

VERDICTS & SETTLEMENTS

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Emotions matter; neutral evaluation, too

By Patrick Mahoney

Family law practitioners understand that emotion is central to their clients' disputes. As a consequence, it is critical that counsel embrace tools that enable their clients to evaluate the risks and rewards of contested hearings, tempering emotion with reason. An underused tool is the evaluation of the dispute by a neutral evaluator in advance of a contested hearing — that is, early neutral evaluation.

Clients want warriors who support the client's version of reality and as a consequence, do not or cannot hear contrary facts or consider the risks associated with any contested hearing. More often than not, an adverse result is deemed to be the fault of the lawyer or the judge in the client's view, never the quality of the client's evidence. It is the warrior lawyer's responsibility to develop and support the client's version of reality and as a consequence, all too often counsel plays down the significance of adverse facts. The neutral evaluation is a reality check for both counsel and the client.

Neutral evaluation is one of the tools introduced in the 1980s to facilitate resolution of disputes prior to trial. At that time, it was a recommended process to be used early in the case, hence the name early neutral evaluations. The idea was that the parties benefit from having their claims evaluated by an expert in the subject matter before engaging in protracted litigation. In its original form, an experienced litigator or retired jurist was given a statement of the parties' claims and supporting evidence, met with counsel and the parties, listened to an oral presentation, and then provided the parties with an evaluation. The evaluator did not act as a mediator or settlement judge and the evaluation had no evidentiary value. It simply reflected the analysis of the claims by an experienced practitioner with no stake in the outcome. Its purpose was to provide the parties with an opinion based on an independent diagnosis of the facts provided before the parties engaged in protracted litigation.

Since its early days, experienced lawyers have come to see the benefit of neutral evaluations in a variety of settings. They can be done by one or both parties before one or multiple evaluators with or without evidentiary presen-



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tations. Given this flexibility, it is a tool that can be used in a myriad of settings to provide counsel and their clients with a reasoned analysis apart from the emotion of the litigants. Consider the following possibilities:

- Counsel for both parties realize there are a range of outcomes confronting the parties and agree to have a retired jurist evaluate the dispute based on written submissions on the law with reference to the key facts and oral argument.
- Where expert opinions are central to the dispute, the opinions are given to the evaluator to assess.
- Where the credibility of the parties is at issue, deposition transcripts and video (if available) are provided for the assessment. In the absence of depositions, the parties may testify on direct and the evaluator may or may not be asked to query the clients.
- Third party testimony can be provided by way of depositions or declarations.
- Where the parties cannot agree on a single evaluator, they can agree on multiple evaluators who would consider the presentations at the same time and issue separate assessments or may be asked to see if they can come to a single assessment.
- The evaluation may occur early in the proceedings, in advance of a settlement conference, on the eve of a contested hearing and may address a single aspect of the dispute or the entire conflict.

- Each of the scenarios can be employed by one party without the participation of the other party. In that event, counsel can have a colleague engage in a vigorous cross examination of the client.

What comes out of the process is a reasoned opinion based on what is presented by an evaluator with no stake in the outcome. It is an evaluation without any direct consequence. The benefit is the indirect consequence of enabling the parties' to understand the risks of litigation because they have been able to tell their story and now have a reaction to that story. It is a tool to facilitate settlement for the evaluator is not enmeshed in the emotion of the parties. Nor is the evaluator playing the warrior lawyer who may have been unable or reluctant to acknowledge the risks of the case. It is these benefits that give the client(s) the opportunity to assess the value of a negotiated resolution as contrasted with a contested result. It is a reasoned analysis that tempers the parties' emotional beliefs.

Given the flexibility and the value of a neutral evaluation, it is a tool that is worth considering in disputes of consequence.

Patrick J. Mahoney is a JAMS neutral with more than 45 years of legal experience as a civil litigator and judge. His unique experience includes a wide-range of matters including business/commercial, employment, family law, civil rights, insurance, real property and professional liability. He can be reached at pmahoney@jamsadr.com.



PATRICK MAHONEY
JAMS