consider alternative fee agreements, but because both (or at least one of them) lack the information required to assess the specific case risks adequately. For example, a matter that requires extensive expert analysis presents risks–both evidentiary and financial–that are fundamentally different from the risks presented by a matter requiring extensive fact discovery with witnesses and documents located abroad. When clients and their counsel have information from an ECA, both are in a better position to evaluate the specific case risks and more effectively identify and negotiate an appropriate alternative fee agreement.

3. ECAs allow you to budget more accurately.

For some clients, cost predictability is as important as overall efficiency. Even if you choose not to explore alternative billing arrangements, ECAs greatly enhance the accuracy of traditional budgeting efforts. At the beginning of a matter, certain costs and expenses can be estimated accurately. There are, however, some costs and expenses that are unknown and must be based upon assumptions. ECAs turn many of these unknown variables into known variables, thereby making budgeting efforts more accurate. Further, ECAs help to identify required budgeting assumptions, so that if/when the assumptions prove incorrect, budget revisions should be less of a surprise.

4. ECAs allow you to devise more savvy strategies.

In litigation as in other contexts, information is power and formulating the tactical approach to your case requires accurate information. ECAs can help you target your discovery–saving effort and generating the results you actually need. Using the information generated by an ECA will allow you to focus resources on the most effective efforts and intelligently choose to avoid devoting resources to less effective efforts/activities. ECAs also build confidence that shows up in your defense, in your settlement negotiations, and in your discussions with opposing counsel.

5. ECAs enable you to achieve better case resolutions.

You need to know what the case value is before settlement discussions start. ECAs are the best way to get there. Your ECA will guide decisions regarding when to seek settlement discussions, and when not to. Your ECA will guide what to say and how to say it in negotiations. Simply put, with an ECA you will know the pros and cons of your case and whether further litigation is to your advantage. To borrow a phrase, with an ECA you will be in a position to decide earlier in the ligation "when to hold 'em and when to fold 'em."

6. ECAs will generate better results across your entire docket.

Those who have measured the effectiveness of ECAs uniformly report their success. "The DuPont cases where ECAs were rigorously followed resulted in higher satisfaction from the business units, faster cycle times, and an average of 28 percent less cost"

according to **Metrics for Success in DuPont's Legal Risk Analysis**, appearing on the DuPont Legal Model Website. ECAs and other initiatives allowed GE to reduce litigation costs from $120.5 million in 2002 to $69.3 million in 2005, according to a **Corporate Counsel** article discussed on **The Wired GC**. Furthermore, conducting ECAs enable attorneys to reduce the litigation expenses in 50% of their cases on average, according to a Cogent Research study. Finally, more than half (57%) of surveyed attorneys felt that ECAs assisted in their ability to prepare a more accurate litigation budget, according to that same study.

C. How to do an Early Case Assessment.

How an ECA works in practice–actually getting what's on the ECA checklist done–isn't quite the paint-by-numbers exercise it might seem to be. *See* **Putting the Checklist into Action: Early Case Assessments, Part III**. First you must agree on the goal. You should state in writing what you expect to have identified and evaluated at the end of the process, evaluate your objectives, and revise them *before you start*. *See* the ECA checklist in Section II.(A) above for some helpful hints.

Next you must identify the team and the process to achieve the stated goals. The entire team must understand that objective evaluation, not planning your side of the case, is your primary goal. The process must also be managed. ECA project management is best maintained through a regularly updated Action Item List—a list that clearly states who will do what by when.

Another prerequisite is buy-in. You must have the authority to require the immediate cooperation and participation of those necessary to the process. Often you must educate witnesses and stakeholders that delay is no longer the strategy. They must make themselves and the requisite information available to the ECA team.

Lastly, there must be accountability and ownership. A properly done ECA can serve as the basis to formulate counsel retention strategy, fee agreement strategy, and a successful strategy to resolve a matter. Fundamentally, it allows you to make several of these decisions after you ascertain the relevant information rather than making the decisions and then hoping the case eventually justifies them.

III. DECISION TREE ANALYSIS

As disputes progress, the parties rarely openly agree on the case's value. If that's posturing, good negotiators can get a deal done–but if there's genuine disagreement on what the case is worth, settlement can be difficult to achieve, and the parties may have to wait for a judge or jury to determine the value of their litigation investment. If you and the other side value the case differently, at least one of you is wrong. Make sure it isn't you.

A. What is a decision tree?

Often used in the **business world**, decision trees are "tree-shaped models of [a] decision to be made and the uncertainties it encompasses," according to **Dwight Golann** in ***Mediating Legal Disputes***. A decision tree "shows the various possible outcomes in a lawsuit and helps the parties evaluate the costs, risks and benefits of each outcome," as **Daniel Klein** discusses more fully in his article **What Is a Decision Tree?**[3]

B. How do you create a decision tree?

A step by step guide to preparing a litigation decision tree can be found at **The Decision Tree Step by Step: How Much Is Your Million Dollar Case Worth?**,[4] but **Kathleen M. Scanlon's** ***Mediator's Deskbook*** tells us that decision trees involve four broad steps:

1. Listing the various possible events which might occur in the course of litigation (or beyond);
2. Considering the costs or gains associated with each possibility;
3. Discounting each possibility by the estimated probability that it will occur; and
4. Evaluating the overall picture by multiplying each possibility by its probability. Utilizing a decision tree requires systematic analysis and client input.

C. Why would you create a decision tree?

Montreal's **Brian Daley** tells us in **Decision-Tree Analysis: An Effective Method to Manage Litigation in a Business Setting** that, as client and counsel explore each branch of the tree, the diagram requires them to "deconstruct a complex lawsuit into discrete steps and possible outcomes that can pave the way for appropriate decision-making." The step-by-step walkthrough required to build a decision tree gives the client input into, and understanding of, the path the case may take–whether it settles or not. **Marjorie**

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[3] For a more complete overview of litigation decision trees, see John DeGroote Decision Tree Analysis in Litigation: The Basics.

[4] As a matter of full disclosure, one of the coauthors of this paper, John DeGroote, is a cofounder of decision tree tool ResolutionTree.com, which is referenced in The Decision Tree Step by Step: How Much Is Your Million Dollar Case Worth? and will be used in the presentation.

Corman Aaron tells us why that's important in ***The Handbook of Dispute Resolution***:

> A decision tree approach requires candid discussion between lawyer and client about the likelihood of each branch on the tree, each twist in the litigation path. That discussion is always worth having. Even if the decision tree is used for nothing more than adding clarity in the conversation of trial alternatives and the client's comfort with attendant levels of risk, the tree has added value.

Thus decision trees can help clients understand their cases–creating an opportunity for what Portland area mediator **Debra Healy** termed a "visual, tangible reality check," helpful because "[i]t can be so difficult for a client with no experience with litigation to even fathom the scope of uncertainties involved."

The interchange between lawyer and client isn't the only advantage to crafting a decision tree. **Marc B. Victor** tells us at **litigationrisk.com** that decision trees can add objective and intellectual legitimacy to the case evaluation process, as they "demonstrate to the client that each case has been rigorously evaluated. They document the rationale underlying your recommendations, and clearly show the effect of varying any assumptions."

While decision trees may generally add to the credibility of a case evaluation, decision trees can also serve as a way to work with "quantitative sorts," according to Pittsburgh mediator and civil engineer Rebecca Bowman, who mediates complex technical disputes:

> Engineers and many accountants generally prefer finite things. It can be extremely powerful to have a clean, concrete decision tree to evaluate risk. Quantitative sorts find it very comfortable to wrap their heads around a 60% probability of an outcome of X dollars.

D. How do you avoid the limitations of decision trees?

Decision tree detractors often argue that decision trees are only as good as the information they contain, and that they improperly place a single value on a case. Clients, however, respond that any case evaluation is only as good as the information and effort it relies on–in effect "garbage in, garbage out." Decision tree users need to ensure that the probabilities and values they assign are meaningful and not merely arbitrary numbers tied to arbitrary events–the more evidence you have supporting your assumptions, the more accurate your estimated case value will be.

And to the point that decision trees place a single value on a case, the response is simple: at the end of the day, the case is only worth one number anyway. Let's get as close as we can now.

IV. ADVANCED SETTLEMENT TECHNIQUES[5]

A gap between the parties' positions doesn't mean the parties can't settle. Parties often fear that a final move to bridge that gap will be seen as a sign of weakness or an invitation to negotiate further. Some litigants prefer the political cover of a number suggested by a neutral party. The tools discussed below are just a few of the ways to close the gap.

A. Settle Halfway

Whether they choose to or not, opponents can agree on some matters in every dispute–discovery schedules and stipulations of authenticity are two common examples. When the parties can't settle a large case during the mediation session or during settlement talks, they may work to settle halfway. Settling halfway is rarely used and it isn't complicated–it's just what the name implies. In disputes where the parties aren't ready, or able, to settle the entire case, they may consider ways to streamline the matter, limit expenses, and refocus the parties on resolving what's left.[6] While the concessions individual parties may consider are necessarily case dependent, examples include:

1. Waivers of weaker claims and defenses, such as punitive damages and laches in many cases;
2. Challenges to personal jurisdiction, venue, arbitration, or other procedural matters; and
3. Monetary settlement of one or more claims while others are permitted to proceed.

Parties that cannot settle at mediation can use the opportunity to settle halfway, combine possibilities, avoid marginal arguments, settle causes of action

[5] A longer version of this section previously appeared as "Chapter 14: High-Low Agreements and More: Definitive Tools to Break Impasse in Mediation," in *Definitive Creative Impasse-Breaking Techniques in Mediation*, published by the New York State Bar Association; for additional discussion of advanced settlement techniques, *see* John DeGroote, Advanced Settlement Techniques & the Use of Mediation & Arbitration to Resolve Disputes.

[6] *See* John DeGroote, You Can Win By Settling Halfway: Settlement Structures, Part I.

expensive to defend, and/or focus on the primary claims in the case. These discussions by definition keep the parties talking, which is an important end in itself, and the case that remains after a partial settlement is necessarily smaller than before–creating another opportunity for all involved.

B. High/Low Agreement

The fact that parties have different interests is news to no one, but the notion that money means different things to different people may be. To a global partnership, paying a nominal amount to settle a claim may mean little, but the costs of insuring against, and disclosing, the downside potential in a single litigation matter–often more theoretical than real–may be significant. On the other hand, a plaintiff may have no real belief she will hit the "home run" in her case, but she may have ongoing medical bills, a desire to expand her business, or some other need for a smaller sum now. Even without settling the case, the parties can leverage their divergent interests with a High/Low Agreement.

A high-low agreement is a form of settlement agreement where the case continues toward traditional resolution through trial or arbitration, but the parties agree that, no matter the outcome in the proceeding, the plaintiff will recover at least $x but the defendant will pay no more than $y. Under this arrangement the plaintiff is certain he will recover at least the number at the low end of the range, and the defendant caps her losses at a number she can handle.[7]

The High/Low Agreement can be an effective tool in limiting the scope of a dispute. If a corporate defendant agrees to settle an employment dispute for a high/low of $50,000 and $7,500, the parties have each gained a valuable concession: The plaintiff has now covered her costs and knows she will get something from the dispute, and the corporate defendant has insured against a runaway result–possibly eliminating any need for disclosure and in all likelihood limiting the resources and attention required to defend the case.

Parties very confident in their cases are often skeptical of High/Low Agreements; however, plaintiffs can be further induced to accept them by paying the "low" amount upon execution of the agreement, and defendants can often be persuaded to consider them if aberrant results in similar cases are discussed.

Importantly, once a High/Low Agreement is executed, the complexion of the case changes–it is no longer a million dollar employment claim involving categories of damages the defendant views skeptically, but rather it has become a dispute over the $42,500 between the parties' positions that may merit further settlement attention.

C. Non-Binding Arbitration

The parties' belief in their own positions is often very strong, and their lawyers, paid to advocate for their clients, often find it difficult to argue against their clients to suggest a settlement as the case progresses. Although some parties demand their "day in court," rarely do they require a full-scale court experience–what they often crave is outside input, and vindication, from a neutral third party. Non-binding arbitration can be a quick and efficient means to achieve that input:

> [N]on-binding arbitration resembles conventional arbitration in that some discovery and briefing usually take place, and there are often formal hearings where evidence is presented and witnesses are examined and cross- examined. A non-binding arbitration award differs from a traditional arbitration award only in that it is not binding.[8]

Although very limited witness testimony can (and often should) be permitted so the parties feel their case has truly been heard, neither witness testimony nor other costly procedures are required–anything to achieve a written, non-binding opinion from a respected authority within a time specified on the basis of limited briefs and documents can assist the parties achieve a settlement, making their efforts at Non-Binding Arbitration a success.

D. Blind Bidding Enhancement[9]

Mediation has long been an effective way to bring parties with divergent positions together, and many tools are available to mediators or parties when more traditional settlement efforts begin to stall. But before the parties begin negotiating in earnest, is there really a gap between their positions? If the plaintiff in a $10 case is willing to take $5 and the defendant is willing to pay $5, do they need to negotiate at all? Since parties almost never open discussions with their bottom line positions, they have to negotiate to see if they can

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[7] John DeGroote, What High-Low Agreements Can Do For You: Settlement Structures Part III.

[8] Steven C. Bennett, Non-Binding Arbitration: An Introduction; *see also* John DeGroote Non-Binding Arbitration: Get Your Day in Court Without One Day in Court.

[9] See generally John DeGroote, How Close Are We? Another Way a Mediator Can Help; *see also* John W. Cooley, Creative Problem Solver's Handbook for Negotiators and Mediators, Volume One.

achieve consensus. In some cases, Blind Bidding Enhancement can change that.

In cases where parties understand the value of their cases and genuinely believe they may have overlap at the outset of the matter, Blind Bidding Enhancement can afford them a quick way to test whether their bottom line positions are close enough to avoid further efforts on the case–so litigation, mediation or even settlement negotiations can be avoided completely. Blind Bidding Enhancement requires the parties to select a neutral party, such as a mediator, who agrees to gather each side's confidential bottom line position in order to determine the next step in the dispute:

a. If the parties' positions are overlapping or identical, the neutral will declare a settlement;
b. If the parties' positions fall within a predesignated range agreed upon in advance, the neutral will either declare a settlement at the midpoint or reveal the parties' positions and work to mediate from those positions; or
c. If the parties' positions do not fall within the range agreed upon in advance, the neutral will inform the parties that no settlement has occurred without revealing their positions so they may pursue settlement negotiations, mediation or litigation.

Blind Bidding Enhancement can be particularly effective in cases where both parties genuinely seek a quick and confidential resolution of the dispute, in cases where the parties have a long-term relationship that would be negatively impacted by protracted settlement discussions or litigation, or in cases with a natural settlement sum, such as a return of a contractual holdback.

Importantly, even a failed Blind Bidding Enhancement process can be advantageous to the parties, since the potential for settlement can force the parties to place a realistic value on their position, since the process gives the neutral an opportunity to explore other avenues to settlement, and because a failed blind bidding effort gives all involved the knowledge that the parties' most confidential settlement positions are far apart at that point in the dispute.

Although Blind Bidding Enhancement can be used before mediation even begins, it can also be used at any point in the litigation/settlement process, since parties' bottom lines may change over time.[10]

[10] *See, e.g.*, "Best Offer" *in* John W. Cooley, Creative Problem Solver's Handbook for Negotiators and Mediators, Volume Two (quoting Steven L. Marquart).

E. Mediator's Proposals

As a mediation comes to a close, the risk remains that creative counsel and their clients will work to "nibble" for that last concession. The Mediator's Proposal is in effect a mediator-suggested settlement amount, but one made confidentially and structured to avoid counteroffers–leaving the parties with only the potential to accept or reject the settlement suggested by the mediator in confidence:

A mediator's proposal is a set of settlement terms advanced by a mediator in an effort to settle a dispute when the parties have reached an impasse. The mediator's proposal is made on a double-blind basis to all parties in separate communications; the parties are asked to accept or reject the terms as proposed, with no modification or counteroffer, within a specific time frame.[11]

The double-blind nature of the Mediator's Proposal has real benefits. If both parties accept the proposal, they learn that they have settled; however, if one party rejects the proposal, she returns to litigation without learning whether the other side accepted it or not. On the other hand, her opponent–the party accepting the proposal she rejected–now knows at least one set of terms the other side is not willing to accept at the moment.

The Mediator's Proposal is an attractive alternative to many because it can result in finality of the dispute on or within a day or two of the mediation–all with the mediator's assistance. Mediator's Proposals are becoming ever more popular, but because some mediators refuse to use them, counsel are well served to know in advance whether their mediator employs Mediator's Proposals or not.

F. Stay for Specific Discovery

Mediation often ends with a realization that a narrow piece, or category, of evidence is truly required to settle–we need to hear what the project manager believes about the delays, or comparable employees' ages and salaries have to be disclosed and reviewed. Although the case may have narrowed substantially during the mediation process, the parties cannot bridge the settlement gap without knowing a few more facts.

Rather than table the mediation process and return to full-scale litigation, mediators can use the end of the mediation session to fashion a targeted discovery plan and schedule, with an agreement that the parties will suspend other activity and expense in the case and return within a predesignated time. In some cases this may be an agreement that a single third party will be deposed, or that a limited category of documents will

[11] John DeGroote, The Mediator's Proposal: A Great Tool for Yesterday's Disputes.

be exchanged, or that each party may depose any two witnesses they wish to depose–the point is that the focus is on obtaining only the discovery needed to settle the case. The parties work toward obtaining that discovery during an agreed-upon window of time without the distraction of other matters on the case and, at the agreed time, the mediator reconvenes the mediation so settlement can be achieved.

G. Med-Arb

What happens at the end of the mediation session when the parties have agreed to the broad parameters of the settlement, but can't agree on implementation details, like how the inventory will be divided or the specs for the new product they have just agreed to build together? Or what if the parties plan to mediate, but if they can't resolve all their differences at mediation they want to avoid litigation?

The parties may consider executing an agreement that will convert any disputes remaining at the end of the mediation process to arbitration. This process, Med-Arb, can be agreed to before the parties agree to mediate, but it often comes as parties in mediation are successful resolving the "big picture" issues in the dispute but need comfort that any differences of opinion arising while they implement the settlement can be resolved quickly, confidentially and cheaply–and the lawsuit they are settling today is "over". A med/arb clause in a settlement agreement, or a term sheet reached at mediation, might read:

> Dispute Resolution: The parties agree to appoint [neutral] as sole arbitrator to render a binding decision to resolve any disputes that may arise among the parties concerning the terms of this Agreement, the drafting of the final Settlement Agreement, and any disputes that may arise during the course of the performance of the settlement terms. [Neutral] shall have sole discretion to set the arbitration procedures. Any binding decision rendered by [neutral] as arbitrator shall be enforceable in [the applicable court].

Med/Arb requires complete trust in the neutrality and fairness of the mediator, but it can be used to sidestep minor impediments to major settlements. Importantly, however, the parties should consider carefully whether their mediator is appropriate for disputes that might arise late, since the mediator will have formed opinions and gleaned information from all sides in what is otherwise a confidential mediation process, and the mediator may be unable to separate herself from confidential disclosures made, and opinions formed in, the mediation session.

H. Mix and Match: The Use of Multiple Tools to Resolve Your Dispute

While it is true that there is no single way to settle a dispute, it is equally true that no single way, employed alone, may get the job done. The advanced settlement tools and techniques described above are less a range of choices than a menu of ingredients that can be used alone or in combination with one another, together or in succession, to achieve a settlement.