Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution

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Early neutral evaluation: an experimental effort to expedite dispute resolution

A program now being tested in the Northern District of California could help reduce the scope of disputes and focus discovery early in a case, resulting in more effective subsequent negotiations.

by Wayne D. Brazil, Michael A. Kahn, Jeffrey P. Newman and Judith Z. Gold

In October of 1982, the chief judge of the federal district court for the Northern District of California, Robert F. Peckham, appointed a task force to which he gave one overriding charge: to determine if there are ways the court can help make litigation less expensive for clients. Judge Peckham expressed deep concern about the weight of the financial burdens that even relatively routine litigation imposes on the parties. He shared his fear that these burdens impair access to justice and might be compromising the quality of the product that emerges from the adjudicatory process. He asked the lawyers and judges on the task force to try to develop new procedures that would make the system more economically sensible.

While parts of the task force examined the court's arbitration and settlement conference procedures, Judge Peckham asked a separate committee to look for other kinds of procedures that might help cut litigation costs. This committee began by studying the considerable body of material that has been developed by proponents of various forms of alternative dispute resolution. It then interviewed experts in emerging dispute resolution techniques and studied contemporary analyses of the cost of litigation, attempting to identify where the most money is spent and the causes of the cost problem.

A consensus gradually developed in the committee. It became convinced that the place where the most could be saved is in the formative stages of litigation. It is in those stages that patterns and expectations are set and thus it is in those stages where an infusion of intellectual discipline, common sense, and more direct communication might have the most beneficial effects.

The committee identified several facts of early litigation life that make it difficult for lawyers and clients to resolve disputes efficiently. One is notice pleading. Complaints and answers often do not communicate a great deal about the parties' positions and what supports them. Moreover, pleadings often exaggerate the size of the dispute. To preserve options and, perhaps, for tactical purposes, parties tend to assert multitudes of causes of action and defenses, a practice that makes it difficult to locate the true center of their dispute.

These pleading practices have at least two ill effects on the cost of litigation: parties must use discovery to learn their opponent's basic position and to assay its underpinnings; and the scope of the discovery parties must conduct is very broad because the scope of the litigation, as presented through the pleadings, is so broad. And the discovery process itself is notoriously expensive, especially in cases where parties are unsure of their opponent's theories or are not inclined to be forthcoming in response to discovery probes.

The committee concluded, however, that uncertainty about opponents' positions is not the sole source of inefficiency in the early stages of litigation. Another problem is that some lawyers and litigants seem to find it difficult to squarely face their own situations early in the life of a lawsuit. Sometimes counsel have difficulty developing at the outset a coherent theory of their own case. Sometimes clients are not prepared to be realistic about their situations. Sometimes litigants and lawyers are so pressed by other responsibilities that they can bring themselves to systematically analyze their own cause only when some external event forces them to do so. Sometimes formidable psychological barriers may stand in the way of such confrontations. It is difficult to make big decisions. It is easier, psychologically, to launch a campaign to collect information, thus postponing serious efforts to come to terms with one's situation.

Early, realistic analysis

The committee recognized that these barriers to prompt, forthright communication and to early, realistic case analysis are major sources of litigation costs. Thus it set out to design a procedure that might help litigants overcome these difficulties. The goal was to design a procedure that could take place early in litiga-
tion and that would:

- encourage each party, at the outset, to confront and analyze its own situation in the suit;
- provide each litigant and lawyer with an opportunity to hear the other side present its case;
- help the parties isolate the center of their dispute and identify the factual and legal matters which will not be seriously contested;
- help parties develop an approach to discovery that focuses immediately on the key issues and that would disclose promptly the key evidence;
- offer all counsel and litigants a confidential, frank, thoughtful assessment of the relative strengths of the parties' positions and of the overall value of the case;
- after receiving the neutral assessment, provide the parties with an early opportunity to try to negotiate settlement.

The lawyers on the task force believe that there are many cases in which enough can be known in the early stages of the pretrial period to make an early evaluation session useful. In some instances parties are in a position, near the time suit is filed, to learn a great deal about their case without going through formal discovery. Often a modest but prompt investigative effort can disclose the basic information necessary to develop the essential outlines of the position the party will take in the suit.

Thus the committee believes there are significant numbers of cases in which parties can understand their situations earlier and better than they would if they relied on the momentum of conventional case development practices. The committee also assumes that there are some cases that cannot be developed sufficiently to make an early evaluation meaningful. But even these cases might well benefit from an early session in which an experienced, impartial third person systematically examines the parties' situations and offers advice about how to move the case as expeditiously as possible into a posture conducive to serious settlement negotiations.

These, then, are the goals and assumptions that underlie the early neutral evaluation program described in the sections that follow. Before turning to the details of the new procedure we should point out that the district court in northern California is launching this program on an experimental basis. During the summer and fall of 1985 the procedure was pre-tested on 10 different kinds of cases. The results were encouraging. Parties and lawyers generally felt that going through the procedure was well worth the effort. In fact, most of the people whose cases were exposed to the program valued it sufficiently to say they would be willing to pay for the service if the court were not providing it at no charge.

The court currently is launching a broader based experiment that is expected to involve about 100 cases over a one year period. By exposing a wide range of civil matters to this procedure, the court hopes to begin learning which kinds of cases are most likely to benefit from the early neutral evaluation sessions. If the experience with the first substantial group of cases is sufficiently productive, the court will expand the program.

The heart of the program

The central feature of the experimental procedure is a confidential two hour case evaluation session that takes place early in the life of the litigation. The session is hosted by a neutral, experienced, highly respected private lawyer who is appointed by the court under its inherent power to appoint special masters. The court requires the parties themselves, accompanied by counsel, to attend the session (on a showing that attendance would impose an undue hardship, the court permits parties to participate by telephone conference call).

At the session there are four major orders of business:

- Each party makes a 15 to 30 minute presentation of its position;
- the evaluator works with counsel to reduce the scope of the dispute by identifying areas of agreement and by urging the lawyers to put tenuous theories on the back burner until settlement possibilities are thoroughly explored;
- the evaluator candidly assesses the strengths and weaknesses of arguments and evidence and offers a valuation of the case (e.g., by estimating the likelihood of liability and the dollar range of damages);
- the evaluator helps the litigants devise a plan for sharing information and/or conducting discovery that will preserve the case for serious settlement negotiations as expeditiously as possible.

Early, frank, and respect-worthy feedback about essential matters, and help devising a sensible case development plan, are the core elements of this concept.

After hearing the parties' positions and offering her assessments based on the information the parties have shared with each other, the evaluator may consider exploring the possibility of reaching an early settlement. If the parties are amenable, the evaluator may caucus relatively early, but in most instances the participation by the neutral has not taken place until after most or all of the discovery has been completed. See, e.g., Levine and Nejelski, Unsettling issues about settling civil litigation, 88 JUDICATURE 9 (1984); Cooley, Query: Could settlement masters help reduce the cost of litigation and the workload of federal courts, 68 JUDICATURE 9 (1984); Burdell, Settling Cases in the United States District Court for the Western District of Washington, 7 FEDERAL BAR ASSOCIATION NEWSLETTER (of the Western District of Washington) 1 (1984); "Report of the Committee on Federal Courts Concerning the Volunteer Master Program in the Southern District of New York (January 21, 1981)," unpublished; Tegland, MEDIATION IN THE WESTERN DISTRICT OF WASHINGTON (Washington, D.C.: Federal Judicial Center, 1984). Court-annexed arbitration programs that use private lawyers as arbitrators have been established in the Northern District of California, the Eastern District of Pennsylvania, the District of Connecticut, and the Eastern District of Michigan. See Lind and Shapard, EVALUATION OF COURT-ANNEXED ARBITRATION IN THE FEDERAL DISTRICT COURTS (Washington, D.C.: Federal Judicial Center, revised September, 1983) and Shuart, Smith and Planet, Settling Cases in Detroit: An Examination of Wayne County's Mediation Program, 8 J. OF SETTLEMENTS & EXRESOL. 307 (1983).

All of these programs schedule the evaluation session to take place after discovery is substantially completed. Moreover, in the arbitration programs the private attorneys do not attempt to streamline, focus, or help counsel plan the development of the cases.
vately with one side (or litigant) at a time in an effort to facilitate frankness and to ascertain whether the parties' privately articulated positions are close enough to make settlement feasible.

**Timing**

There are several features of the early neutral evaluation program that combine to make it unique. Among these, the most important is the fact that the evaluation and planning session takes place *early* in the life of the litigation. In some cases the session is held even before the first judicially-hosted status conference (the theory being that use of articulated positions are close enough to ascertain whether the parties' privately obtained ground rules will make it feasible to conduct very limited key discovery prior to the evaluation session, on the theory that in some matters a little discovery might go a long way toward improving the parties' understanding of their positions and toward equipping the evaluator to make meaningful assessments.

Because some motions can dramatically affect the shape or even the existence of the litigation, the court will occasionally decide an important motion before sending the case to the evaluation session. Since some of the potential benefits of the session would be seriously jeopardized if it were postponed until counsel had completed most discovery, or in other ways "matured" the case, the court insists that the parties get the advantages of the evaluation session early, usually within three to four months of the filing of the complaint. The court does not wait for the matter to be "at issue" because too often a great deal of time elapses before all parties have filed their answers.

**Program elements**

While the court has not imposed a rigid format, since it is sometimes wise to permit the instincts of the experienced and neutral evaluator to shape a procedure that is tailored to the peculiar needs of a given situation, the program has the following components.

At least seven calendar days before the date fixed for the evaluation session each party delivers to the evaluator and to other parties a written Evaluation Statement. The Statement may be no longer than 10 pages (double spaced). The litigants are permitted to include in their Statements anything they think would be helpful in achieving the ends of the evaluation program. However, the rules require the statements (1) to identify any legal or factual issues whose early resolution might reduce the scope of the dispute or contribute significantly to the productivity of settlement discussions and (2) to suggest which discovery promises to contribute most to expediting case preparation and to equipping the parties to assess the strengths and weaknesses of their positions.

After consultation with all counsel, the evaluator picks a specific time and place for the session that is as convenient for the participants as possible. The session is held on clearly neutral territory, sometimes in the evaluator's office, sometimes in a room in the courthouse. The environment is as informal and unthreatening as possible.

At the session the evaluator begins by making a short "speech" describing the goals of the session and setting the tone he or she hopes will predominate. The evaluator emphasizes how much the parties can expect to accomplish if they adopt a constructive and cooperative attitude. The evaluator also emphasizes that he or she is a problem solver, a "solution oriented" person who will help the parties search creatively for common ground and for ways to maximize the benefits each litigant derives from the neutral evaluation.

The evaluator then describes the basic ground rules of the session, emphasizing that all oral communications made during the session are absolutely privileged, as will be the evaluation of the case. The evaluator also reminds the parties that the rules of evidence will not apply during the session, and that there will be no formal taking of testimony and no cross examination.

**Case presentation**

The evaluator asks each party to make a 15 to 30 minute presentation, focusing on the "open" (apparently disputed) areas. The evaluator asks the parties during these presentations to explain their views of the facts and to describe the evidence that will support their views. He or she invites the parties to use documents, where appropriate, to explain or support their contentions. Where he or she does not understand a party's presentation, or thinks a question would help clarify the basis for a position, he or she may interrupt the presentation with questions. But he does not permit opposing parties to ask questions or make comments while a presentation is being made.

While listening to the parties' presentations the evaluator attempts to identify areas where positions are not far apart, i.e., areas of substantial agreement, or in which substantial agreement seems possible with a little coaxing. After the parties have completed their presentations, the evaluator identifies these areas and tries to encourage stipulations.

Next, the evaluator identifies, with the help of the parties, the key unestablished facts on which resolution of the dispute might turn. He or she attempts to divide these facts into two categories; those which are simply unknown to the parties; and those which are affirmatively disputed, i.e., those as to which the parties insist on incompatible versions.

The evaluator attempts to identify the most efficient way to establish the potentially important but merely unknown facts. Where appropriate, he or she might encourage joint fact finding. With respect to potentially important facts that the parties affirmatively dispute, the evaluator probes why the parties disagree. He or she explores with as much specificity as possible the nature and probative power of the evidence each party says it could muster in support of its views. During this probing the evaluator keeps in mind that one of his or her tasks at the end of the session will be to recommend a discovery plan and/or a motion practice plan that would move the case into a posture amenable to settlement as expeditiously as possible.

After probing the support for differing views of the facts, the evaluator offers his or her assessment of the relative strengths of key evidence and arguments. Then, if feasible, the evaluator offers a valuation, i.e., using the information available up to that point, and drawing on his or her experience, he or she predicts the likelihood of liability and the probable amount of damages, if any. Both predictions might be made in
ranges, e.g., a 60 per cent-80 per cent chance of liability, and damages between $75,000 and $100,000. He or she orally communicates this valuation to all parties and counsel assembled simultaneously (or by telephone conference call, when necessary). The evaluator mails his or her assessments and valuation to any party (i.e., client) who has not participated directly in the session.

After assessing the case, and, perhaps, commenting on the likely cost of completing discovery and going through trial, the evaluator might ask the parties if they would be interested in exploring possibilities of settlement. If the parties seem open to pursuing this course, the evaluator could follow any number of alternative approaches. She might host a discussion of settlement positions in which all lawyers and parties simultaneously participate. Or, she might start the process by meeting first only with the lawyers. Another approach would begin with private meetings, seriatim, with each lawyer (or each lawyer and client).

If the parties are not interested in conducting settlement negotiations at this juncture, or if they conduct such negotiations unsuccessfully, the evaluator’s final, but by no means least important, task, is to recommend the discovery or motions he or she thinks ought to be pursued (and in what order) to prepare the case as efficiently as possible for meaningful settlement discussions. In making these recommendations, the evaluator focuses on the matters that are at the center of the dispute. He or she formulates a discovery plan under which the parties acquire first the evidence on which the most significant aspects of the case are likely to turn. In cases where the testimony of key witnesses (percepient or expert) is likely to be pivotal, the evaluator recommends a deposition schedule. In cases where documents are likely to be crucial, he or she recommends a procedure for expeditious production.

In all cases his or her goal is to distinguish information that is really necessary for serious settlement negotiations from the broader information that is only likely to be needed if the case goes to trial. Before the close of the session the evaluator records his or her discovery (or motion) recommendations on a prescribed form, copies of which he or she delivers to each party.

The evaluators have no power to enter binding orders of any kind.

If the evaluator or the parties felt that a follow-up session would be useful, they could discuss what the objectives and timing of such a session might be. Such a session would be permitted only on the consent of everyone involved, including the evaluator. Based on the first cases that have gone through this program, there is reason to believe that there are a good number of cases in which follow-up sessions might well be productive. For example, the parties might want to make a second effort at settlement after they have taken a key deposition or discovered important records. If they respect the evaluator, they might want to capitalize on her knowledge of the case in a second session, after the key discovery.

Limits on powers of evaluators

The evaluators have no power to enter binding orders of any kind. Within limits set by the court, they can fix the time and place of the evaluation session itself, and they are expected to report to the court if a party fails to submit a timely pre-session statement or to appear at the session, but they have no other powers. Moreover, the General Order that establishes this program prohibits the evaluators from communicating with the court or anyone else anything about what transpired at the session. In fact, the General Order (No. 26) casts a cloak of confidentiality over everything said or done at each E.N.E. session. No participant may disclose even the questions posed by the evaluator, to say nothing of her assessments and valuation. And during the first experimental stages of the program they will not share with the court the recommendations they make to the parties about discovery. The purpose of this restriction on communication with the court is to encourage counsel and litigants to be open at the session and to reduce incentives to posture for procedural advantage.

On the other hand, we believe the court might find useful the evaluator’s procedural suggestions—especially since they will be formulated after the evaluator has learned much more about the case than a judicial officer normally would at this early stage. Thus the embargo on communication about discovery plans between evaluator and court represents a lost opportunity for the court to benefit from the evaluator’s knowledge. For this reason, at a subsequent stage in the life of this project the court will re-examine this policy and consider permitting the evaluator to recommend to the assigned judge that the parties conduct specified key discovery before they launch their full preparations for trial. Under no circumstances, however, would the evaluator’s opinions about parties’ positions or his valuation of the case be disclosed to the court.

Incentives for preparation

Several aspects of the experimental procedure offer counsel inducements to prepare well for and attempt to make constructive use of the early evaluation session. One incentive stems from the fact that at the evaluation session counsel are required to perform in front of their clients. The desire to look good in front of the person paying the bills, and to appear to be in control of the situation, should inspire counsel to do basic investigative homework and to come to the session ready to make a substantial presentation.

Another reason to prepare well for the evaluation session is the knowledge that the evaluator’s assessments of evidence and arguments, and his or her valuation of the case, might well have a substantial effect on the settlement negotiations that take place later. The evaluator’s reactions will remain in the minds of counsel and clients; they will be useful to and used by at least one of the parties. Lawyers will foresee that fact and want those assessments to be as favorable to their client as possible.
Program impact
The list of contributions a well-run evaluation and case focusing session might make is lengthy. We do not expect each session to make meaningful contributions in all of the ways we describe below, but there is reason to hope that many of these kinds of benefits will be realized in a healthy percentage of the cases.

The program could move counsel and parties to do their basic investigative homework (as opposed to major formal discovery) substantially earlier than they otherwise might.

The session also could provide a vehicle for meaningful communication between the parties about the case (put real flesh on the pleadings bones): a cost-effective device by which litigants can learn what their opponent's case really is all about. In some cases, the evaluation session will serve as an inexpensive early substitute for some formal discovery. And in other cases going through the evaluation will open channels of communication between the parties that will lead to voluntary sharing of information, perhaps even joint fact-finding efforts.

The process compels counsel and client to confront, early in the proceedings, a systematic presentation of their opponent's position and to examine systematically the strengths and weaknesses of their own case. This forced confrontation with their overall situation might inspire parties to make the difficult decisions about the case that they otherwise would postpone.

The evaluator's assessments could serve as a reality check for parties or lawyers: bringing some frivolous matters to an abrupt halt, or, short of that, fundamentally altering some parties' expectations. The mere prospect of a neutral evaluation session could induce some parties to dismiss their claims or to make the kind of offers that could result in prompt settlement.

The process increases client involvement in lawsuits and in making basic decisions about how litigation is handled. In some situations clients feel alienated from the litigation process—cut off from it and bewildered and intimidated. Having clients attend the evaluation sessions can make them feel more a part of the process and can educate them about their situation and their options. The evaluation sessions also can be used to give clients an opportunity for catharsis. Sometimes being given a chance to get something off his chest can be very important to a litigant. Getting the story told to a neutral figure can remove one obstacle to productive settlement discussions. There also may be cases in which clients could serve as important sources of economic discipline and common sense for their lawyers if they had a more meaningful opportunity to assess the situation at the outset. The early evaluation session gives a client some capacity to review the decisions being made by his lawyer.

In other cases the evaluator's assessments could help attorneys with unrealistic clients. Occasionally clients have unrealistic expectations about litigation (both its probable outcome and its burdens). And, occasionally, lawyers hired by such clients have difficulty dislodging those expectations.4 Frank talk from a senior, neutral litigator could reduce this problem.

The session could reduce the scope of the dispute and focus discovery. The early conference could produce fact and law stipulations. The evaluator's assessments could persuade parties to drop (at least for the initial, settlement-oriented stage of discovery) tenuous causes of action or defenses which could justify, theoretically, expansive and ultimately unproductive discovery. The evaluator can draw on his or her experience to help the parties fashion a "lean and muscular" discovery plan, i.e., a plan that focuses at the outset on the central, potentially dispositive data.

The neutral valuation of the case could provide a "hub" to help move and center subsequent settlement negotiations.

Finally, the evaluator could introduce a fresh, creative perspective to the litiga-

4. Data produced in a recently completed survey that explores litigators' perceptions about some aspects of the settlement dynamic suggest that the vast majority of lawyers encounter the problem of the unreasonably recalcitrant client in less than 20 per cent of their cases. In fact, about 53 per cent of the lawyers surveyed report that it happens in less than 10 per cent of their cases that a client is reluctant, or unwilling, to accept a settlement offer that counsel thinks is reasonable. See Brazil, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES, 99-101 (Chicago: American Bar Association, Litigation Conference and National Conference of Federal Trial Judges of the Judicial Administration Division, 1985). See also Brazil, SETTLING CIVIL SUITS: What Lawyers Want from Judges, 28 JUDGES' J. 14, 17 (1984).

5. See Brazil, SETTLING CIVIL SUITS, supra n. 4, at 153.
trial probably would feel considerable reluctance, early in the case, to be as specific and candid in assessing parties' positions as the neutral evaluator is expected to be.

Moreover, parties and counsel might be more open in their discussions of the case with a private lawyer who will have no power over the course of the litigation than they would be with a judge or magistrate. Parties might be less fearful and less formal in the presence of the private evaluator, more willing to communicate candidly, and more flexible.

An additional factor favoring use of private attorneys in this role is that some judges and magistrates have less recent private attorneys in this role is that some private lawyer, more willing to communicate candidly, is at the center of the lawsuit in which the master will serve. Subject-area expertise can be important and is not always available from a judge or magistrate. A private litigator who really knows a particular field can cut quickly to the center of things and can reliably assess parties' contentions and evidence. Such a litigator also is in a peculiarly good position to identify the kinds of discovery or motions that will move the case efficiently into a posture conducive to serious settlement negotiations.

**Special masters**

Perhaps nothing is more critical to the success of this program than the quality of the people who serve as evaluators. How much their opinions mean to the parties, how helpful their advice is about discovery, and how significantly they can improve the parties' communication will be determined by how much they are respected. Thus it is crucial that the lawyers who are appointed to serve as evaluators be thoroughly experienced in civil litigation and enjoy handsome reputations for the quality of their work and the evenness of their temperament.

The court also may attempt to enlist law professors and retired judges to serve as evaluators, especially in cases where parties challenge the capacity of private counsel to form neutral judgments. And when a suit involves an area in which the local bar is perceived as divided along party lines (i.e., most attorneys are identified with plaintiffs or with defendants) it may be necessary to appoint evaluators who practice in fields other than those that are the subject of the litigation.

For the initial experimental stages of the program in the Northern District of California the court is hand-picking the lawyers who serve as evaluators. In so doing the court draws on its experience with members of its bar and accepts nominations from its task force. Normally the parties will not select the person who will be the evaluator in their case, but they may interpose any objections they have to the person chosen by the court (e.g., a party might believe that the court's appointee would have a conflict of interest in a particular case). The court is establishing a program to train the lawyers in the skills necessary to serve effectively as evaluators.

During the period the court is evaluating how well this procedure works and trying to identify the kinds of cases for which it is appropriate, litigants will not be charged a fee for participation, and the evaluators will not be compensated for their service. Based on experiences in other jurisdictions, such as the Western District of Washington, the court is confident that it will have no trouble finding highly qualified lawyers to volunteer for this potentially significant work.

If initial experiments demonstrate that the early neutral evaluation procedure is beneficial, and thus the program is extended into the future, we feel that the masters should be paid for their services, that the fee should be more than a token sum, and that except in extraordinary situations it should be borne equally by all the litigants (the court would waive the fee for impecunious parties). There are several reasons why it is important that the court require the parties to pay a fee. One is that it is the parties who will benefit from the service. Parties who use the evaluation procedure intelligently should be able to reduce their overall litigation expenses. Moreover, we believe the parties will take the opportunity this program represents more seriously, and get more out of it, if they pay for it. If they pay, they will have made an investment in the process and will have an additional incentive to make it productive. As important, by compelling parties to pay the court makes a symbolic statement to them about its confidence in the potential utility of the procedure. The fee, in other words, symbolizes the court's view that this procedure, if properly used, can make a valuable contribution to the overall cost effectiveness of litigation.

Making the fee a meaningful sum also will improve the court's ability to continue to attract high quality lawyers to serve as evaluators, and will improve the likelihood that those who are appointed will perform their duties conscientiously. We also believe that the fee should be fixed on a per case rather than a per hour basis. A per case fee will give evaluators an incentive to work efficiently and will remove any temptation some might feel to "elaborate" their involvement in order to increase their compensation.

**Voluntary participation?**

If the principal purpose of the early neutral evaluation session were to negotiate settlement, it might make sense to confine the program to cases in which all parties volunteer to participate. The primary objective of the procedure described in these pages, however, is not immediate settlement. Most cases will not settle at such an early conference.

The primary purposes of this program are to promote early, efficient, and meaningful communication about disputes and to move parties and counsel to confront early and assess realistically their situations. The lawyers and parties who would volunteer to participate in such an exercise are the least likely to need it. It is the lawyers and litigants who are not in the habit of communicating directly with opponents, or who are not inclined to come to terms early and realistically with their litigation situations, who are likely to benefit most from the session with the evaluator. Moreover, findings recently published by the ABA's Action Commission to Reduce Court Costs and Delay show that when use of new procedures designed to expedite

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6. Id., at 139, where the author reports that 64 per cent of the responding attorneys indicate that they are "likely to be more open in settlement discussions with a judge who will not preside at trial than with the judge slated to preside at trial." In the Northern District of California, the most populous and urbanized of the four study districts, the percentage of responding litigators who say they are likely to be more open with someone other than the assigned judge climbs to 80 per cent.
case development is voluntary the procedures can end up being little used.7

The federal courts' authority to compel litigants to participate in an early neutral evaluation exercise does not seem seriously disputable. Federal courts have drawn on Rule 53, Rule 83, and their "inherent powers" to implement programs designed to improve the efficiency of dispute resolution. The seminal case in this area is Ex parte Peterson,8 where Justice Brandeis, speaking for the court, declared:

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. Compare Stockbridge Iron Co. v. Cone Iron Works, 102 Massachusetts, 80 87-90. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our Government, [this power] has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners.9

The committee's confidence that there is authority to compel parties to participate in the early neutral evaluation program is reinforced by the fact that the Judicial Conference of the United States, the Justice Department, and, as of 1985, ten federal district courts have concluded that there is authority to compel parties to participate in non-binding arbitration.10 Moreover, federal district courts in Washington (state), Michigan, Connecticut, and New York have established programs in which parties are required to participate in settlement or pretrial conferences that are hosted by private lawyers who have been appointed by the courts.11

Nor does it appear that the Seventh Amendment poses an obstacle to implementing an early neutral evaluation procedure. As long as the program does not block or significantly delay access to trial, requiring parties to participate would not offend their right to jury trial.12 Since the purpose and probable effect of the evaluation procedure would be to expedite case preparation, save litigants money and time, and (by encouraging earlier settlements) improve access to early trial dates, the committee sees no colorable Seventh Amendment objection.

Whether the court has authority to compel litigants to pay the master's fee raises a separate question, but we believe it also can be answered in the affirmative. We rely primarily on the line of cases, again beginning in the modern era with Ex parte Peterson, that hold that federal courts have inherent power to appoint special masters, over the objection of parties, and to require parties to pay for the masters' services.13 The federal courts in Michigan reinforce our conviction on this issue by requiring the parties to pay the fees of the arbitrators in the mandatory evaluation program that is well-established in those courts.14

Kinds of cases

Given the fact that, to our knowledge, this kind of evaluation procedure has not been tried elsewhere, it is not possible to pre-identify the kinds of cases or situations in which the early neutral evaluation procedure would be beneficial.15 Moreover, different dimensions of the evaluation procedure may have different degrees of utility in different kinds of cases.

For example, in smaller, less complex actions, it may be that the most useful part of the program will be the dollar-specific valuation.16 In larger, more complicated matters, by contrast, the parties might find more valuable the evaluator's critiques of specific theories, or suggestions about the most efficient ways to share information and conduct discovery. And there may be types of cases in which the most useful contributions by the evaluator will be creative suggestions that encourage parties to rethink their basic objectives, or to consider innovative dispute resolution mechanisms that take the case, at least temporarily, out of the traditional litigation mold.

At this juncture neither lawyers nor judicial officers know enough about how the evaluation dynamic will work to be able to select the cases for which this program is likely to be valuable. Presumably there are kinds of cases in which an early evaluation session would be unproductive, perhaps even counterproductive. The way to learn what those kinds of cases are is to expose a range of matters to this procedure and then to monitor closely how the system works and what results it produces. It is for this reason that the court will send a broad range of cases through the program and will carefully study how the procedure works.

Conclusion

The judges of the United States District Court for the Northern District of California have concluded that the early neutral evaluation program described here is sufficiently promising to justify experimenting with it in about 100 cases over a one year period. The court is establishing a system to monitor and evaluate the program as it operates. Thus we should begin learning whether, or in what circumstances, a procedure like this can contribute to the efficiency and quality of dispute resolution.

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