TWO HEADS ARE BETTER THAN ONE: A SETTLEMENT COUNSEL PRIMER

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A. WHAT IS A "SETTLEMENT COUNSEL"?

1. Definition

A Settlement Counsel is a lawyer who focuses exclusively on resolving a client's dispute by way of negotiation. A Settlement Counsel, who is sometimes known as a "Dispute Resolution Counsel", does not participate in the traditional litigation process or will strictly limit their participation in that process. If litigation is required it is handled by a separate lawyer. U.S. attorney William F. Coyne, Jr., is often credited with creating the concept of "Settlement Counsel" in his 1999 paper, *The Case for Settlement Counsel*.[1] While we have been influenced by Coyne's work, we have also adapted the Settlement Counsel model based on our own experiences and preferences to fit our clients' needs and those of the legal culture in which we practice.

2. How is Settlement Counsel different from a Litigation Counsel?

In Canada, the U.S. and several other jurisdictions with similar adversarial legal systems, the traditional role of a civil litigation lawyer or attorney ("Litigation Counsel" or "litigator") is to gradually prepare a client's case for an eventual determination on its merits by a third-party decision maker such as a judge or an arbitrator.[2] The

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1. 14 Ohio St. J. on Disp. Resol. 367.
2. The authors acknowledge that in some jurisdictions, like England and Scotland, there is a traditional division of legal labour as between solicitors and barristers (England) or advocates (Scotland). This division has been blurred by the rise of solicitor advocates who can now perform the barrister's or advocate's once-exclusive higher court duties. In Ontario, the distinction primarily exists in name only: Licensed lawyers are automatically both "barristers and solicitors" regardless of their actual professional activity – although many Ontario civil and criminal litigators prefer to call themselves "barristers", many non-litigation lawyers use the moniker "solicitors", and

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hearing is usually in the form of a trial but increasingly it may be an arbitration or a motion for summary judgment. A Litigation Counsel will also argue any appeals from the decision rendered after the hearing. Along the way, he or she usually handles certain interlocutory or procedural steps and events such as discovery and motions for a client.

The adversarial nature of litigation has led to an image of the Litigation Counsel within the legal profession and popular culture as a "rights warrior" and "master tactician". This warrior-tactician is someone who seeks to gain advantage for their client by creating the legal framework to assert or defend claims based on legal rights. They attempt to obtain evidence to support the client's position utilizing legal procedure to the client's advantage and then, hopefully, put the client in a stronger, rather than a weaker, position. The warrior-tactician always thinks ahead to the ultimate battleground in the courtroom as the central focus is on winning.

However, in many jurisdictions the overwhelming majority of civil cases settle by way of a negotiated settlement at some point before the hearing stage. Settlement negotiations are typically conducted by the Litigation Counsel who handles all other aspects of the case. Balancing these two objectives, positioning for a win in the ultimate battleground and exploring opportunities for settlement, can be compromising.

Unlike a Litigation Counsel, a Settlement Counsel is not concerned with preparing a case for a hearing that probably will never take place or will take place many months or years in the future. A Settlement Counsel's mandate is to try to resolve the case as early as possible by finding a negotiated solution with the other side of a case to save everyone the cost, time and risk of protracted proceedings. Settlement Counsel usually approach cases as "problem solvers" rather than as tacticians seeking to win or outmanoeuver the opponent. Further, war imagery is not useful when a lawyer is attempting to create an open dialogue and rapport with the other side. That said, as an advocate, a Settlement Counsel is inherently partisan, unlike a mediator who is neutral and represents neither side of a dispute.

even more lawyers use both names (or neither). However, Settlement Counsel is not the same as a solicitor or a solicitor advocate – especially since Settlement Counsel do not typically attend court, except for settlement-related events. It is an entirely different type of role that is not born out of any (real or historic) solicitor-barrister distinction, but out of the ADR movement in the United States (where attorneys are neither barristers nor solicitors).

If an early settlement cannot be reached, a Settlement Counsel will usually transfer the case to a Litigation Counsel to handle the litigation but, depending on various factors, a Settlement Counsel can stay involved in the case to help identify and capitalize on various settlement opportunities that may arise in a proceeding as it moves its way to a hearing and, sometimes, beyond.

3. The traditional role: one lawyer, two heads

As described above, traditionally, Litigation Counsel and Settlement Counsel roles are played by the same lawyer. As a metaphor, this one lawyer can be said to have "two heads" or one head wearing "two hats". They are, simultaneously, a warrior-tactician and a problem-solving negotiator. Despite the inherent tension, Litigation Counsel usually take their dual roles, or two heads, for granted. They may assume that there is no possibility to play only one role or they often prefer one role over the other.

4. The rise of ADR

As noted above, most cases settle before trial or other form of hearing. Local rules promoting settlement of lawsuits such as costs consequences for the losing side, a client's needs, economic realities, risk management, delays, privacy concerns, and a host of other factors lead to a high settlement rate. As well, the popularity of Alternative Dispute Resolution ("ADR"), most notably, mediation, in the last 20-30 years has put further pressure on Litigation Counsel to increasingly play the role of negotiators rather than trial lawyers. Mediations, which offer ripe opportunities for settlement, are not like trials or hearings. There are no witnesses, third-party decision makers such as judges or arbitrators or binding decisions imposed upon the parties. Instead, the goal is a full and frank discussion that will, ideally, lead to a binding settlement reached by the parties themselves with the assistance of lawyers and a neutral mediator.

Therefore, the style of advocacy that serves a lawyer well at a trial, or at an examination for discovery such as questioning witnesses to elicit helpful evidence and making oral and written arguments that will persuade a decision maker, is not as useful at a mediation where creative problem solving, collaboration and client management skills are required. Often, the very advocacy skills Litigation Counsel employ at trial or examinations are the skills that polarize the parties. Yet, a modern day Litigation Counsel, "wearing two hats", is expected to have all of these skills and more.

5. Ethical considerations

In addition to the above considerations, in some jurisdictions lawyers are now ethically bound to encourage compromise or settlement and to consider and inform a client about ADR.[3] Some might view such a rule as conflicting with the Litigation Counsel's traditional role as a zealous advocate who must "endeavor to obtain for the client the benefit of every remedy and defense authorized by law" and who must be "openly and necessarily partisan".[4] It appears that even professional rules of conduct encourage a litigation lawyer to wear two hats. However, Litigation Counsel could, potentially, comply with their ethical obligation to encourage settlement by engaging a different lawyer to pursue settlement for the client.

6. Challenges and limitations of the single lawyer approach

For the same person to have to switch between being a traditional litigator and a negotiator-problem solver can be extremely challenging and inefficient. It also runs counter to the trend of increasing specialization within the legal profession. One of the benefits of Settlement Counsel is that lawyers can be better[5] at their jobs, better at serving their clients and better at playing their vital role in the civil justice system by focusing on the work they do best. This means that in a single case, separate lawyers handle negotiating and prosecuting legal proceedings. The two lawyers have different roles and scopes, yet work in tandem.

B. ROLES AND SCOPE OF SETTLEMENT COUNSEL

1. To resolve a case without legal proceedings, at the earliest opportunity.

Early settlement is preferable as it provides the most value for a client by avoiding the risk of an unfavourable outcome and saving time and money. As well, finality is normally achieved through an enforceable settlement reached by the parties themselves. Further, early settlement may preserve privacy, if that is an important value to the parties.

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3. For example, in Ontario, lawyers are bound by rule 3.2-4 of the Rules of Professional Conduct of the Law Society of Upper Canada. In a sense, Abraham Lincoln's famous advice to lawyers to "discourage litigation" and to "persuade your neighbors to compromise" has become a codified, ethical imperative.
4. See, for example, rule 5.1-1 of the Rules in footnote 5.
5. And, perhaps, "happier".

2. Settlement counsel primarily take an interests-based approach

If a Settlement Counsel is involved from the beginning of a case, they will gather evidence and provide legal advice just as a litigator would. However, in pursuing an early settlement, a Settlement Counsel will primarily be concerned with determining and advancing a client's real interests in addition to their legal and factual position. A client's interests may align with those of the other side, thereby making quick resolution a reality. Legal rights are, of course, given weight but so are a number of other factors. For example, the client may appear to have a strong case, legally-speaking, but may not want to pursue protracted litigation for a host of personal and other reasons. In any event, even seemingly "strong" cases can be inherently risky. The client may be happy with an outcome that is "good enough" from a purely legal standpoint because other interests will have been met and because a perfect or seemingly better outcome can never be guaranteed.

3. Settlement Counsel may use some mediators' skills

Mediators are neutral facilitators while Settlement Counsel are partisan advocates. However, some mediator skills are valuable for when a lawyer practises as a Settlement Counsel. For example, active listening and responding with "why is that important?" are vital for unearthing the true interests that underlie any legal dispute. While, in our view, Settlement Counsel do not necessarily have to be professional mediators, mediation training and experience provides some highly useful skills for Settlement Counsel. Since mediation is also a prime forum for resolving legal disputes, under this model, the client should normally be represented at the mediation by a Settlement Counsel. A Settlement Counsel with mediator skills and a problem-solving mindset can be an asset because they can assist the actual mediator of the case to better perform their role.

C. ROLES AND SCOPE OF LITIGATION COUNSEL

1. Litigation counsel raise and assert legal rights

The primary roles of Litigation Counsel are to raise and assert legal rights through the litigation or arbitration process and gradually prepare their cases for an eventual hearing unless Settlement Counsel can settle the case before then. A Litigation Counsel will still consider a client's underlying interests but is "less interested in

interests" than Settlement Counsel may be. When advancing a client's case, Litigation Counsel are free to do so zealously and without having to compromise or to tailor their tone so as to "leave doors open".[6]

2. To obtain evidence

To the extent that a Settlement Counsel has failed to obtain evidence relevant to the client's case (assuming Settlement Counsel was involved prior to Litigation Counsel), it is the role of the Litigation Counsel.

3. Conducting the major litigation events

The Litigation Counsel is responsible for drafting pleadings, or at least having input into a pleading drafted by the Settlement Counsel, preparing for and conducting any hearing of the case on its merits including examinations for discovery, motions, the trial or arbitration.

4. Litigation Counsel as "Chief Strategist"

As a "master tactician" who is responsible for moving the case forward, the Litigation Counsel should be the chief strategist, or lead counsel, on most files. In Ontario, this will likely mean that the Litigation Counsel will typically be the lawyer of record, although much will depend on the particular case and client, and the stages at which the Settlement Counsel or the Litigation Counsel are engaged.

5. To identify opportunities for settlement, but not to engage in it

Part of the Litigation Counsel's chief strategist role is to identify opportunities for the Settlement Counsel to engage in settlement opportunities. However, just as the Settlement Counsel would not conduct a trial, the Litigation Counsel, working in tandem with the Settlement Counsel, would refrain from having settlement discussions with the other side save for resolving interlocutory motions that cannot result in a final judgment. Instead, they would direct the Settlement Counsel to initiate and conduct the discussions in accordance with the client's instructions.

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6. This does not, however, mean that a Litigation Counsel is not bound by principles of civility and any other professional or ethical duty. It simply means that settlement of a case is not within the litigator's mandate.

D) WHO DOES WHAT?

The relationship between a Settlement Counsel and a Litigation Counsel is like a tag-team. One player is in action during a certain sequence until such time as the other player, on the sidelines, can be tagged to "enter the ring" to replace them. The following chart outlines a typical division of labour between the Settlement Counsel and the Litigation Counsel in the stages of a civil action in Ontario, Canada. While we propose that a supportive role by either lawyer is possible and even desirable at several stages, it is not mandatory. It will depend upon the nature of the case, the client's needs and the complexity of the issues. This does not dilute the tag-team model since even in a tag-team match the player who is not in the ring may coach from outside of it.

	• Settlement Counsel	• Litigator
• Pre-Litigation	• P	• S
• Pleadings	• S/P	• P/S
• Discovery	• S	• P
• Motions	• S	• P
• Mediation	• P	• S
• Pre-Trial Conference	• P	• S
• Trial, or other hearing	• S	• P
• Post-Trial or hearing (*i.e.*, appeals, execution proceedings)	• S	• P

P = Primary Role S = Supportive Role

1. Pre-litigation

Since early settlement is the primary aim and value of the Settlement Counsel, provided they are engaged sometime close to the beginning of a case, they will normally take the reins at the pre-litigation stage. This may or may not follow a demand letter sent by the Litigation Counsel. Either way, making opposing counsel aware that a litigation lawyer is "waiting in the wings", or already involved, in the event settlement cannot be achieved, tends to make the Settlement Counsel more credible in the eyes of the opposition. It also frees the Settlement Counsel to negotiate freely, off-the-record, without concern about having to come across as "tough" or

"serious" enough. Early intervention by the Settlement Counsel also allows both the Settlement Counsel and the Litigation Counsel to inform themselves on the client's underlying needs and vulnerabilities. It may also expose the vulnerabilities of the opponent's case.

While the Settlement Counsel can engage in early evidence gathering and providing a legal opinion for the client, in some cases this task may be better handled by the Litigation Counsel. As well, if direct negotiations do not result in a pre-litigation settlement, the Settlement Counsel should advocate for a mediation to take place prior to the issuance of any formal legal proceedings or at least as soon after such proceedings have been commenced rather than wait for a later point in time. Further, the Settlement Counsel should consult with a Litigation Counsel about the desirability of proposing another form of ADR such as arbitration or mediation-arbitration to the other side instead of traditional litigation.

2. Pleadings

If legal proceedings must be commenced or defended, the Litigation Counsel is typically best suited to drafting court documents such as the Statement of Claim and the Statement of Defence containing allegations to be proven by evidence adduced at trial or on a motion. Having the Litigation Counsel deal with pleadings also removes the Settlement Counsel from appearing overly positional, which can hinder later settlement discussions. That said, there may be routine matters where there are few legal issues and a pleading is, more or less, of a "boilerplate" variety. It may be more efficient for the Settlement Counsel to prepare such a pleading, especially if the Settlement Counsel's firm is on the record or if both the Settlement Counsel and the Litigation Counsel work in the same firm. Nevertheless, the Settlement Counsel, in our view, should at least have the draft pleading reviewed by the Litigation Counsel who is responsible for prosecuting or defending the action based upon the wording of the pleadings. Having to amend a pleading later because the Litigation Counsel would have drafted it differently is a waste of time and resources.

3. Discovery

The gathering, classification and weighing of documentary and oral evidence by way of discovery, including preparing Affidavits of Documents and attending examinations is, naturally, the Litigation

Counsel's role. However, the Litigation Counsel may receive evidence from the Settlement Counsel gathered during pre-litigation investigation and discussion. This provides the Litigation Counsel with a head start. As well, depending upon the evidence obtained on discovery, the Litigation Counsel could recommend that Settlement Counsel initiate or revive settlement discussions during, or directly after, the discovery process. However, this is different than the Settlement Counsel actually being responsible for obtaining evidence by way of questioning parties under oath or preparing the client for examinations.

4. Motions

While it should be the Litigation Counsel's decision to recommend to a client that they bring or respond to interlocutory motions before the court, in motions where the entire case may be determined on its merits, such as a motion for summary judgment, the Settlement Counsel can play a supporting role by attempting to negotiate a resolution without the necessity of a hearing. For example, the time after serving motion materials, but well prior to the actual hearing, provides an opportune time to initiate settlement discussions.

5. Mediation

Depending upon the case and the parties, mediation may take place at any stage prior to the hearing on the merits. There can also be more than one mediation session. Settlement counsel, for the reasons explained above, is naturally suited to handle mediation where resolution is ideally the primary purpose of the event as opposed to obtaining evidence or the determination of the case on its merits. In fact, mediation is best handled by a non-litigator who is focused exclusively on resolution through negotiation. That said, the Litigation Counsel can play a supporting role. For example, they could assist Settlement Counsel with the preparation of a mediation brief by providing or reviewing the legal argument section and any identifying evidence supporting the party's case. As well, the Litigation Counsel's availability during the course of mediation to address a legal or evidentiary issue arising during negotiations for the drafting of a particular term of a settlement agreement can often prove useful.

6. Pre-trial conferences

Depending upon the jurisdiction, the case and the presiding judicial officer, the attendance of both the Litigation Counsel and the Settlement Counsel at a pre-trial will either be useful or essential. In our jurisdiction, the trial counsel is normally required to attend a pre-trial conference. However, since off-the-record settlement discussions usually take place at pre-trials, they are a natural forum for the Settlement Counsel. Depending on the length and format of a particular pre-trial, one possibility is for the Litigation Counsel to attend for the trial management segment of the conference and initial discussions with the presiding judge or master and then physically leave the session with the judge's or master's permission so that the Settlement Counsel can engage in negotiations.

E. WHY TWO HEADS? SEPARATING THE ROLES OF THE LITIGATION COUNSEL AND THE SETTLEMENT COUNSEL

The major benefits of dividing the roles are as follows:

1. The Litigation Counsel and the Settlement Counsel can concentrate strictly on their respective roles and play to their respective strengths.
2. Providing a practical manner of fulfilling ethical duties to the client respecting ADR.
3. The Settlement Counsel can be more detached from the legal and factual positions – and more attached to the underlying interests of the parties, thereby increasing the chances for settlement.
4. For the Litigation Counsel, it removes some of the following challenges:
   - The risk of a litigator appearing to the client as too soft or weak or not being in the client's corner if they recommend or engage in settlement discussions.
   - The risk of appearing too soft or weak to the other side or not committed to their own client's cause.
   - A possible tension between a lawyer's interests and a client's interests in terms of advancing the case to a hearing on the merits. A lawyer may be motivated even, in part, by the desire to build a reputation as a "tough" advocate who will try to win cases and who is, therefore, viewed as a formidable foe in the future. If a case settles because a client has determined that settlement is in their

best interests, that settlement should have no bearing on the reputation of the Liti-gation Counsel since it was the Settlement Counsel who handled the negotiations.

F. COMMON QUESTIONS

In advancing the Settlement Counsel model, the following are some of the questions we are frequently asked:

1. It this going to cost the client more?

This is not the case in our experience. A concentrated effort on early resolution saves the client from potential additional legal costs later in a proceeding that does not settle early. It assumes, of course, that the lawyers have properly educated their clients about the risk, time and true cost of litigation. Furthermore, alternative fee structures (such as flat fees or even bonuses for settling early) can help control costs and create settlement incentives for clients and lawyers. Even having two lawyers involved on a strictly hourly rate basis should not result in an increase in costs provided there is no duplication of work for which the client is charged extra. In any event, it is not unusual to have more than one lawyer working on a file even if they are not dividing labour as between settlement and litigation activities. For example, it is already common practice for a junior lawyer to keep costs down by attending to more routine matters while a more expensive senior or lead counsel deals with trial or other more complex tasks.

Finally, one must consider not only a client's own legal fees in the final analysis. For example, there is the exposure to potentially having to pay the other side's lawyer's fees after a loss at a trial or other hearing. As well, there are the non-monetary, or less obvious monetary, costs of not settling as early such as stress, time, distraction from one's business or personal life, risk to reputation, lack of privacy and the potential and lack of finality due to the prospect of appeals.

2. One retainer or two retainers? One firm or two firms?

o Should there be one retainer or two retainers? In other words, is the client hiring one law firm or lawyer or two? In our view, there are a myriad of ways that a client can make use of the Settlement Counsel model. For example, the client could retain a Settlement Counsel who then, in turns, hires, with the

client's consent, the Litigation Counsel who acts as agent or counsel for the Settlement Counsel for certain tasks, or vice versa. Another way would be through a joint retainer arrangement where both lawyers are hired directly by the client to fulfill different roles.

- o Should the Counsel come from one firm or two firms? A related question is whether it is more effective for the Litigation Counsel and the Settlement Counsel to be part of the same firm. Certainly, there are advantages to the "same firm approach" such as proximity, simplicity, a perception of lower cost and the comfort level of certain clients. However, a two-firm approach has the advantage of increasing the perception of all persons involved that there is a genuine split between settler and litigator. A two-firm approach also detaches Settlement Counsel from any negative feelings the opposing party might have against the zealous Litigation Counsel. It may also be a necessity if the Settlement Counsel's firm does not have its own litigation lawyer or vice versa. Given advances in technology, the two firms do not even need to be located near one another. Electronic documents can be easily shared as between firms, and meetings as between counsel and clients can take place by way of videoconference. In the end, much will depend on the file and the client when determining whether litigation or settlement work should be handled in-house or "contracted out".

Both counsel must ensure that, at all times, they adhere to local professional rules of conduct and standards when creating their particular arrangements with clients, including retainer agreements and authorizations. As well, clients need to be well informed of their options and their commitment and consent to the two-lawyer approach before embarking. We are also opposed to the idea that a Settlement Counsel pay a Litigation Counsel a referral fee (or vice versa) even if such a fee were technically permitted by local rules of professional conduct.

3. Yes, but isn't this arrangement reserved or better suited for larger or complex cases?

Any professional engaged in dispute resolution has probably heard, or said, the following: "The smaller the case, the harder it is to settle." This is precisely why a Settlement Counsel is suited to smaller cases and not just larger ones in dollar value or complexity or both.

Having a lawyer who is dedicated to settling a case where less money is involved, as early as possible, where continued legal proceedings have lower marginal value over time, is not only appropriate but strongly recommended.

4. What are the clients saying?

In our experience, clients have embraced the idea. Clients feel safe knowing that someone is focused, not just on winning the case, but on their ultimate goals, early resolution, adverse decisions, avoiding publicity, avoiding precedents, avoiding distractions from their other business interests or advancing their principles.

5. Do you need two Settlement Counsel to make this work?

No. It is not necessary that the opposing lawyer (or paralegal) also be a Settlement Counsel although on the rare occasion that we encounter such a lawyer (either, officially, or in their approach), we often find that the prospect of an early settlement is higher than normal. It should also be noted that the Settlement Counsel model, as we have conceived it, does not operate like collaborative law, which requires a special agreement and rules, although collaborative law approaches can teach us a great deal. There is no commitment on the part of any advocate or party dealing with a Settlement Counsel to buy into a formal arrangement before negotiating or even just communicating.

Lastly, a less combative "Settlement Counsel approach" may improve dealings as between legal professionals and self-represented litigants.

6. What are opposing counsel saying?

In our experience, opposing counsel are embracing the idea. They like that there are no mixed messages. They know that, when dealing with a Litigation Counsel, the matter is going forward and, when dealing with a Settlement Counsel, that settlement is truly possible.

7. Does it appear "weak"?

No. As long as it is clear that there is a litigation lawyer actually ready to handle matters (and who actually does, where warranted) then, in our experience, the involvement of a Settlement Counsel should not appear as weak in the eyes of a client or opposing lawyer, especially in a legal culture where ADR is commonplace. In fact, we

find that the majority of clients and opposing counsel welcome this fresh approach to lawyering and find it interesting, wanting to know more about it. Certainly, we have never encountered an attitude of hostility, disdain, or a refusal to negotiate.

G. WHAT IS REQUIRED FOR THE SETTLEMENT COUNSEL APPROACH TO WORK WELL?

The following is a non-exhaustive list of qualities:

1. Good communication between the Settlement Counsel and the Litigation Counsel.
2. An educated client in the sense that the lawyers have taken the time to explain the process and the advantages of the two-lawyer approach.
3. Both Counsel confining themselves to their respective roles.
4. Both Counsel knowing when to let go and to pass off the file to the other counsel.
5. Everyone involved buying into the process.

H. FINAL THOUGHTS

What we have described is an alternative to the traditional manner in which lawyers handle legal disputes. Many will find it attractive, others will not. However, we wish to make it clear that we are not proposing that it replace current practices, although we prefer to see the Settlement Counsel model grow. There will always be those advocates who wish to play both settler and litigator, and clients who will want to deal with only one lawyer or firm throughout a case. The Settlement Counsel model simply provides greater choice and opportunities for parties and professionals within the civil justice system. This can increase efficiencies, access and overall client satisfaction.