

Early neutral evaluation

Early neutral evaluation is a process, both in court and out of court, in which an experienced lawyer gives an indication, as strong and as detailed as the disclosure and representation at that stage allows, of what would be the outcome if the matter were to be finally adjudicated in court.

Early neutral evaluation in court includes the FDR hearing at which the judge is required by the rules to predict what would happen if the matter were to go to a final hearing. It has its limitations for example because of time. Nevertheless there is a very high success rate. It is acknowledged as one of the primary achievements of the ancillary relief procedure. To a lesser extent, the process at the First Appointment is an early neutral evaluation as the judge is required to consider the points in dispute with a view to narrowing the issues.

Early neutral evaluation out of court is much less frequent and prevalent. Indeed, there is almost only apocryphal knowledge of what is going on. In this regard, it is also, perhaps confusingly, described sometimes as private judging.

The working party felt that it was now time to encourage early neutral evaluation yet to have better definition, boundaries and safeguards including within the professional context. Moreover the working party found a delightful coincidence of the collaborative law group of the ADR committee independently considering the same issue at the same time. Our recommendations do not conflict with any recommendations they make but it is hoped that the use of early neutral evaluation can build together, solicitors either as client representatives and as collaborative lawyers.

The anecdotal evidence is that over the past 15 years or more, from time to time opposing solicitors in a case have jointly consulted senior members of the profession, often senior barristers but also senior solicitors in other firms, on a complex issue causing a stumbling block towards a settlement. Sometimes this has been the whole of the case, for instance on quantum. Sometimes it has been discreet, perhaps interlocutory, issues or one single issue separating the parties. It is believed that often the opinion has been given in conference but sometimes in writing. It is believed that on occasions it has been given on a privileged basis so that issues do not arise about the status of the evaluation, the weight to be given in the court process and similar. It is not believed that any of these early neutral evaluations or private judgments have come before the courts for consideration of their status.

Specifically it is believed that when there was an incredible backlog of work due to the wardships being terminated under the Children Act by a specific date and many financial cases were taken out of the list and relisted for at least six months later, many cases in fact settled including a number through the assistance of early neutral evaluation.

Private judging is sometimes used as an informal expression of early neutral evaluation. In some instances, it is identical. However early neutral evaluation is technically evaluation at an early stage in the case. Private judging has often occurred on a joint instruction to a senior professional towards the later stages of the case and as an alternative to a court adjudication. In this document we are referring to early neutral evaluation although private judging could also be incorporated in our recommendations.

Coincidentally with our consideration of the matter, the collaborative law section of the ADR committee of resolution were looking at a situation where it was proving difficult to reach a settlement because of unresolvable differences between the parties, perhaps on an issue of law or perhaps generally on outcome. Could two collaborative lawyers jointly instruct a senior professional to give a joint opinion to assist the parties?

In a similar fashion, could two lawyers representing their clients in conventional fashion yet working

collaboratively to seek a settlement but being unable to do so for similar reasons, perhaps on an issue of law or perhaps generally on outcome, jointly instruct a senior professional to give a joint opinion to assist the parties?

The Family Law Bar Association was consulted and in turn they consulted the Bar Council. Their opinion was that provided there was no conflict between the instructing solicitors in the matter or areas on which the expert is being instructed, there is no reason why a member of the Bar cannot act in this way.

We have spoken with the Ethics Department of the Law Society. They have given a similar opinion to the Bar Council. Provided there was disclosure of all relevant information and joint instructions so that the expert solicitor was clear on what were the jointly agreed facts and information and boundaries of the request, then it was perfectly proper and an exercise of the professional function of a solicitor to provide this service as a jointly instructed expert in giving an opinion. The Law Society recommended that law firms should check their indemnity insurance on entering into new areas of work as technically this is, they said, contract rather than family law.

We therefore recommend highly that early neutral evaluation should be considered by opposing solicitors working towards a settlement but finding difficulty in concluding a settlement because of differences in circumstances in which the opinion of a senior professional might overcome those differences. This might be an issue of law applicable to the dispute. It might be a matter of the outcome on agreed facts. It is unlikely to be appropriate where the issue is credibility of witnesses.

It will be for the parties and their lawyers to discuss whether the early neutral evaluation is open or privileged. If open, it still cannot bind the family Court. Nevertheless, we believe it is likely to have some significant weight presuming the expert calibre of the expert appointed and the veracity and comprehensiveness of the joint instructions. Where the parties are nervous about subsidiary litigation on the status of the early neutral evaluation, there may be much sense in its being privileged. Its weight and status flows from the calibre and status of the jointly appointed expert rather than its open status.

There will be significant benefit that this is a confidential process and therefore will be attractive to some parties if the court process is opened up and becomes more transparent and public. We anticipate that in those circumstances a number of parties may seek private judging, to produce an outcome, and for this further reason we consider that it is valuable if early neutral evaluation is advanced now.

Naturally we do not say here about the respective qualities of the bar or a senior solicitor to give the early neutral evaluation. We record that on procedural issues and matters of family dynamics, solicitors are probably more aware and more familiar. We also acknowledge that most solicitors do not appear frequently before the higher courts on final hearings and therefore barristers have inevitably an advantage in this regard. We anticipate that in time a number of senior members of both professions will undertake a number of early neutral evaluations, perhaps private judgments.

We consider that it is important that this form of assistance should not be confused with directive mediation. At this stage in the development of directive ADR, we recommend that someone appointed to give an early neutral evaluation should not previously have acted as a mediator. Equally at this stage in the development of this ADR, we consider a mediator should not subsequently give an early neutral evaluation, unless jointly requested and there is no risk of any confusion of roles and no issues of knowledge of privileged material.

As with any joint instructions, the request must be clear, with an agreed statement of facts and precise terms of request and agreed terms of acting.

We recommend this for the consideration of the profession in appropriate cases to overcome particular

difficulties in reaching a settlement by the appointment of a jointly instructed expert to give an early neutral evaluation, perhaps undertake a private judging of the whole case.

An extract from the report of the SFLA/resolution working party on the directive ADR, a full copy of the report of which is obtainable from www.davidhodson.com