Neutral Evaluation – An Effective ADR Process

By Malcolm Sher

Neutral Evaluation, sometimes called "Early Neutral Evaluation," ("ENE"), is an confidential process in which a neutral third party (usually with subject matter expertise) hears presentations by disputants of their positions, prepares (in private) a written evaluation of their case, then asks the parties if they would like to engage in mediated settlement negotiations before hearing that evaluation. If either party wants to hear the evaluation at any juncture, the neutral evaluator presents it simultaneously to all parties in joint session. Thereafter, the evaluator again asks if the parties would like to discuss possible settlement. Pioneered by Magistrate Judge, Wayne Brazil, (Ret.) formerly of the Northern District of California, neutral evaluation is also encouraged by some state courts and is being increasingly recommended by attorneys on a voluntary basis.

Often used in cases whose outcomes seem difficult to predict, e.g., cases that involve complicated or mixed fact/law questions, difficult evidentiary issues, or hard-to-prove damages, it works best when parties and counsel acknowledge these concerns (at least privately) before spending inordinate time and money on extensive discovery or motion practice, although it is not uncommon for some initial discovery to be undertaken to flush out "core" issues and documents. Neutral evaluation offers lawyers and clients access, through a relatively informal and low-risk process, what can be an instructive (because truly objective) "second opinion" about their case.

The process typically begins with the selection of a "neutral evaluator," preferably someone who enjoys a high level of trust and regard by the attorneys, has some subject-matter expertise, is able to quickly grasp the issues and is skilled enough to talk openly and candidly without burning bridges. The attorneys and the clients likewise need to be invested in the process, be non-confrontational and willing to actively listen to the evaluator's opinions and to factor them seriously into their settlement decisions.

Following selection of the evaluator and a pre-session conference call, the parties submit written statements, much like arbitration briefs, although they may be in the form of offers of proof. Included are relevant documents and reference to critical deposition testimony, if discovery has progressed that far, or witness declarations under oath.

The evaluator's review of the submitted material is followed by a face-to-face joint session with parties and attorneys. Here the attorneys present a summary of their clients' cases, and in a Socratic back-and-forth dialogue, the evaluator asks questions designed to elicit information and clarify issues. Some evaluators may "signal" their thoughts without offering any concrete opinions, and attorneys and clients who are listening carefully will usually be able to pick up what the evaluator considers to be strong and weak points in each others' cases purely through the dialogue. Unlike most mediations, there are no private caucuses before the neutral evaluator commits his/her assessment to writing (so all participants can see everything that might affect the neutral's substantive views). Private caucusing would occur in the neutral evaluation process only if the parties elected

to proceed to settlement negotiations with the neutral – and only with all parties' permission.

In most situations, the evaluator will prepare a written evaluation, either in narrative or "bullet-point" form. This may include his or her opinions about both the liability and damages dimensions of the case (the latter often expressed as a judgment value range – as distinct from a settlement value zone). Before presenting the evaluation, however, many neutrals, including this writer, will ask the parties and attorneys if they believe it would be beneficial to have the evaluator change roles and work with them in a more "mediative" capacity in an attempt to resolve the case. If this is declined, the evaluator will present his or her written evaluation. If, however, the role-change is accepted, the evaluator may never need to deliver the written evaluation unless settlement negotiations fail.

Although not suitable in all cases, there are obvious benefits to Neutral Evaluation. The process provides speedy, private, and relatively cost-effective access to a second opinion from an experienced, credible, objective source. The evaluator's insights into which of the competing presentations are likely to gain traction at trial and which are likely to fail can be particularly useful when lawyers' clients are corporate executives, adjusters or risk managers who may need to report to other stakeholders before final decisions are made – and thus are not ready to settle then and there. Neutral evaluation also can be especially helpful when one or more of the parties (perhaps your own client) seems to have unrealistic expectations about how the case might play out. It can help protect counsel from unjustified client dissatisfaction. But even when a case cannot be settled, the neutral evaluation process can deliver significant value by sharpening trial preparation.

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