

Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?

By Wayne D. Brazil

Among ADR processes, mediation is sweeping the field. Even when other forms of ADR are available, mediation is the process of choice in the vast majority of circumstances. But should this be so? How thoughtful and well-informed is this most commonly made “choice”? Do parties too often end up in mediation as a result of little more than subcultural inertia, or because mediation appears (to the superficial eye) to be the least demanding and least threatening form of ADR? Do litigants and lawyers “choose” mediation because they assume that they know what mediation is—because it feels familiar and comfortable—while passing over other ADR processes largely because they are less familiar and less malleable in our imaginations?

If we are to be good counselors, we must seek more solid bases for making important process choices. Toward that end, this article identifies factors or circumstances that could commend early neutral evaluation (ENE) (for more description of ENE, see the sidebar titled “ENE: Key Purposes and the Process”) to more careful consideration. It is no part of my purpose to denigrate mediation or to discourage its use. Mediation can be a wonderful process, and in many circum-

stances, mediation will most likely meet the needs of the parties. But in a time of expanding process pluralism, it is not wise to consider mediation the only available option.

When trying to decide between mediation and ENE, we must begin by asking ourselves two big questions. First, at this specific juncture in the litigation, what are the most important needs we want to meet, or objectives we want to achieve, through an ADR process? Second, to which kind of mediation are we comparing ENE?

There are many different objectives that we (as litigants or lawyers) could use an ADR process to pursue. Which of those objectives is most important—or most feasible—can change at different junctures in the pretrial period. Settlement may not be our primary objective in some situations, or it may not be feasible at some points. But even if our goal at a given juncture simply is to get the case settled, we need to determine what the principal barriers to settlement are and how best to attack them. In other words, we need to identify the things that we could do through an ADR process that are most likely to enhance our chances of getting a deal. Then we need to select the ADR process that holds the most promise for accomplishing those things.

And before we slide into choosing mediation, we better be sure we know what kind of mediation we would be getting. Some mediators purport to offer you the full range of forms of mediation, from the truly transformative, through the facilitative (or “elicitive”), all the way to the most aggressively evaluative (or “directive”). Some mediators also will say you can choose from a variety of



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formats: all group session, all private caucusing, or some combination.

Beware of such promises. In some regions, mediation subcultures have drifted primarily in one process direction, often toward the evaluative end of the spectrum with a heavy emphasis on private caucusing. If that is the situation in your area, you might have difficulty finding a mediator who is really practiced in and comfortable with, or good at, any form of mediation that is outside his or her subcultural mainstream. Habits are hard to break. And skills not regularly practiced get rusty.

In a variation on this theme, if you were to list the principal benefits that ENE might deliver in your situation, some mediators might respond by assuring you that their "mediations" can deliver all those same benefits—that you can do everything in one of their mediations that you could do in any ENE. For reasons I hope to make clear, you should be skeptical of any such assurance.

So what are the factors or considerations that should move us to give serious consideration to using ENE?

1. How important to achieving your goals at this juncture is a credible evaluation of the merits of the case from an impartial and knowledgeable source? For progress to be made toward settlement in your case, is it essential to persuade one or more of the parties that their view of the merits may well be misplaced? Does a party or lawyer need a reality check? Or, to move forward, does a party or lawyer need to feel appreciably more confident that he or she has an accurate understanding of the law and the cut of the evidence?

For several reasons, ENE may be superior to mediation for achieving these kinds of goals. Evaluation is the center of ENE. The core purposes of an ENE session are to (1) identify the legal and evidentiary center of the case, (2) develop as reliable an evaluation of the merits as the circumstances permit, and, when needed, (3) craft an efficient plan for developing the information the parties' believe is sufficient to make responsible judgments about

what a litigated outcome would most likely be. ENE also offers parties an opportunity to try to settle their case, but that opportunity arises after the evaluative table is fully set.

Mediations, on the other hand, have multiple and sometimes mobile purposes, some of which have little to do with the merits (under the law and evidence) of the case. Even in "evaluative" mediations, the play of competing purposes can compromise, in some measure, the reliability and credibility of the "evaluation." Mediators are likely to think that the "mediation" component even of an "evaluative mediation" is quite important and should occupy a significant segment of the process. And many mediators are primarily interested in process values, so they may concentrate more of their energy on the nature and spirit of the dynamic between the parties than on analysis of evidence and law. For these and other reasons, there is a risk that the "evaluative" component of a mediation will be underdeveloped, fragmented, partial, nonlinear, or indirect.

An ENE, by contrast, is structured to assure that the bases for the evaluative component of the process are systematically developed, fully visible to all parties, and as comprehensive as the parties' knowledge permits. The evaluator knows that his or her primary assignment is to provide the parties with as reliable a second opinion of the merits as possible, so he or she works hard to identify the legally pertinent analytical matrix and to bring to the surface, to the fullest extent feasible, the evidence that that matrix makes material.

Moreover, in ENE, unlike mediation, the neutral host of the process must have subject-matter expertise. The evaluator understands the relevant law in advance and knows what kind of evidence is most germane and where that evidence is most likely to be found. The requirement that the evaluator have subject-matter expertise improves the likelihood not only that his or her evaluation will be sophisticated and as reliable as the circumstances permit, but also that the evaluation will be so perceived by the litigants. In short, evaluative feedback from a substantive expert is likely to

Early Neutral Evaluation: Key Purposes and the Process

ENE provides litigants with a free, nonbinding, confidential opportunity to reduce cost and delay, to improve the quality of justice, and to explore settlement. A confidential ENE session is held before expensive discovery and motion practice are completed. Lead counsel and their clients must attend the session; key witnesses, including experts, may attend. Clients may participate actively.

Face to face, in the presence of an evaluator with subject matter expertise, the parties present evidence and set forth their positions. The evaluator clarifies and probes with questions, identifies the key issues, then retires to a separate room to prepare a written evaluation. After the evaluation is written, the parties may choose to engage in settlement negotiations with the assistance of the evaluator. If no settlement is reached, the evaluator helps the parties develop a focused case development plan.

The ENE process expands the parties' information base for decisions about case development and about settlement, improves the quality of parties' analyses, and sharpens the joinder of issues. It also provides litigants with valuable impartial feedback from an expert about the merits of their positions, and with suggestions about how to acquire efficiently any additional evidence the parties need to engage in more productive settlement discussions.

have more credibility with the litigants and their lawyers than evaluative feedback from a process expert.

There are two additional reasons that evaluation from an evaluator may well have greater credibility than evaluation from a mediator. The first arises out of assumptions the parties are likely to make about the agenda of the host of the proceedings. When parties begin a mediation in a case that is being litigated, many are likely to assume that the mediator's primary goal is to get the case settled. Many litigants will assume that the mediator has his or her eye on that main chance at all times, and that the mediator will manipulate how he or she behaves and what he or she says in order to preserve or enhance his or her relationships with the parties. These parties assume that the mediator will take great pains not to alienate anyone, lest he or she lose effectiveness as a lubricator of the movement that will be necessary to get a deal.

These assumptions can compromise parties' confidence in the reliability of a mediator's evaluative feedback. On the one hand, the parties may fear that their mediator is straining to retain their goodwill by not being frank or thorough in assessing the merits. On the other hand, the parties may fear that their mediator is exaggerating their legal or evidentiary vulnerabilities to induce them to be more flexible about settlement.

These threats to the credibility of a mediator's "evaluation" can be even greater if the mediation features private caucusing. In that setting, litigants may worry that all parties are not receiving the same "evaluation" when they meet separately with the mediator. The secret meetings may intensify the parties' fear that the mediator is manipulating the assessments that he or she offers each side privately in order to build a sense of connection or to capitalize artificially on the parties' risk aversion.

In addition, when ex parte communications are part of the process, no party can be sure that he or she knows all the information or considerations that influence what the mediator says about the merits of the case. Each party may worry that some secret (about evidence, about a legal argument, or about something extraneous to the merits of the case) that some other party has shared with the mediator is affecting the evaluative feedback he or she is providing. Some litigants may fear that their mediator, being more concerned about determining what terms of settlement the parties might accept than about what entitlements they might have under the law, will permit his or her sense of where a litigant might be willing to move in the negotiations to color the views the mediator might otherwise articulate about the relative merits of the parties' positions.

In ENE, by contrast, every participant in the session is privy to every communication that reaches the mind of the neutral before he or she prepares the evaluation. Ex parte communications with the neutral are strictly prohibited until the evaluator has committed the evaluation to a writing that each party is entitled to see before the ENE session may move into settlement discussions. There may be no ex parte phone conversations with or email or letters to the neutral before the session. The parties exchange their pre-session written statements. During the session, every party is present for the substantive presentations and every party hears the evaluator's questions and the answers they elicit.

Thus, in ENE, every party and lawyer knows every piece of evidence and every argument that goes into the neutral's mind before he or she commits the evaluation to writing and memorializes the reasoning that supports it. This visible, rule-based requirement can increase the parties' confidence

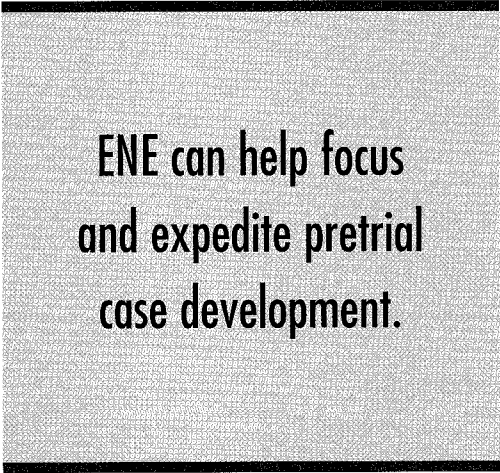
in the intellectual and moral integrity of the neutral's evaluative feedback. It also can reduce the parties' fear that the neutral's feedback is being distorted by some secret consideration or some privately developed sympathy.

However, if what would best serve your client's interests is a really cold shower from a neutral source on the viability of your client's side of the case, but you don't want your opponent to watch as the frigid water washes over your client's head, an evaluative mediation that features private caucuses might be appreciably more attractive

than an ENE session. Just be sure to let your mediator know that she will be doing more harm than good if, in private caucus with your client, she pulls her substantive punches.

2. How important at this stage is focusing and expediting the case development process? Sometimes opposing counsel and litigants aren't sure where the center of the case is, especially early in the pretrial period. Sometimes it is difficult to identify the claims or counterclaims on which an opponent intends to rely most, or which of many affirmative defenses really matter. And even when counsel have a pretty good idea where the center of the dispute is, the case development process, through discovery and motion practice, can be painfully slow, wasteful, and expensive. In fact, in many cases it is pretrial proceedings—which too often are discursive and fractious—that impose the most expense and frustration on the parties.

In theory, parties could use case management conferences with a judge to streamline the case development process. But in practice it can be difficult to get detailed guidance in these legally unsexy arenas from busy judges.



**ENE can help focus
and expedite pretrial
case development.**

Moreover, because judges must be so circumspect in expressing views about the merits of a case early in the life of the litigation, they often cannot offer substantive feedback at case management conferences. Similarly, they may feel reluctant to offer specific suggestions about case development planning that might appear to be rooted in instincts about the relative viability of the litigants' positions.

Evaluators are not similarly cabined. They usually will have more time to devote to exploring a dispute in depth early in its life; and they may be more confident that, because of their subject-matter expertise, they can reliably help with the details of pretrial planning.

In theory, parties also could use an early mediation to help locate the issues that really matter and then to develop a focused plan for uncovering the evidence that is likely to be most useful for predicting the outcome. But many lawyers resist going to mediation until they have completed most (or all) of their discovery or until a judge has ruled on most (or all) of the potentially significant motions.

Early neutral evaluation, unlike at least some mediations, is early. A principal reason it is early is to press the litigants to identify the center of the case and to cut through the indirection and delay that so often accompany formal discovery and motion activity.

Evaluators are trained to capitalize on the information base that an ENE session can build by helping the parties agree on a focused case development plan that would remove, as efficiently as possible, the informational excuses for not proceeding with serious settlement

negotiations. Mediators are more likely to be process specialists than evaluators, while evaluators are more likely to be experts in the substantive issues on which the case will turn.

Mediators are likely to work hard to try to get a deal, but some may lose some interest and energy when it becomes clear that no deal can be reached. In ENE, on the other hand, there is no risk that the neutral will drift into relative passivity when the merits seem to loom too large as an obstacle to progress in negotiations. An evaluator understands that a core aspect of his or her role is to be sure the parties don't overlook or gloss over the legal or evidentiary issues that the applicable law makes pivotal to their dispute.

In mediation there also is a risk that case development planning won't get detailed attention once the mediator concludes that no agreement is in the works. Good medi-

ators don't just give up when the parties won't settle, but if it appears that the main chance (settlement) will elude them, many mediators will find it difficult to muster the discipline and energy that is necessary to contribute meaningfully to case development planning. And some mediators will not have the subject matter expertise to offer reliable assistance in that arena. Evaluators, by contrast, are taught that an important part of their job is to use their subject-matter expertise to help the parties fashion a cost-effective plan to position the case for critical motions, trial, or more promising settlement negotiations.

Thus, there may be much to recommend ENE if you are having trouble getting your opponent (or even your own client) to focus on case development planning, or if you fear that the pretrial process could be stalled by procrastination or could degenerate into expensive and time-consuming meandering through discovery and motion practice.

3. How important to achieving your objectives at this juncture is face-to-face interaction with the other side? In some local legal cultures, mediation has come to be dominated by private caucusing. Group sessions have not been abandoned, but in many mediations most of the time is spent and most of the significant work is done in private caucuses. Sometimes, however, the advantages that private caucusing can offer are outweighed by benefits that can be achieved only through group sessions. Because ENE guarantees an extensive group session, it can be an attractive option when what you need most can be achieved only through substantial consideration of the merits face-to-face with the other side.

The group-session in ENE is always substantive. It is in the group session, the core event of ENE, that the parties set forth the merits of their claims and defenses and present or describe the core evidentiary and legal underpinnings of their positions. Lawyers make presentations. Clients can tell their side of the story, provide information, ask questions, and respond to inquiries. Retained experts can present their views. When the evaluator probes, everyone can see and assess the responses. These features can make an ENE session very useful when it is important that (1) your client or you (or both) see the other side's presentation, or (2) the opposing litigant or lawyer (or both) see your side's presentation.

Your client may need to see the other side's presentation directly to feel more centered in his or her decisions about

Problems ENE Can Address

- Uncertainty about where the center of the case is—what the key issues that separate the parties are
- Poor communication (across party lines or between counsel and client)
- Procrastination
- Difficulty seeing case comprehensively or through opponent's eyes
- Unfocused/unnecessary discovery and motions
- Unrealistic clients
- Clients lacking confidence (in their lawyer; in bases for decisions)
- Alienated clients
- "Meter-running"
- Unrealistic lawyers
- Lawyers lacking confidence (or who are overconfident)
- Parties' reluctance to be the first to broach settlement

how to proceed, or to develop more confidence that you are accurately assessing the relative strengths and weaknesses of the parties, the lawyers, and their positions. Or your client may need to see the other side's presentation in order to appreciate how strong its case is, how sympathetic as a witness the spokesperson for your opponent may be, how persuasive an opposing expert's testimony will be, or how able opposing counsel is. You might even feel that, in order to make the most intelligent decisions about settlement, your client needs to see the opposing party's presentation directly in order to develop more empathy for him or her, or at least to understand more clearly that his or her side of the story has some fairness appeal.

Regardless of what your client might need to see, you (as counsel) may feel that you need to see the other side's presentation directly. Communication across party lines may be poor, leaving you unsure about what your opponent's primary claims, lines of reasoning, or evidence might be. You may not want to spend a lot of your client's time and money trying to use motions and discovery to assess the strength of the other party's case, or trying to get a read on your opponent's personality, ability, and likely rapport with a jury. You may want to get an informal, inexpensive look at your opponent's expert witness and theories, perhaps before deciding how much to invest in experts for your client.

In some situations, you may feel strongly that you don't want to rely on a mediator's assessment of the other side and its case; you might want to see as much of the other side as possible, so you can make your own assessments. A mediator might not be as good at making these kinds of judgments as you are, perhaps because he or she has not had as much experience as you have had with this kind of case. Or you might be concerned that the drive to get the case settled might lead the mediator to overstate your opponent's strengths in order to induce your client to be more amenable to settlement.

The flip side is that it might be very important for the other side to see directly your client, his or her side of the case, and how you perform. You may feel that your side has strengths that a mediator would not be able to communicate adequately. Your client might have very strong jury appeal—something that you want your opponent to see directly. Or you may fear that the power of your reasoning or the implications of your evidence will be diluted in the process of translation by a shuttling mediator. In short, you may want an unimpeded "persuasion-shot" at the opposing litigant and lawyer—something a mediation might compromise.

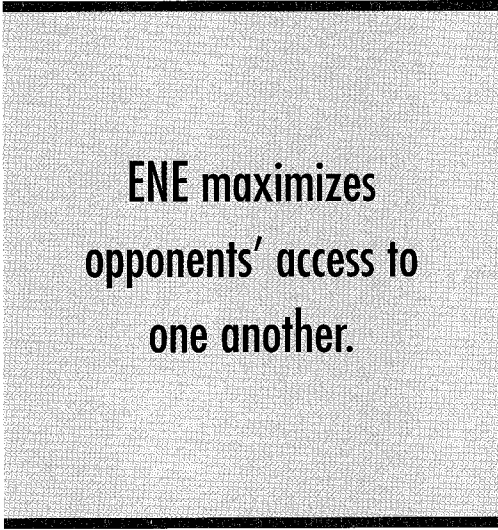
In a more elevated variation on this theme, it might be important to use direct interaction with the people on the other side to try to humanize the dynamic across party lines and to put to the best use the assets as human beings that players in your litigation pageant possess. Direct interaction across party lines might be the best way to de-sterilize the disputing process, to convert it from a struggle that is dominated by abstractions or institutions into a dynamic between human beings. Direct interaction may be the best way to make it difficult for the other side to demonize you or your client, to ignore what you have in common, or to use generalities or preconceptions to dismiss you. You might feel that an ENE session offers the

best opportunity to try to explain to the people on the other side your client's views about why things happened as they did, and thus to give your opponents a feel for your people as people. Substantial direct interaction might even offer the best chance to show your opponents that your people are principled and trustworthy.

In theory, much of this could be achieved through a mediation—at least if the mediation were dominated by a group session and if the mediator removed himself or herself most of the time from the communication loop. But mediators are trained and inclined to medi-

ate. For many, that means making sure they remain in the communication loop by "actively" listening, "feeding back" to the parties to demonstrate understanding and to build trust and connection, "framing" and "reframing" the parties' inputs and views, and gently (or otherwise) guiding the substance and character of the communications into the forms and zones that the mediator feels are most appropriate and promising. Thus, in practice, even if the bulk of the time in a mediation were spent in a group session rather than in private caucus, much of the interaction between parties would remain "mediated"—less direct, less sustained, more diluted. Sometimes this can be a good thing. But not always.

4. How important is it for your client (or an opposing litigant) to feel he or she has had something like his or her day in court? The center of an ENE session consists of the parties presenting the best evidence and argument they can muster (at the time) in support of their claims and defenses. It is, to be sure, a telescoped and informal proceeding, but it is a proceeding. It provides each litigant with an opportunity to see and hear the presentation of his or her case alongside a competing presentation of the other side's case, and then to receive a direct assessment, by a neutral person with considerable experience



**ENE maximizes
opponents' access to
one another.**

and subject matter expertise, of the relative merits of the parties' positions.

Many clients feel the need to be heard. For some, it is very important that the principal listener be the opposing party, not some stranger to the dispute. Such clients will value the opportunity that ENE guarantees to speak directly to the other side about the merits.

But even clients whose "need to be heard" can be satisfied by speaking to a stranger may not find being heard by a mediator as satisfying as being heard by an evaluator. Many parties will assume that a mediator's overriding goal is to get the case settled. That assumption may lead parties to believe that the "listening" that a mediator seems to undertake so sincerely is really an artifact of training and role, a mere tool for inducing litigants to change their settlement positions. Such parties may find it almost impossible to feel that a mediator is really absorbing their story and their feelings, especially if they believe that the mediator is proceeding in exactly the same manner when he or she meets privately with the opposing party.

Ironically, some clients may feel that a neutral whose role is to pass judgment, rather than to lubricate or engineer changes in the parties' settlement positions, is more "real" as a listener, more likely to take in honestly a person's story and to react genuinely to it.

Moreover, there probably are clients who will not feel ready to move on (toward serious consideration of settlement) unless and until both parties' conduct has been the subject of judgment. For some parties, the passing and pronouncement of judgment may be necessary to clear a psychological block, to experience vindication and erase guilt or second-guessing, or to begin weaning themselves from unrealistic hopes or avaricious expectations. For such clients, ENE may contribute more than mediation to clearing a path forward.

The Promise of ENE

I am a big fan of mediation. The spirit that animates it, and its malleability, can yield a beautifully constructive process and magnificent fruits. The purpose of this article is not to dull mediation's well-deserved luster, but to encourage lawyers and litigants who are thinking about using an ADR process to identify the most important objectives that they hope to achieve through the ADR process they select and then to consider carefully which process

holds the most promise, in their specific circumstances, for achieving those objectives. Even if the immediate goal is no more elaborate than to get the case settled, before we select an ADR process, or decide how much of the process should be devoted to group session, it is important to determine what the primary obstacles to settlement are likely to be, and then to identify the kinds of input from a neutral and the kinds of interaction with other players that are likely to contribute most to overcoming those obstacles. In some cases, we might find that ENE promises to deliver the most of what we need. ♦

Essentials of the ENE Process

- Pre-session conference with all counsel (usually by phone).
- Exchange and submit to evaluator confidential written evaluation statements (not filed).
- The Confidential ENE Group Session (everyone present):
 1. Evaluator describes process and explains its purposes.
 2. In group session, parties make structured but informal presentations of their claims and defenses (e.g., through documents, statements by parties or key witnesses, proffers of testimony, etc.); rules of evidence not applied; no cross-examination.
 3. Parties make responsive presentations re: merits.
 4. Evaluator asks questions to clarify, probe.
 5. Evaluator identifies common ground and possible stipulations.
 6. Evaluator identifies key disputed issues (issue clarification).
 7. Evaluator privately prepares written evaluation (qualified or limited as availability of evidence makes necessary).
 8. Evaluator returns to group session and asks if parties wish to explore settlement before the evaluation is presented; if so, evaluator offers to help (private caucusing permitted only with everyone's agreement).
 9. If parties do not wish to explore settlement at this juncture, or if parties try to negotiate but fail to reach agreement, evaluator presents evaluation.
 10. Evaluator asks (again) if parties wish to explore settlement.
 11. If no settlement, evaluator helps parties develop an efficient case development plan.
 12. Participants consider utility of various types of follow-up to the session (e.g., reports to or phone conversations with the evaluator); evaluator schedules a second session only if all parties want one.
- Follow-up.