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Case Studies in Settlement Counsel: Best Practices for Litigation Exit Strategies

Litigation and Dispute Resolution

CHEAT SHEET

- ***What is that?*** Settlement counsel negotiate a settlement of a claim or lawsuit as opposed to appearing in court in litigation on behalf of a client.
- ***The two-track approach.*** Typically retained to expedite a favorable resolution of a dispute, settlement counsel often work on resolving disputes even as trial counsel pursue their litigation strategies.
- ***Streamline litigation efforts.*** Even if the case does not result in a settlement, such counsel can determine earlier on whether a trial will be necessary.
- ***Bring rigor to an ad-hoc event.*** Settlement counsel bring attention and consistency to settlements, easing the burden on less specialized general counsel and trial attorneys.

The increased cost and sophistication of litigation has resulted in specialization in most every facet of the practice of law — except for the area that controls over 98 percent of all legal disputes, the settlement process. Settlements resolve nearly all legal disputes, but settlement remains an ad hoc event and is rarely treated as the defined process it should be. Too often the trial team's or general counsel's focus on settlement comes only "when the time is right."

Hasn't the time come to manage the exit strategy with the same focus and attention to detail as the litigation or any other core business decision?

That's where the role of the emissary, or settlement counsel, comes in. Settlement counsel, in some form, have been around as long as litigation itself. But just as mediation was not understood or widely adopted initially, the same can be said of the low prevalence of settlement counsel now. Settlement counsel should be used much more frequently because they can save money and time — particularly when the stakes are highest. Indeed, we expect that in the not-too-distant future, the use of settlement counsel will become as common as mediation is today.

To illustrate how the use of settlement counsel functions and adds value, the following is a case narrative, based on our experiences with several clients. In this first installment, we will explore the general counsel's perspective of settlement counsel and the benefits of adding another arrow to your quiver.

Overworked and overwhelmed

As general counsel for the company, Roger Williston enjoyed his work. He believed in the mission of the company; respected and worked well with the CEO, CFO and the other board members; and enjoyed fielding questions and providing reports on pending legal matters.

With a buy-out offer for the company on the table, though, Williston and the assistant general counsel were overworked with transaction and related regulatory issues. At the same time, a lawsuit initiated by a rogue employee had erupted from a minor state court case in Highlands County, Florida, to a much more serious case against the company in Charleston, South Carolina, where the company had recently suffered its largest jury verdict in its history (in the same federal court and with the same

judge). This recent escalation could negatively affect the buy-out opportunity.

A former litigator with 18 years of experience in commercial trial work, Williston had learned much from that prior unpleasant experience in Charleston. With allegations of destruction of electronic evidence in the current federal case, the budget for another full-blown federal court dispute would be massive. The board members reacted with palpable frustration when Williston presented his report and the revised budget.

Something different had to be done this time, particularly since the buyout opportunity would soon expire.

Settlement counsel — What is THAT?

The next morning, Williston received a message from an attorney who said that he was “settlement counsel” in the pending litigation who had been retained by the opposing company’s general counsel. The attorney wanted to speak to Williston about whether the two different cases could be resolved. Williston was dubious for many reasons:

- He had never heard of a “settlement counsel.”
- He liked his trial team and had great confidence in them.
- Most of the important rulings had gone in favor of his company — at least in the state court proceeding.
- In other cases the company had generally been able to obtain satisfactory settlements during mediation in the weeks leading up to trial.

But this case felt different, perhaps because Williston was extremely pressed for time. Neither he nor his assistant general counsel, a transactional lawyer who didn’t like litigation or appreciate its nuances, had the time or inclination to discuss settlement at this point. Also, the opposing company’s lawyer had made multiple filings that blew past the boundaries of even the most aggressive type of corporate litigation — suggesting that any forthcoming settlement offer would be so unreasonable that it wouldn’t even warrant a response.

Additionally, the parties had filed competing motions for spoliation of evidence and were waiting for the judge to schedule a hearing. In all likelihood, the hearing would require Williston, the assistant general counsel and perhaps even the CFO to provide live testimony about whether the company’s document retention procedures had been followed appropriately. Williston had too much on his plate to think about returning a cold call from a settlement counsel.

Still, when Williston’s contract attorney knocked on his door with a buy-out question, Williston asked her to research “settlement counsel” and provide a report by the end of the week.

The work of settlement counsel

The contract attorney sent Williston an email that provided the following definitions and guidance on the use of settlement counsel:

Settlement counsel – One or more lawyers retained specifically to negotiate a settlement of a claim or lawsuit as opposed to appearing in court in litigation on behalf of a client. Typically retained to expedite a favorable resolution of a dispute, settlement counsel often work on resolving disputes

even as trial counsel pursue their litigation strategies.

- “Settlement counsel is an attorney engaged for the express and limited purpose of assisting a client to resolve a current dispute. Settlement counsel is *not* a member of the litigation team. . . . Settlement counsel is a specialist who has developed skills and techniques in negotiation and mediation advocacy.” Because settlement counsel assists the client with risk analysis and the potential for cost savings, it’s recommended that settlement counsel be engaged early. *Settlement Counsel: Answer to the FAQs*, James E. McGuire, *NYSBA Disp. Resol. Law.*, Fall 2010, Vol. 3, No 2, at 23-25. (Emphasis added).
- A very early mention of settlement counsel appears in *What about Negotiation as a Specialty?*. Professor Fisher, an author of the best-seller *Getting to Yes*, proposed a “two-track answer” for litigation, saying that the client’s interests would be better served by having one lawyer pursue or defend litigation, while a separate lawyer tries to settle the case. This would allow a client’s discussions of settlement to begin without the trial team having to worry about appearing weak. Fisher said that settlement counsel would also strengthen the litigation team. *“Freed from any duty to explore settlement, the litigating lawyer can concentrate single-mindedly on preparing and pursuing the strongest possible case in court.”*. (Emphasis added).
- Fisher advocated a “two-track approach,” involving a separate settlement lawyer to handle negotiations while the litigators prepare for trial, in *He Who Pays the Piper*, which is a somewhat tongue-in-cheek, fictional letter from a CEO to the head of the litigation department for the company. The CEO observed that even though a single lawyer can perform both duties, litigating and fully exploring settlement each require a different focus. “The psychological orientation of a general engaged in battle is quite different from the diplomat engaged in peace negotiations.” Or, as another author wrote, *“The trial lawyer asks, ‘What happened?’ The focus of the fact-gathering is on the past. Settlement counsel asks, ‘What do you want to have happen? The focus of settlement is on the future.”* (Emphasis added).
- Two law review articles discuss settlement counsel. In the first article, lawyer William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 Ohio St. J. on Disp. Resol. 367 (1999), discussed in practical terms how settlement counsel can help penetrate the primary barriers to settlement presented by the litigation system. In the second article, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution,* 24 Ohio St. J. on Disp. Resol. 83, 115-120 (2008), Prof. John Lande, who specializes in dispute resolution, proposed settlement counsel as one of the methods for reaching earlier resolutions.
- A former general counsel for Motorola, Inc., Kathy A. Bryan, wrote a compelling piece simply titled, *Why Should Businesses Hire Settlement Counsel?* 2008 J. Disp. Resol. 195., and stated that hiring settlement counsel would not be duplicative of any legal work already being performed by in-house and outside counsel. She noted three advantages: preserving relationships, reducing cost and time to resolution, and overcoming adversarial bias. Bryan defined adversarial bias as “essentially the human tendency to need ‘to be right’ in a dispute [which] affects everything in litigation.”
- Settlement counsel is engaged by the client and reports to the client, *not* to the trial team. The client retains control of settlement decisions at all times. It’s best when there’s a “clear demarcation of roles and good channels of communications” between trial counsel and settlement counsel. For example, all litigation questions would be referred to the trial team, while all settlement questions would be referred to settlement counsel.
- Finally, settlement counsel often bills on a contingency fee or success fee basis.

The CFO loves settlement counsel

Although the concept of settlement counsel made some intuitive sense, Williston was still skeptical.

But he immediately understood “adversarial bias” from his years as a corporate trial lawyer. Plus, he recalled how difficult it was to maintain his focus on the important litigation issues as the parties inched towards settlement during the ramp up to trial. He also understood from having just read the best-selling book, *Thinking, Fast and Slow*, written by Nobel Prize winner Daniel Kahneman, that most people are subject to a psychological phenomenon known as “the endowment effect.” According to Kahneman, the endowment effect makes our own items, ideas and strategies generally become more persuasive with time.

Williston was so busy trying to close the buy-out deal that he was willing to try almost anything that might reduce the time for resolving the dispute. He remembered that a law school classmate had just become general counsel for a much larger and publicly-traded company.

After catching up, Williston said to his friend, “I’ve got this case that’s a royal pain. A former employee did some stuff he really shouldn’t have done. We didn’t even pay much attention to it when it was filed because our initial evaluation didn’t catch some information that was kind of buried, and now we’ve got a much bigger problem in federal court in Charleston. I just got a call from a guy who said he was hired as settlement counsel for the other company, and he wants to sit down with me. Have you heard of or used settlement counsel?”

His friend responded, “Roger, I’ve been using settlement counsel for years. I like it so much that we brought on a guy to do it full-time for us, especially for all our IP disputes. Our experience is that it’s best to engage settlement counsel as soon as the case has been filed, or even before, if that’s possible. Having a consistent and dedicated resource to focus on settlement early in the case means we actually do identify “when it is right” to settle. Since most of our litigation is in federal court, the new rules for document retention mean that we have to spend at least $50,000.00 every time there’s a new case filed against us.”

Roger’s friend continued, “You know your business people are no different than our business people. They hate sitting down with me or a member of my team and preparing for a deposition, and fly-specking old emails that might come back to bite them in a deposition. In fact, it’s to the point where our CFO is the biggest advocate for using settlement counsel, because it actually helps him budget legal costs. I think you need to get your own settlement advocate. I’ll send you three names.”

Introducing the settlement counsel idea to trial counsel

Williston decided to discuss the matter with his lead trial lawyer, Edward Darrow. He reached Darrow in his car as he was driving to another deposition in South Carolina. “What’s up, Roger?”

“Not much, Ed. Trying to figure out how to get everything done. I’d like to talk about how we’re staffing the Charleston case.”

“OK, Roger. What do you have in mind? I thought that we were good on the division of labor, but I want to make sure we’re on the same page.”

“Well, Ed, I think that you and your team are doing a great job. Roger continued, “I’m going to bring another person onto the team to start talking now about whether there’s some middle ground, or maybe even some ground that’s anywhere close to the middle that we could live with.”

“Roger, I don’t know what you’re saying. You know how these things go; we’ve done plenty of them together. And we eventually get where we need to be at mediation or at trial. You and I have gotten

good results together."

"Ed, we have worked well together. I've just gotten a call from a guy who said he's been hired by the other company to be their settlement counsel."

"Settlement counsel? What's that?"

After Roger explained settlement counsel to Ed and went through some of the reasons for why it made sense, Ed asked, "Roger, I thought you were the one who usually did the risk analysis and planned negotiation strategy, and that we did most of that together?"

"That's right, Ed. I typically do that stuff, but I've decided to give settlement counsel a try. While I know I can do this, the question is really should I do it? I would really like the input of an independent third party. Who knows — it might be good for you and your team. You now don't have to worry about running certain strategic points by me to make sure that a motion or a deposition strategy isn't going to inadvertently squelch some settlement you know nothing about. And I've heard you say more than once that you don't really like talking settlement."

"I'm going to give this settlement counsel a shot. Most of them work on contingency anyway. In fact, I want you to just keep doing what you're doing, because the better prepared we are to try the case, the more leverage I'll have to get a decent settlement."

"One more thing, you and I have read the same studies that report that companies that look to resolve cases early save money, not only in costs of litigation, but they get resolutions at a lower cost. We all know how protracted litigation adds significant costs to the settlement picture, and you add to that how entrenched the parties become in their respective positions — and we end up with a case that is hard to settle and more expensive to settle."

Roger concluded, "I will make sure settlement counsel coordinates with you and doesn't jeopardize what you are doing."

Settlement counsel and trial counsel: Who does what?

Darrow and Williston discussed settlement counsel further and clarified the following points:

- Who controls litigation strategy? The client and the trial lawyer.
- Who controls the settlement strategy? The client and the settlement counsel.
- What does the trial lawyer do with questions regarding settlement? Refer those questions to the client and settlement counsel.
- What does settlement counsel do with questions regarding litigation? Refer those questions to the client and the trial lawyer.
- Who formulates and conducts settlement discussions? The settlement counsel with approval of the client and trial counsel.
- Who is in charge of the case? The client.

Darrow said, "I get it, Roger. You're right; I don't like having to try to talk settlement with the same guy who's badgering my witnesses in depositions and disparaging us in Court filings. And I really don't like compromising. I'll continue getting this case ready for trial. Not having to focus on settlement means I can focus on what I really want to do — try this case."

Settlement counsel hired while the litigation continues

Williston met with the CFO, who liked that all three settlement counsel had proposed a limited duration for their retention and a success fee for their compensation. The CFO was also anxious to see if a settlement could be reached so the buy-out could move forward, and she would not have to testify about whether the electronic document policy had been followed, especially when it came to some of the financial data that was at issue in the litigation. She agreed to add a settlement counsel to the legal team.

Williston sent the settlement counsel the pertinent pleadings, rulings and discovery from both cases. While negotiating the terms of compensation, Williston and the CFO mentioned their skepticism about adding another member to the legal team. The settlement counsel said, “A Harvard professor named Frank Sander once said something to the effect that only a lawyer could say with a straight face that you should hire two lawyers to save money, but I think you’ll see that this system works.” They agreed to a termination date and a compensation arrangement based on a successful resolution. After getting the fee agreement in place, the settlement counsel met with lead litigation counsel, and his team, to ensure that they were communicating effectively. They agreed upon a clear demarcation of their respective roles for Williston and the company.

Meanwhile, the two opposing settlement counsel reached an agreement on the terms for the voluntary exchange of highly relevant information, and that all discussions would remain confidential and inadmissible pursuant to Federal Rule of Civil Procedure 408(a). They then started working on meetings and examining the materials provided by the other side.

As with most cases, there were a handful of important documents, and each side had plausible explanations for documents that appeared to be detrimental to their legal positions. Additionally, the experts had provided skilled illumination on some of the technical issues, but none of the reports offered any surprises or contained any massive oversights. In other words, the trial lawyers had done a fine job preparing each case for trial. Neither side had a clear advantage before a jury.

However, Williston received word of an unusual development in the Florida case. The trial judge had reversed a prior ruling and would now allow the punitive damages to proceed, which meant that previously protected financial documents would have to be produced. Williston’s trial lawyer in Florida had said that even opposing counsel was surprised by this ruling, particularly since no motion for reconsideration had been filed. Williston worried that a sharp accountant could discern from certain financial documents that a buyout was in the offing. If that happened it would drive the price of settlement up or perhaps tank the buy-out deal.

While Williston, Darrow and his Florida trial counsel were discussing the potential implications of the ruling, settlement counsel was looking for dates during which another day-long meeting could be scheduled to negotiate the terms of a “deal sheet” which would contain the factors to be addressed for a settlement. The magistrate judge in Charleston then entered an unusual order on the competing motions for spoliation of evidence. The order required counsel and party representatives to meet personally and submit stipulated facts and documents prior to an evidentiary hearing. Clearly, the magistrate judge was frustrated with something that had occurred in the litigation.

While Darrow and his trial team prepared for the hearing, Williston and his settlement counsel stepped up their work with their counterparts. Multiple drafts of a settlement agreement were exchanged, but the parties could not agree on the language of a liquidated damages clause in time to prevent the evidentiary hearing.

The evidentiary hearing went forward and resulted in an order that neither side could have predicted. The magistrate judge was satisfied with the explanations the parties provided regarding the evidence but made it clear to all, particularly to Williston, that she would not be as accommodating in future hearings.

The parties then negotiated the final terms on the settlement agreement, and the litigation was concluded. Unfortunately for Williston and his stock options, the buy-out transaction never closed, but it wasn't because the pending case interfered with the deal. He would not retire early in Seaside after all.

A settlement counsel convert

Williston continued to use both trial lawyers and settlement counsel for the rest of his time at the company. He saw that his settlement counsel could generally achieve the following:

- Open lines of communication with the other side, allowing both parties to obtain information that is helpful to a more accurate analysis of the case.
- Reach an earlier, cheaper and more effective settlement than waiting for a "perfect" settlement event, dependent upon a court ruling or another external event.
- Determine sooner, rather than later, that the case cannot be settled under acceptable terms. Knowing this, Williston was more confident that a litigation team's preparation for trial was necessary.

With settlement counsel, Williston was able to do a better job of managing legal matters for the company. He also worked better with his outside trial teams. Strategic victories and favorable rulings in court would both leverage the company's bargaining position for negotiating a resolution, and strengthen the company's case for trial, if the case couldn't be resolved.

Conclusion

Anyone familiar with complex, high-stakes litigation will agree: settlement negotiations require time and focus. General counsel and trial attorneys may have the background and skills to take on settlement responsibilities, but aren't always the best choice, given their primary responsibilities. Settlement counsel helps companies determine whether there is an acceptable, perhaps desirable, alternative to the cost and risk of a litigated outcome — usually with less cost and aggravation.

Further Reading

Black's Law Dictionary, Tenth Edition, Bryan A. Garner, West Publishing Co., 2014.

Settlement Counsel: Answer to the FAQs, James E. McGuire, NYSBA Disp. Resol. Law., Fall 2010, Vol. 3, No 2, at 23-25. (Emphasis added)

What about Negotiation as a Specialty? Roger Fisher, 69 A.B.A. J. 1221 (1983).

Id. at 1224.

Harvard Bus. Rev. (March-April 1985) 150.

Id. at 155.

McGuire at 23.

The Case for Settlement Counsel, 14 Ohio St. J. on Disp. Resol. 367 (1999)

The Movement Toward Early Case Handling in Courts and Private Dispute Resolution, 24 Ohio St. J. on Disp. Resol. 83, 115-120 (2008).

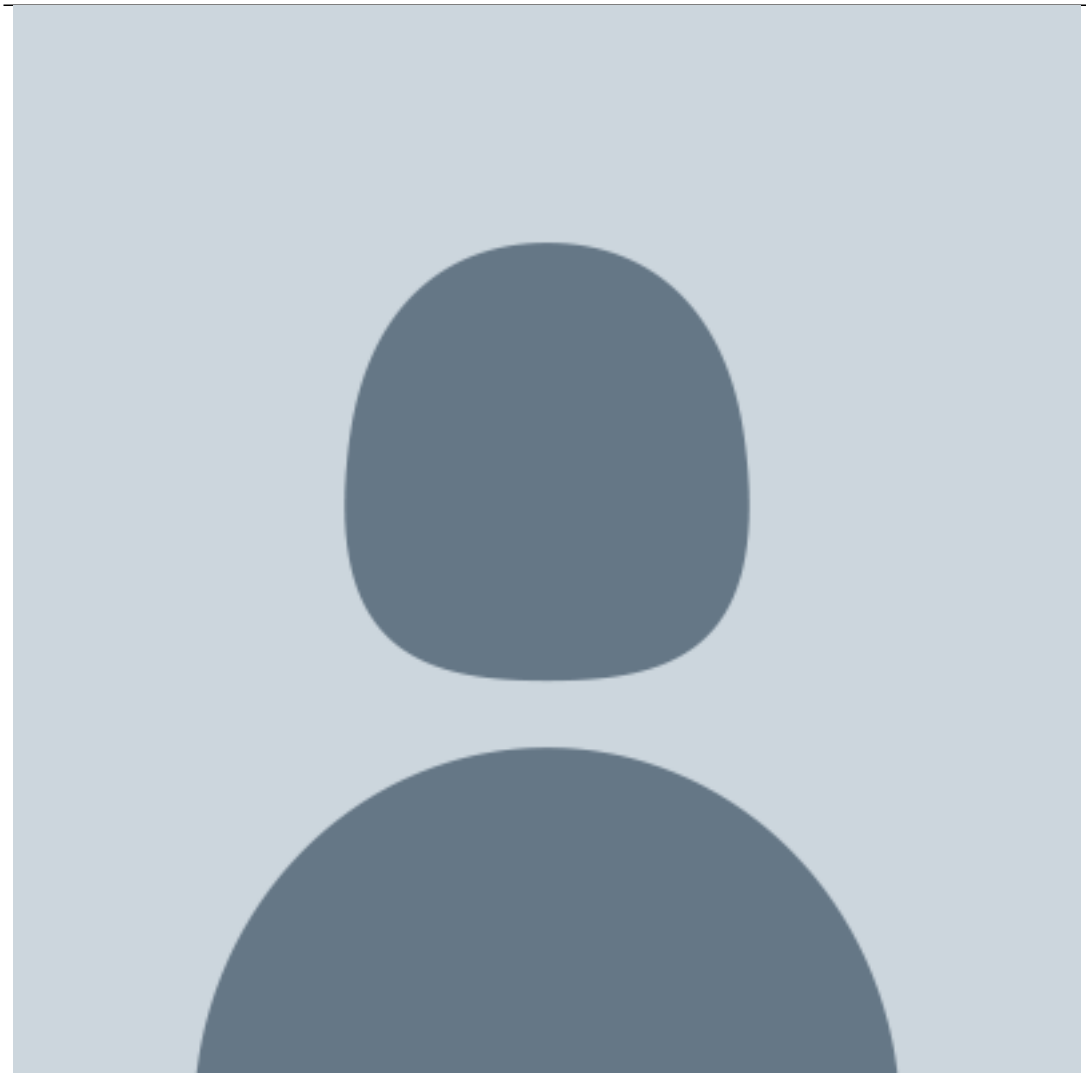
Why Should Businesses Hire Settlement Counsel? 2008 J. Disp. Resol. 195.

Id. at 198.

McGuire at 24.

Id. at 25.

Dan Churay



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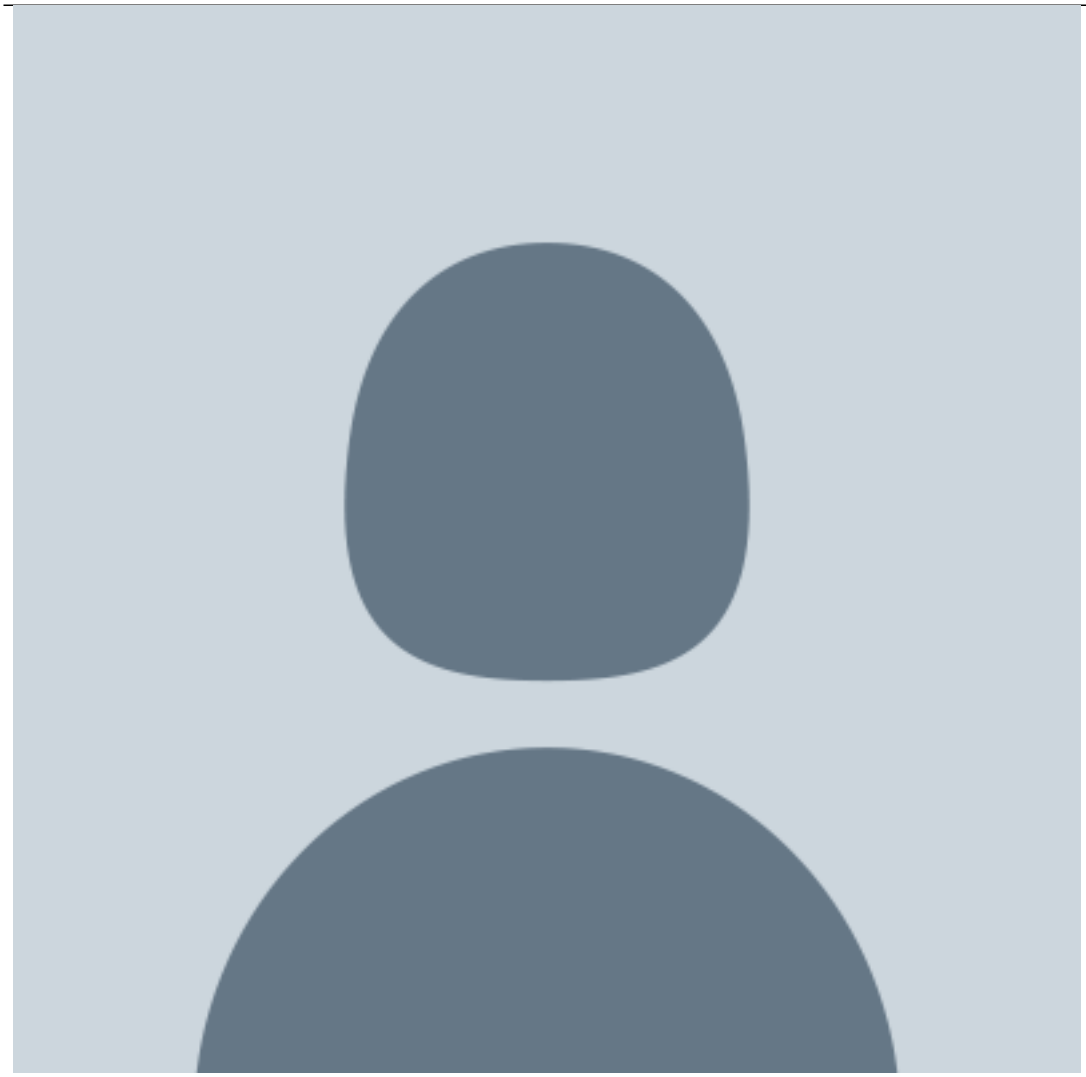

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Frank M. Bedell specializes in complex commercial matters. Prior to concentrating on settlement strategies, he spent more than 25 years litigating a variety of commercial disputes in state and federal courts.

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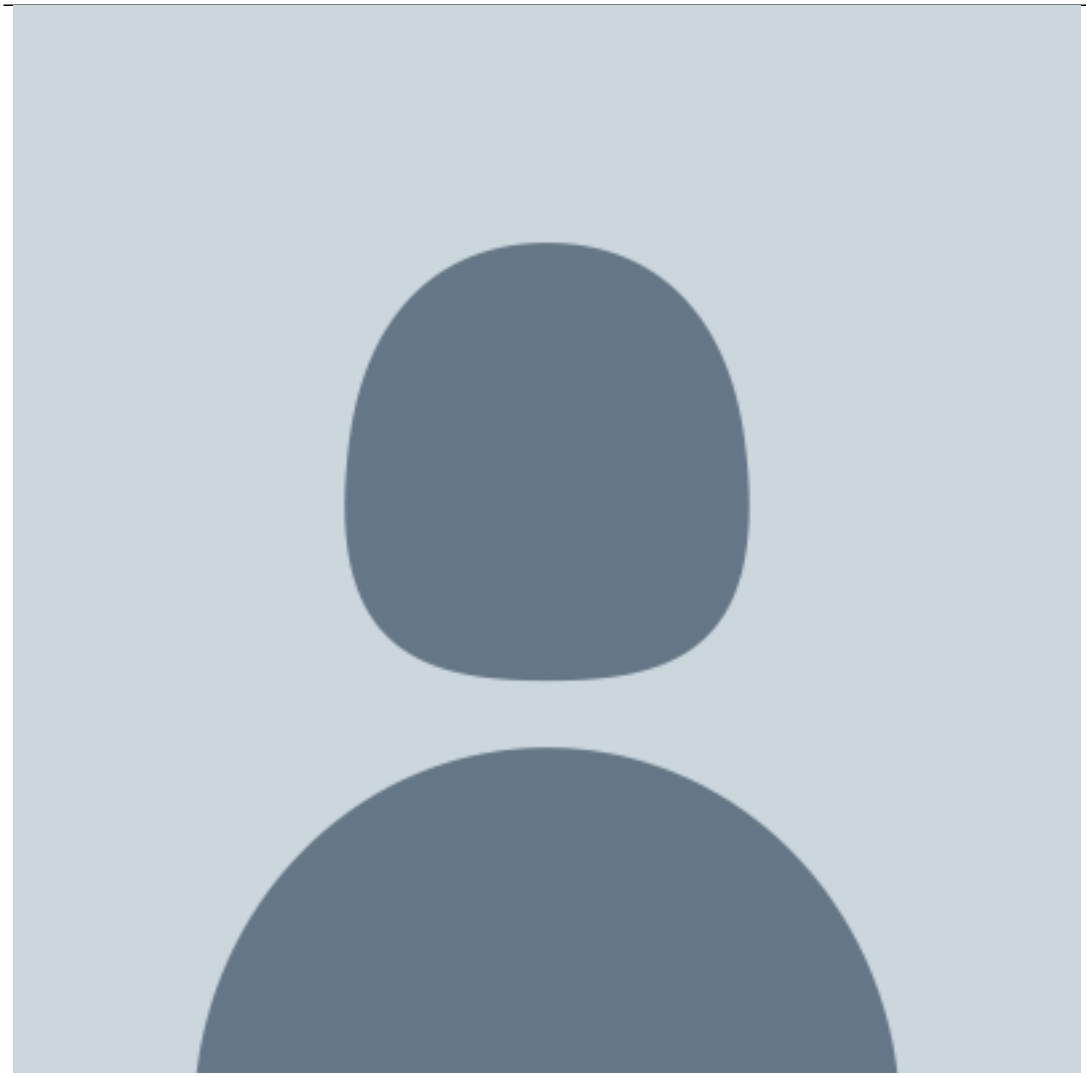

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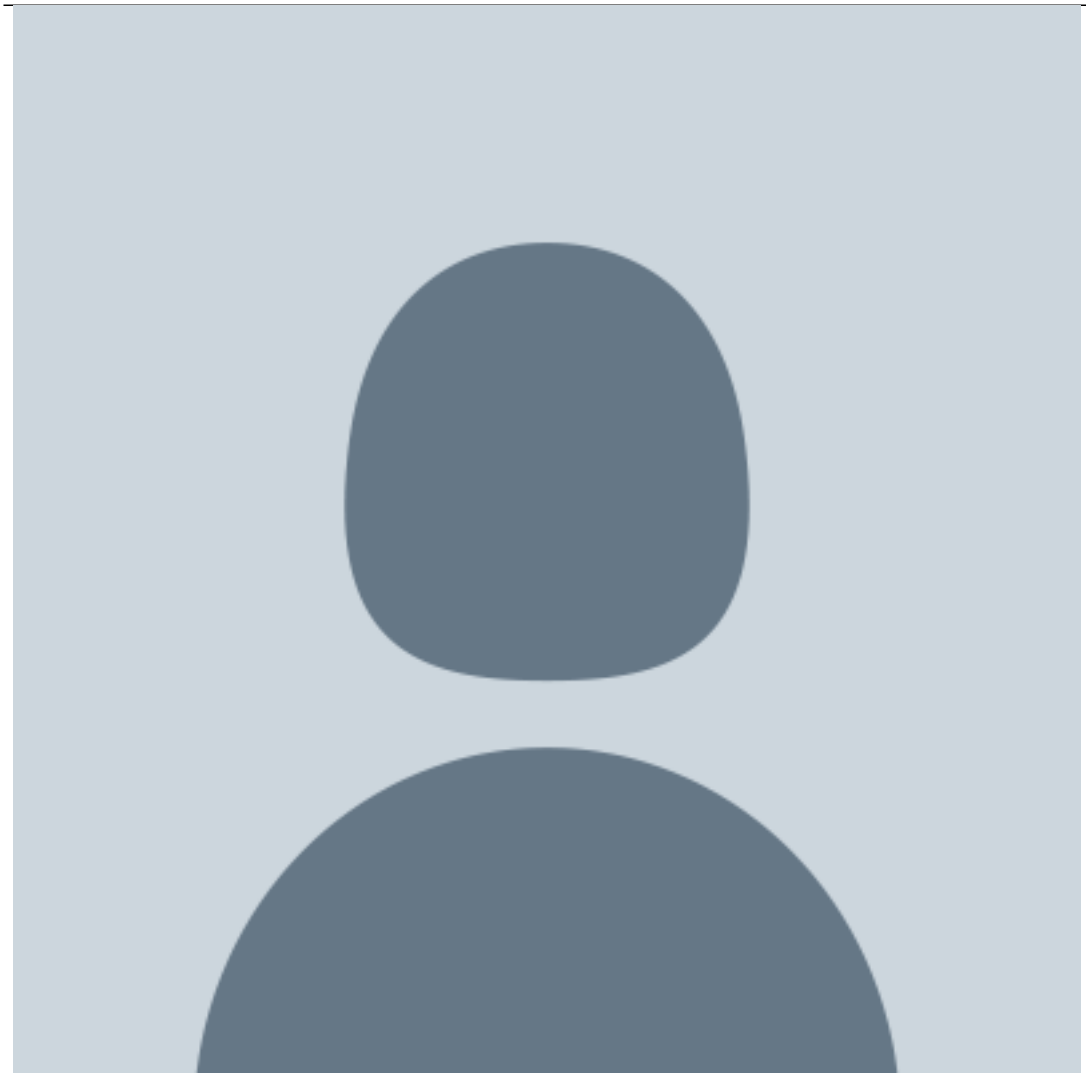

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A former in-house counsel, O’Malley continues to advise entrepreneurs and senior management in a number of private and publicly held companies. He received his JD from the University of Oregon Law School.