There is little case law detailing the legal consequences of mediator coercion or other misconduct.

In theory, mediators risk complaints and legal action under the theories of civil liability, criminal liability, or the complaint mechanisms of the mediator referral structures or voluntary mediator memberships.[1] Scholars debate the absence of legal action against mediators without true consensus.[2] There are no reported cases where a mediator paid damages to a party, but in dozens of cases, parties attempt to overturn mediated settlements on the basis of coercion, undue pressure, or principles of fairness. Hundreds of decisions address confidentiality issues when mediators give testimony regarding the conduct of participants, discussions during mediation, or mediator conduct. Overall, the number of reported cases involving mediators is steadily rising,[3] but direct action against the mediator is essentially nonexistent.

The following is a sampling of cases where a mediator's conduct has been questioned or evidence has been sought from the mediator. Many of the reported mediator coercion cases involve requests to set aside settlements because of the mediator's actions. Only in one case, however, was a settlement overturned on that basis. In the mediator testimony cases, we learn that the general rule of mediator confidentiality is sometimes disregarded.

A. Court Finding of Mediator Coercion

In *Jacobs v. New York Financial Center Hotel*, 96 CIV. 7088 (LLS), 1997 WL 375737, at *1 (S.D.N.Y. July 7, 1997), a New York court refused to dismiss a complaint filed after a pre-suit settlement agreement was signed. The plaintiff argued that his wavier of ADEA claims was not knowing or voluntary. He alleged that "the mediator told him that defendants' offer was open only during the mediation session," despite the fact that an applicable statute provided at least seven days to consider a waiver agreement. *Id*. at *2. Since the plaintiff was given only five hours to consider the offer and ultimately received no benefits under the settlement agreement, the court held that it was voidable and did not bar a subsequent suit. *Id*. The court noted that "[t]he short, intense time was insufficient to allow full consideration of the terms of the agreement." *Id*.

B. Mediator Misconduct Alleged

In some situations, the mediator is accused of threatening extreme consequences if the parties fail to settle.

1) In *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001), a Florida court held that alleged mediator coercion can be a valid basis to set aside a mediated divorce settlement. The wife alleged the mediator acted inappropriately "including but not limited to coercion and improper influence, and that she entered into the settlement agreement as a direct result of this misconduct." *Id.* at 1095.

The wife's coercion allegations focused, in part, on claims that the mediator pressed her to allow the husband to dispose of frozen embryos that she wanted to retain. *Id*. at 1096. She claimed that the mediator told her, among other things, that the embryos were not "lives in being," that the judge would "*never* give her custody of the embryos," and that the court would not require the husband to pay child support "if she were impregnated with the embryos after the divorce." *Id*. at 1097 (emphasis in original).

Applicable court rules limited mediator behavior as follows:

> **(a) Decision-making.** Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination.
>
> **(b) Coercion Prohibited**. A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation.
>
> **(c) Misrepresentation Prohibited**. A mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting a mediation.

Id. at 1098-99 (citing Fla. R. Med. 10.310(c)).

The committee notes from the rules cautioned, "[w]hile mediators may call upon their own qualifications and experience to supply information and options, the parties must be given the opportunity to freely decide upon any agreement. Mediators shall not utilize their opinions to decide any aspect of the dispute or to

coerce the parties or their representatives to accept any resolution option." *Id*. at 1099 (citing comment to Fla. R. Med. 10.370(c)). While the court remanded the case for additional findings of fact concerning the alleged conduct of the mediator, it noted that that a court may decline to enforce a settlement agreement procured through mediator fraud or duress. *Id.* at 1099-1100.

In most cases alleging mediator misconduct, the facts are less remarkable.

2) In *Crupi v. Crupi*, 784 So. 2d 611 (Fla. Dist. Ct. App. 2001), the plaintiff alleged mediator coercion in connection with a mediated divorce settlement. The wife alleged that she was under the impression that she had to settle, and that she was not in her right mind because she took three Xanax pills on the day of the mediation. *Id*. at 613. She admitted on cross, however, that she remembered signing the mediation agreement and that "nobody unduly influenced her . . ." *Id*.

The appellate court noted that the "inquiry on a motion to set aside an agreement reached through mediation is limited to whether there was fraud, misrepresentation in discovery, or coercion." *Id.* at 612. After considering the facts, the court concluded, "[w]e agree with the trial court's finding that three Xanax pills, and anxiety and pressure to settle are insufficient proof of coercion necessary to set aside such an agreement. Otherwise, few, if any, mediated settlement agreements would be enforceable." *Id.* at 614.

3) In *Zimmerman v. Zimmerman*, 04-04-00347-CV, 2005 WL 1812613 (Tex. App.?San Antonio Aug. 3, 2005, pet. denied) (mem. op.), the husband argued the mediator committed misconduct and coerced settlement in a domestic mediation. The husband stated that he "went into the mediation determined to take the case to a jury unless he received at least 'equal time' with his child and no child support payments." *Id*. at *2. He alleged that the mediator, a senior judge, told him "[y]ou're not going to get any of that from a judge, and a jury is not going to give it to you either." *Id*. The husband further alleged that when the mediator wrote down what he believed would be the outcome at trial, he "felt like he had no choice." *Id*. The court found that the "trial court did not err either in concluding that [the husband's] signature on the mediated settlement agreement was not coerced or in enforcing the agreement and denying the motion for new trial." *Id.* at *3.

4) In *State v. Milligan*, No. 108,094, 2013 WL 2919942 (Kan. Ct. App. June 7, 2013), the accused appealed his guilty plea and claimed mediator coercion. His "only argument on appeal [was] that the mediation process, and especially the mediator's guarantee that he would lose at trial, unduly pressured him into accepting the guilty plea." *Id.* at *2. More specifically, the defendant alleged that "the mediator's guarantee 'overstated' the strength of the State's case, improperly induced a guilty plea, and this coercion is the good cause shown that entitles him to withdraw his plea." *Id*. at *3.

The appellate court considered these allegations and held:

> Milligan does not allege that the physical conditions surrounding the mediation were coercive in any way. He does not dispute the district court's finding that during the mediation he was allowed a lunch break and there is no evidence that any requests for food, water, or a break were denied. We acknowledge that the pressure to accept a plea was mounting because of the pending trial the following week, but that pressure would be typical in any case at that point in time.
>
> Without a doubt, Judge Conklin's statement that he guaranteed Milligan would be convicted if he went to trial is a strong statement. However, ***this was the mediator's opinion and it was the same opinion held by Milligan's attorney. Milligan was simply being informed of the strength of the State's case and the harsh reality that the outcome of a jury trial is determined by what the jurors believe*** the facts to be, their perception of the evidence and the eyewitnesses, and the emotions that would be involved in a case like this.

Id. (emphasis added). This passage highlights circumstances that might be considered coercion, but indicates that a mediator offering his or her opinion and view of the case (rather than merely facilitating discussions) is proper.

5) In *Seneca Insurance Co. v. Ruday Realty Corp.*, No. 499 2004, 2010 WL 338100 (N.Y. Sup. Ct. Jan. 26, 2010), a party alleged mediator misconduct and corruption where there were signs of bias. While the court used the term "mediator" in the *Seneca* opinion, the proceeding at issue was a "binding mediation" that the parties agreed to participate in as part of a settlement stipulation concerning a different aspect of the litigation. *Id*. at *1. As a result, the proceedings at issue were more akin to arbitration than a typical non-binding mediation.

Counsel for one of the parties associated an attorney who allegedly had a longstanding personal friendship with the mediator. The defendants asserted that the attorney was brought to the mediation "for the sole purpose of acting as a 'hired gun due to [his] longstanding personal and professional relationship with the mediator over a 35 to 40 year period.'" *Id*.

Continued on next page

at *2. The associated attorney was seen speaking with the mediator "behind closed doors" discussing the "good old days." *Id*. The defendants believed several decisions by the mediator evidenced misconduct, including his "inexplicable" refusal to award fees and expenses, his award of 50% of what was sought without any mention of how that number was reached, his award's inclusion of a section on conflict of interest when the issue was not presented, and his misapplication of the controlling law. *Id*.

The court affirmed the award and found that the defendants "failed to establish by clear and convincing evidence that Seneca procured its award by means of fraud or misconduct." *Id*. The court also specifically found that the mediator and the alleged "hired gun" had not seen each other in twenty-six years. *Id*. Finally, the court spoke to the alleged conversations behind closed doors and held that "while private communications between an arbitrator and a party-litigant can constitute misconduct or partiality, the discussions here admittedly concerned a personal matter that was 'wholly unrelated to the subject matter' that was presented." *Id.* at *3.

6) In *In re Patterson*, 969 P.2d 1106, 1110 (Wash. Ct. App. 1999), a party argued mediator coercion when the mediator:

> *[K]ept stating that if I didn't sign the agreement I would ruin his record of being always able to settle the case . . . I just gave in and signed it. I felt I was signing under coercion and duress*. I was never given an opportunity to call my attorney during the mediation nor was I given the mediation agreement to take back to my attorney to review and then sign if we agreed.

Id. at 1110 (emphasis added).

The court found that the plaintiff failed to carry his burden of proof for coercion and upheld the settlement agreement. *Id*. at 1110-11. In reaching this decision, the court found that there was no evidence he asked to have his attorney review the agreement, no evidence that he was denied an opportunity to confer with counsel, and no evidence that he expressed a desire to end the mediation without signing the agreement. *Id*. at 1110.

Good mediators are likely to feel violated by being compelled to give evidence that could be used against a party with whom they tried to establish a relationship of trust during a mediation. Good mediators are deeply committed to being and remaining neutral and non-judgmental, and to building and preserving relationships with parties. To force them to give evidence that hurts someone from whom they actively solicited trust (during the mediation) rips the fabric of their work and can threaten their sense of the center of their professional integrity. These are not inconsequential matters.

7) In *Estate of Skalka v. Skalka*, 751 N.E.2d 769 (Ind. Ct. App. 2001), three siblings filed a petition against their brother seeking to partition land he inherited from their father. The parties reached a tentative agreement during an in camera pretrial conference with the judge that was not attended by counsel. *Id.* at 770-71. While a draft agreement was circulated, it was never signed. *Id*. at 771. The judge ultimately entered his recollection of the agreement on the record in an order. *Id*. The three siblings who brought suit appealed "claiming they never agreed to the settlement during the pretrial conference and claiming that the trial judge's recollection of what occurred during the conference was inaccurate." *Id*. They also argued that the judge "improperly acted as a mediator," pointing to the following statement by the judge:

> You know, we sat in my chambers, people, and you walked out of my office in agreement. Alright. I did as much as I could possibly do to resolve the conflict. ***But if you people want to continue fighting, I'm no longer going to be the mediator here, I'm going to be a judge. You are going to go through the cost of this thing. It's going to be financially draining and I can tell you you're going to wind up losing the property.***

Id. at 772 (emphasis added).

The court concluded that the judge did not act improperly or coerce the parties into an agreement, but was attempting to "assist the parties in reaching a settlement of their disputes" rather than to serve as a mediator. *Id.* at 772.

C. Testimony or Other Evidence from Mediators

Mediation is governed by strict rules of confidentiality, yet the number of cases involving testimony or other evidence from mediators is on the rise. According to a 2006 article in the Harvard Negotiation Law Review, "[t]he number of cases raising confidentiality issues more than doubled between 1999 and 2003, from seventeen to forty-three."[4] In a number of opinions, confidentiality issues were combined with other mediation disputes such as enforcement, ethics, sanctions, fees, and the duty to mediate. *Id.* Many cases consider whether mediator testimony regarding the parties' conversations or conduct is permissible. Others consider whether the mediator's or lawyer's conversation or conduct is permissible testimony. Given the increasing

challenges of mediation confidentiality, one scholar has noted that "the walls of the mediation room are remarkably transparent." *Id.* at 58.

1) In *Addesa v. Addesa*, 919 A.2d 885, 890 (N.J. Super. Ct. App. Div. 2007), the lower court compelled the court appointed mediator in a divorce proceeding to testify about the parties' private mediation communications. The mediation occurred before either party retained counsel. *Id*. The parties and the mediator agreed to maintain confidentiality and that no mediation records or files would be subject to subpoena. *Id*. at 891.

The appellate court concluded that "the first judge should not have ordered or required the mediator to appear and testify as to the communications and disclosures made to him during the mediation . . . . [R]eview of the mediator's file and the ordering and consideration of the mediator's deposition testimony was inappropriate. As a result, we neither refer to, recite, nor consider that evidence." *Id.* (internal citations omitted).

2) In *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1113 (N.D. Cal. 1999), a party to a court-sponsored voluntary mediation who signed a memorandum of understanding, asserted that the agreement expressed in the memorandum was not valid. The opposing party filed a motion to enforce the memorandum as a binding contract. *Id*. The plaintiff suffered from high blood pressure, testified that she was in extreme pain, weak, dizzy, "felt like passing out," felt pressured by her lawyer and opposing counsel to reach a settlement, did not understand that mediation was voluntary, was not told she was required to participate, and did not participate in any of the negotiations. *Id*. at 1142-43. However, the court found that the settlement agreement reached at 1:00 in the morning (fifteen hours after the mediation began) was valid. *Id.* The mediator was compelled to testify in closed proceedings under seal concerning his perceptions of the plaintiff's capacity to sign the memorandum of understanding. *Id*. at 1128.

The court determined that the parties, not the mediator, waived confidentiality by asking the court to consider what took place during mediation. *Id.* at 1119. The court noted, however, that "it [was] not at all clear that the waivers by the parties were sufficient to make it lawful to compel testimony from the mediator." *Id.* Ultimately, the court called the mediator to testify in the interest of justice, but the following passage makes clear that the decision was not easy:

> Good mediators are likely to feel violated by being compelled to give evidence that could be used against a party with whom they tried to establish a relationship of trust during a mediation. Good mediators are deeply committed to being and remaining neutral and non-judgmental, and to building and preserving relationships with parties. To force them to give evidence that hurts someone from whom they actively solicited trust (during the mediation) rips the fabric of their work and can threaten their sense of the center of their professional integrity. These are not inconsequential matters.
>
> Like many other variables of this kind of analysis, however, the magnitude of these risks can vary with the circumstances. Here, for instance, all parties to the mediation want the mediator to testify about things that occurred during the mediation – so ordering the testimony would do less harm to the actual relationships developed than it would in a case where one of the parties to the mediation objected to the use of evidence from the mediator.

Id. at 1134.

3) In *In re A.A*., 560 S.E.2d 763 (Ga. Ct. App. 2002), a mediator spoke to the court concerning why mediation had not taken place. The issue arose when a juvenile delinquent claimed she was "erroneously denied the opportunity to mediate her case . . ." *Id*. at 764. The court stated

Continued on next page

that, "[t]he victims' parents indicated a willingness to mediate, and the court instructed the parents to contact the mediator and discuss dates on which to have the mediation. Nearly two months later, the case came on for adjudication, as it was never mediated." *Id*. at 765. Before testimony was given during the adjudication hearing, the mediator explained that she had scheduled the mediation "with the victims and then the mama decided she didn't want to pay for it and that I was violating all her civil rights. Then she decided later that she wanted to come back and do it and one of the victim's phones had been disconnected and so I couldn't get back in touch with them. So that is why it hasn't been mediated." *Id*.

4) In *Few v. Hammack Enterprises, Inc*., 511 S.E.2d 665, 669 (N.C. Ct. App. 1999), the court interpreted a North Carolina statute which made evidence of "statements made and conduct occurring in a mediated settlement conference" non-discoverable and inadmissible. *Id.* at 668. The court was called upon to decide whether "evidence of an agreement (and its terms) reached by the parties at a mediated settlement conference is admissible under the statute." *Id*. at 669. One party contended that the statute did not allow the parties or the mediator to reveal whether an agreement was reached at the required settlement conference. *Id*.

The court held that "we do not read [the statute] as prohibiting the admission of testimony or other evidence of the *outcome* of the mediation settlement conference before a judge making the determination of whether settlement was reached and of the terms of that settlement. It follows that, in this limited context, evidence of an agreement, and the terms of that agreement, reached by the parties during a mediated settlement conference is admissible." (emphasis in original). *Id*. at 670. The court went on to note that a subsection of the same statute allowed a mediator to "testify or produce evidence on whether the parties reached a settlement agreement, and as to the terms of the agreement, where the judge is making that determination." *Id*.

5) In *VJL v. Red*, 39 P.3d 1110 (Wyo. 2002), the court counseled against mediators voluntarily inserting themselves into judicial proceedings. In that case, the mediator in a child visitation dispute who was accused of bias and prejudice, "apparently on his own initiative, filed a report . . . in which he set forth his view of what occurred during the mediation and his 'observations' . . . ." *Id*. at 1113. The court "ma[d]e no ruling as to the propriety of the mediator's report," but stated that "the function of a mediator is to be a conciliator, to bring parties together in an effort to reconcile their differences. Interjecting oneself into court proceedings after the fact of the mediation as basically a witness to discredit the truthfulness and character of a party to the mediation would not seem to comport with the functions of a mediator." *Id*. at n.3.

D. Conclusion

The number of reported decisions involving mediators is rising. Mediators themselves are rarely sued, but often the agreements reached in mediation are challenged. The cases do not suggest widespread coercion or duress by mediators, but enforcement is challenged on these grounds. Mediators and parties to confidential mediations are sometimes asked to disclose communications that occur during mediation. This seems to occur most frequently in family related disputes. Courts are less hesitant to consider evidence from mediators when a statute allows consideration or the parties ask the court to consider such evidence. ■

Note: This article was adopted from a presentation the author gave at the ADR Advanced Mediation Seminar in October 2013.

---

[1] For a detailed discussion of complaints against mediators, see: Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81, 85 (2003).

[2] *See generally*, James R. Coben, Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

[3] *Id.* "In 1999, state supreme courts addressed mediation issues in eleven cases; in 2003, that figure grew to thirty."

[4] Coben & Thompson, *supra* note 2, at 57.

Introduction

Early Neutral Evaluation (ENE), also referred to as case evaluation or early case assessment, is a fairly recent addition to the types of alternative dispute resolution techniques available to practitioners and the courts.

Pioneered in the 1980s by Judge Wayne Brazil of the Northern District of California, ENE is an "informal process in which a third-party evaluator provides a non-binding evaluation of the matters in controversy, assists the parties in identifying areas of agreement, offers case planning suggestions, and assists in settlement discussions."[1] Originally, ENE was strictly a court-annexed process, intended to operate as an amalgamation of traditional mediation and nonbinding arbitration. In its first decade, use of ENE as a dispute resolution tactic spread to fourteen federal district courts.[2] Today, ENE is included in several states' ADR rules, including South Carolina, Oklahoma, Montana, Utah, Minnesota, and Colorado. Some of these jurisdictions have incorporated rules mandating ENE as an element of certain causes of action, such as family law matters and certain civil actions.[3]

The spread of ENE is due, in large part, to the fact that it provides a means for parties to gain a dispassionate view of their matter through the unbiased opinion of the neutral evaluator very early in the litigation process. This can result in expediting the resolution of matters which could otherwise result in lengthy and expensive litigation. ENE has proved to be reliably successful, with over half of ENE negotiations resulting in a settlement.[4] Because ENE has the potential to significantly reduce the time and money spent on litigation, eliminate many of the burdens of formal discovery, maximize the parties' focus on important issues, and present favorable settlement options, it has become a viable ADR choice in those jurisdictions where it is available.

The Process

Ideally, parties consent or are directed to ENE and attend their first meetings – known as "Sessions" – before formal discovery begins.[5] The first step in the ENE process is the selection of a neutral evaluator. Typically, the parties receive a list of potential evaluators from the court—usually ENE-trained judges, lawyers, or professional mediators with experience in the subject matter of the dispute—and then mutually agree on which evaluator to select.[6] Although specific rules on the appointment of an ENE evaluator differ between jurisdictions, the requirement that the evaluator possess expertise in the area of dispute remains constant.[7]

After the selection of an evaluator, the

second step in the process is for the evaluator to work with the parties and their counsel to schedule the exchange of initial written statements in a Pre-Session Conference. These statements provide "the substance of the dispute, the parties' views of the critical liability and damage issues, important evidence, and any other information that may be useful to the evaluator."[8] Based on the evaluator's recommendations, the parties self-impose restrictions on the length, scope, and contents of the initial statements; they additionally schedule the first group ENE Session.[9] The parties, with the help of the evaluator, often agree to certain informal discovery exchanges during the Pre-Session Conference.

The third step, the initial ENE Session, begins with the evaluator explaining the format, structure, and content of the Sessions. All parties, their attorneys, and any other "critical stakeholders" are required to be present at each of the ENE Sessions.[10] Following the evaluator's introduction, the plaintiff presents a brief oral summary of their case, including necessary evidence, documents, and legal theories; the defendant subsequently does the same.[11] During these presentations, the evaluator helps the parties identify areas of agreement, enter into stipulations on those non-disputed issues, and prepare a discovery plan.[12] The evaluator may interrupt these presentations to clarify or to request additional information, but the parties are precluded from interjecting or making objections as the formal rules of evidence are not in effect.

The fourth step follows the parties' substantive presentations, and occurs prior to any discussion of mediation or settlement. During this phase, the evaluator drafts an objective, reasoned evaluation of the merits of the case. The document assesses the legal strengths and weaknesses of both sides' arguments in light of the factual background provided during the presentations. Different jurisdictions impose varying time restrictions, ranging from a few days to a few weeks, for the evaluator to finalize the evaluation.[13] This requirement of a written evaluation forms one of the few bright-line boundaries between ENE and traditional mediation.[14] The parties may request a copy of the evaluation, ask that the evaluator read it to the parties, or agree that the evaluation should be withheld until settlement negotiations commence.[15] If any party decides to view the evaluation prior to settlement negotiations, it must be made available to all the parties.[16]

"The initial ENE Session, begins with the evaluator explaining the format, structure, and content of the Sessions. All parties, their attorneys, and any other "critical stakeholders" are required to be present at each of the ENE Sessions.[10] Following the evaluator's introduction, the plaintiff presents a brief oral summary of their case, including necessary evidence, documents, and legal theories; the defendant subsequently does the same."

Once the written evaluation is completed, the evaluator gives the parties the opportunity to engage in mediation. If one of the parties declines to mediate, the evaluator discloses his opinion to the parties, but the evaluation is not disclosed to the court, and remains non-binding and confidential.[17] Should the matter not proceed to mediation, or if settlement conferences are unsuccessful, the evaluator remains available, working with the parties and their attorneys to develop a case management plan that addresses specific discovery, scheduling of depositions and motions that should be heard.[18]

If the parties proceed with mediation, the evaluator shifts roles and begins to act as a traditional mediator.[19] An essential tenet of this role-shift is that the evaluator must maintain neutrality in her role as mediator. The evaluator:

> [M]ay offer no evaluative feedback and no analytical help, even indirectly . . . to things litigants say or do during the mediated process. [The evaluator] must take care not to betray her substantive views in the ways she poses questions, or even by encouraging parties to look more closely at particular evidence or issues.[20]

Because the parties are able to direct the procedure according to what they have learned or focused on during the ENE

Continued on next page

Sessions, the post-evaluation phase of ENE allows for a great deal of flexibility. Frequently, the presentations given during the initial Session allow the parties to view their dispute objectively and analytically, which facilitates—and increases the odds of success during—settlement negotiations by the time the evaluator has drafted his assessment.

Comparing ENE with other ADR Techniques

Despite the fact that the evaluator may shift roles and act as a traditional mediator after concluding her evaluation, ENE still stands distinct from other dispute resolution methods in a number of ways. One of the notable differences is timing. ENE occurs very early in the litigation process, occasionally within a month of filing, prior to motions or discovery. This provides the parties with the opportunity to gain an unbiased perspective on their claims early in the litigation timeline and saves money by presenting informal discovery and motion schedules, along with viable settlement opportunities, before the costs associated with litigation get excessive.[21]

Although arbitration is supposed to be expedited and often is, ENE differs from it in some fundamental respects. While arbitration is less formal than a traditional court proceeding, the arbitrator still hears the case and renders a decision—there is a winner and a loser. Furthermore, binding arbitration results in a final judgment with severely limited judicial review.[22] ENE, on the other hand, focuses on providing parties with a realistic take on their issues and subsequently discussing settlement options within that impartial framework.[23] Additionally, unlike a final judgment from arbitration, the content of the evaluator's assessment and the discussions in ENE Sessions (prior to a concrete settlement agreement) are not binding on the parties and can never be used in subsequent court proceedings.

Even though ENE, like other ADR techniques, seeks to facilitate and encourage resolution of disputes, the first purpose of ENE Sessions is "to have someone with no vested interest in the case provide a reality check to the parties," evaluate the facts and merits of the case objectively, without focusing on emotional considerations.[24] ENE focuses on the strengths and weaknesses of the parties' legal and factual positions. Although mediation also seeks to find a mutually agreeable solution, the mediator normally would not form an opinion based on an evidentiary and factual foundation as occurs in ENE. This attention to the strength of a party's legal argument stands in contrast to processes like facilitative mediation, which, in an attempt to achieve creative solutions to the disputes, considers the parties' subjective interests and impediments to settlement rather than legal and factual issues.[25]

The similarities between ENE and other traditional resolution techniques allows practitioners to transition into an ENE setting without difficulty. The timeliness of ENE offers one of the benefits of arbitration without requiring the parties to accept a binding, final judgment. Additionally, ENE allows parties the settlement-oriented benefits of mediation

without sacrificing the attention to legal argument and objective evidentiary proof in favor of emotional or subjective positioning. The innate flexibility of ENE, thanks to its position as a blend of arbitration and traditional mediation, allows parties in the right case to avoid much of the time and cost associated with traditional courtroom litigation through a non-binding opinion and follow up mediation.

Conclusion

Although the specifics of ENE tend to vary from one jurisdiction to the next, it is a demonstrably successful dispute resolution technique. Additionally, the key attributes of the ENE process—a trained evaluator with specific subject matter expertise, a written and impartial assessment of the parties' arguments, and the option to engage in formal settlement negotiations—transcend the jurisdictional differences to provide an adaptable and dynamic method. Whether court-ordered or party-selected, ENE provides the involved parties and attorneys with an opportunity to examine their legal position early enough into a conflict to either reach an agreeable and early resolution, or develop a more thorough and analytical approach to the remainder of the litigation process. ■

---

*Erin D. Guyton (eguyton@cwplaw.com) is an attorney with the Jackson office of Carroll Warren & Parker, PLLC. Her practice is focused in complex civil litigation, commercial insurance disputes, and property and casualty loss coverage.

1 Alex Sanders & John S. Nicholas, *Early Neutral Evaluation*, Trial Handbook for S.C. Lawyers §39:6.

2 Eric Ordway, *The Increasing Use of ADR by Federal and State Courts*, Weil, Gotshal & Manges LLP News/Publications, http://www.weil.com/news/pubdetail.aspx?pub=3956.

3 *Id.*

4 Cindy M. Perusse, *Early Neutral Evaluation as a Dispute Resolution Tool in Family Court*, 41-May Colo. Law. 37, 40 (May 2012).

5 J. Boyd Page, Sandra L. Malkin & Edward H. Saunders, *The Role of Mediation and Early Neutral Evaluation in Facilitating Settlement Negotiations*, PagePerryLLC.Com, http://www.pageperry.com/the-role-of-mediation-and-early-neutral-evaluation-in-facilitating.

6 Robert Rack, *Early Neutral Evaluation: A Comprehensive History Told With Intellectual Passion and Clarity*, Dispute Resolution Magazine 15, 16 (Summer 2013).

7 Page, Malkin & Saunders, *supra* note 3, at 8.

8 *Early Neutral Evaluation: Getting an Expert's Assessment*, American Arbitration Association, http://www.adr.org/aaa/faces/services/disputeavoidanceservices/earlyneutralevaluation;jsessionid=4pvTS8mfpTgkpTBy2L1ylg0R7Q62hnlQSlKnZghvkCkFvLLFwLfn!649886742?_afrLoop=1487018830144621&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D1487018830144621%26_afrWindowMode%3D0%26_adf.ctrl-state%3Drhtulim36_4.

9 Rack, *supra* note 6, at 16.

10 *Id.*

11 Page, Malkin & Saunders, *supra* note 3, at 7.

12 Jay E. Grenig, *Court-Annexed Alternative Dispute Resolution Procedures: Early Neutral Evaluation*, 1 Alt. Disp. Resol. § 22:12 (3d ed.).

13 *Early Neutral Evaluation*, *supra* note 7.

14 Rack, *supra* note 6, at 16.

15 *Id.*

16 *Id.*

17 Page, Malkin & Saunders, *supra* note 3, at 7.

18 *Id.*

19 Rack, *supra* note 6, at 16.

20 *Id.* (quoting Wayne D. Brazil, Early Neutral Evaluation (2012)).

21 Perusse, *supra* note 4, at 40.

22 *Id.*

23 Jordan Leigh Santeramo, *Early Neutral Evaluation in Divorce Cases*, 42 Fam. Ct. Rev. 321, 326 (Apr. 2004).

24 Perusse, *supra* note 4, at 39.

25 Santeramo, *supra* note 21, at 326.

26 For further information on Early Neutral Evaluation, see any of the above-cited sources, or see Judge Brazil's book, Early Neutral Evaluation. Wayne D. Brazil, Early Neutral Evaluation (2012).