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Early Neutral Evaluation: A Follow-Up Report

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Early neutral evaluation: a follow-up report

An early assessment of the Northern District of California's experimental program to help reduce the scope of disputes and focus discovery indicates that, although modifications are needed, it is proving useful to the parties.

by David I. Levine

Recently, *Judicature* published an article announcing an experimental program in expedited dispute resolution that is underway in the federal district court in San Francisco called Early Neutral Evaluation (ENE).[1] It noted that the court had arranged for ENE to be analyzed by an independent observer. The author has undertaken that analysis; this follow-up report covers the initial pilot phase of ENE.[2] In brief, the conclusion is that with some modifications, ENE is sufficiently promising to warrant expanding the program to a larger number of cases.

The court decided to assign a small number of cases to ENE as a pilot study before committing itself to a larger experimental program. The court, the ENE task force, and I agreed that I would conduct a qualitative appraisal of the pilot sample of ENE cases. This article is based upon the author's attendance at the training session for the evaluators, six ENE sessions, a February 1986 debriefing of the evaluators conducted by Chief Judge Robert F. Peckham and Magistrate Wayne D. Brazil, review of the case files, and interviews with the participants (clients, attorneys and evaluators) in the ENE cases. The author conducted structured personal or telephone interviews, lasting between 30 and 70 minutes, with 50 of the 57 possible interviewees. All of the evaluators were interviewed.

Table 1 Status of early neutral evaluation cases

Subject matter	Days after filing ENE held	Status since ENE (6/1/86)
Civil rights	121	Defendant intends to file motion to dismiss for lack of prosecution (no activity since ENE, except status conference)
Civil rights	138	Settled
Civil rights	—	Magistrate determined not suitable for ENE
Contract	218	Settled
Contract	155	Discovery proceeding; trial date set
Contract	100	Discovery proceeding; motion for summary judgment filed; trial date set
Contract	—	Settled prior to scheduled ENE session
Contract	—	Settled prior to scheduled ENE session
Insurance coverage	—	No ENE because motion for summary judgment filed first
Labor	115	Court referred remaining issue to binding arbitration
Patent infringement	119	Jury trial held; on appeal to Ninth Circuit
Personal injury	207	Settled
Personal injury	—	Discovery proceeding; ENE postponed at direction of evaluator

The supervising magistrate and a law clerk selected a variety of civil disputes for the cases in the pilot group. They made no attempt to limit the cases by the amount in controversy, as is common in many programs.[3] They sought cases that seemed to be manageable in terms of the number of parties—generally only two or, at most, three parties were in each case. The status of each case is summarized in Table 1.

Written evaluation statements

The written evaluation statements usually fleshed out what was truly in dispute, something that could not always be discerned from the bare bones papers that the parties had filed under the notice pleading policy of the Federal Rules of Civil Procedure. The evaluators found these statements to be particularly useful.

The quality of the statements ranged dramatically. A few were perfunctory,

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1. Brazil, Kahn, Newman & Gold, *Early neutral evaluation: an experimental effort to expedite dispute resolution*, 69 JUDICATURE 279 (1986).

2. Although I was not involved in the design of ENE, full disclosure requires that I note that Magistrate Wayne D. Brazil, who is now supervising ENE for the court and who helped create it, was a former colleague at Hastings.

3. *Background and Status*, DISPUTE RESOLUTION F. August, 1985 at 4; Hensler, *What we know and don't know about court-administered arbitration* 69 JUDICATURE 270 (1986). *See also* Ebner & Betancourt, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE (Santa Monica, CA: Rand Corporation, 1985); Nejelski, *Supplements to Trial: A Court Administrator's View*, 29 VILL. L. REV. 1339 (1984); Rolph, INTRODUCING COURT ANNEXED ARBITRATION: A POLICYMAKER'S GUIDE (Santa Monica CA: Rand Corporation, 1984).

formalistic statements; others were more useful because the lawyers provided a crisp summary of the truly key issues. The participants also found it helpful when the written statements included pertinent documents as exhibits. The court order now expressly encourages submitting key exhibits in advance. The order now also requires parties to identify witnesses who will support their versions of the facts. All in all, the statements do seem to fulfill the intended functions of informing the evaluator and the other side of the real contentions of the party and, most importantly, forcing the lawyer to focus on the case and to present succinctly his or her case in a positive light. This is certainly the first place where an infusion of "intellectual discipline" takes place in the ENE process.

The ENE session

Evaluator's preparation before the session. The time required to prepare varied for the evaluators; at least two hours was typical. This included reviewing the notes from the ENE training session and the file for the case, doing research, scheduling, and reading the written statements. Other than reading the papers thoroughly, probably the most effective preparation was for the evaluator to do some legal research to permit a succinct presentation to the parties about the state of the law. The evaluators' conscientious preparation was obvious to the participants and to this observer.

Opening remarks of the evaluator. It is important for the evaluator to explain what will happen at the ENE session, the order of events, what the role of the evaluator is and the evaluator's experience. It is also useful to indicate that he has read the papers and is familiar with all that is in the record as of a particular date. If parties have added something to the record since that date, they can inform the evaluator.

It is important for the evaluator not to deprecate his capacity to serve as evaluator. In a few cases, I thought that the evaluators unnecessarily described themselves as knowing little about the particular subject matter area. I think the evaluators should emphasize positive qualities rather than dwelling on any lack of knowledge in a particular area, if this is the case. The court should continue to make every effort to match evaluators and subject matter in order to enhance the quality and credibility of the evaluations.

Presentations. The quality of the presentations varied. In some instances, well prepared counsel delivered what was essentially an opening statement to a jury. Other counsel, perhaps those who had not read carefully the order of the court, appeared surprised that they were expected to make a presentation. Their statements were not polished. On most occasions, the clients also spoke. They sometimes added helpful information. For the clients, the opportunity to speak was moderately cathartic. It is important that the clients be given an opportunity to speak so that they will feel that the evaluator has taken their views into account.

The evaluations

The evaluators frequently introduced legal issues or contentions that the parties did not think of on their own. For example, in two cases the evaluators suggested that there was no subject matter jurisdiction of the case in federal court. In one instance, the evaluator pointed out that the defendant had a defense under the terms of the contract that would save at least $9,000 on a claim that was in the $200,000 range. In another case, the evaluator came up with a new interpretation of the contract provision at issue that would provide a complete defense for the defendant.

Near the end of each session, the evaluators presented their evaluations. These evaluations were, as the program designers wanted, frank, candid, and explicit. The evaluators always discussed their assessment of liability and of the range of potential damages. The assessments of the evaluators ranged from telling the parties that the plaintiff had a very strong, very clear case to win all or nearly all of the damages sought, to cases where the evaluator told the parties that the defendant had a very strong position and that the plaintiff really had little or no hope of achieving the results he desired through litigation.

In general, the parties have perceived the evaluations to be reliable and useful. The evaluations often confirmed what the lawyers were telling their clients about the value of their own cases. Where the evaluation was quite different from what the lawyers had thought before the session, the lawyers reported that the process encouraged them to re-evaluate the effectiveness of their presentation of the case and the strength of their position.

The ENE process is much less useful when the parties do not understand how the evaluator arrived at his evaluation. It was my impression from speaking to the parties, as distinguished from their lawyers, that they sometimes did not fully understand the reasoning process of the evaluators. Occasionally, the litigants told me that they thought that the evalu-

Early neutral evaluation in brief

The heart of the ENE program is an early, frank and thoughtful assessment of the parties' relative positions and the overall value of the case. Each evaluation is delivered by a neutral, very experienced and highly respected private attorney, who is called the evaluator. The confidential evaluation, which is based on a reaction to the parties' written evaluation statements and oral presentations, is given orally to the parties and their attorneys.

The ENE concept was based on Brazil's recent survey data suggesting that lawyers want neutral, penetrating, and analytical assessments of their cases.[1] Such an assessment could enhance the prospects of a successful negotiation by offering a realistic view of what might transpire if a case is fully prepared and tried. This is in contrast to a mediator, who might seek only to reflect how the parties see the case, rather than reveal his or her own views. —*David I. Levine*

1. Brazil, SETTLING CIVIL SUITS 44-46 (1985). *See also* Brazil, *Settling Civil Cases: What Lawyers Want from Judges*, 23 JUDGES' J. 14 (1984).

ator had jumped to a conclusion, or perhaps had not listened to them or had not taken everything into account, particularly when the evaluation was not as favorable as they had hoped. The evaluations, which tended to be expressed in terms of the chances of the plaintiff prevailing on liability and then on a possible damage range, seemed clear enough for the attorneys, but not for some of the parties. One possible solution to this problem is for the evaluator to write out the components of the mental process leading to the evaluation and then to explain it carefully step by step. If the evaluator gives a careful presentation, the disappointed party will have little cause to make the excuse that the evaluator was not thorough or was unfair.

Contributions to case management

The evaluators have contributed to narrowing the dispute, and streamlining discovery, but only in informal ways. For example, the parties in many cases were able to decide on an informal basis what was and was not in dispute. In the labor case, the parties narrowed the issues to one, backpay, which they agreed subsequently to submit to binding arbitration.

The evaluators were also able to assist the parties to make some informal arrangements on discovery. For example, in a personal injury case, the defense lawyer said that he couldn't discuss settlement without the complete medical records of the plaintiff. Rather than requiring a formal request for the documents, the plaintiff's lawyer immediately offered to obtain all the relevant records. In another instance, the evaluator was able to arrange for an exchange of selected documents. This saved the parties the problem of requesting a massive amount of documents and then sifting through them after they had been copied and presented at the normal great expense.

The evaluators have been less successful in getting the parties to focus discovery on only the aspects of the case that will play the most important roles in settlement discussions. Although evaluators made suggestions as to which depositions or documents would be most important, my interviews with the parties and the lawyers indicate that the existing discovery plans of the litigants were not affected by the evaluators' recommendations.

In addition, although it was a stated goal of ENE, very little in the way of formal documentation of the resolution of any issue was ever created. In no case did the parties write or agree to write a stipulated statement of facts. In two instances, the possibility of shaping a case for cross motions for summary judgment was discussed, but in no case did this actually occur. In no case did the parties formally agree on a discovery plan or even on a schedule of depositions.

The evaluators have contributed to narrowing the dispute and streamlining discovery.

The lawyers (as distinguished from the evaluators) reported that they could have made stipulations but that there seemed to be no necessity to do so. The lawyers thought that if it became necessary, it would be possible to reduce their informal agreements to stipulations. It remains to be seen whether the evaluators ought to insist on formalizing these agreements. It may prove to be difficult to obtain a formal stipulation at a later date.

Finally, in many ways, the mere fact of the meeting changed the "atmospherics" of the litigation. The opportunity to sit down face to face, for the first time, particularly in the corporate matters, and to express views to each other in a civilized fashion proved to be very useful. In one instance, the case was settled for almost $200,000 a few weeks after the session on the basis of a telephone call between the principals that took place with the knowledge of, but without the participation of, the lawyers. The litigation was diverted from "full-tilt" discovery to working out a business problem between business people. Thus, while little tangible comes out of the ENE sessions in the way of formal agreements, much is being accomplished.

Settlement

Settlement is a knotty issue for ENE. Although settlement ordinarily would be an important goal of a dispute resolution plan, the people who developed ENE very much wanted to get away from the settlement conference concept. They thought that by intervening early, the cases would not be ripe for settlement; the evaluator's task accordingly was to shape the future of the case in an effort to make pretrial as cheap, expeditious and efficient as possible. However, in some of the cases in this small sample, the parties were actually ready to settle. In two cases, settlements were achieved in lieu of the ENE session; the impending session motivated the parties and lawyers to settle. In other cases, settlements were ultimately achieved, but it depended in part on how the evaluators approached their task.

In training, the evaluators were told emphatically that they were *not* hosting settlement conferences. As a result, the evaluators frequently reported feeling constrained by their role and did not attempt to conduct settlement negotiations. In other instances, the evaluators acted more as mediators and did focus on settlement. In one instance, the session ended with the plaintiff making a settlement offer to the defendant. That case was settled and dismissed from the court docket within six weeks after the evaluation session. My follow-up calls with the parties confirmed that the ENE session was the direct cause of the settlement.

In one case, however, the settlement position of the plaintiff hardened after a favorable evaluation. The evaluator's assessment of the value of the claim was 33 per cent higher than the plaintiff was prepared to accept in settlement on that day. (The defendant was prepared to pay the lower figure.) Months later, that case was still in litigation, even though based on my interviews, it would have been settled on the day of the evaluation, if the evaluator had not presented the evaluation (as he was instructed to do) and had worked on settlement instead. As I will discuss below, it is possible that the goal of ENE as an expeditor of litigation and the potentially conflicting use of ENE as a settlement device can be accommodated.

Problems with ENE

Substantive problems. To date, there have not been major substantive problems. The ENE task force was concerned about the effect of the session and the frankness of the evaluators' views on the litigation. The most sensitive issue, they feared, would arise if the evaluators suggested a legal issue to the parties that had not been raised. Although this did occur frequently (at least four times), in my private interviews the parties and the lawyers did not seem unduly upset by this fact. It was taken in the spirit of advice from the impartial neutral; several participants noted that the issue would have arisen at some point anyway. Thus, based on this small sample the concern seems to be more theoretical than real.

Scheduling mechanics. The actual problems at this point are more mechanical than substantive. In some cases, it was a long time before the evaluations took place because of problems in coordinating the schedules of five or six people. This was a special problem when someone had to come from out of town. In two instances, the supervising magistrate had to issue orders requiring the presence of all parties on a specific date at the evaluators' office. The mechanics of scheduling proved to be burdensome for the court (especially the law clerk helping the magistrate) and for the evaluators who had to coordinate the scheduling. The court needs to minimize this administrative burden.

Conflicts of interest. When using senior litigators who have large personal dockets, particularly when they come from major law firms, the problem of conflicts of interest come up regularly. As a result, the ENE program had some trouble assigning evaluators to cases because of uncertainty about what constitutes a conflict of interest. However, in Local Rule 500, which governs court-annexed arbitration, this court had previously decided to follow the standard for judicial disqualification, 28 U.S.C. §455. ENE has now adopted the same standard, which should reduce the problem of uncertainty.

Conflicts of interest were a particular problem in those areas where the bar is fairly specialized and relatively small, such as admiralty. In those areas, the court should consider selecting evaluators from the ranks of retired judges or lawyers, or from the faculties of law schools.

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***Pro se* litigants.** ENE seems to be less productive with *pro se* parties than with represented parties. Two cases included parties who were essentially acting *pro se*. My interviews showed that these people did not fully comprehend the relationship between the ENE session and the court proceeding; as a result, they did not seem to appreciate what the evaluator was doing and how they should use the information they received at the session. While the session may have had a cathartic effect, it achieved little of substance in either case. At my suggestion, the court has decided to exclude *pro se* cases from ENE.

Attendance. In most of the pilot cases, parties with real power attended the sessions. There have been no greater problems when the client is out-of-state rather than in-state. At least twice, however, parties were not represented by a person with real authority to make binding decisions. In such cases, the evaluators ought to consider referring the case to the supervising magistrate for sanctioning. In addition, the court's general order ought to require that, in the written statement, the parties are to state who will be attending the session. This will create an opportunity for the opposing party to notify the evaluator if there is a problem with the designated representative. The evaluator ought to attempt to resolve the problem in advance of the session.

The order also has been amended to permit one party to suggest in the written statement that the other party bring a particular person to the session. For example, it may be that Party A will know that it was dealing with a particular employee of Party B and that that person's presence at the ENE session might be very helpful in achieving progress toward resolution of the dispute. Finally, the order now provides that when there is insurance coverage in the case, the party who is insured must be represented by a decisionmaker for the nominal party and by an adjuster or other representative of the carrier.

Parties' views of ENE

Almost uniformly, the clients and the lawyers praise the program. They do confirm the designers' hope that this kind of assessment—neutral, penetrating and analytical—is helpful to a case. The litigants mention the advantages of the assessment, including the opportunity to readjust litigation strategy on the basis of the evaluator's reaction and the qualitative advantages of sitting down together for an informal exchange.

The participants indicate that on the basis of their experience, they would be willing to pay for the services of an evaluator. They say that they would pay from $250-$1,000, split between the parties. Uniformly, they report that the time and expense of the session was worth it in terms of the benefits received. This applied even to parties who had to come to San Francisco from as far away as the East Coast.

The participants also indicated great satisfaction with their evaluators. For the pilot program, the evaluators were handpicked by the court. They are all locally well-regarded litigators, with 10-20 years of litigation experience. The evaluators also almost always possessed great subject matter expertise. These factors enhanced the quality of the evaluations and their credibility for the participants. The parties and the lawyers seemed more willing to listen and consider the evaluation of people with well-established reputations and expertise. As a result of the emphasis that the participants placed on these characteristics, my scientifically untested view is that it is not enough simply to have evaluators who possess good mediation skills.[4] This, of course, will make it much more diffi-

cult in the future to expand the program because of the need to carefully arrange "marriages" that balance the requirements of the case and the expertise of the available evaluators.

Improving ENE

Follow-up. Follow-up needs to be incorporated as a regular part of the ENE procedure. My sense from attending ENE sessions was that they frequently ended with an air of incompleteness or lack of closure. Several evaluators presented their evaluations and then closed the session with a statement on the order of "Good luck with your lawsuit." I think that the more successful closings were those where the evaluator, acting somewhat as a case manager, made sure that something specific would happen between the parties by a certain date.

Follow-up ought to be included in every session. The court has given the evaluators the discretion to decide the form of the follow-up. For example, follow-up might consist of another session after key discovery, or simply telephone calls or an exchange of letters. It would be wise for the evaluator to set specific dates in the first evaluation session by which certain follow-up steps will be taken.

Integrating settlement. Any worthwhile dispute resolution technique ought to enhance (or at least not harm) the possibilities for amicable settlement. However, the goal of settlement of cases is potentially in conflict with the designers' goals for ENE. The evaluator's candid and frank assessment of the case could harden parties and make settlement more difficult. (In one case, that certainly happened.) Moreover, because of the emphasis on *early* intervention, the case might not be ripe for settlement at the session. There might be some specific discovery (such as an exchange of documents) that needs to be completed before a case can be settled.

Despite these considerations, ENE ought to clearly permit the evaluators to discuss settlement and to facilitate negotiations. In several of the cases, the parties were prepared to attempt to settle at the session, but the evaluators had been told at their training session that they were not running settlement conferences. It was clear at the debriefing session that the evaluators felt constrained by not having authority to attempt to facilitate settlement; they wanted that authority and thought they would be effective. I concur in that judgment because I believe that ENE can mitigate both the potential conflict between the role of a person who facilitates settlement and one who provides a frank evaluation and the problem of basing an evaluation on information learned from one side privately.

One evaluator used a written evaluation to good effect. After hearing from both sides and asking questions, he used a short break to write out his evaluation on paper. With the evaluation committed to writing, but hidden, the evaluator could explicitly shift the session into a settlement conference. If through private caucusing and mediation, a settlement could be reached, the evaluator would not have to present the evaluation. An undisclosed evaluation cannot harden positions and prevent settlement. If the parties do not settle, the evaluator can still present the evaluation without the taint of anything that was said in confidence while in "settlement mode." Another approach an evaluator might choose would be to hold off the presentation of the written evaluation until a second session. In this fashion, the evaluator could shift roles and yet be able to present a frank assessment, if necessary, without losing an opportunity to settle.

Summary and conclusions

ENE holds considerable promise. The overall goal of the program designers was to alleviate some of the problems of standard litigation. Their goals were to force the parties to confront the merits of their own case and their opponent's at an early stage, to identify which matters of fact and law actually were in dispute, to develop an efficient approach to discovery, and to provide a frank assessment of the case. With the exception of obtaining formal written stipulations, which is perhaps the least important goal, these goals are being met by ENE. In addition, I think ENE can and should adopt early settlement as a goal and follow-ups as an additional procedure. With these changes, I believe ENE has the potential to be a very useful technique to expedite the resolution of disputes. However, its reliance on the limited pool of very experienced litigators with substantive knowledge probably will prove to limit widespread use of ENE.

I offer no judgments here about important issues of quality or cost-effectiveness—whether this procedure really speeds up settlements, or whether it saves time and money for the parties and for the court. The court has accepted my recommendation that the program be continued into a larger sample, and has agreed to permit me to conduct a random-assignment study that will compare ENE to standard judicial case management and to the Northern District's court-ordered arbitration program. Cases have been assigned to these three groups and new evaluators have been trained. From that larger and more rigorous study, I hope to obtain more concrete data on these important matters and to make it possible to place this program's worth in the context of work that others have done in this field.[5] □

4. Judge Harry Edwards has also cautioned against ADR "experts" who "advertis[e] an ability to solve any dispute." Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 683 (1986).

5. Evaluations of other programs include: Adler, Hensler & Nelson, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (Santa Monica, CA: Rand Corporation, 1983); Goldman, THE SEVENTH CIRCUIT PREAPPEAL PROGRAM: AN EVALUATION (Washington, DC: Federal Judicial Center, 1982); Hensler, Lipson & Rolph, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (Santa Monica, CA: Rand Corporation, 1981); Lind & Shapard, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Washington, DC: Federal Judicial Center, 1983 rev.); Shuart, Smith & Planet, *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program*, 8 JUST. SYS. J. 307 (1983); and Weller, Ruhnka & Martin, *Compulsory Civil Arbitration: The Rochester Answer to Court Backlogs*, 20 JUDGES' J. 36 (1981). Some evaluations are in process. Meierhoefer & Seron, DESCRIPTION OF COURT-ANNEXED ARBITRATION IN TEN PILOT FEDERAL DISTRICT COURTS: A STATUS REPORT (Washington, DC: Federal Judicial Center, January 1986); Rand Corporation, "Research Plan: Research on Court Annexed Arbitration in the Middle District of North Carolina" (unpublished, June 14, 1985).

See also Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420 (1983); Ryan, Lipetz, Luskin & Neubauer, *Analyzing court delay-reduction programs: why do some succeed?*, 65 JUDICATURE 58 (1981) (comparing programs). *But see* Bedlin & Nejelski, *Unsettling issues about settling civil litigation*, 68 JUDICATURE 9 (1984) (criticizing some evaluations on methodological grounds).

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