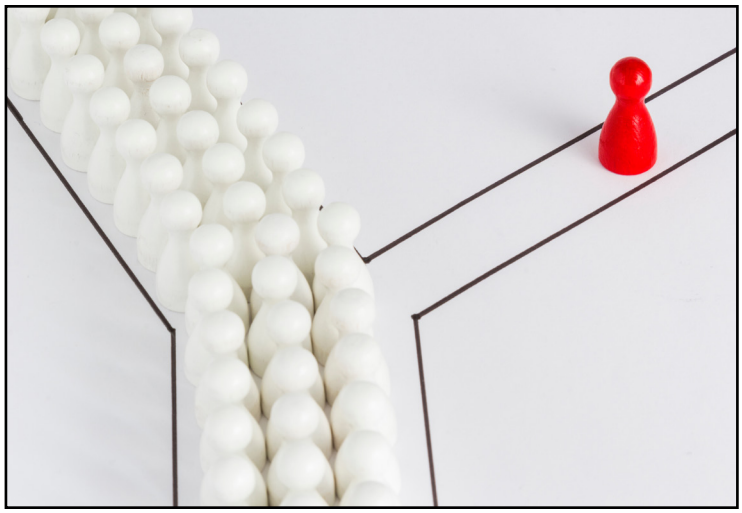
Daily Journal
VERDICTS & SETTLEMENTS
FRIDAY, JUNE 19, 2020

Early neutral evaluation: The road less traveled

By Greg Derin



Shutterstock

According to the prophet Mick Jagger "[y]ou can't always get what you want, but if you try sometimes, you might find, you get what you need." Since the advent of the modern alternative dispute resolution movement in 1976, mediation has grown more popular and supplanted private negotiation as the preferred means of avoiding resolution by adjudication.

Mediation has obvious advantages to litigation. Within the limits of having a bargaining partner, parties have complete control of the resolution of their dispute. As great as their advocates may be, as compelling as the witnesses and documentary evidence may appear, once parties step into a courtroom or arbitration forum, they surrender control to those who view the controversy through a lens clouded by a lifetime of experience and prejudice. In a confidential mediation setting, after identifying their interests and objectives, the parties control the outcome. They like a deal, they take it, they do not like the best available deal, they reject it and proceed with their alternatives.

Yet even in mediation, the parties enter the process viewing the controversy through the lens of their own story, and with their own perspective on the facts — each with a determined view of how the dispute should be resolved. As Mick would probe, what do you really need? When we default to mediation, we skip down the road, not always pausing to ask where it leads.

Some years ago, I received a call from two general counsel of sophisticated media companies. They asked me to mediate their pre-litigation dispute. The controversy involved what is known as a vertical integration claim: one party alleging that the other had not paid it a fair license fee for the broadcast of its television production, because that licensor was the parent company of the broadcaster with which it was negotiating (i.e., it had not bargained at arm's length). As I probed the nature of the dispute, both general counsel responded positively when asked if what they really wanted was for me to evaluate the claims and tell them who would prevail if they litigated the dispute.

I then asked if they would be better served by an early neutral evaluation, or ENE, rather than progressing immediately to mediation. I explained, in its simplest form, that an ENE is a confidential proceeding in which an attorney with expertise in a subject area reviews proffers of evidence and either helps the parties reach a resolution, or provides an opinion of the likely litigated outcome. If no settlement is achieved, the neutral evaluator may help the parties design a streamlined discovery or litigation plan in anticipation of trial.

Both general counsel enthusiastically embraced the ENE concept, and we designed and executed an agreement structuring a one-day confidential proceeding in which the parties presented documentary evidence, and witnesses presented relevant facts by direct examination. I asked clarifying questions, but cross-examination was not permitted. Highly confidential financial information regarding comparable license fees was submitted only to me in camera.

*AN **ENE** IS A CONFIDENTIAL PROCEEDING IN WHICH AN ATTORNEY WITH EXPERTISE IN A SUBJECT AREA REVIEWS PROFFERS OF EVIDENCE AND EITHER HELPS THE PARTIES REACH A RESOLUTION, OR PROVIDES AN OPINION OF THE LIKELY LITIGATED OUTCOME.*

After a full day of "hearing," I asked how the parties and counsel wished to proceed. One side stated that they understood the position of the other side, and the relevant facts, much better and desired to move immediately into mediation. The other side rejected that approach and insisted upon receiving a written evaluation. I produced a 15-page single spaced evaluation of the merits of the parties' positions,

and my view of the likely outcome of litigation, based on the information provided, including my in camera review of the confidential financial documents. Armed with this confidential document, senior executives of the two companies met directly and settled the dispute.

The ENE process bore many attributes of a mediation, but with significant differences.

1. The parties obtained an informed factual and legal review from someone they viewed as a credible source. Although an "evaluative" mediation assesses the risks and potential of claims, the ENE provided a non-binding review in which witnesses were assessed by the parties, and evidence was shared confidentially in a more fulsome manner, and subject to a more comprehensive review than would have been possible in a mediation, which is now generally conducted in private caucuses. Mediations are often lauded for allowing parties "their day in court." While this can be a strength, the goal of mediation is settlement. Evaluation is at the heart of ENE. The evaluator is hired for his subject matter expertise, and for the express purpose of rendering an opinion. After the first phase of the ENE, the parties can consider mediation, or request assistance structuring a litigation process. In appropriate cases, this flexibility is very advantageous.

2. Both ENE and mediation are private processes. Confidentiality and avoidance of precedent make ENE a powerful element. In the highly confidential pre-litigated matter in which I was engaged, privacy was essential. Privacy aside, in an ENE, there are no caucuses, and hence no apprehension that the evaluator is receiving information ex parte or communicating opinions to the parties differently. If evaluation is the central goal of the parties, an ENE levels the playing field in a more arbitration-like format.

3. Confidentiality. In structuring the ENE process, the parties may fashion flexible additional protections. The ENE discussed above involved documents which would have been the subject of expensive discovery battles in public litigation. The parties trusted the evaluator to review them in camera and render opinions based upon the documents in a manner which protected the documents, but used them as a factual basis of opinion.

4. Avoiding precedent. Neither mediation nor an ENE create binding evaluations. The power of the ENE is in its more granular focus on the facts and law, persuading those who require such an analysis of the likely outcome. Good mediators will engage in gradations of evaluative behavior. The art of the process lies in focusing on the win-win of interest-based negotiations. ENE is best suited for those who need to drill into the facts and law and receive a concentrated opinion of the likely results from an evaluator whose opinion they respect.

5. Comparative efficiency of mediation and ENE. Increasingly, mediation of complex matters may require more than one day. An ENE will likely require more than one day for preparation, hearing and the possible writing of an opinion. The speed and cost of both processes will vary depending on complexity. The cost of the ADR process should not be the "tail wagging the dog." I often hear how grateful parties are for what they consider to be money well spent on securing good results, avoiding the uncertainties of trial, and controlling their own destinies.

6. What process is best positioned to resolve a dispute with least disruption to the relationship of the parties? Parties often seek a non-adjudicatory resolution that will repair, improve or avoid further damage to already strained relationships.

7. Sequential processes. Although the licensing dispute did not formally transmute from an ENE to a mediation, the parties took the evaluation and used it as a predicate for a negotiated solution. If it had not resolved in this manner, our next step would have been an effort to streamline the litigation to preserve privacy and minimize cost. The particular matter would have been very public and given the scope of the financial data, the cost of the litigation would have run into the millions of dollars.

Mick Jager's fellow philosopher, Yogi Berra, said "[y]ou got to be very careful if you don't know where you're going, because you might not get there." Know where you want to go and choose your ADR process accordingly. ■

Greg Derin *is a mediator and arbitrator at Signature Resolution. He has been an ADR professional for nearly 20 years. For eight years he assisted in teaching the Mediation Workshop at the Harvard Program on Negotiation. Greg can be reached at gderin@signatureresolution. com.*