



Laboring Results

A Monthly Dispute Resolution E-zine
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March 2005

The Los Angeles Superior Court 'Mediation' Panel Is Nothing More Than Early Neutral Evaluation: Mediators' Reluctance To Engage In The Process

Why did the mediator cross the road?

I'm sorry, I can't share that information with you unless the chicken authorizes me to tell you.

Why did the Early Neutral Evaluator cross the road?

To evaluate how the chickens should get to the other side.

Los Angeles Superior Court (LASC) defines a mediator as 'an impartial, neutral intermediary, whose role is to help the participants reach a settlement. The mediator will not impose a settlement, but will assist the parties in exploring settlement options.' However, the role of the neutral that is assigned to 'mediate' an action, in actuality does not conduct a mediation but an early neutral evaluation, whose aim is not to settle an action but to assist the parties to determine their future strategy in the case. The LASC Mediation Panel has to be redefined and relabeled for mediators to actively participate in the process.

Early neutral evaluation (ENE) provides parties in dispute with an early and frank evaluation by an objective observer or "evaluator" of the merits of a case. At the early stage of litigation, early neutral evaluation results in enhancing direct communication between the parties about their claims and supporting evidence, providing an assessment of the merits of the case by a neutral expert, providing a "reality check" for clients and lawyers, identifying and clarifying the central issues in dispute, assisting with discovery and motion planning or with an informal exchange of key information, and, if possible, facilitating settlement discussions, when requested by the parties. ENE positions the case for the parties to begin

thinking about resolution by settlement, dispositive motion or trial. Settlement is not the major goal of ENE.

This 'mediation' mislabeling by LASC has occurred because the court forces the actions to early mediation before any discovery or very limited discovery is conducted. Usually a trial date has not been set and if it has been set, the mediation cut off date is six months before the trial. This type of scheduling causes the attorneys and litigants to engage in Early Neutral Evaluation to determine how they should proceed with the case. Settlement is not the major goal amongst the parties because of the lack of discovery and/or unheard dispositive motions. Unfortunately, this mislabeling can cause a misconception amongst the participating parties as to the mediation process and leaves them disillusioned with mediation.

The Lawyers Seek Early Neutral Evaluation

The parties seek early neutral evaluation in actions involving substantive legal issues, for example, employment disputes. The parties are sent to early mediation and discovery has not begun or depositions have yet been taken. In one scenario the 'mediator' is faced with a pending motion for Summary Judgment by one of the parties. The so-called mediation is spent with the lawyers using this as an opportunity to obtain the 'mediator's' assessment of the merits of the case and as a discovery tool to determine the evidence they need to gather to oppose the MSJ. The lawyers are engaging in early neutral evaluation and are not interested in settling the action. In this situation, many mediators do not engage in the three hours of free 'mediation' and once it is obvious the parties' goal is not to settle, they respond: 'if you are interested in settling, call me after the court has heard the Motion for Summary Judgment.'

The second common scenario is where the defendant is considering filing a dispositive motion and hopes to settle for the costs of filing the motion. Again this is another form of early neutral evaluation, and the goal is not settlement amongst the parties, but to obtain the evidence to support a dispositive motion and to obtain the 'mediator's' assessment as to the success of the motion. Some parties even go so far as to ask the 'mediator' what strategy should be used in defending or prosecuting the action. Again a mediator has not been assigned to give an early neutral evaluation or to assist the parties with their case. A mediator should take the position that if the parties are not interested in settling the action then the parties should proceed to 'file the motion for summary judgment.'

Usually an experienced and knowledgeable mediator, in the subject matter area, has a good sense as to the likelihood of the success of a dispositive motion. In a particular employment matter, I mediated a few months ago, I listened to the facts and the parties' demands for an hour.

The defendant insisted that they had a good chance of succeeding on a Motion for Summary Judgment. I concluded to myself that the MSJ had merit and instructed the parties that if they were interested in settling after the motion was heard, to give me a call. I was contacted later and told that the court granted the MSJ. Until LASC mediation panel becomes an ENE panel, many mediators will not spend three hours to engage in early neutral evaluation. Once a mediator determines that the parties are using the mediation process for early neutral evaluation, the mediator will come to the conclusion that the goal is not to settle and end the session.

A Change Is Needed

I have been informed by parties that they have had bad experience with LASC's 'mediation' program because the mediator would not put in at least three hours of time. If the process was correctly labeled and the mediators knew their role, a mediator would be more than willing to spend as much time as was needed in order to reach a settlement. If the goal for LASC is to have the parties engage in early neutral evaluation, then the mediator's role needs to be redefined. If settlement is the goal, then the judges need to change on how they manage their cases so that lawyers are not forced into using early neutral evaluation.

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