Early Neutral Evaluation: Fresh Eyes and Lower Costs

"A peace is of the nature of a conquest;
for then both parties nobly are subdued,
and neither party loses."
-2 Henry IV, Act IV Scene ii

Let's try a little word association exercise, dear reader(s). When you hear the term "ADR," what's your first thought? If anyone answered "Amazing Danish Roosters," you need to up your meds. Most of you no doubt thought of mediations, by far the favorite settlement technique of the last couple of decades. And why shouldn't it be? Mediations are traditional, predictable and easily sold to your clients. But what about another "alternative" road to settlement, one that arguably provides better flexibility and can often be used earlier in the dispute resolution process? Consider "Early Neutral Evaluation."

Conceived in its original form in the 1980s by some overworked lawyers in northern California whose effort resulted in its adoption as a Local Rule in several federal districts, Early Neutral Evaluation (ENE) at its core is the process by which one or more parties to a dispute submit the essentials of the issues to a neutral "evaluator," typically a grizzled veteran of the legal system with demonstrated credibility and expertise in the subject matters at issue. The evaluator then considers all submissions given to him or her and acts impartially to "evaluate" the dispute. The beauty of ENE is that it is not cookie-cut in form or substance and can be tailored to the specific needs of the parties to a dispute. It can be arranged unilaterally as a "second opinion" for the benefit of a single party, or bilaterally to suit the needs or desires of adverse parties. The result of the evaluation can remain confidential or shared with all parties. Indeed, the matters to be evaluated are also subject to discussion, and can range from the efficacy of certain claims or defenses to the credibility of lay or expert evidence to, most prominently, an opinion on the courtroom value of asserted damages. In essence, the evaluator's role is not to arrogantly dictate any absolute "truth" about a case, but rather to provide his best professional judgment as to what inferences a finder of fact is most likely to draw from the evidence to be presented.

Importantly (and in contrast to mediations), this "out of the box" process is a clean slate whose procedural and substantive limits and parameters can be adjusted limitlessly depending on the needs and creativity of the requesting parties. In practice, its use can range from a written opinion responding to written submissions of a single party to a full-blown informal hearing among the parties that may even include "live" testimony. One particularly intriguing use of ENE, especially in personal injury cases, has the evaluator reaching a decision as to the value of a case, with each party then deciding on a confidential "deal or no deal" basis whether the evaluation is acceptable. If all parties accept, then and only then is the consensus announced to all, resulting in a settlement. If no consensus exists, then the individual acceptance by any party is not revealed, thereby preserving that party's future negotiating position.

As it should be, the selection of the evaluator is a critical step in the ENE process. If the parties cannot agree on a particular person, an alternative for selection could be similar to the one used in medical -review panels, where each party submits several names and a "striking" process is used that results in the surviving evaluator. In addition to experience, expertise and credibility, the person chosen for this crucial role should also display other important traits such as intellectual honesty and integrity; a commitment to efficiency and diligence; a respectful attitude toward all parties; and the

ability to engage energetically in the process without preconceived notions.

Once an evaluator is chosen, a telephone conference may be arranged with counsel for the participating parties during which the "meat" is placed on the "bones" of the process, particularizing its scope to the needs of the parties involved. The evaluator then sets reasonable deadlines for any submissions, the scope and form of evidence to be considered, and a convenient date for any joint session that might be desired.

In most cases, a "live" joint session is a crucible event in the ENE process, providing a multiplicity of benefits not only to the evaluator but also to the parties, including:

- Incentive to focus at an early (and cost-reducing) date on the core issues in dispute;
- The chance to communicate productively "across the table" with opposing parties;
- A means to quickly and efficiently learn the primary building blocks of an opponent's position;
- The ability to assess in person the effectiveness and persuasiveness of key witnesses and even their counsel;
- A way for clients to feel a more direct participation in analyzing the basis and risks of the dispute.

If conducted, a typical joint session as conducted by the evaluator would commence with a brief opening statement, after which he would elicit the presentation of each party and consider all evidence presented. Each party then would have the opportunity to make a responsive presentation. Typically, these presentations would be conducted informally, without evidentiary objections or cross-examination and without interruptions by opposing parties. The evaluator would then engage in whatever questioning or clarification he might require before rendering his evaluation. Depending on the case, this can be derived while the parties wait or soon thereafter, if additional review or research is needed.

The central role of an evaluator, and the key to the ENE process, is analogous to the celebrated anecdote retold by the noted comedienne Paula Poundstone, who remembered the day her mother had commented that her own parents had taught her to swim by pushing her off a pier. Poundstone retorted to her mother that maybe, just maybe, teaching her to swim may not have been their actual intent. It is this type of reality check, by experienced and expert "fresh eyes," that sells ENE as a useful method of saving months or even years of costly litigation.

In a well-written tome describing ENE ("Early Neutral Evaluation," ABA Section of Dispute Resolution, 2012), author Wayne D. Brazil hit the proverbial nail on the head in describing its potential use:

> The purpose of ENE is not to displace established procedures, but to add an event to the pretrial process that enables parties to make better informed decisions about how to use the conventional equipment of civil litigation more efficiently and to better effect. The goal is to subtract by adding: to reduce the overall burdens the system imposes by adding one compact, productive event to it.

WRITTEN BY VINCENT P. FORNIAS