

Neutral Evaluation: Another Tool in the ADR Toolbox

By Andrew D. Ness



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For almost thirty years, mediation has been the dominant alternative dispute resolution technique for settling construction disputes, and for good reason. It seems every significant construction case goes to mediation at some point in the dispute's life cycle, and often it works. Mediation continues to be a powerful and effective tool for settling a wide variety of cases in a cost-effective manner. But, of course, not all mediations result in a settlement.

Mediations fail for a wide variety of reasons. One common situation where mediation is not productive is where both sides feel strongly and sincerely that they have a very strong case. This mutual high degree of confidence in the merits of their case prevents the parties from making the kind of concessions needed to get to a mutually acceptable settlement figure. But, of course, they cannot both be right. One party or the other, and often both parties to some degree, is misreading the actual strength of its case. If the case goes to trial or arbitration hearing, one side is going to be very disappointed, while the other will be proven to have been closer to the mark in its case evaluation. But which party is off the mark?

In multiparty cases, the same problems occur but are often more complex. The various parties often have a wide range of views, not just on the basic strength of the major claims, but also on the relative strength of the various claims, the damages, and the jurisdictional or procedural hurdles to recovery. Mediators are skilled at finding a consensus that is sufficient to drive a resolution, but this does not always work—the views may be too disparate to find any common ground in dollars and cents.

Coming out of an unsuccessful mediation involving this situation of firmly held but widely divergent views of the strengths of their cases, counsel will generally have learned from the mediator that one, both, or multiple sides are entrenched due to their high level of confidence in their positions. The reaction traditionally has been along the lines of, “well, some cases just need to go to

trial.” And there haven't been many obvious alternatives to doing just that.

Is there a better alternative besides proceeding to trial or an arbitration hearing in these situations? Both trials and hearings involve a full airing of the issues, as the witnesses with knowledge are heard from at length and the key documents are reviewed, interpreted, and argued over, often repeatedly. Most of the time this results in a reasonable decision on the merits and assessment of the damages, but this is a very time-and-resource-intensive process. A great deal of effort and expense must be expended to answer the basic question that precluded settlement: Which party is being overly optimistic about the strength of its case?

At its essence, neutral evaluation is a tool for obtaining the answer to that key question in a much faster and more cost-effective manner than a trial or hearing. A well-designed neutral evaluation process will yield highly practical, realistic feedback respecting the relative strength of both sides' positions and arguments at a small fraction of the cost of a trial or arbitration hearing. If the views of the neutral evaluator are set out clearly and persuasively, and are well grounded in the facts and law applicable to the dispute, then the chances are very good that both sides will be substantially influenced by the evaluation. The path to settlement becomes much clearer and easier. Sometimes a resumed mediation is needed to close the deal, but in many instances the evaluation alone will be sufficient to enable the parties to reach an agreement, often largely if not entirely along the lines of the evaluation.

Structuring a Neutral Evaluation

The hallmark of neutral evaluation is its almost unlimited flexibility—the process can be shaped to meet the needs of a very wide variety of construction disputes, from very simple to extremely complex, and from modest in size to very large claims. The three common elements, however, are selecting an agreed evaluator (discussed further in the next section), agreeing on an efficient process to get the relevant facts and positions before the evaluator, and then agreeing on what the desired evaluation will address and look like. In all but the most straightforward situations, the three elements should be set out in an agreed document, often called an evaluation agreement, signed by all parties participating. Such agreements need not be lengthy—most are only a page or two long—but they establish the parties' agreed mutual expectation for the process. They also serve to guide the evaluator in producing an evaluation that best meets the parties' needs.

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Allocation of the evaluator's fees and costs should also be addressed in this agreement, and are typical split equally among the participating parties, as is the common practice for mediator expenses.

The evaluation itself should be a written document, which can be as detailed or summary as the dispute requires. Putting the evaluation in writing serves several purposes. It reduces miscommunication as to the substance of the evaluation; it sets out in greater or lesser degree the logic behind the evaluator's views about the dispute, and it allows the substance of the evaluation to be communicated accurately to those who were not present to hear an oral evaluation (such as upper management personnel or board members who must sign off on a settlement). Finally, it provides a written record that sometimes is important for one party or another to have in the file to justify its decision to settle, such as where that decision may later be reviewed by regulatory authorities or others. Neutral evaluations are by their nature non-binding, a point typically confirmed in the evaluation agreement. And in most cases the resulting evaluation is made expressly nonadmissible in any subsequent proceeding. Typically, the evaluation is expressly intended to be used for settlement purposes only.

For a dispute involving a smaller amount, an inexpensive neutral evaluation may be limited to submission of written summaries and key documentary exhibits to the evaluator. The resulting evaluation might be three to ten pages summarizing the evaluator's views on the key issues presented. The whole process in such instances, from agreeing to utilize a neutral evaluation to receiving the written evaluation, can often be completed in thirty days or less. What is most important in utilizing such a bare-bones approach is that the evaluator be given enough information to evaluate the conflicting contentions in context, and not just as abstract issues of law or fact. A short summary of the applicable law is not likely to be a useful neutral evaluation, nor is a simple recitation of the facts. Sufficient context is important to permit the evaluator to understand and address accurately the factual situation presented, and how the relevant contract provisions and legal principles are likely to be applied in that situation.

While it might be tempting to have counsel extract the relevant contract clauses and present only those to the evaluator, in most instances the need to provide sufficient context argues strongly in favor of providing the evaluator with the entirety of the relevant sections of the contract—most often the agreement, general conditions, and special conditions. Any relevant specification sections or drawings can generally be excerpted, however, without providing the entire set of specifications and drawings, and many ancillary exhibits can be omitted. A well-chosen evaluator will have sufficient experience with similar contracts that he or she will be able to quickly skim the contract for context and relevant provisions, with perhaps some guidance from the parties identifying the clauses each primarily relies upon. Providing more rather than

less of the contract usually does not consume an undue amount of time or expense in the evaluation process.

Sometimes there is just one specific issue, or at most a small handful of specific issues, at the heart of the dispute, and at the root of the inability to reach settlement. A neutral evaluation can easily be structured to be limited just to those issues. The rationale is that with expert input on the most important issues, the parties and counsel can sort the rest out by themselves (or with the help of a mediator, if needed). This is another avenue for obtaining the benefit of neutral evaluation with minimum time and expense that works well in the right situation. Again, the primary concern is not to so closely circumscribe the information made available to the evaluator that the evaluation is of limited value because it is not well grounded in the context of the contract and project history.

Because of the importance of understanding the context in most disputes, most neutral evaluations go beyond just providing the evaluator with relevant documents and short written summaries of each party's position. Generally, this involves adding a presentation element to the process. Each party is provided an agreed time period to make a presentation to the evaluator regarding the dispute. The evaluator additionally has the opportunity to ask questions of the parties, which is an important mechanism for assuring that the evaluator has the opportunity to clarify the parties' positions as well as the relevant background and context.

Typical ground rules for such presentations are along the following lines:

1. Each party has the right to make its presentation without interruptions from other parties.
2. All participating parties are entitled to be present for all presentations.
3. Each party can use its allotted time however it chooses. Some may choose to focus on presentations by counsel, while others will emphasize hearing directly from the individuals who would be the key witnesses in a trial or hearing setting. Experts may also be utilized as desired.
4. Presentation aids (like PowerPoint slides) are optional but often encouraged by the evaluator as an aid to recalling the key points.
5. The evaluator can ask questions at any time, but the time utilized for asking and responding to those questions does not count against the party's allotted presentation time.
6. Some limited opportunity for rebuttal presentations is allowed, either by reserving some of the allotted time of each party or by agreeing in advance to a designated amount of rebuttal time for each party.

In many cases, these presentations can be completed in something between a half day and a full day; this is not intended to be, nor does it need to be, an extended process. Additionally, in the age of Zoom, they are often

done by video to avoid the need for travel, and the presentation format is well suited to video meetings.

This basic structure—submission in advance of written summaries of each party’s positions and arguments, accompanied by a limited set of the most relevant documents, and followed by party presentations and opportunity for rebuttal—can be expanded and revised as appropriate, depending on the number and complexity of the issues and the amount in dispute. A key goal in any neutral evaluation is that each participating party believes that it has had a fair and equal opportunity to present its side of the issues. For this reason, agreement on page limits for written submissions/briefs, the approach to including exhibits, and the dates for exchanging submissions, exhibits, and presentation slides are useful for assuring a level playing field and sense of procedural fairness for all parties. Similarly, setting out the parties’ understandings with respect to the general scope and detail expected in the written evaluation has the beneficial effect of both setting expectations and informing the evaluator as to the extent of the work product that the parties feel is appropriate to best benefit their resolution of the dispute.

In the most complex and high value disputes, it can be appropriate to specify a significantly more elaborate neutral evaluation process. That said, the cost of the neutral evaluation should be kept at a quite modest fraction of what an arbitration hearing would involve. Keeping this in mind sets a natural upper limit on how extensive a process might be appropriate. A nonbinding process such as a neutral evaluation should not be allowed to grow so elaborate as to effectively become a “pre-arbitration” that potentially (if not successful in leading to resolution) must be followed by a full arbitration or court proceeding. That risks a significant magnification of the cost and time required to achieve final resolution of the dispute, just the opposite of the intended result.

The following outlines the neutral evaluation process recently used in a complex, multicclaim, highly technical and high value design and construction dispute. While appropriate for that dispute and those parties, it represents an approximation of the upper end of the range in terms of a reasonable neutral evaluation process.

1. Each party submitted initial position statements a month before the date for presentations. Position statements were to state the reasons and basis for all claims and defenses, and discuss contract, technical, and legal references relied upon by the party. Exhibits were to include documents relied upon by the party in support of its positions. There were no page limits, and the parties each submitted one to two notebooks of exhibits.
2. Rebuttal position statements, with additional exhibits, were submitted fifteen days before the presentations.
3. Expert reports were to be submitted with the initial

position statements, and rebuttal reports with the rebuttal submissions. Each party utilized multiple experts.

4. Presentations were scheduled for two days, with each side allowed six hours for its initial presentation and two hours for rebuttal (plus time for evaluator questions). This was subsequently modified to give each side three and one-half hours for rebuttal, with rebuttals conducted on a third day.
5. Both parties were expressly required to have persons with full decision-making authority to settle the dispute in attendance at the presentations.
6. Both parties wisely chose to spend 85–90 percent of their presentation time on presentations from those directly involved in the disputed issues and experts, and only 10–15 percent on presentations by counsel, generally limited to legal and contractual issues. Given the complexity of the issues and length of presentations, a court reporter was used to generate a transcript of the presentations.
7. Both parties used PowerPoint slides extensively, which were exchanged before the presentations, and the evaluator was provided with a hard copy of the slides for reference during the presentations.
8. The evaluation agreement specifically required that the evaluation include “detailed findings of fact and conclusions of law on entitlement and quantum.” So, by design, this resulted in a very lengthy and detailed evaluation.
9. A short period for requesting reconsideration was also provided, to address any mistakes, errors, misunderstandings, or miscommunications that might have found their way into the evaluation.

Choosing the Evaluator

Probably the most important decision to be made in formulating an effective neutral evaluation process is selecting an appropriate evaluator. The evaluator should be selected by mutual agreement of the parties and be an individual in whom the parties have confidence as to both ability and neutrality. The selection criteria are generally aligned with what would be appropriate in selecting a sole arbitrator. Deep knowledge of construction disputes and the relevant legal and contractual principles is obviously a key criterion. If the dispute would otherwise be arbitrated, prior experience on arbitration panels is beneficial, as part of the value of the process stems from predicting how a panel of arbitrators is likely to view the dispute. Of course, choosing an individual with a reputation for integrity and sound judgment is of paramount importance. The value of the process as a settlement tool is closely tied to all parties having confidence that the evaluation has been impartial, fair, and well-reasoned. Neutral evaluators are required to quickly master the relevant facts and law, so choosing someone who is a “quick study” is also a desirable quality in assuring the process proceeds as efficiently as possible.

Decisiveness is a quality appropriate to a neutral evaluator that is frequently overlooked. Having gone through the exercise, the parties deserve and presumably want an evaluation that pulls no punches and calls the issues clearly as the evaluator sees them. An evaluation styled as a “maybe this, maybe that” identification of the litigation risks of each party can be better and more quickly obtained from the mediator in a mediation setting. At the neutral evaluation stage, the parties are usually more interested in hearing in a clear and decisive manner just how the neutral evaluator assesses the parties’ positions, for better or worse.

Requiring disclosures from the neutral evaluator of past engagements and connections to the parties and counsel, not just conceded conflicts of interest, is also appropriate before finalizing the evaluator selection. Again, the confidence of the parties that the evaluator is entirely independent and impartial is critical to the persuasiveness of the resulting evaluation. So full disclosures similar to those required of an AAA arbitrator, covering past and present relationships and connections to the case, the parties, counsel, and witnesses, is entirely appropriate. That said, as is the case with a mediator, past relationships may well not be disqualifying, and can even be a positive. In one recent case, the neutral evaluator was acceptable to both parties precisely because both parties had utilized him as a lawyer in prior, unrelated matters, and as a result had great confidence in his perceptiveness and analytic abilities.

Alternative Uses of the Neutral Evaluation Concept

To this point, the presumption has been that all parties with a direct interest in the dispute have agreed to participate in the neutral evaluation, and at least tacitly, agreed to be guided in their future settlement efforts by the results. However, this is not a prerequisite for utilizing a neutral evaluation. In a multiparty case, there are many situations where a subset of the parties may agree to obtain a neutral evaluation. This can be useful for assessing their relative shares of potential liability, or for later sharing with the nonparticipating parties to help convince them to settle, as just two of many possibilities.

Neutral evaluations are also frequently commissioned by one side of a two-party dispute, such as where the party wants to obtain an independent assessment of its position and prospects before committing substantial further resources to the case. Often, the neutral evaluation obtained, where favorable to the commissioning party, is then shared with the opposing party in an attempt to inject a greater degree of reality into the other party’s overly optimistic case evaluation. This can be effective, but naturally is not normally as effective as getting the opposing party to participate in the neutral evaluation process from the outset. It is naturally much harder to disregard an unfavorable neutral evaluation when the party has agreed to the selection of the evaluator and participated in the process.

The hurdle to overcome in any neutral evaluation that does not involve all parties is assuring that the best arguments and facts most favorable to the nonparticipating

party are fairly considered in the evaluation. Many times, the neutral evaluator has sufficient experience to anticipate the missing party’s best points, at least in general terms, but there is always a risk that key facts may be difficult to anticipate and may be missed. The party or parties commissioning the evaluation need to take care to accurately represent the positions and best arguments of the nonparticipating party if the objective is to obtain the most accurate and useful evaluation that reflects the actual merits of the dispute. On occasion, this is done by assigning one member of the legal team to act as surrogate opposing counsel, making the nonparticipating party’s arguments as effectively as possible, to best assure that the resulting evaluation has fully considered both sides’ positions.

Limited forms of neutral evaluation can also be utilized in a wide variety of other formats to meet the needs of a particular case. For example, JAMS panelists report successful experiences in commercial disputes rendering many types of nonbinding evaluations, such as:¹

- mock arguments to test trial strategies and themes;
- presentations to a panel of retired judges to predict likely jury reactions to the dispute;
- neutral evaluation of proposed expert testimony;
- mock summary judgment arguments;
- neutral prefiling appraisal of contemplated claims;
- neutral appraisal of contemplated appeals; and
- mock appellate arguments.

It is also possible to incorporate neutral evaluation directly into an ongoing mediation process.


Ken Gibbs, a JAMS mediator in Los Angeles, calls the process he has developed “Mediation-Evaluation.” If the mediation reaches an impasse, the mediator, together with counsel, develops a list of the issues where an evaluation is likely to be helpful in promoting resolution. The mediator then takes on the role of evaluator, and the parties make informal presentations regarding their respective positions on those issues. These presentations are similar to those described earlier—a mix of presenters including key fact witnesses, experts, and counsel. After rendering the evaluation, the mediator can then resume mediation and seek to obtain a final resolution of the dispute. Mediation-Evaluation has had particular success in matters involving public entities, insurance carriers, and publicly traded corporations that need “something in the file” to justify expanded settlement authority.

The clear advantage of Mediation-Evaluation is that the mediator/evaluator has already obtained a basic grounding in the dispute and its context through the preceding mediation process, so the evaluation can probably proceed more quickly and at less cost than if a different individual is utilized to provide the evaluation. But this structure has limitations and risks also. There is significant risk that while acting as the mediator, the mediator/evaluator has obtained confidential information from one or both sides that would not be shared in an evaluation

setting (or in arbitration or litigation, for that matter). This can obviously work to the advantage or disadvantage of a party, as the mediator/evaluator cannot effectively “unlearn” the confidential information previously shared.²

On a more conceptual level, it is a basic maxim of mediation that much of the mediator’s power to influence the parties and push them toward settlement is rooted in the mediator’s complete neutrality. Once having rendered an evaluation, however, that neutrality has been breached by offering specific views as to the merits of each party’s positions. Many mediators would not feel that they could effectively resume the role of mediator after having rendered a specific evaluation of the merits. To pull off this feat, the parties’ trust and confidence in the mediator must be such that they can continue to accept the mediator/evaluator as an “honest broker” in completing the mediation after rendering an evaluation and reaching an agreed settlement. The alternative, of course, is either to utilize a separate individual as the neutral evaluator, allowing the mediator to resume the mediation after the evaluation with neutrality intact, or (much less commonly) utilize a different mediator after the evaluation stage.

No brief article can fully do justice to the almost

endless possibilities for productively utilizing neutral evaluation to break an apparent impasse that is precluding resolution of a construction dispute. The usefulness of the technique is limited only by the imagination of counsel, and what counsel can agree upon to advance the goal of reaching an agreed settlement. In this regard, neutral evaluation offers a highly useful tool in many circumstances that counsel should consider in every case where mediation has proven to be unproductive. 

Endnotes

1. Neutral evaluations almost always involve a single evaluator for reasons of cost and to avoid scheduling difficulties. However, where the evaluation is limited in scope and involves more subjectivity (such as predictions as to how a particular judge or a jury is likely to react to proposed trial themes), a panel of three evaluators may make the most sense.

2. This problem is essentially the same as is faced when utilizing a “mediation-arbitration” or “med-arb” dispute resolution method, where the mediator becomes an arbitrator issuing a *binding* decision if the mediation is not successful. This inherent problem causes many mediators to decline to undertake med-arb assignments.