

COMMENTARY

Neutral analysis: Evaluate your case through the right lens

By Hon. Mary Beth Kelly (Ret.)

Neutral analysis has become increasingly prevalent as corporate counsel attempt to manage litigation, settling the right cases at the right time for sums that make sense given the exposure level. The concept of neutral analysis, namely evaluation of litigation by a former judge pointing out the strengths and weaknesses, includes a myriad of forms, such as presentation by counsel, review of written submissions, mock presentations, review of expert reports or another evaluation suited to the particular dispute and its litigation stage.

Neutral analysis actually has legal underpinnings. Consider the would-be medical malpractice plaintiff. In most states, a plaintiff cannot even file a malpractice action unless a medical doctor has attested that the proposed action has been reviewed and has merit. Likewise, at most litigation stages, relevant expert testimony is necessary to sustain certain legal claims, which typically results in lawyers engaging a cadre of experts to support their claims.

These experts typically provide financial and medical evaluations, build damage models or make jury assessments. Review of this accumulated expert data by a former judge as a neutral analysis, for example, can be extremely helpful in providing a judicial perspective of how strong a case is at a particular point in the litigation process.

More helpful, however, may be a neutral analysis which can synthesize all gathered data from the company, analyze the legal claims and provide neutral feedback from the perspective of a former judge of a given case at an even earlier point in the litigation process. Like



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the would-be malpractice plaintiff, an in-house counsel considering whether a dispute warrants legal action finds meaningful assistance with a neutral evaluation.

Neutral evaluation can assist in the decision whether a dispute even warrants the filing of a complaint or whether it is better resolved informally or through ADR processes like mediation or arbitration. Neutral evaluation after discovery can evaluate the prospects of a summary relief or assist in evaluating the settlement range of a case.

Neutral evaluations in the form of mock trials and mock appellate arguments are particularly helpful for those cases which appear actually ready for trial or appellate argument. Again, the involvement of former judges in these exercises provides that unique judicial perspective and helpful insight. Much emphasis on “jury reaction” has driven mock trial exercises, yet many lawyers do not anticipate

enough of the difficult evidentiary, in limine issues and other aspects of a trial controlled by the judge. Neutral analysis in the form of a mock trial without a former judge involved may lose this significant benefit to counsel. Likewise, most appellate counsel now “mock” their arguments before the actual appellate argument, but typically it is to other lawyers in their firm and their clients — people all very close to the case. The true benefit of mock appellate neutral analysis is the quality of the replication of the actual argument, which a former appellate judge can provide. Appellate counsel benefits from this “dry run” much like an actor benefits from dress rehearsal, replicating as closely as possible the actual appellate argument. Neutral analysis allows corporate counsel to see their case as the court may see it. Surely, all judges are different, but good judges have been well trained through the years to fairly apply the law to the cases before them. A neutral analysis allows corporate counsel that snapshot of any case at every stage in the litigation process, a powerful tool in any corporate counsel’s arsenal, to be sure.

Mary Beth Kelly, Retired Justice, Michigan Supreme Court joined JAMS after serving on the Michigan Supreme Court for four years. During her tenure with the Supreme Court, Justice Kelly authored many significant decisions and served as an administrative liaison on family, veterans’ and child welfare matters for the court. She can be reached at mkelly@jamsadr.com.