NEUTRAL ANALYSIS AND SECOND OPINIONS

By Kimberly Taylor, Esq.

Corporate counsel—under seemingly never-ending pressure to contain costs—have a wide array of dispute resolution tools available to them, including negotiation, mediation, arbitration and litigation. There are other devices, however, that merit consideration at any stage of a dispute.

In many places ADR has lost its novelty now that mediation and arbitration are firmly entrenched in the legal lexicon. In some jurisdictions, virtually every civil matter is mediated at some point on the way to the courthouse, or the arbitration venue. The value of mediation is well known. It is effective, resulting in settlements in most cases. It is confidential, delivers time and cost savings, helps to preserve relationships and gives users much-needed control and predictability in the face of the unpredictability of litigation outcomes. Arbitration also offers control, flexibility and confidentiality.

What about those cases where the stakes are so high and positions so entrenched that business leaders are unwilling or unable to negotiate a settlement? Is there a place for other alternative forms of dispute resolution? Astute counsel are increasingly turning to a variety of neutral analyses exercises to aid in the evaluation and ultimate resolution of their legal matters.

Neutral evaluation or analysis is, simply put, a non-binding process used when multiple parties or a single party to a dispute seeks the advice of an experienced third-party neutral concerning the strengths and weaknesses of their cases. The neutral may meet with all or one of the participating parties and receive documents as agreed, review factual and legal positions, evaluate what a likely outcome might be, and provide his or her view—usually in written form—of the likely result. In some cases where the neutral is acting on behalf of all parties, the neutral may also attempt to facilitate a settlement through mediation.

Another form of neutral analysis is mock trial. This is involves the presentation of one or more components of a trial including evidence (documents, witnesses, demonstrative), opening and closing statements and closing arguments in a simulated trial before a mock jury or judge. The judge and/or mock jury provides input regarding the impact of the evidence and arguments, and the strengths and weaknesses of the case. A similar process can be used for mock arbitrations, and neutrals may also be called upon to provide neutral assessments or analysis involving summary judgment and other motions or hearings. These processes can and do yield valuable opinions that help shape the presentation of evidence and arguments at the actual trial or arbitration.

As with mediation and arbitration, the neutral and counsel must be mindful of ethical obligations, such as ensuring that the neutral serves as an advisor, not a representative of the parties or an advocate or expert witness. The parties should also be aware that a neutral appointed to serve as a neutral evaluator or preside over a mock trial/arbitration, and is later retained to provide other neutral services (particularly arbitration) in a different matter involving a party or counsel for whom the neutral evaluation or mock trial/arbitration services were provided, must disclose the fact of that engagement to the other side. Details of the assignment need not be revealed, but the ABA Code of Ethics for Arbitrators, ADR provider ethics guidelines and some state laws (e.g., California) require some level of disclosure in later matters.

The advantages of receiving an unbiased evaluation of the strengths and weaknesses of a case are abundant. Soliciting an evaluation before embarking on litigation could save countless time and money, not to mention avoid risking a motion to dismiss at the outset. Receiving an unbiased opinion about the strengths of a summary judgment motion or motions in limine would likely lead to more streamlined motion practice. In some cases, a neutral evaluator can provide the business client a more realistic view about the relative merits and settlement value of a case, particularly in advance of a mediation session or settlement conference. Even at the appellate stage, counsel can benefit from testing their arguments and honing their presentation skills in advance of oral argument.

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In virtually every legal matter, counsel and the parties can benefit from a neutral analysis of the merits of their case. Lawyers will feel more prepared whether they are headed to mediation, arbitration, litigation or appeal, and clients will have greater confidence that their money is being well spent toward a final resolution of their legal dispute. ■

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