INTRODUCTION

A. THE PURPOSES AND ORGANIZATION OF THIS BOOK

This book is designed to teach lawyers, litigants, neutrals, judges, court program administrators, and public policy analysts what Early Neutral Evaluation (ENE) consists of, why and under what circumstances it might be used most productively, the differences between it and mediation (in the forms most commonly encountered by litigants and lawyers), and how clients, litigators, and neutrals have assessed the value of ENE. Because these materials explicate all the elements of the ENE process in considerable detail, they enable potential users or consumers of ENE services to understand the process and its potential at a sophisticated level. Thus, the book equips lawyers and clients alike to decide more reliably when to use ENE and how to participate in an ENE process most effectively.

A second principal purpose of this book is to teach individuals how to perform most effectively and responsibly as early neutral evaluators. This book includes virtually all of the materials that the United States District Court for the Northern District of California uses to train lawyers and professional mediators to serve as evaluators. These materials provide evaluators with a detailed road map through the ENE process, identify best practices, suggest ways to manage challenging situations, and offer advice about how to resolve ethical issues. Thus, the book can be used by institutions or organizations as a cornerstone for ENE training programs, as well as by dispute resolution professionals who would like to teach themselves how to serve best in the role of the evaluator.

B. WHAT, EXACTLY, IS ENE?

Early Neutral Evaluation is a tool for responding to some of the more distressing facts of civil litigation life. Only about 2 percent of civil cases go to trial.[1] The real center of civil litigation is in the pretrial stage, which is notoriously expensive, time-consuming, and unfocused. ENE provides litigants and their lawyers with the means to attack these problems—and, while they're at it, to improve the quality of the outcome of lawsuits, whether by settlement, motion, or trial.

Toward these ends, ENE is a hybrid process that provides equipment and incentives for litigants to save money and time. In some situations, the lawyers and the parties on both sides have a lot of information about the matter before it is at issue or, sometimes, even before the complaint is filed. But even in those situations, where the shared information base would be sufficient to support productive settlement negotiations early in the pretrial period, the litigation process seems to take on a life of its own and to continue, expensively but unproductively, much longer than it needs to. ENE provides counsel and clients with tools to reduce the risk of this kind of waste.

For the many cases in which the shared information base, at the outset, is not sufficient to support productive settlement discussions, ENE enables parties to identify more reliably the most important disputed issues (whether factual or legal, or both) in their case, to understand better the support for their respective positions on those issues, to narrow and focus discovery and motion practice, and to explore prospects for settlement before wasting vast sums on unproductive pretrial excursions.

In addition to increasing the efficiency and rationality of litigation, ENE can improve the quality of justice by expanding the information base on which parties make decisions about case development and settlement, by sharpening the joinder of issues, and by enhancing the subtlety and reliability of litigants' analyses of relevant evidence and law.

1. This is the figure for federal district courts. The percentage of civil cases that reach the trial stage is only a little higher in state courts of general jurisdiction.

The purposes and benefits of ENE can be summarized as follows:

ENE is a process tool that litigants can use to improve the

(1) efficiency,
(2) rationality, and
(3) fairness

of civil litigation.

ENE presents litigants with opportunities to

- reduce cost,
- expedite disposition,
- explore prospects for settlement, and
- enhance the quality of justice by
  - expanding the database for decisions about case development and settlement,
  - refining analysis of evidence and law, and
  - sharpening the joinder of issues.

Just as ENE is good for litigants, it is also good for courts—not necessarily because ENE reduces docket pressures (though it might), but because it makes litigants less unhappy with the court system. Courts that offer free or low-cost ENE sessions improve the service they provide by offering litigants opportunities to cut through the thickets of indirection and expense that have grown over the path of pretrial litigation. By adding ENE to the tools they provide the parties, courts explicitly acknowledge the limitations of conventional litigation and reach out to litigants to help them address its shortcomings.

Moreover, in ways we will explain, including ENE in their offerings enables courts to deliver meaningful service to a higher percentage of their civil cases. By delivering better service to more cases, courts earn more gratitude and greater respect from litigants, thus strengthening our democratic institutions.

We call ENE a "hybrid" process because it serves two different (but related) *purposes* and includes two different (but related) *processes*. The two purposes are (1) to reduce the cost and time consumed in the pretrial phase of litigation by focusing efficiently on what really matters and (2) to better equip parties to determine whether they need to proceed with litigation at all—i.e., to see whether they can settle their case after the first couple of rounds of pretrial dancing rather than waiting until the orchestra has exhausted itself into silence.

The two processes within ENE consist essentially of (1) an informal, preliminary, nonbinding minitrial (of sorts) to an expert in the subject matter of the lawsuit and, at the parties' election, (2) a mediation hosted by that same neutral expert.

What are the essential elements of ENE? While variations on the basic process themes have surfaced in other parts of the country, this book is based on the original and best-developed model of ENE, the version that has evolved in the United States District Court for the Northern District of California. The key features of ENE in this court are as follows:

ENE is

- free,
- nonbinding, and
- confidential.

The evaluator combines

- subject matter expertise with
- training in mediation.

ENE consists of

- a presession conference, followed by the
- evaluation session, in which
  - parties and counsel attend a joint session,
  - counsel deliver direct, informal presentation of bases for claims and defenses,
  - there is no direct or cross-examination,
  - percipient or expert witnesses may participate in presentations,
  - settlement negotiations may occur after the evaluation is drafted, and
  - an opportunity is presented for stipulations and case development planning.

Evaluators often follow up the ENE session by scheduling:

- further exchanges of information or of offers or demands.
- phone conferences.

Launch Early

Under the Northern District's model, the first "E" in ENE is important. Moving a case toward an ENE session should begin *early* in the pretrial

period. In many cases the decision to use ENE should be made before most motion activity and discovery have been undertaken. Often the best time for the litigants or the court to launch the ENE process is *before* the parties have spent a lot of money and time using the conventional machinery of pretrial litigation to formally develop their cases.

Select the Evaluator

The first step is to identify the person who will serve as the host of the ENE session. That person must be an experienced lawyer or retired judge who has appropriate qualities of mind and temperament, as well as (1) deep expertise in the subject matter of the litigation, (2) training in the role of an ENE evaluator, and (3) training and experience as a mediator.

The Presession Conference

Once the evaluator is selected, he schedules a preliminary conference, which is usually conducted over the phone. Lead counsel are required to participate. Clients are invited, but not required, to observe and to contribute. During this preliminary conference, the host:

- makes sure that everyone understands the procedures that will be followed and the rules that apply (e.g., re confidentiality),
- helps counsel decide whether it would be wise to exchange specified additional information or to schedule limited additional discovery in advance of the ENE session,
- identifies matters that should receive special attention in the written ENE statements that the parties are required to exchange, and
- sets the date and location for the full ENE session.

The Written ENE Statements

The parties submit to the evaluator and exchange their written ENE statements about a week in advance of the session. These statements are not filed and may not be disclosed to anyone outside the ENE process. In addition to analyzing the evidentiary and legal underpinnings of the key issues in the case, the parties' statements (1) identify by name and position each person who will attend the session and (2) describe any matters that might need limited, additional exploration through disclosures, discovery, or motions in order to position the parties to engage in productive settlement discussions.

The ENE Session

The ENE session is confidential and not recorded. The principal components of the session include the following:

An opening presentation by the evaluator. She describes the purposes of the process and how it will be structured, and reminds the parties about the key rules and conventions that will be honored.

Substantive presentations by each party. These presentations are made primarily by counsel but sometimes include significant contributions by the parties themselves or, less commonly, by experts or percipient witnesses. Some characteristics of the presentations are as follows:

- The presentations are informal and often narrative in form.
- No rules of evidence apply, there is no examination or cross-examination of any party or speaker, and no interruptions are permitted during this phase of the process.
- The parties decide for themselves what to include in their presentations, but typically they (1) identify what they believe are the key disputed issues and (2) describe (or present) the evidence and set forth the arguments that support their positions.
- Occasionally parties use this opportunity to identify longer-range goals or concerns, or opportunities the situation might present to advance in tandem any interests of the parties that might overlap or be complementary.

Responsive substantive presentations by each party. After each party has made its initial presentation, opposing parties are given an opportunity to respond by describing additional evidence, making additional argument, or commenting on larger or longer-range matters.

The evaluator poses questions to clarify or probe. The evaluator might also summarize her understanding of what has been said in order to afford parties an opportunity to correct misunderstandings or to add material for the neutral's consideration.

The evaluator identifies the parties' common ground (matters about which the parties seem largely to agree), as well as issues the parties could put on the back burner (issues that likely won't get much play in determining outcome). The goal here, of course, is to encourage the parties not to waste time and money on undisputed or peripheral matters.

The evaluator identifies the most important disputed issues of fact or law. The parties are given an opportunity to comment on, correct, or even concede some points.

The evaluator privately drafts an evaluation. The evaluator retreats to her private office to draft the evaluation. The reach and depth of the evaluation varies with the character of the information base the parties have provided. The evaluation might be of the entire action, or of some claims or defenses, or of especially significant lines of argument or packages of evidence. Necessarily, the evaluations are provisional, never purporting to be definitive or written in stone. In their evaluations, the neutrals identify any important assumptions or conditions that inform their assessments to help the litigants isolate significant forks in the analytical road.

The parties decide whether to hear the evaluation at this juncture or to first explore prospects for settlement. After generating paper copies of her evaluation, the evaluator returns to the session room. Instead of immediately presenting her evaluation, however, she presents the parties with a choice:

- If any party elects to hear the evaluation at this juncture, the evaluator presents it to everyone, simultaneously, *or*
- If all parties agree, the evaluator keeps her evaluation under wraps for the time being (the parties are entitled to see it later) and changes roles from evaluator to mediator.

Thus, at this point the parties may agree to convert the ENE session into a mediation, the purpose of which is to explore whether the parties can reach a settlement, or at least can identify more reliably what they need to do in order to position themselves to take a hard run at reaching an agreement.

The evaluator offers to help the parties fashion an efficient plan to attack the obstacles to settlement that the evaluation and mediation have exposed. After presenting the evaluation and helping the parties explore prospects for settlement, the evaluator is well situated informationally to help the parties decide what discovery or motion activity they need in order to position the case for disposition by settlement, motion, or trial. The evaluator has no power to force the parties to proceed in any given way, but she can make suggestions and help the parties negotiate a path forward that promises to lead most efficiently to disposition. The evaluator can also

offer to host a second mediation (or cheerleading phone conversations) after the parties have completed core follow-up activities.

Follow-Up Communication

The Northern District's rules permit the evaluator to order limited follow-up communication by the parties. For example, the evaluator may order parties to respond to settlement demands or offers that have been made, to exchange letters addressing specified factual or legal issues, to participate in a focused telephone conference with the evaluator, or to report (later) how anticipated discovery or motion activity affects counsel's analyses of the case or their clients' settlement positions.

To summarize in outline form, the essentials of the ENE process are as follows:

A. A Presession Conference with All Counsel (Parties May Monitor and Participate)
B. Written Evaluation Statements
C. The ENE Session
    1. Evaluator makes introductions and opening remarks.
    2. Parties informally present bases for claims or defenses.
    3. Parties make responsive presentations.
    4. Evaluator asks questions to clarify and probe.
    5. Evaluator identifies common ground and possible stipulations.
    6. Evaluator identifies and clarifies key disputed issues.
    7. Evaluator privately prepares written evaluation.
    8. Evaluator offers parties opportunity to explore settlement before receiving evaluation; evaluator changes role to mediator to facilitate settlement negotiations if asked to do so.
    9. If settlement is not explored or reached, evaluator presents evaluation to all parties.
    10. Evaluator offers parties another opportunity to explore settlement.
    11. Evaluator encourages stipulated case development planning.
    12. Evaluator and parties schedule follow-up.
D. Follow-up

What Can This Procedure Deliver to Litigants and Lawyers?

- An incentive for lawyers, parties, and claims adjusters to do their investigative and analytical homework earlier than they otherwise might.
- An occasion to communicate substantively and directly across party lines.
- A tool for cutting through the indirection, obfuscation, and expense of conventional discovery and motion activity—and thus for learning, in a compact process, some of the key lines of reasoning and significant evidence that support an opponent's position.
- A sustained opportunity to see and assess, directly, the parties and lawyers on the other side.
- A means to enable clients to participate more directly and to understand their cases and options more clearly.
- More information about a case early in its life.
- More reliable analysis of key evidence and issues.
- A valuable second opinion (on the merits) from a neutral expert.
- Ideas from an expert about how to position the case most efficiently for disposition by agreement or litigation.
- An opportunity to try to settle the case earlier than it otherwise might and, if no settlement is forthcoming, a tool for identifying the things that really need to be done for settlement negotiations to be fruitful.

In sum, ENE can improve the litigation process, making it more efficient and rational, and, at the parties' election, can help them find a way to leave litigation behind. It can enhance the quality of justice by delivering more information across party lines and sharpening the joinder of truly significant issues.

On a more abstract (but not necessarily less real or important) level, ENE can improve litigants' access to justice and reduce the alienation from our adjudicatory system that many litigants feel.