



By Sandy Gage

Early Neutral Evaluation — panacea or pitfall?

Just when you thought you knew all the alternatives to trial by jury, a new option is being offered by the Los Angeles Superior Court, called Early Neutral Evaluation or ENE. The program has been exported from success in Northern California. Can you use it to benefit your and your clients? The answer is: "It depends."

At the outset it requires that all parties opt for the program. They then select an evaluator from a panel of pre-qualified experienced trial attorneys. So far about 50 attorneys have been selected, based upon their expertise in specific subject matters. Their job is to provide the parties with an oral no-holds-barred evaluation of the case. They can discuss evidentiary issues, liability, damages, and their impression of anything that might bear upon the outcome of the case.

How do the ENE's prepare an opinion to express? The program starts with a telephonic conference call with all attorneys to discuss the case and the approach that will take place. The attorneys then are to submit a brief that covers the relevant issues at least seven days before the hearing. The hearing consists of an abbreviated trial-like presentation. It is contemplated that the clients have read the briefs and will participate by comments or testimony at the proceeding, but the scope of their involvement is up to their counsel. The ENE will ask pertinent questions to inform himself or herself and may bring up points not previously addressed. Nothing is recorded. There is no cross-examination. The proceedings are cloaked with confidentiality.

At the conclusion of the presentation, the ENE retires to write out an analysis and evaluation of the case. Upon return, the parties are asked if they want to hear it, or negotiate, or leave. This is the moment of truth. It is like the decision to see the river card in Texas Hold-

Em. If any party asks for the information, it is orally reported. The parties may then decide to have a settlement conference or discuss the further handling of the case or leave. The ENE will assist, as requested. The report is not filed with the court nor handed to the parties.

The goal of this process is to meet early and attempt to resolve the case or find ways to move it forward more expeditiously and less expensively. The ENE is to provide a reality check for the parties. So is it a panacea or a pitfall? It depends on the merits of the case and what would be most helpful. Illustratively, if you have a good case but feel that the other side is unrealistic and has not evaluated it properly, the ENE summary might help to resolve the case. If the value may hinge on some legal issue, a motion for summary judgment or the significance of an expert's report, perhaps this early evaluation will help to settle the matter. What if the ENE evaluation is unfavorable? Is that necessarily bad? Maybe a further assessment of the case or a discussion with the client will save much expense and dissatisfaction down the road.

ENE has an important benefit – the first three hours are free. A second benefit is that the panel consists of knowledgeable attorneys who have stature in the community. That should provide some assurance that they will do their best to provide an honest evaluation. Unlike mediation, no ex parte communications are permitted so that you know exactly what each side has presented and said. Since a mediator is a facilitator, the process usually moves settlement to the lowest common denominator whereas the goal of the ENE is to evaluate the case based on the factual and legal issues even if much higher or lower than what they would suggest at a mediation.

A potential benefit is that the client can participate in an active way. Sometimes this catharsis is very helpful and the fact that the ENE renders an opinion might satisfy that client's need to be heard and avoid the need to proceed to jury trial with a consequent savings of time and money.

Unlike a non-binding arbitration, the procedure is shorter; less formal; does not require any formal proof; and the scope can be controlled by the advocates.

Although the ENE may lead to settlement, that is not the explicit goal of the process. The session may instead result in assistance in planning discovery or working out a useful process that simplifies handling by the parties.

The experience in San Francisco has been favorable and some recent anecdotes in LA suggest that ENE hearings may result in settlements. Such discussions could occur before or after the neutral's opinion has been expressed.

So what are the drawbacks? The neutral might not agree with your approach and evaluation of the case and that expression of opinion might hinder later negotiations. Since all proceedings are conducted jointly, some cases might not be suitable for the ENE process. Cases in which you would rather disclose confidential information to a mediator, such as those in which you have significant impeaching material or where you want the mediator but not the other party to be aware of substantial problems that might impact value would be handled better in a different forum.

As every trial lawyer knows, litigation is both an art and a science. Careful selection of cases for an ENE might provide substantial benefits for you and your

See Gage, Next Page

client. Thus, keep it in mind as one of many options that might be just right in a given case.

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