# The Lawyer's Obligation to Advise Clients of Dispute Settlement Options

**By Paul M. Lurie and Sharon Press**

*In this feature, Paul M. Lurie and Sharon Press raise issues of professionalism and their practical applications.*

In our experience, most commercial court cases and arbitrations settle before judgment or award.[1] But many of those settlements occur only after expensive discovery and pretrial practice, including costs associated with lawyers, experts, depositions, and motions. Delays inherent in court and arbitration procedures also subject clients to the substantial costs associated with employee and executive time spent on litigation matters. Further, public companies bear the risk of being required to report unresolved claims on regulatory filings.

In commercial litigation and arbitration, lawyers should advise clients not only about the terms of settlement but also about the comparative cost of settling or not settling at various points during the period leading to judgment or award and the various processes that may facilitate settlement. Clients may not understand when and how settlement discussions should begin and the cost implications of their choices. This is especially true when they first engage attorneys and their emotions are running high.

This obligation is consistent with the ABA Model Rules that require a lawyer to provide competent representation to assure that the client's best interests are served (Model Rule 1.1). That duty is informed in part by what reasonable lawyers would do under similar circumstances to help the client resolve the case. Model Rules 1.4 and 1.2(a) require competent lawyers to consult with their clients about resolution options so the client can make an informed decision about the terms and transactional costs of settlement.

A number of state rules of professional conduct require or strongly encourage lawyers to discuss settlement options and/or dispute resolution options with their clients.[2] In the Canadian province of Quebec, for example, pending legislation will require parties to attempt settlement processes before being allowed to litigate.[3]

The characterization of the lawyer as zealous advocate may not be consistent with standard practice. "[A] study of large-firm lawyers found that although lawyers often initially express the 'standard take' of a duty to seek every possible advantage, most acknowledge that some hyper-aggressive tactics are inappropriate even if they are legal."[4] Indeed, based on the Model Rules, we could imagine clients bringing malpractice claims against their lawyers for (1) failing to properly consult with their clients about discovery and motion practice alternatives and their cost implications; and (2) failing to properly use the mediation process to reduce the costs of settlement.

Judge Patrick J. Walsh of the US District Court in Los Angeles agrees that the zealous advocate may not be acting within evolving standards of care because:

> [T]he scorched-earth practice many lawyers employ, attempting to discover "everything" without regard to cost and aggressively litigating when production is not forthcoming, seems inconsistent with the goals of the civil rules — the just, speedy, and inexpensive resolution of the case — and what one

assumes is the client's goal: obtaining the best possible result for the least amount of money.[5]

The Planned Early Dispute Resolution Task Force of the ABA Dispute Resolution Section recently addressed the relationship between early settlement and cost in commercial disputes:

> Private Early Dispute Resolution is a major change from traditional approaches to dispute resolution for many businesses and their law firms, not merely a shift of procedures. Although some businesses and their lawyers use a comprehensive PEDR approach, probably most do not. As an alternative to litigation as usual, it reflects a significant change of mindset as well as procedure. It is based on the premise that parties generally do best when they and their lawyers jointly determine what is needed to resolve a dispute at the earliest reasonable time and in the most efficient manner.

The PEDR approach emphasizes that lawyers should play the primary role as negotiators to facilitate earlier settlement. Paul has written about the "Guided Choice" dispute resolution process in which the mediator, acting as a process facilitator, confidentially investigates the impediments to settlement and recommends the best process for settlement negotiations. Paul argues that Guided Choice mediation may add to the methods to accomplish not only settlement, but an earlier settlement that reduces the expense of legal and expert expense.[6]

Lawyers must realize that earlier and less expensive settlements are good for business and indeed will help attract the best clients. We can only hope that they will not have to learn this from malpractice claims.

## Endnotes

1 Symposium, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339 (1994). The American Arbitration Association told Paul Lurie that in 2013 63% of their construction cases settle before award.

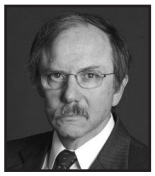
2 *See* Marshall J. Breger, *Should an Attorney be Required to Advise a Client of ADR Options?,* 13 Geo. J. Legal Ethics 427 (2000).

3 An Act to Establish the New Code of Civil Procedure, Bill 28, 40th Leg. (1st Sess. 2013) (Can. Q.).

4 John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L.J. 1315, 1384 n. 62 (2003), referencing Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations,* 67 Fordham L. Rev. 709, 712-15 (1998).

5 Patrick J. Walsh, *From the Bench: Rethinking Civil Litigation in Federal District Court*, 40 A.B.A. J. Sec. of Litig. 6 (2013).

6 *See* Paul M. Lurie, *Using the Guided Choice Process to Reduce the Cost of Resolving Construction Disputes*, 9 Construction Law International 18 (2014), *available at* http://www.schiffhardin.com/File Library/Publications (File Based)/PDF/CLInt_March_2014_Lurie.pdf.



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