

## Neutral Analysis From a Judicial Perspective

*By Hon. Gregory M. Sleet (Ret.)*

Counsel are increasingly turning to litigation analytics generated from vast data sets and cutting-edge technology, such as artificial intelligence (AI), to help advise clients about possible litigation outcomes. These analytics can include such information as how a judge has ruled on a particular type of motion and the average amount of time taken to make such a ruling. That information, together with the predictions derived from it, is clearly valuable and may be sufficient in some cases. But in complicated, high-risk cases, litigation analytics should serve only as a starting point. One problem is that the technology cannot measure the specific facts of a client's case against the parties' (actual or likely) legal arguments, and certainly not with the understanding and gravitas of an experienced

jurist, who, among other things, may have specific insights based on having worked with the judges of the court in which the case is pending (or is likely to be filed). The power and utility of neutral analysis—as with jury consultation or mock trials—is that it moves beyond trends and abstraction, and offers counsel and clients the ability to communicate with a decision-maker (or decision-makers) and receive case-specific, qualitative feedback. This feedback not only helps sharpen legal arguments, but it is also likely to resonate with clients far more than counsel's regurgitation of litigation analytics.

### **What types of cases lend themselves to neutral analysis?**

When I was on the U.S. District Court in Delaware, I presided over complex civil cases covering a broad range of subject matter,



such as patent, antitrust, securities, Employment Retirement Income Security Act (ERISA) and employment discrimination. In my opinion, all of these could have benefited from neutral analysis.

Indeed, I think that most complex business litigation would benefit from neutral analysis, and I would suggest at least considering making regular use of this tool in the litigators' box in appropriate

circumstances. There are obviously many factors that counsel and parties must consider, but the decision of whether or not to engage the services of a neutral or neutrals probably comes down to what is at stake. In some actions, an asset such as a patent on a widely prescribed drug may be on the line, a product whose loss of the right to exclude others from its manufacture—at least for a time—could result in the elimination of hundreds of jobs or even put the company out of business. The cost of neutral analysis, when measured against what your case is worth or what you stand to lose, will likely be nominal. If so, it can thus serve as a useful, cost-effective barometer of the risks of your case as it moves forward.

**In what phase of litigation would neutral analysis be most useful?**

I think it could be useful at all phases, but it should certainly be considered post discovery. At that point, and likely before, you engage the process of preparing issue- or case-dispositive motions. That is a good time to think about getting a neutral or neutrals involved. You might want to engage a retired judge or judges or combination of judges and experienced former

trial lawyers who are familiar with the types of issues in your case as well as the forum where you are litigating. For example, what is the track record of your judge on motions for summary judgment involving infringement of a patent? Litigation analytics will give you valuable information on questions like this, but it will not likely help you with the intangibles, the human element, in quite the same way as a neutral debrief.

Another example is when you're considering case strategy. What is the wisest way to spend your client's money? Would it be a futile act to move forward to trial? Should I have a neutral look at the draft briefs to get another perspective on the merits of my arguments? These are some of the questions you may be asking yourself, and enlisting a more objective view may help you answer them. I think it's only natural to believe in the merits of your position. The input of a neutral can, however, help reduce a tendency toward myopia.

In a patent case, for example, you might want to test your Markman arguments in a mock setting before the actual hearing, or before the oral argument on a motion for summary judgment in an antitrust case. Another phase

during which neutral analysis may be useful is the briefing and preparation of pre-trial motions on significant evidentiary issues—which evidence do I want to attack in limine, how should I frame my argument, and so on. Opening statements and closing arguments might look one way when you are trying them out in the shower or with your team, and entirely different after a mock argument to a neutral panel. If the economics of the case warrant it and the case is to be tried by a jury, you may derive great benefit from a mock trial presided over by a retired trial judge. Of course, this applies in the bench context as well. The appeals phase of the litigation process will also present considerations as to whether neutral analysis might help in formulating and delivering your arguments to the court of appeals.

**What is your opinion of an oral versus a written analysis given after the neutral evaluation presentation?**

I prefer an oral analysis. I recently participated in a neutral exercise that required almost a full day of presentation where both trial and in-house counsel as well as the overseas clients were present. In a situation like that, it

makes more sense to do an oral evaluation while all the relevant players are present. This particular exercise involved a three-member panel. Counsel wisely left two hours at the end of the day for debriefing. This allowed the panel, trial and in-house counsel, as well as the client, to engage in a thorough and free-flowing exchange. The lawyers were well prepared with good questions, as were the clients. They elicited opinions from each of us regarding various components of their presentations. The benefit of this approach was that the panel members got to play off one another rather than providing opinions drafted in isolation. You really lose the benefit of tells like body language and voice inflection, which do not come through in a written analysis, as well as the opportunity for spontaneous exchanges. Do not forget that trials are human dramas. I would suggest not to risk the loss of the human element by requesting a written analysis.

### **What are some other benefits of neutral analysis?**

Given the globalization of the world's economy, you will frequently be representing international clients. They might not

be familiar with the U.S. justice system. By having them observe and participate in a mock session, particularly with retired judges, you can give your clients valuable insight into the workings of our justice system. Although it's only a mock exercise, your clients will have the opportunity to see the reactions and hear the feedback of experienced jurists and lawyers before they encounter the real thing—a trial.

### **How does your expertise on the bench help you to be a good neutral evaluator?**

I think one thing is subject matter expertise. Most important, however, is the experience that comes from 20 years of handling complex matters: the fairly thick skin and capacity to sift the wheat from the chaff that develops only after some period of seasoning. One day, when I was a new judge, I ran into a colleague in the parking garage. I asked him how he learned to deal with the complexities of the job. He looked at me and smiled. My colleague told me that it would take maybe three years just to learn how to wear the robe, and at least six to figure out what the hell you are doing. He wasn't far off with his assessment.

### **What are your thoughts about blind evaluations, where the neutral evaluator does not know who the client is?**

I may be missing something, but I really don't see the benefit of placing that kind of limitation on your neutrals. I guess it's done, and I imagine they figure out how to check for conflicts, but if you've engaged experienced neutrals, I don't think hiding the identity of the client adds a thing.

### **Do you have any advice for somebody considering neutral analysis?**

I would recommend you involve your corporate counsel early on when you begin to think about whether to have a neutral analysis; after all, they control the budget. I recommend you invite their active participation in the exercise. They definitely should participate in the Q&A session at the end. I saw one where the in-house attorneys and the clients gave very valuable input to their lawyers during the debrief.

