

Reproduced with permission from Corporate Accountability Report, 13 CARE 05, 01/30/2015. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

LITIGATION

The Alternative Dispute Resolution Case Evaluator's Role in Contemplated and Pending Litigation



BY THE HON. ALLAN VAN GESTEL

As the use of alternative dispute resolution has increased over the past several decades, so have the options available to parties. One of the more frequently used processes now available is an evaluation of potential or pending cases by a neutral individual experienced with adjudicating similar disputes. This article explores the many benefits of early neutral evaluation.

What Lies Ahead

Disputes between entities and parties in business transactions are well suited for the kind of early analysis, or second opinion, that a neutral evaluator can provide. Businesses have as their primary function earning

The Hon. Allan van Gestel (Ret.) is a full-time mediator and arbitrator with JAMS in Boston. He has more than 53 years of experience as a lawyer and judge handling complex civil litigation matters and is an expert at resolving business and commercial disputes. He served as the founding and presiding Justice of the innovative Business Litigation Session of the Massachusetts Superior Court. He may be reached at (617) 228-0200.

a profit for their shareholders and owners. Much more than in other disputes, it is the bottom line on the financial sheet that counts most, not the personal emotion, the righteousness of the cause or the actual pain involved. The hallmark of a well-run business when it comes to litigation is the careful assessment of the possible outcome before proceeding with a lawsuit.

Modern litigation with its extensive and intrusive pre-trial discovery, particularly eDiscovery, is both expensive and fraught with uncertainties. Before a business starts down the litigation highway, it should consider all aspects of what lies ahead. This includes the likelihood of success on the merits of the case, the amount of monetary and/or injunctive relief that may be expected, how long the process will last, what the legal and other fees may involve, how much interruption to the day-to-day operations can be expected, the strength of the other side's potential for a successful counterclaim, and what other non-litigation issues may be involved such as public or private financing or future business opportunities with the target entity.

It is when making the business judgments on these issues that a properly qualified neutral evaluator can provide significant assistance. There is also the potential for significant savings in both time and cost.

The Process

From a potential plaintiff's point of view, the assessment of the contemplated lawsuit can occur before the complaint is even filed. But for the timing, a defendant can similarly obtain an early private assessment of the case brought against it and any counterclaims or responses that may be available to it. Such evaluations also can be of assistance at other stages of the litigation process, such as in anticipation of mediation or arbitration. Neither the potential plaintiff nor the actual defendant has any obligation to advise the other side that it is seeking the evaluation or what the results of that process are.

One important word of caution. Counsel should consider whether the assignment should be established by

a written agreement that will protect the process, the conversations in the process and the results of the process from discovery by the other side. To ensure this, it would be prudent to have a retention agreement entered into between the outside trial counsel for the company and the independent neutral evaluator such that it is *the lawyer* who is engaging the neutral to consult with and advise his or her client in evaluating a claim or potential claim in which the client is, or is about to become, involved. The engagement agreement should spell out the confidentiality of the arrangement and the fact that what is being sought will be included as part of the attorney's work product. This provides protection against the forced disclosure in discovery of the mental impressions, conclusions, opinions or legal theories of both the attorney and the neutral evaluator engaged by the attorney concerning the litigation. Such an agreement can make clear that the work of the neutral evaluator has been accomplished, prepared and presented to counsel and the client in relation to litigation, pending or prospective. Also, for the same reason, it is advisable to have counsel present whenever there is substantive communication with the client and to have counsel transmit instructions and information to the neutral evaluator.

Once the neutral evaluator is engaged, he or she will then be provided with materials and information that is useful and necessary to the evaluation. This often includes key documents in the transaction, such as any contract or amendment; significant communications and reports relating to the matter at hand; information about who did what and what problems arose during the process; position papers on charges of breaches of contract or tortious acts; legal memoranda; and sometimes even a draft complaint. In addition, it is often useful for the neutral evaluator to have an opportunity to

speaking with key individuals involved at the company, as well as counsel.

When the assessment is completed, there will be a meeting with counsel and key company decisionmakers, at which the neutral evaluator presents his or her conclusions, and fields and discusses questions and issues that come up. Further, in some instances, the neutral—with counsel—may be asked to appear before the board of directors or other management team to further explain the evaluation and respond to additional questions.

The whole process can vary depending on the complexity of the issues at hand and the amount of information to be digested. Except in particularly complex matters, however, this is a process that may take only two to three weeks and amount to a cost for the evaluator's work of approximately 10 to 20 hours.

Such an effort is money well spent when compared with the economic burden of imprudently rushing to court with a case that may be weak or fighting on with a defense that has no legs. It also provides a degree of protection for the entity's officers' and directors' business judgment to proceed in the event of later criticism by shareholders in a derivative lawsuit.

Conclusion

Engaging a third-party neutral evaluator, specifically an individual with significant experience adjudicating similar cases, offers many benefits to both defendants and plaintiffs. It provides an unbiased view of the strengths and weaknesses of a particular case, and an assessment of the possibility of success.

In litigation, information is power, and early neutral evaluation provides exactly the information that parties need before embarking on a costly and time-consuming effort.