

Neutral Analysis: A Powerful and Effective Tool

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In a wide range of disputes, counsel and their clients have increasingly turned to neutral analysis and evaluation. When conducted by experienced neutral professionals with no preconceived view of the issues, neutral analysis is a powerful and effective tool in helping parties better understand, and even settle their dispute. Often called a second set of eyes or a clear-eyed assessment, neutral analysis is much more than a case evaluation with a predicted outcome or settlement suggestion.

Traditional case evaluation, which is required by many courts, provides the parties with an evaluation outcome and potential sanctions for rejection. While some case insights are provided in the natural course of this approach, modern neutral analysis is much broader. And, there are many creative ways neutral analysis can be designed and conducted ranging from a narrower specific approach to a much wider use.

Where the neutral is a former judge, neutral analysis offers a view from the other side of the bench with deep, detailed insights on the case issues, presentation and likely outcomes. A former judge or justice brings these unique years of experiences to neutral analysis. A non-judicial neutral with extensive trial experience or substantive subject-matter expertise can bring other experience to the analysis as well as a view from counsel's perspective having represented clients in disputes. Let us examine this in a bit more detail.

Neutral analysis can be used to review, assess, critique and predict impact of:

- Key Essentials of the Dispute
- Themes and Strategy
- Case Organization
- Legal Issues and Case Dispositive Possibilities
- Key Facts
- Witnesses, Credibility and Best Design for Examination
- Evidence and Evidentiary Issues
- Approaches to Remedies and Damages
- Jury Selection
- Likely Judge, Panel or Jury Reactions, Understanding and Outcomes
- Preservation of Appellate Issues and Likely Appellate Judge or Justice Views
- Counsel Dynamics

In many cases, the neutral(s) will have knowledge of the particular court, judge or justice and can provide valuable, particularized insight.

Neutral analysis allows counsel and the client to plan and customize an effective approach. The presentation can be based solely on written materials or in-person presentations, or a combination. The subject matter may be part of the case or the entire case. For example, a party may wish to test particular legal arguments that could be dispositive of the entire case. Neutral analysis will offer an unbiased view of the arguments and assist the party in the design of the most effective manner of presentation.

Other options include key evidence, admissibility issues, predicted impact, objections and the most effective way to present the evidence. Demonstrative evidence can be analyzed and refined to be more easily understood or more convincing. Opening statements and closing arguments can be analyzed, critiqued and refined. While some of these objectives can be accomplished through mock audiences, including colleagues or mock juries, neutral analysis brings the crucial experience and insight of the neutral.

In the appellate arena, neutral analysis can assist a party in the decision on whether to appeal, what issues to raise, how to structure the appeal, likely outcomes and the potential for favorable or unfavorable precedent.

A broader use of neutral analysis is to conduct a mock trial on a summary or full basis. This allows the complete use of the experience of the neutrals whether they be former judges, justices or experienced trial or specialized counsel.

Importantly, neutral analysis can be used at any point in a dispute. Obviously, more evidence is available after a case is filed and discovery occurs. However, pre-filing neutral analysis is becoming more common, saving considerable time and cost. It can be done by a single party or side to the dispute, before litigation has commenced, to provide an analysis of the strengths and weaknesses of potential claims or defenses.

Joint neutral analysis can be conducted by all parties to a dispute before a case is filed with the parties agreeing to limited discovery. Here, in a joint open session planned in advance with the neutrals, the parties present their best case. Argument, evidence, demonstrations, deposition testimony, visual aids, and more can be provided to the neutrals who then meet with the parties separately and ultimately provide an evaluation opinion or remedy. Sufficient time is scheduled so that the process is in depth and provides deep insights. The evaluation result is often then successfully used as a basis for a negotiated settlement in the dispute, sometimes with the neutral evaluators helping, and the parties mediating around the evaluation. This form of neutral analysis, a hybrid of mediation and neutral analysis, leads to an extremely well-informed basis upon which to resolve a matter.

Counsel and parties to a dispute should consider neutral analysis as a powerful and effective tool in analyzing, evaluating and even helping to resolve their case.

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