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# Northern District of California adopts Early Neutral Evaluation to expedite dispute resolution

*Based on the positive results of an extensive experimental program, the Northern District has ordered that ENE be made permanent. About 400 contract, personal injury and certain other types of cases will be assigned during the coming year.*

by David I. Levine

Since 1985, the federal court for the Northern District of California has operated an experimental program in expedited dispute resolution, called Early Neutral Evaluation (ENE). After a lengthy period of analysis and revision,<sup>1</sup> the court has permanently adopted ENE based on considerable evidence that it is an effective way to improve the resolution of civil disputes. This article first briefly describes ENE and the results from the initial pilot phase. It then reviews the analysis of the second experimental phase of ENE and concludes by describing how ENE will work in the Northern District on a permanent basis.

The developers of ENE were motivated by the desire of the judges of the Northern District to make litigation less expensive and burdensome for clients. They thought that this could best be accomplished by getting a neutral party to intervene in the early stages of the litigation process and to inject a dose of "intellectual discipline, common sense, and more direct communication."<sup>2</sup>

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1. Articles in *Judicature* have previously reported upon the ENE program at its inception, Brazil, Kahn, Newman & Gold, *Early neutral evaluation*, 69 *JUDICATURE* 279 (1986), and in its initial pilot phase, Levine, *Early neutral evaluation: a follow-up report*, 70 *JUDICATURE* 236 (1987).

2. Brazil et al., *supra* n. 1, at 279.

3. Levine, *supra* n. 1.

The heart of ENE was to be an early, frank and thoughtful assessment of the parties' relative positions and the overall value of the case. Each evaluation was to be given by a neutral, very experienced and highly respected private attorney, called the evaluator. The confidential evaluation, based on the evaluator's reaction to the parties' written evaluation statements and oral presentations, was to be presented orally to the parties and their attorneys. The developers of ENE hoped to accomplish a variety of specific goals: (1) to force the parties to confront the merits of their own case and their opponents'; (2) to identify which matters of law and fact actually were in dispute as early as possible; (3) to develop an efficient approach to discovery; and (4) to provide a frank assessment of the case. Later, fostering early settlements was added as an explicit goal.

## Initial pilot phase

The court decided to assign a limited number of cases to a small pilot study before committing itself to a larger experimental program. The pilot study permitted the court to determine what management problems would arise. As described elsewhere,<sup>3</sup> it also enabled this author to make independent observations of several ENE sessions and to conduct structured interviews with 50 participants in the sessions.

It appeared that many of the goals of ENE were being met, largely because the evaluators were providing helpful assessments of the cases to the litigants. The program needed some improvement, especially in the areas of clearly communicating the evaluation to the clients, incor-

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porating follow-up into the standard ENE process and, where appropriate, taking advantage of opportunities to settle the case. On the basis of the information obtained by studying the pilot cases, the court concluded that ENE was sufficiently promising to warrant making the recommended modifications and expanding the program to a second phase of experimentation with a larger number of cases.

## The second phase

In the second phase, 150 cases were assigned to the program. The clerk's office of the district court selected cases for ENE using criteria based on specified subject matters, rather than the amount in controversy. A law clerk in the supervising magistrate's office double-checked

the cases for suitability and obtained appropriate evaluators for each case from a list of selected and trained attorneys. In descending order, the four most common subject matters were: contracts, torts, civil rights and labor.

A total of 67 of the assigned cases actually went through the ENE process.<sup>4</sup> The second phase was studied on the basis of questionnaire data collected from the participants in those sessions,<sup>5</sup> observations by the author or his assistants at five ENE sessions, review of the files of all of the cases and follow-up telephone interviews with the attorneys in the cases in which ENE sessions took place.

**The participants' views of ENE.** Overall, the reaction to ENE was very positive. For example, 52.6 per cent of the attorneys agreed that the ENE procedure provided them with new information about their own case and 58.8 per cent agreed they obtained new information about the other party's case. The parties themselves obtained new information about the other party's case (63.5 per cent) and even about their own case (40.4 per cent). By similar margins, the attorneys and parties agreed that they obtained information sooner and at less expense than they would have without ENE. The process also helped the participants make use of this information; they frequently agreed that it enabled them to identify key issues in the case (77.2 per cent of the attorneys, 85.7 per cent of the parties). There was also strong agreement that the process improved the prospects for settlement (57.8 per cent (attorneys), 66.6 per cent (parties)). In fact, in 37 per cent of the cases in which an ENE session was held, a settlement was achieved either at the session itself or as a direct result of the session.

In contrast, the participants indicated that some of the goals of the ENE program were achieved less frequently. For example, compared to the responses reported above, the attorneys agreed much less often that the participants entered into stipulations of facts (23.6 per cent) or discovery plans (36.4 per cent) as a result of the ENE process. Similarly, the attorneys were less often in agreement (38.9 per cent) that the process helped to identify key motions whose early resolution could affect the future of the case. These mixed results can be read in at least two ways. They might indicate that

ENE has not achieved several of its goals. On the other hand, it may be true that many cases did not need, for example, a formal stipulation of facts. This is particularly true when one considers that over one third of the cases were settled at the ENE session or were put well on their way towards settlement. If a case were on the verge of settlement, it would not make sense for the evaluator to press for formalizing a stipulation of fact or planning further discovery.

**The participants' views of the evaluators' contribution.** There was overwhelming agreement that the evaluators made useful contributions to the parties' understanding of their cases (80 per cent (attorneys), 81 per cent (parties)). More specifically, according to the parties and attorneys, the evaluators provided new insights (54.9 per cent (attorneys), 61.9 per cent (parties)); a fresh perspective (52.6 per cent (attorneys), 47.6 per cent (parties)); a more complete understanding (46.5 per cent (attorneys), 52.4 per cent (parties)); improved communications (60.2 per cent (attorneys), 52.4 per cent (parties)); identification of key issues (75.4 per cent (attorneys), 47.5 per cent (parties)); and improved prospects for settlement (54.9 per cent (attorneys), 58.5 per cent (parties)). Less frequently, evaluators enabled parties to enter into stipulations of facts (20.2 per cent (attorneys)), discovery plans (30.9 per cent (attorneys)) or to shape the future of the case through motions (33.4 per cent (attorneys)).

**Satisfaction and fairness.** Given the fact that the attorneys and clients agreed they obtained so much from the ENE process and the evaluators, it is not surprising that they also indicated a high level of satisfaction with the program (79.6 per cent (attorneys), 73.8 per cent (parties)) and agreed that it was fair (94.5 per cent (attorneys), 88.1 per cent (parties)). Based on their experience, the vast majority of attorneys (86.2 per cent) and parties (91.9 per cent) indicated that they would endorse expansion of the ENE program to more cases in the federal district court.<sup>6</sup> The parties and attorneys were equally satisfied with the evaluators. Virtually all of them agreed that the evaluators were not biased and were prepared for the ENE session.

Yet another indication that the participants deemed ENE to be worthwhile was

their reaction to paying a fee in future cases for the services of the evaluator. (In the experimental phase, the court asked evaluators to serve on a *pro bono* basis.) Most participants indicated that it would be fair to charge a fee for the evaluation, in the \$500 range, if the charge were split equally between the parties.

**Costs and cost savings.** There are very limited data available on the costs of ENE and the potential savings. Given the context of high litigation costs, the participants do not believe that ENE costs them a substantial amount of money. (The direct costs involve preparation and delivery of a ten-page written evaluation statement, preparation for, travel to and attendance at the ENE session by both the attorney and client and compliance with any follow-up, such as document delivery or participation in another session, that is agreed upon.) For most parties, these expenses totaled \$1000-2500. Many attorneys and parties reported that the case was about as costly as it would have been absent ENE (37.4 per cent (attorneys), 32.3 per cent (parties)). A comparable percentage in each group reported that the case was less costly (33.7 per cent (attorneys), 42.0 per cent (parties)); a somewhat smaller group reported that the case had been made more costly (29.0 per cent (attorneys), 25.8 per cent (parties)) as a result of being assigned to ENE.

The participants were also asked whether ENE had saved them money. It was difficult for them to predict what a case would have cost without ENE, especially in those instances where the case had not yet terminated. Nevertheless, among those few who answered the question, most estimated that ENE had saved more than \$5000; three respond-

4. None of the cases in the sample reported on previously, Levine, *supra* n. 1, were included in this phase.

5. In all, 286 people participated in the 67 ENE sessions and were sent questionnaires. A total of 210 questionnaires were returned: 63 of 67 from the evaluators (94 per cent response rate); 104 of 150 from the attorneys (69 per cent); and 43 of 69 from the parties (62 per cent). This brief article generally does not report the responses of the evaluators; almost invariably, they were even more enthusiastic about ENE than were the parties or their attorneys.

6. No statistically significant differences in these (or any other) results were obtained when the responses of the attorneys were compared on the basis of the subject matter of the case, how long the attorneys had been admitted to any state bar, what percentage of time they devoted to plaintiffs' matters over the past five years, their work setting or the monetary value of the cases the attorneys most commonly handled.

ents estimated that over \$45,000 was saved as a result of the ENE procedures.

Because of their fragmentary nature, these data on cost savings must be treated with great caution and can be relied upon for only the most preliminary sort of conclusion regarding cost savings. This is an area in which it would be helpful to study a very large number of cases and attempt to collect data in a systematic fashion, something that all researchers in this area have found very difficult to achieve.

### Problems with ENE

The data revealed a limited number of problems with the program. Although they are not fatal, the ENE administrators need to work on them; in one important respect, the evaluators need to alter their behavior.

**Timing of ENE sessions.** The stated goal of the program was to have the ENE session take place within 100 days of filing of the case in federal court. This goal was virtually never met—in only two cases were the sessions held within this time limit. Twenty-five per cent of the ENE sessions were held within 173 days, 50 per cent of the sessions were held within 193 days, 75 per cent within 240 days, and all of the cases had sessions held within 429 days. In part, the slow pace can be attributed to the difficulties of getting a new program off the ground and in part to relying on part-time law students for much of the program's administration.

Although the program's time goal was not met, it does not appear to have had a significantly detrimental effect on the perceived value of the program. A computer analysis was conducted, which examined the views of the attorneys, clients and evaluators according to the time quartile in which the ENE session fell. The result was that there were virtually no statistically significant differences when the responses were analyzed according to their quartile. Even in those few instances where there were statistically significant differences, there was not a consistent pattern indicating that late ENE sessions (even those held more than one year after filing) are less useful or satisfactory.

7. What these data cannot demonstrate is whether an early session will lead to termination of the case more promptly. Such an examination needs a different type of data than was collected for this report.

8. See Levine, *supra* n. 1, at 240.

## ENE contributes greatly to the parties' understanding of the issues in their cases.

Overall, then, while intuitively it makes sense to believe that ENE sessions ought to occur as early as possible in the process, at least in terms of the perceptions of the participants, there is no empirical basis to conclude at this time that the usefulness of ENE deteriorates when the sessions are held later. Although the program may attempt to improve its record of timeliness, there is less cause for concern in terms of the perceptions of the participants.<sup>7</sup>

**Communicating with the parties.** In the pilot study,<sup>8</sup> it was noted that there were some problems with the parties' understanding of the evaluations. The parties sometimes did not understand how the evaluator arrived at the predicted result or specific aspects of the evaluation, such as why a particular item of claimed damage was not recoverable. Despite the emphasis that the training for the evaluators placed upon clearly communicating the evaluation to the parties, there is some evidence that this is still a problem.

The data supporting this concern are found in two questions. All participants were asked whether the evaluator (1) assessed the probability that the plaintiff would prevail on the merits, and (2) if so, how much the plaintiff would receive. The discrepancies among the groups in

their answers are striking. While 94.1 per cent of the evaluators said that they had assessed the probability of the plaintiff's success, just 56.4 per cent of the parties and 77.5 per cent of the attorneys stated that the evaluators did this. The result perhaps can be explained by the natural tendency of the evaluators to respond to the survey questionnaire that they actually did something that they knew they were supposed to do. However, the responses from the second question do not seem to support that hypothesis.

When the participants were asked whether the evaluator predicted how much money the plaintiff would receive if the case were to go to trial, 51.0 per cent of the evaluators said they provided a monetary assessment, as did 47.2 per cent of the attorneys, but only 26.8 per cent of the parties said that this happened. Since the attorneys would have no incentive to state falsely that the evaluators did something they were supposed to do in the ENE session, the close correspondence between the attorneys' figures and the evaluators' stated figures and the discrepancy of both with the parties' are striking.

Taking the responses to the two questions together, it appears that the evaluators typically are assessing the probability of the plaintiffs' success and are assessing the amount the plaintiffs would receive if they won at the liability stage, but that too often the message is not getting through to the parties. Showing the participants something in writing, even if it consist of nothing more than notes on a yellow pad, would help to emphasize to the parties that the promised evaluation was being given. This might help the parties remember that the evaluation was indeed presented, to recall what the reasons were for the evaluation and to leave the session with a more lasting impression of the results.

### Summary

Analysis of an extensive body of empirical data indicates that ENE works. The procedure makes counsel and parties confront their cases systematically; it enables the parties to exchange detailed information about their cases and can help identify the areas in need of additional discovery; it contributes greatly to the parties' understanding of the issues in their cases; it provides a vehicle for

communication between the parties that can be more efficient than formal discovery and more productive than most scheduling or status conferences; it gives parties a fresh perspective on their case and a frank assessment of the relative strengths of their competing positions from a neutral and experienced evaluator; and it creates opportunities to conduct settlement negotiations before the parties have wasted resources on ritual pretrial skirmishes.

The parties and attorneys have shown considerable confidence in the integrity of ENE. By overwhelming margins, they report that ENE is fair and the evaluators are unbiased. Those who have experienced ENE strongly endorse its expansion to more cases, even where the session did not lead to the direct settlement of the action. As a final indication that the participants believe that ENE is valuable, they are willing to be charged a substantial fee (approximately \$500, split between the parties) for the services of the evaluators.

Although, in general, ENE is working very well, it could be improved. The materials sent to litigants must be as clear as possible. Evaluators need to be especially careful that they are doing all that they can to help the litigants focus on case development planning, where that is necessary. Evaluators must also take great pains to improve the likelihood that the clients who attend the evaluation sessions really hear and understand what they are told about their cases. The program ought to strive to meet its goal of having evaluation sessions within approximately 100 days of filing the case.

The study could not provide meaningful data on the actual cost-effectiveness of the ENE program. On the basis of what is presently available, it is impossible to reach any conclusions regarding whether, as compared to case management or to other ADR programs such as court-ordered arbitration, ENE is the superior vehicle to speed the satisfactory termination of law suits, or whether it is truly a means to save litigants and the court time and money. Nevertheless, there can be no question that, with ENE, the Northern District of California can be confident that it has developed a program that its participants strongly believe is worthwhile.

**ENE is a  
program that  
participants  
strongly believe  
is worthwhile.**

**ENE made permanent**

The court has ordered that ENE be made permanent in the Northern District of California. The goal is for the program to have 250 actual ENE sessions per year. (Because of the attrition that the program experienced after a case was assigned in the second phase, it is expected that approximately 400 cases per year will be formally assigned to ENE from the dockets of all of the full-time judges of the court, but that only 250 sessions will actually occur.) This figure was based upon the Task Force's prediction that the court could develop, train and maintain a pool of no more than 125 first rate evaluators, and that any one evaluator could not be asked to actually host more than two sessions per year. Even if more evaluators could be found, the clerk of the court was concerned that with the resources available, his office could not absorb the administrative burdens of a larger program.

The ENE program will be presumptively mandatory for the assigned cases, in order to ensure that there will be a program that is substantial enough to justify the commitments of the evaluators and the court. The cases are "presumptively mandatory" because the judge to whom the case is assigned originally will have the power to remove the case from ENE on his or her own initiative (such as at the initial status conference) or upon a showing of good cause by counsel. (Such motions could also be referred to the ENE

magistrate for disposition.)

Because of the limitations on the number of available evaluators, the court designated only certain categories of cases as being eligible for ENE. The first criterion is the subject matter category. The categories include many contract and personal injury matters, employment civil rights cases, wrongful termination matters and certain types of commercial litigation, such as actions under the securities and antitrust laws and civil RICO. These categories were selected because of their frequency on the Northern District docket and because of the court's confidence that it could develop and maintain a pool of well-qualified arbitrators for these matters without severe problems of conflicts of interest. (Such conflicts proved to arise frequently in those subjects where the bar is comparatively small and highly specialized.)

The second set of criteria for identifying cases was based on the experiences suggesting that certain cases would be less appropriate for ENE. These are where: (1) at least one party is proceeding *in pro per*; (2) the principal relief sought is equitable, not monetary; (3) the case raises an important issue of public policy on which a judicial pronouncement is sought; or (4) the legal standards on which the disposition will turn are not clear and the parties will need a judicial pronouncement on the law to resolve the matter. The first two can be applied administratively; the last two can be considered by the trial judge or upon motion as a basis for removing a case from the ENE program. Finally, the court decided that any case that met the criteria for referral to its mandatory arbitration program (under Local Rule 500) not be designated for ENE. Given the fact of limited resources, the court decided to provide a greater number of cases access to some ADR procedure rather than provide two special procedures to a smaller number of cases. Having made ENE a permanent program through the adoption of revisions to its General Order No. 26, the court is now expanding the pool of evaluators. The first cases were assigned to ENE in November 1988. □

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