



## WHAT IS EARLY NEUTRAL EVALUATION AND HOW CAN IT HELP COUNSEL AND CLIENTS?

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### What is ENE?

"Early Neutral Evaluation" [ENE] is a type of Alternative Dispute Resolution [ADR], by which counsel retain a neutral third party to help them analyze legal (and factual) issues and to reduce

litigation time and expense, thereby assisting the parties in resolving their disputes. In some ways, it is a combination of "facilitative" and "evaluative" mediation.

ENE helps parties pinpoint the strengths and weaknesses of each side's case. It usually takes place after some exchange of discovery has taken place, although the Evaluator can assist the parties in exchanging information so that the process is successful.

After choosing an Evaluator, counsel will "meet" with the Evaluator over the phone, to schedule the process. Counsel can advise if certain discovery or information is needed. The Evaluator will receive copies of the important pleadings and schedule the service of position statements that outline the facts that are undisputed and in dispute, the major legal issues, and the party's position on the legal issues. After reviewing such, the Evaluator will advise whether he/she needs further briefing or oral argument to narrow the focus on the facts and legal issues in dispute, and, if not, will focus the parties on the factual and legal issues in dispute (and give each side an opportunity to comment on such, as well as to point out other factual or legal disputes). Another round of focusing and position statements may take place; the Evaluator uses joint sessions, akin to an oral argument to further focus the parties. Each side is asked pointed questions, and can possibly ask each other questions. However, the parties are not examined or cross-examined.

The Evaluator, after considering each side's positions, will provide an analysis or a list of questions that focus on the possible weaknesses, and to explore the perceived strengths. This may also serve as an opportunity for the parties to stipulate to facts that are not in dispute. The Evaluator at each stage will give the parties an opportunity to discuss settlement. The Evaluator may shift his/her role to that of a neutral Mediator, to assist the parties in exploring settlement options, if requested to do so. The Evaluator can assist the parties in focusing on the areas for discovery, too. Finally, if resolution is not achieved, the Evaluator can follow up with the parties to see if there are future opportunities to explore settlement.

### Why ENE?

- ENE gives parties and counsel "their day in court" – that is, having an experienced, well-regarded neutral give an objective view of the positions that they have taken in a dispute.
- ENE helps the parties facilitate their discussions – without being perceived as being weak, or not having confidence in their case
- The obvious: the parties and their counsel get an objective view of their case from a neutral person with expertise.
- ENE helps the parties focus on their strengths and weaknesses
- ENE can help where there is a party or a lawyer who over-plays his/her case
- ENE can help an attorney convince his/her own client see weaknesses, especially if counsel believes (rightly or wrongly) that merely suggesting settlement, or pointing out weaknesses in a case will be perceived by the client to be a lack of confidence
- ENE, by narrowing issues, can assist in streamlining discovery and motion practice, thereby reducing the costs of litigating a case

### When can you use ENE?

To be most effective, ENE requires that there have been an exchange of sufficient information so that the real issues (factual and legal) can be explored and targeted. If used at an early stage, the Evaluator can help the parties exchange information or target the few depositions that are truly needed, to ensure that everyone – including the Evaluator – has sufficient information on hand to analyze the disputes properly.

## **How do you choose an Evaluator?**

An Evaluator should be a competent and experienced attorney, with an expertise in the substantive issues in dispute. The Evaluator should be trained in ADR, including evaluation and mediation techniques.

Parties should not expect their judge to be an Evaluator, as the court dockets simply are too crowded to permit the time and attention that ENE requires.

## **What qualities do you want in an Evaluator?**

The Evaluator should be an experienced attorney with expertise in the subject area. The Evaluator needs to be persuasive and honest, calm, a quick study, intelligent, and a good listener who is respectful of the parties and counsel. The Evaluator should not be defensive, but needs to be sensitive to the investment that parties and their lawyers have made, and interested and invested in helping the parties (including by helping them explore settlement).

## **What can participants expect from ENE?**

ENE helps in a myriad number of ways:

- Reduces discovery (including costly depositions)
  - Obtain more information about a case early on
  - Allows clients to participate
  - Provides a reliable resource to analyze the strengths and weaknesses of evidence and legal issues
  - ENE can provide an opportunity to explore settlement, including through mediation (as an adjunct), by finding the common ground of facts and the analysis of legal issues.
  - ENE helps avoid or reduce the delays and enormous expense of litigation, and to avoid the delays inherent in court schedules
  - Early use of ENE may help avoid the expense of discovery of ESI (electronically stored information), the delays and expense of motion practice (including discovery motions).
  - ENE may help parties and counsel communicate more effectively, and avoid "personality" issues and conflict.
- Insurance representatives and in-house counsel may obtain a more objective and neutral evaluation of a case, thus helping them to focus on settlement and save transactional cost of litigation.

## **What is the difference between ENE and Mediation?**

In mediation, the neutral, objective person, helps facilitate a resolution of the parties' dispute, through a variety of techniques. A mediator may use joint sessions (where all parties and counsel are in attendance), position statements (which may or may not be exchanged), private caucuses and other ex parte communications, to help the parties settle their dispute, by finding common ground. Mediation helps the parties focus on their common interests, and what alternative can be achieved through a settlement, including by saving the expense of litigation.

In ENE, a neutral and objective person helps the parties and counsel focus their energies on what issues of fact and issues of law exist, and to analyze what a likely result may be. Much of the work is in joint sessions, until the Evaluator begins his/her evaluation of the strengths and weaknesses of a case. ENE usually involves more participation by lawyers than their counsel, but through the process, parties feel as though they have their day in court because the Evaluator, whose expertise in the legal issues is essential, explores the evidence and legal issues with each side and helps them to assess "their case". By seeing how the case may fare through the judicial process, parties and their lawyers can have a more sensible view of settlement options. An experienced Evaluator can also help assess the cost of litigation.

Early Neutral Evaluation is a valuable tool to reduce the expense and delay inherent in litigation, and to help explore early opportunities to settle a dispute.

## **About the author**

**Erica B. Garay** is the Chair of the **Alternative Dispute Resolution** practice group and a member of the **Litigation** practice at Meyer, Suozzi, English & Klein, P.C. located in Garden City, Long Island, N.Y. She is also a Member of the Firm, and an arbitrator and mediator. Ms. Garay is on the American Arbitration Association roster of

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