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BEFORE THE POINT OF NO RETURN: EARLY CASE EVALUATION

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There are many benefits to evaluating the merits of a case before litigation proceeds past the point where the costs start to add up.

Engaging in early case evaluation also allows for a change in trial strategy and direction when more options are available to counsel and their client. While counsel may opt to evaluate their own case, with the input of colleagues and others, there is significant merit in engaging a neutral third party to conduct the evaluation.

A neutral evaluator, often a former trial judge, can offer objective testing and evaluation of a case before counsel and their client invest substantial time and money. The process aids in minimizing risk and maximizing benefits for stakeholders.



To be most effective, early neutral evaluation should take place before meaningful discovery begins or closes, particularly significant depositions. Case evaluation after discovery is closed and on the brink of trial, severely minimizes evaluation benefits.

Completed discovery often molds case analysis. Earlier evaluation provides options for consideration leading to alternative trial strategies and increasing opportunities for success.

Counsel and their clients should consider presenting

both sides of the case to the neutral evaluator. Shortchanging the opposition's point of view lessens significantly the value of going through this process, the aim of which is to provide a realistic assessment of the case. Taking the time to present both sides as thoroughly and accurately as possible will pay dividends. It brings more value to the evaluation by either confirming the road being traveled or suggesting a different route.

The number and quality of the witnesses as well as their mode of presentation for both sides should be as similar as possible. For example, don't show a video deposition of a witness and later have the evaluator receive the opposing witness' testimony by written deposition rather than available video deposition.

Time Frame

Actual documentary evidence should be presented in its trial form. It should not be in executive summary or selected paragraph form. Both judges and juries regularly receive the entire document for their use. Evaluators require the same level of information. Additionally, evaluators seeing the entire document may pose

questions and raise issues not recognized beforehand that can now be addressed ahead of the trial.

The neutral evaluator may provide his or her assessment in written or oral form, or both. There certainly is value in immediate oral evaluation, as it allows counsel and their clients to ask questions or seek clarification. The back and forth is usually very constructive.

Additionally, the evaluation can be contemporaneously challenged. This is a worthwhile pushback exercise to test the basis and content of the evaluation. Additionally, issues concerning body language, trial techniques and persuasion style can be discussed more directly and effectively.

Written evaluations often are a valuable tool for attorneys as a positive way to further educate the client. The client's original case assessment may need resetting to ease into a different trial strategy. What better way than an experienced, third-party suggesting a less than favorable result or demonstrating there is more difficulty in proving a crucial point.

The length of time for a case evaluation varies. The amount in controversy, the

number of trial witnesses and exhibits, the benefits or risks at issue, the experience of the trial attorney, value of the client's continuing business and referrals are several of the considerations impacting how long the evaluation lasts.

In addition to the time element, one must consider the amount of available resources. Be certain this is not a last-minute, carefree exercise devoid of careful planning and preparation. Do it right the first time. Failure to do so borders on the tech slogan of "garbage in-garbage out."

Resolving disputes began with forms of self-help, progressed to civil courts and advanced with alternative dispute resolution. One of the best kept secrets of optimizing preparation for resolving disputes—unfortunately underutilized and yet most beneficial—is early neutral evaluation.

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