BY KATHERINE D. SPITZ

Early Neutral Evaluation and the Value of an Informed Second Opinion

Early neutral evaluation, an often-overlooked aspect of alternative dispute resolution, can help litigants "escape the echo chamber," by providing them with an informed basis upon which to either resolve or more efficiently litigate disputes.

Of 141,653 cases disposed of in Wisconsin circuit courts in 2023, 3,917 (2.8%) ended in a trial.[1] In federal district courts, only 0.7% of cases went to trial nationwide during the same period.[2] Most cases tried in Wisconsin circuit courts were small claims court trials or evictions; only 112, or 0.08%, of Wisconsin cases were disposed of via jury trial in 2023.[3] These statistics represent a longstanding trend that includes an increase in the use of alternative dispute resolution (ADR), most frequently mediation.

Mediation works well in many cases, but it is not the only option. Early neutral evaluation (ENE) can enhance time and cost savings and promote attorneys' confidence in the decision to settle a case and on what terms. Alternatively, this process can streamline litigation by identifying those issues on which discovery and motion practice is likely to be most beneficial – thus saving attorneys and clients time and money.

What Is ENE?

ENE is a non-binding dispute resolution process in which a third-party evaluator considers the parties' arguments and offers an assessment of their strengths and weaknesses early in the litigation process, typically before extensive discovery occurs. The evaluator must have expertise in the type of case at issue. The format of the evaluation can vary depending on the preferences of the parties or the court; it usually entails the parties providing legal briefing, oral presentations, or both to the evaluator. No written submissions are filed with the court, and any oral presentations are not recorded. The evaluator then provides a confidential written or oral evaluation exclusively to the parties and their counsel. The evaluation is, in effect, a second opinion. It may assess, among other things, the parties' likelihood of success, a range of damages, or the admissibility and persuasive value of key evidence based on the evaluator's expertise.

The evaluation frees parties and counsel from the echo chamber that frequently develops in the early stages of litigation before the other side's positions are known or understood. A neutral evaluation by an expert invites the parties to approach their dispute with a fresh perspective. The parties can then choose to engage the evaluator as a neutral mediator, or they can proceed with the litigation, having the benefit of both an expert's perspective and the knowledge of areas in which discovery and motion practice are most likely to be fruitful. The primary goal of ENE is providing clarity to the parties with a targeted investment of time and cost. Although a mediated settlement may follow ENE, resolution is not the primary goal of the process.

The accompanying table (p. 20) shows some of the most important similarities and differences between ENE and mediation.

Wisconsin's ADR statute, Wis. Stat. section 802.12, authorizes ENE. Section 802.12(1)(c) describes ENE as "a dispute resolution process in which a neutral 3rd person evaluates brief written and oral presentations early in the litigation and provides an initial appraisal of the merits of the case with suggestions for conducting discovery and obtaining legal rulings to resolve the case as efficiently as possible." Although this option is codified, it is infrequently used (apart from medical malpractice panels, described below).

On the federal side, ENE has been authorized as a dispute resolution procedure by Congress for roughly 35 years.[4] The Eastern District of Wisconsin's Civil Local Rule 16(d)(4) notes that ENE aims to "reduce the cost and duration of litigation by providing an early opportunity for the parties to obtain a neutral evaluation of the case

Early Neutral Evaluation	Mediation
Non-binding; evaluator cannot require parties to settle	Non-binding; mediator cannot require parties to settle
Proceedings are confidential and inadmissible	Proceedings are confidential and inadmissible
The evaluator is expected to provide an opinion on the likelihood of success of claims or the strength of arguments due to nature of the role	Mediators frequently decline to provide input on the likelihood of success because doing so can be perceived as a breach of neutrality
Only an expert in the subject matter of the case can serve as an ENE evaluator	Mediators might or might not have subject-matter expertise
Typically occurs before extensive discovery or motion practice	Can be used at any stage of litigation

and to engage in meaningful settlement negotiations."[5] The rule emphasizes that the evaluator "has no power to impose settlement."[6] Although the local rule's text provides that any civil case "may be referred to ENE if all parties agree," the commentary to the local rule states that the judge "may encourage and even order the parties to participate in ENE."[7] While ENE has been part of the local rules for years, the author confirmed with the Eastern District that the process is very rarely invoked by litigants.

The Western District of Wisconsin does not have a specific local rule referencing ENE, but the federal rules provide that the court may take appropriate action on matters including, but not limited to, "using special procedures to assist in resolving the dispute" and "facilitating in other ways the just, speedy, and inexpensive disposition of the action"[8] during the preliminary pretrial conference.[9]

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How ENE Is Used

Some attorneys may be skeptical of the promise that ENE will save money and time – after all, the process more closely mimics a mini-trial or a summary judgment hearing than does a typical mediation. This might mean more preparation for counsel earlier in the case and therefore some additional expense up front. But attorneys may be interested in using the procedure in the Eastern District in particular, where the local rule provides that the evaluators "volunteer their preparation time and the first four hours in an ENE session" and then are capped at 60% of their standard billing rates for the next four hours.[10] Under the rule, the evaluator must be "an experienced attorney with expertise in the subject matter of the case."[11] As in mediation, the parties can agree on the neutral or the court may appoint one.

While ENE might be rare in practice here in Wisconsin, attorneys and judges have implemented it successfully elsewhere. For example, Minnesota attorneys and judges frequently use ENE in family law disputes, including but not limited to those related to custody and placement.[12] The result can be the disposition of divorce cases in weeks instead of months. The Southern District of California mandates the procedure, and the Northern District of California encourages it, to expeditiously dispose of cases or to narrow issues.[13] The District of Vermont has been operating a robust ENE program since 1994. As of 2016, the most recent date for which aggregated data is publicly available, over 2,000 cases had proceeded to an ENE session.[14] Other courts, like those in Wisconsin, explicitly authorize the practice, but little data is available on how frequently it is used.[15]

As often occurs in mediation, parties and attorneys benefit from the perspective of an outsider, but unlike mediation – for which the neutral can but need not be a subject-matter expert – the evaluator is well-positioned by expertise to understand those aspects of the dispute that are likely to matter to a judge. Lawyers frequently struggle with clients convinced that they could never lose at trial. The input of a neutral expert can tamp down unreasonable expectations and offer a more nuanced assessment *before* litigants spend months or even years taking extensive discovery at high cost. Participating parties can have something akin to their day in court without long delays. And, as a bonus, litigators who enjoy trying cases can use their presentation skills early in the litigation, in a setting with less risk to their clients.

Getting more information faster can break down the walls of the echo

chamber in which lawyers and clients often find themselves early on. There is frequently a lag between the pleadings stage and taking discovery in earnest. Attorneys only have so much time; many are inclined to put out the most urgent fires first, and a new case might only heat up as a deadline in the scheduling order approaches. But that also means that parties might spend months knowing only their own point of view on the dispute. ENE encourages litigants to make the case a priority, preparing the best evidence and arguments early so that all can determine whether protracted litigation is necessary (and, if it is, areas to which litigants should apply their resources).

Medical Malpractice Cases in Wisconsin. ENE is not appropriate for every case, and its blanket application to one category of cases in particular has likely contributed to the relative infrequency of its use in Wisconsin. Specifically, the statutory requirement in medical malpractice cases that all cases be submitted to medical mediation panels either before or in conjunction with the filing of such claims[16] has fallen out of favor.[17] Much like ENE in other contexts, the medical mediation panels envision a proceeding conducted without an official stenographic record, the administration of oaths, or public disclosure of proceedings or documents.[18] The Wisconsin Legislature's stated intent was to provide litigants with "an informal, inexpensive and expedient means for resolving disputes without litigation."[19] Unfortunately, the blanket application of this procedure has arguably not had that effect.

Even in the early years of their application, the panels were not favored by litigants. Between their initiation in 1986 and 1995, the panels were "perceived as serving no constructive purpose" in over one-half of mediation requests filed in conjunction with a court action.[20] Because the mediation period expires three months after the mediation request is filed and can only be extended by the consent of all parties,[21] many cases never receive a hearing and the procedure became a procedural hoop to jump through to reach circuit court. The law requires parties to file a request for mediation; it does not necessarily require that they *participate* in one. The director of Wisconsin's medical mediation panels confirmed to the author that of the 82 requests for medical mediation in 2023, only 8 panels were convened.

While a larger discussion of the medical mediation panel requirement is beyond the scope of this article, even assuming its inefficacy does not doom ENE to failure in all cases. A key to effective ENE in Wisconsin is its careful selection as a form of ADR by judges and litigants.

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When ENE Might Be Appropriate

Case types in which ENE is particularly useful include 1) cases involving new or developing issues of law; 2) cases that turn on one or a few key evidentiary rulings, such as the admissibility or exclusion of expert testimony; and 3) cases that turn on a ruling that applies largely undisputed facts to the law. ENE is less likely to be helpful in disputes that require a judge or jury to decide between two disparate versions of the essential facts, although a limited ENE process in such cases may help the parties identify the most important points of contention, formulate a focused discovery plan, and thereby streamline litigation scheduling and costs.

Additionally, an ENE process in which the evaluator can assess the client representatives via oral presentations may reveal if there are significant strengths or weaknesses that have the potential to sway a factfinder (and alert the lawyer to how the client may perform under pressure in deposition or at trial). Giving parties a chance to tell their story during an ENE presentation engages them in a manner that their counsel's brief writing cannot and gives all parties access to new information.

Here are some representative examples in which litigants could benefit from ENE:

- A prospective employee files a complaint with the state Department of Workforce Development alleging that an employer uses artificial intelligence in hiring in a manner that creates a disparate impact based on arrest or conviction record. There is no governing case law directly on point.
- Two companies dispute whether one exercised commercially reasonable efforts before invoking a contract's termination clause, and there are few (or only immaterial) factual disputes concerning the company's actions prior to termination.
- In a condemnation case, the landowner and the condemnor submit appraisals based on different valuation approaches. Each side anticipates filing a motion in limine to exclude the opponent's expert opinion.

Although there are many more examples, ENE is not a fit for every case. Perhaps most obviously, ENE is inappropriate for cases involving self-represented litigants on one side and a represented party on the other — unless the court recruits an advocate for the unrepresented litigant to assist with the legal analysis. Pro bono service as an attorney for ENE and limited follow-up negotiations or mediation could allow attorneys who do not have the capacity to take a case all the way through summary judgment or trial to make a valuable impact on the administration of justice, gain experience, and maintain necessary balance with their existing practice commitments. Likewise, experienced attorneys willing to volunteer their

expertise as evaluators – particularly in the Eastern District, where, by rule, much of the work is uncompensated or compensated at a reduced hourly rate – can do their part to reduce the backlog of cases courts are tasked with deciding by providing informed, non-binding opinions on the merits for parties to consider.

Conclusion

When properly applied, ENE can not only reduce the financial expense associated with extensive discovery and motion practice but also mitigate its attendant delay. The process can also increase clients' satisfaction with their attorneys. If the case settles, lawyers and clients can take some comfort in knowing that they did so on a principled basis: a risk assessment offered by an expert in the field. If the parties choose to litigate, they can do so with a focused plan and foreknowledge of the areas on which they most need to focus when developing the record for summary judgment or trial. A second opinion from an ENE can thus bolster attorneys' confidence in their case analysis and clients' confidence in their attorneys. **WL**

ENDNOTES

[1]Wis. Ct. Sys., *Civil/Small Claims Disposition* (report period Jan. 1, 2023-Dec. 31, 2023), https://www.wicourts.gov/publications/statistics/circuit/docs/civildispostate23.pdf.

[2]U.S. Cts., *Table C-4—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary* (Dec. 31, 2023), https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2023/12/31.

[3]*See supra* note 1.

[4]*See* Civil Justice Reform Act of 1990, P.L. No. 101-650, § 473(b)(4) (authorizing courts to include "a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation" as a "litigation management and cost and delay reduction technique").

[5]Civil L.R. 16(d)(4) (E.D. Wis.). The Eastern District's local rules are available online at https://www.wied.uscourts.gov/local-rules-and-guidance (last visited Nov. 8, 2024).

[6]Civil L.R. 16(d)(1)(C) (E.D. Wis.).

[7]Civil L.R. 16(d)(1)(A) & comment (E.D. Wis.).

[8]Fed. R. Civ. P. 16(c)(2)(I), (P).

[9]The comments to the 1993 amendment to Fed. R. Civ. P. 16 specifically mention "neutral evaluation" as a method of facilitating resolution.

[10]Civil L.R. 16(d)(1)(E) (E.D. Wis.).

[11]Civil L.R. 16(d)(1)(B) (E.D. Wis.).

[12]Minn. Judicial Branch, *Early Case Management/Early Neutral Evaluation*, https://www.mncourts.gov/Help-Topics/ENE-ECM.aspx (last visited Nov. 8, 2024).

[13]*See* N.D. Cal. ADR Local R. 5; S.D. Cal. Civil R. 16.1(c) (mandating ENE conference within 45 days after answer).

[14]U.S. Dist. Ct. for Dist. of Vt., *Early Neutral Evaluation Report, 2016 Annual Report* 7, https://www.vtd.uscourts.gov/sites/vtd/files/2016%20Annual%20Report%20Final.pdf.

[15]*See, e.g.*, W.D. Mich. LCvR 16.4; E.D. Mo. Local R. 6.01(B); W.D. Pa. LCvR16.2(C).

[16]Wis. Stat. §§ 655.44, 655.445. As the Wisconsin Court System's website notes, the term "mediation" is a misnomer because the process is more accurately described as early neutral evaluation. *See* https://www.wicourts.gov/courts/offices/mmp.htm.

[17]*See, e.g.*, MedicalMalpracticeLawyers.com, *The Failure of Wisconsin's Medical Mediation Panels*, https://medicalmalpracticelawyers.com/failures-wisconsins-medicalmediation-panels/ (last visited Nov. 8, 2024); Cary Spivak, *Medical Mediation Rarely Provides Closure for Families,* Milwaukee J. Sentinel (Aug. 9, 2014); *see also infra* note 20.

[18]Wis. Stat. § 655.58.

[19]Wis. Stat. § 655.42(1).

[20]*See* Wis. Ct. Sys., *Medical Mediation Panels*, https://www.wicourts.gov/courts/offices/mmp.htm (updated May 24, 2022).

[21]Wis. Stat. § 655.465(7). **WL**