

How Lawyers Benefit From Early Neutral Evaluation



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Law360, New York (April 03, 2013, 10:36 AM ET) -- Lawyers facing litigation have a number of alternative dispute resolution options. They can pursue mediation or arbitration. But if they are considering summary judgment or a bench trial, there is another available tool: early neutral evaluation.

Early neutral evaluation usually asks a retired judge to consider one party's case, as if preparing to rule on summary judgment or presiding over a bench trial. Instead of deciding the case, the judge evaluates the case and its presentation. Independent neutral evaluation essentially applies a mock trial approach to bench proceedings.

Evaluations typically fall into two types. The first is full motion or trial preparation and presentation. The second is a more direct analysis of a case, often for settlement purposes.

In the full motion or trial case, the party seeking evaluation typically retains either one or three judges. The party's law firm then "splits" itself into two teams. One advocates for and briefs the firm's client's position; the other team does the same for the opposing side.

These briefs are submitted to the evaluators a week to 10 days prior to the mock proceeding. Briefs may be accompanied by exhibits or witness statements, if appropriate. In some patent cases, tutorials have been presented. The evaluators read and review the pre-proceeding materials just as if preparing to hear the case.

On the appointed day, the evaluators and lawyers for both sides convene. The motion or trial is then argued and presented. After argument, the evaluators retire, to deliver either a ruling or their opinions. They, then, thoroughly discuss the briefs, the arguments, and the parties' particular positions.

Some analyses are highly structured. Under some formats, evaluators may reply to prepared questions prior to a particular argument, and give further structured feedback after the position is argued, or rebutted.

Finally, the evaluators critique the presentation and the ways the arguments have been framed or offered. The lawyers and evaluators can discuss ways to present a particular point or position.

Evaluations are sometimes observed, either directly or through one-way mirrors, by other attorneys, or by clients and client representatives. When clients are present, they may participate in the post-hearing discussions. These discussions can be very revealing. The clients themselves may press points or issues they believe should have been raised, or issues the evaluators should have taken up. The best, most helpful, discussions are give-and-take and very frank and direct.

The second form of neutral evaluation is less structured. The evaluated party submits materials or evidence to the evaluator. The evaluator analyzes the party's position. The evaluator then offers insights into how that party's position has been received in other proceedings, or might comment on how a claim for punitive or injunctive relief could be viewed by a judge. This second kind of presentation is not as labor- or cost-intensive as the first. But it, too, gives insight to a party seeking the evaluation.

In both formats, the neutral evaluators are not trying to predict what the case's actual judge will do. Rather, the evaluators are there to discuss whether there might be a better way to frame the argument or brief, so counsel's points might be better understood. Similarly, the evaluators can provide insight into ways an argument to a judge sitting alone might differ from an argument to a lay jury. The goal in all cases is to give a clear view of how a judge sees the party's position and its presentation.

Neutral evaluators are not advocates for one side or the other. The goal is to maintain objectivity in order to assist counsel in presenting the client's case. Strategic decisions are not evaluated — that's for the lawyers. The evaluator critiques the lawyers' tactics in advancing their client's strategic goals.

Neutral evaluation can be performed within reasonable budgetary constraints. Lawyers are well aware that "mocking" civil trials yields real value and can materially improve their case. Similarly, lawyers using neutral evaluation report they receive new insights into the ways judges might consider their positions, and ways to improve their presentations. Lawyers also frequently discover that factual or legal points they believe are crystal clear, may not be as well defined to an outside observer.

Neutral evaluation allows lawyers to benefit from the reality that judging and case adjudication is specialized work. Working judges often hear three or more motions, 30 to 40 weeks a year. Independent neutral evaluation lets lawyers draw on that experience and learned expertise. At the same time, the evaluator is free to express doubts or criticisms about one or another position, free from the lawyer's common concern that the client might think the lawyer is less than zealous — or not fully supportive — of the client's case.

In the end, an independent neutral evaluation can supply a reality check on a case. Effective evaluation gives the lawyer the gift of seeing the case as others see it.

--By Hon. James M. Rosenbaum (Ret.)

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