

# Neutral evaluation: a wake-up call for all

By Robert K. Wrede

Lawyers faced with litigating complex, high-stakes cases should seriously consider including in their case-management tool boxes a hybrid ADR process known as “neutral evaluation,” which originated in the U.S. District Court for the Northern District of California in the 1980s. In 2005, the process was adopted, refined, implemented and used by the Los Angeles County Superior Court’s ADR program with considerable success until the program’s recent budget-induced demise.

The objective in adopting the process was to make available to civil litigants a panel of experienced neutrals, with expertise not only in ADR, but also in commercial, employment, medical or legal malpractice, real estate, trade secret, unfair competition litigation, and other non-personal injury general jurisdiction matters. The panel would provide parties and counsel — on a fully voluntary and totally confidential basis, and at an early stage in litigation — with an evaluation of their respective positions to help organize the cases going forward, and, ultimately, to encourage settlement.

Originally known as “early neutral evaluation,” the process was intended to: use voluntary, nonbinding, summary “arbitration” of selected business-related disputes by neutrals with demonstrated procedural and substantive expertise; provide parties and their counsel with an unbiased expert perspective on the strengths and weaknesses of their respective cases (a “reality check”); assist with case management; enhance communication among the participants; and facilitate settlement discussions.

The Los Angeles program, however, dropped “early” from the name, reflecting the belief that the process could be useful at virtually any stage of the litigation process.

## Why Use Neutral Evaluation

Although the closure of the ADR program in Los Angeles has brought

court-annexed neutral evaluation to a close, the private use of neutral evaluation should be recognized by litigators for what it offers: a useful, low-cost, confidential tool for assessing the strengths and weaknesses of appropriate (usually complex, high-stakes) cases, efficiently managing those cases going forward, and commencing or even consummating the settlement dance.

First, many counsel found the process useful in conveying to their clients the highly unpredictable nature of traditional litigation, the high cost of going forward, and the risk of losing cases in which clients might have a deep but unrealistic emotional investment, without making the lawyer seem disloyal or unsupportive. In many cases both counsel and parties responded to the experience as a “wake-up call” or “reality check,” giving them their first opportunity to view their cases through the lens of an experienced neutral rather than through the frequently distorting lens of partisan self-interest.

**The neutral evaluation process ... can provide litigators with a valuable tool for conducting a cost-effective reality check of their cases.**

Second, most participants viewed the process as an opportunity to commence settlement negotiations without suffering the perceived stigma many lawyers and litigants seem to associate with willingness to discuss settlement early in the litigation process.

Third, the process encourages early case investigation, analysis and preparation — the end result of which is useful in evaluating and even resolving cases well before trial — thus facilitating settlement discussions, and even settlement, before significant litigation costs have been incurred and barriers to settlement have consequently risen. All this work (and then some) would be necessary in the unlikely event the matter actually went to trial. Why not



Shutterstock

A neutral evaluation can be a reality check for the parties — and counsel.

do it relatively early in the litigation, before costs have skyrocketed?

Fourth, as with other ADR methodologies, neutral evaluation allows considerable flexibility to both the evaluator and counsel in structuring the proceeding, ranging from the extensive use of teleconferences and the transformation of the process from pure evaluation to settlement discussions, on the one hand, to a full-blown hearing to test and train witnesses in a quasi-litigation environment, in addition to offering counsel and clients a written evaluation from a knowledgeable neutral, should the participants so desire, on the other.

Fifth, neutral evaluation offers counsel the assistance of a highly experienced neutral to help them clarify factual and legal issues, identify and resolve discovery and other case management problems, provide a neutral, informed perspective on the dispute, as well as to emphasize the desirability to clients of a facilitated settlement.

Finally, neutral evaluation offers participants the better attributes of both mediation and arbitration. At the outset, it offers the mutual disclosure requirements and judgmental aspects of arbitration, without the negative implications of a binding, public judgment or verdict, thus providing a risk free reality check from a knowledgeable expert chosen by counsel for his or her procedural and substantive competence at a modest cost. If the parties so desire, neutral evaluation can then offer the facilitated negotiation aspects of mediation at a stage in the litigation when settlement should be easier to reach because significant litigation expenses

usually have not yet been incurred and positions are less likely to have become intractably polarized.

Far from being limited to cases in their early stages, neutral evaluation may also be utilized relatively late in the litigation process as a low-cost, neutral indicator of the possible outcome of summary judgment motions, or other potentially dispositive motions, to assist the parties and their counsel in deciding whether to fight or settle, or to bolster their settlement posture.

\*\*\*

The neutral evaluation process, which was carefully developed, tested and successfully used by the Los Angeles Superior Court until the recent closure of its ADR program (and is still actively used elsewhere), can provide litigators with a valuable tool for conducting a cost-effective reality check of their cases, for helping streamline complex cases, for moving complex commercial cases toward resolution, and — by doing so — reducing the costs of litigation that so many litigants find too expensive or too frustrating to bear. There is, in short, much to be said for the private use of the process by creative counsel in the preparation and management of appropriate cases.

Try it, you’ll like it!

**Robert K. Wrede** is a neutral in Los Angeles with over 40 years experience as a commercial trial lawyer. He is an adjunct professor of law at the Pepperdine Law School Straus Institute for Dispute Resolution. Additionally, he served both as a member of the pilot program panel used to test, develop and adopt the neutral evaluation program in Los Angeles County Superior Court, and as a



ROBERT K. WREDE  
Neutral

member of the permanent pro bono and pay panels from the program’s inception until the closing of the court’s ADR office earlier this year.