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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Legal Professions' Curious Under-Use Of 2nd Opinions

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Judge Wayne D. Brazil

One fact of litigation life has become more apparent to me over the 30 years I have been a "decider": at least for cases that can survive disposition by early motion, fate is fragile. Outcomes are extremely difficult to predict. Sophisticated studies have shown that lawyers have considerable difficulty developing truly objective assessments of the cases on which they work and that litigators are especially vulnerable to an over-confidence bias. And asking one of your partners or associates for a candid assessment of your case can come perilously close to asking for a candid assessment of yourself.

These facts should drive lawyers to seek neutral, "uninvested," second opinions about how sitting judges or other neutrals might respond to contemplated claims, proposed arguments, competing evidentiary presentations or lines of reasoning, or conflicting presentations by experts. Even though law is a lot less of a "science" than medicine, in medicine the importance of getting second opinions is much more widely accepted. Both physicians and patients understand that second opinions can reduce the risk of error — as well as clients' suspicions of error. Second opinions reduce second-guessing.

When the neutral minds that will matter the most in a case belong to jurors, lawyers know they can turn to jury consultants. But what if the neutral mind that will matter the most belongs to a trial judge, or to a court of appeals panel, or to a retired judge serving in the role of an arbitrator, or a former lawyer serving as a professional mediator? To get leverage on how sitting judges might assess a case, or rule on a key motion, wouldn't it make sense to ask someone who was a sitting judge?[1] Or, to increase the odds of predicting the views of an arbitrator or mediator, wouldn't it make sense to seek a second, wholly independent opinion from an experienced arbitrator or mediator?

While some lawyers and law firms have come to appreciate the value of such second opinions, many have not. Moreover, most lawyers don't seem to appreciate the full range of circumstances in which second opinions might be truly useful. Nor do they realize that the cost and effort entailed in securing such opinions can be limited by carefully shaping or targeting the matter on which the neutral input is sought. What follows is a non-exhaustive description of circumstances in which creative lawyers have secured valuable second opinions.

Prefiling assessment of possible claims and of alternative paths forward. Whether to file a lawsuit and, if so, which claims to make, are among the most significant decisions lawyers and clients have to make. In some circumstances, a second opinion from someone who has seen thousands of lawsuits and ruled on thousands of motions to dismiss could be extremely valuable. Neutral input from a veteran law and

motion judge, for example, could effectively eliminate the risk of wasting time and money on unproductive pleading wars. Counsel also could use experienced neutrals to develop (for their clients) realistic comparisons of the relative costs and benefits of proceeding with litigation or of pursuing solutions through alternative processes. Well-considered second opinions on such matters, from respected sources, could improve client confidence in counsel's advice and reduce the risk of agitated second-guessing down the road by the people who are supposed to pay the bills.

Case valuation in preparation for a settlement conference or a mediation. Given the key role that settlement negotiations and mediations have come to play in the disposition of civil cases, it is surprising that lawyers look so infrequently outside their own firm's experience when trying to develop a sound sense of the settlement value of clients' cases.

Second opinions from respected sources about how to value a case for settlement purposes could be especially important for clients — and especially useful to lawyers whose clients suffer from over-confidence, or who don't understand the unpredictability of adjudicatory proceedings, or whose mystification or anger at their circumstances is impairing their ability to make wise settlement decisions. Sometimes clients (and lawyers) need a second opinion to feel the confidence necessary to make difficult decisions.

Assessing a proposed offer of judgment under Rule 68 or under a state law analogue like CCP sec. 998. Research shows that parties who make 998 offers are less likely to misjudge the value of cases than parties who do not make such offers. When a statute or contract calls for fee shifting in favor of a prevailing party, an offer of judgment can be a source of significant settlement leverage. Identifying the kind of offer that would seem realistic, however, is hardly an exact science. So this is another arena in which counsel might wisely seek an objective assessment of an offer of judgment they contemplate making.

A second opinion about the appropriateness of a proposed offer of judgment also could deliver special value to lawyers for defendants who are having difficulty persuading their clients that making such an offer is not tantamount to conceding liability, fault, or moral wrongdoing. A second opinion from a respected outside source could explicitly address any such misapprehensions.

Conducting mock trials — or mock hearings on important motions. A mock trial is a relatively widely recognized tool for acquiring one or more opinions in a big case that will be presented to a jury. Less frequently, lawyers consider using these proceedings in matters to be presented to judges (trial or appellate) or administrative agencies. To cite a few examples, a second opinion based on a mock proceeding could be very useful in advance of a motion to dismiss, for summary judgment, class certification or even on especially significant motions in limine. On a more recently developing front, IP lawyers might find neutral second opinions especially useful when preparing to appear before a panel of administrative law judges in an inter-parties dispute in a Patent Trial and Appeal Board proceeding.

Counsel who use mock proceedings to secure objective second opinions sometimes fail to mine them for their full value. Counsel should consider:

- Seeking assessments of or reactions to the pertinent written materials (e.g., briefs, documentary evidence, demonstrative exhibits) before oral arguments.

- When two or three neutrals are asked to critique mock presentations, not permitting them to form their initial assessments dialectically, as a group (in caucus or in open sessions), but requiring each mock judge to form and articulate her opinions privately (in writing and/or orally) before learning what the other mock judges think (and only then determining whether a consensus view emerges).

- Preparing, in advance of the exercise, focused written questions for submission separately to each mock judge at key intervals in the proceedings.

- Asking for independent opinions about discreet issues, or important pieces of evidence, or critical sections of a line of reasoning, instead of merely seeking 'verdicts' on entire proceedings or on long, complex, multifaceted components of a matter.

Preparing for appellate proceedings — and to respond to tough questions from appellate judges. Lawyers grappling with challenging appeals also can benefit substantially from second opinions, e.g., about the content and style of their briefs, about the manner in which they make oral arguments, and, most significantly, about the strengths and weaknesses of their substantive positions. Retired appellate judges can alert counsel to key issues and vulnerabilities and can give lawyers opportunities to practice fielding difficult questions or dealing with difficult judicial personalities — thus both improving their performance and reducing the anxiety they experience when the real show begins.

What About the Expense of All This?

While securing a second opinion from retired judge or an experienced arbitrator or mediator can be expensive, it need not be. Counsel can control the scope of the assignments they ask outsiders to undertake. In some circumstances, counsel might need an objective assessment of only one slender piece of a matter. I know a neutral, for example, who was retained on very circumscribed terms: for a very modest preset fee, counsel asked him to develop a neutral opinion (based on written materials) about one discreet, but important issue.

While the range of subjects or matters on which second opinions might be sought is huge, cost-conscious counsel can contain expenses by surgically targeting second opinions on pivotal issues or events.

In Sum

As conscientious professionals who are required to address problems with notoriously elusive dimensions, lawyers should consider securing second opinions in a much wider array of circumstances than has been the norm — not only in order to reduce the risk of error, but also to help them help their clients feel that litigation-related decisions are well-grounded. Lawyers can do their jobs better when they have benefitted from second opinions. Clients are less likely to be unhappy with the services they have received, and the outcomes of their cases (whether through litigation or settlement), when they have greater confidence in the analyses and recommendations their lawyers have provided. Second opinions from respected sources can go a long way toward increasing that confidence.

—By Judge Wayne D. Brazil, JAMS

Judge Wayne Brazil is fully engaged as a neutral at JAMS, after earning a national and international

reputation as one of the most significant innovators and leaders in the field of Alternative Dispute Resolution. Prior to joining JAMS, he spent 25 years as a magistrate judge in the United States District Court for the Northern District of California.

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[1] The Honorable Allan van Gestel (Ret.), former presiding Justice of the Business Litigation Session of the Massachusetts Superior Court, wrote an essay about securing second opinions that includes, among many other things, guidance about steps counsel should take to protect the confidentiality of the input they receive from a neutral. It also includes an exemplar of a Retention Agreement that includes clauses intended to maximize the protection of communications to and from a neutral.