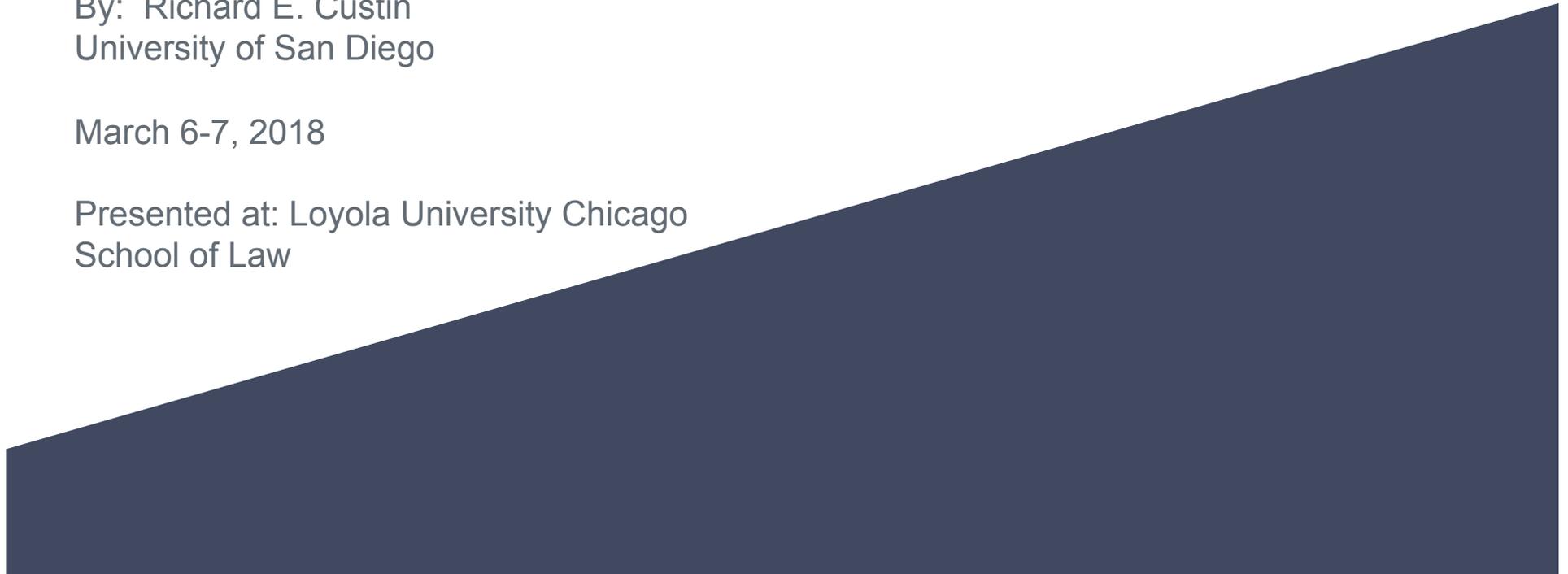


Early Neutral Evaluation (ENE)

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Goals of Early Neutral Evaluation

Understanding

- enhance direct communication between the parties about their claims and supporting evidence
- provide an assessment of the merits of the case by a neutral expert
- identify and clarify the central issues in dispute

Resolution

- provide a “reality check” for clients and lawyers
- assist with discovery and motion planning or with an informal exchange of key information
- facilitate settlement discussions, when requested by the parties

Process of Early Neutral Evaluation

1. Present evidence and arguments supporting the case
2. Evaluator identifies areas of agreement, and attempts to clarify the disputed issues
3. Evaluator writes evaluation of agreement
4. Evaluator presents the case evaluation
5. Evaluator may assist with settlement, assess litigation costs, further contribute to the case development, and provide a pathway forward

Attendance

In ENE, attendance requirements:

- Clients with settlement authority and knowledge of facts
- Lead trial attorney for each party
- Insurers of parties, if their agreement is necessary to achieve settlement

The Neutral

Necessary Qualifications Include:

- Must be a Lawyer for at least 15 years
- Must have experience in civil litigation in federal court
- Expertise in the substantive law of the case
- Training by the court

Preservation Of The Right To Trial

In ENE:

- Evaluator has no power to impose settlement if parties do not accept recommendations
- Confidential and Non-Binding
- Not shared with the trial judge
- If no settlement occurs, case remains on the litigation track

Appropriate Uses

Use ENE when:

- Parties are far apart on their view of the law / value of the case
- Case involves technical or specialized subject matter
- Case planning assistance would be useful
- Communication across party lines (about merit or procedure) could be improved
- Equitable relief is sought

Advantages of ENE

Benefits include...

- Voluntary and Non-Binding
- Informal and parties decide on the process
- Confidential
- Neutral is an expert in the subject matter
- More time efficient and cost effective than most ADR and litigation

Disadvantages of ENE

Can be problematic because...

- The “winner” can become entrenched in their position and “loser” can have negotiating position undermined
- If no settlement occurs, ENE can be expensive and time consuming
- May be too short to deal with complex issues
- If carried out in court, Judge may not be able to take part in subsequent proceedings

Mediation is not the only option

When deciding whether mediation or ENE is appropriate:

- What are the most important needs and objectives we want to achieve?
- Which kind of mediation are we comparing to Early Neutral Evaluation?
- What is the objective of the ADR process? Hint: It may not be settlement

Conclusion

ENE can be:

A suitable alternative or compliment to mediation

ENE aims to:

Aid in case development, reduce costs, and assist in the settlement process

ENE is powerful:

Since most neutral's are subject experts with experience in mediation and both sides of the issue are thoroughly evaluated

Additional References: Early Neutral Evaluation

Wayne D. Brazil, Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution, 69 *Judicature* 279 (1985)

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David I. Levine, *Early Neutral Evaluation: The Second Phase J. Disp. Resol.* 1 (1989).

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<http://www.cand.uscourts.gov/localrules/ADR>

What Is the Difference between Early Neutral Evaluation and Mediation? Kraemer Manes & Associates, (2016)

lawkm.com/difference-early-neutral-evaluation-mediation/

Your facilitator

- Richard E. Custin exercises a practical approach to teaching based upon his experience as owner and manager of a law office, mediator and as a litigation attorney. Custin is a member of the California Bar Association and the American Association for Justice (AAJ). He was also appointed to a judge pro-tem assignment in Los Angeles, California. He served as a judicial law clerk in the Iowa District Court and was the recipient of the Hathaway Kemper Insurance Law Fellowship. Custin holds active bar memberships in California and Illinois. He is further admitted to practice law before the District of Columbia Court of Appeals, The United States Court of Federal Claims, The United States Court of Appeals For The Ninth Circuit and United States District Courts for the Northern District of Illinois, Central District of California and Southern District of California. In 2016, he was appointed an affiliate professor of the Joan B. Kroc School of Peace Studies.

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