When the Numbers Are Not So High; Justice Nigh—Seeking Justice from an Imperfect Justice System

By Bart J. Eagle and Adam J. Halper

Introduction

Anyone who regularly practices in state or federal court knows that money figures prominently in how cases are resolved. Often, parties with legitimate claims or defenses have to decide whether it is worthwhile to continue with their arguments given the cost of having good attorneys make them. Consideration of cost leads to very real and psychically challenging results. For example, a plaintiff may forgo bringing a "just" claim because the cost of pursuing it is greater than what they might recover in the end. A defendant will pay to get rid of an unmeritorious claim to avoid expending further litigation costs. As a result, settlements often bear no relationship to the actual merits of a dispute.

Because of litigation costs, cases that involve modest sums are often cost prohibitive.[1] Let's look at two examples:

Jane loans Dick[2] $30,000. Dick gives Jane a promissory note, which contains a payment schedule. Dick defaults on his obligations. Let's assume that there are no factual disputes: there is no question that Jane paid the money to Dick, that Dick signed and delivered the note to Jane, and that Dick defaulted. Why shouldn't Dick repay the loan?

Or, so that we do not display plaintiff bias, consider:

Jane agrees to sell a specific piece of jewelry to Dick for $30,000. The jewelry that Jane delivers was not the piece that that had been agreed upon, and Dick refused to accept it. Jane then sues Dick for $30,000. Again, let's assume that there are no factual disputes: there is no question that the piece of jewelry Jane proffered to Dick was not what had been agreed upon, and that Dick did not accept the piece of jewelry proffered. Why should Dick pay Jane anything?

In both scenarios, we have a dispute over $30,000. Can either party go to court and obtain justice in a cost-effective way? In both scenarios, the party who is quite clearly "right" would have to spend a significant amount of money to get relief. So, what are Jane and Dick to do? Walk away from a legitimate claim; pay a frivolous one? Many lawyers might advise them that, in the end, this is a business decision; given the amount in dispute, the parties should consider accepting a part of what is due or paying a part of a frivolous claim. This advice would have little to do with the merits of the dispute; instead, it may have much to do with cost.

In this article, we make suggestions that can be implemented in our justice system so that these lesser value commercial disputes[3] can be resolved in a cost-effective way. Thus, Jane and Dick might have the opportunity to obtain justice.

Early Neutral Evaluation (ENE): In the Land of Money and Litigation, Sooner Is Better Than Later

Early neutral evaluation (ENE) is a form of Alternative Dispute Resolution. It has particular value in modest dollar cases. While it would not require the parties to give up a trial if the matter is not settled, if administered properly, it would provide parties with the chance to receive the full amount they claim or avoid paying simply to resolve a frivolous lawsuit; or at least achieve a reasonable settlement.

Here's how this would work. Shortly after a case is filed, the parties are required to appear before an "early neutral evaluator" ("Evaluator"). The Evaluator's job, in the first instance, is to hear the essential arguments of both sides. This isn't a trial or arbitration. Flexibility would be a key component of this process. For example, the Evaluator can meet with the parties and counsel jointly or meet separately, confidentially, to probe specific facts and positions.[4]

Bart J. Eagle is an attorney and mediator. He is on the roster of mediators for the AAA, the NYC Supreme Court Commercial Division, for the SDNY, and the panel of the NYC Bar Association's Co-op and Condo Mediation Project. Mr. Eagle is co-chair of the NYSBA Dispute Resolution Section Mediation Committee and chair of the NYC Bar Association State Courts of Superior Jurisdiction Committee.

Adam J. Halper is a mediator, arbitrator and attorney in private practice. He focuses on mediating and counseling in family, matrimonial, employment, elder, and trusts and estates matters. He is on the roster of neutrals for several state and federal courts. Mr. Halper is past co-chair of the NYSBA Dispute Resolution Section Mediation Committee.

Roll the Dice at Your Peril: The ENE Proposal

At the conclusion of the ENE, if the parties do not arrive at a settlement, the Evaluator should provide a written proposal reflecting his or her evaluation of the case. We propose that if, for example, Jane agrees to the proposal and Dick does not and Dick gets a judgment that is no better than the proposal after trial, Dick pays a penalty. The penalty is that Dick pays Jane's reasonable attorney's fees.[5] Thus, the ENE proposal has a highly motivating component—a *stick* attached to it.

The award of attorney's fees serves two purposes. First, the award acts as an incentive to both parties to settle the case. Second, the award acts as a disincentive to bad behavior. To be clear, not agreeing to a settlement proposal is not necessarily "bad behavior," especially if there is a reasonable dispute as to law or fact. Bad behavior takes many forms. Typical examples— (1) One party continues litigation even where their claims or defenses are without merit because they think that the other side will eventually fold for economic reasons; (2) One or both parties are motivated by deep personal animus *and* can afford the costs of losing; or (3) One party thinks litigating is fun! (Yes, this happens). Bad behavior would likely change if, early on, there was a neutral evaluation and a penalty if a party thumbed their nose at it.

We understand that awarding attorney's fees to the party who accepted the ENE's proposal and did no worse after trial (the "Prevailing Party") would be a sea change in American jurisprudence and require action by the New York State legislature. However, statutes already exist that provide payment of attorney's fees to a prevailing plaintiff, often where doing so would act to level the playing field between parties and/or as a disincentive to bad behavior. For example, an employee who prevails in a discrimination case would be able to recover her attorney's fees from her employer. The employer, who may have

significantly greater financial wherewithal than the employee, cannot simply bleed a plaintiff into submission.

Still, an award of attorney's fees should be justified and the threat thereof should not be used to prevent a party from proceeding simply out of fear of losing. And the court would provide an important check on the applicability of the stick.

So, how would this work in practice?

First, *after* the case is decided, the Evaluator's proposal would be presented to the judge.

Second, if the judge finds that there is a Prevailing Party, the judge would then determine whether the proposal was reasonable *at the time made*.[6] In deciding on the reasonability of the ENE proposal, the Judge would consider the positions of both sides at the time the proposal was made. For example, if the applicable law was in flux or otherwise unsettled, the parties should not have been expected to accept an Evaluator's proposal that does not take that into account. If the Judge believes that the proposal was not reasonable, the inquiry would end.

If the Judge determines that the proposal was reasonable, the Judge would then decide on the amount of legal fees to award the Prevailing Party. This may sound harsh, but think about how such a result would, at the outset, incentivize Dick, in our first scenario, and Jane, in the second, to accept the Evaluator's reasonable proposal.

The ENE should be time limited—perhaps three hours or fewer. If successful, the parties would not be required to invest the time and incur the costs that would go into further litigation.[7] In essence, our proposal is to insert evaluation into the litigation process early and incentivize parties (and their attorneys) to consider it carefully.

The ENE proposal outlined above is designed to level the playing field in a way that recognizes the critical role that a party's resources play in litigation. Most everyone agrees that litigation takes too long and is too costly. In any cost benefits analysis, the benefit decreases exponentially as the costs add up; this is especially true for disputes over relatively small amounts of money. ENE builds on the good practices that currently exist to resolve disputes, including the recent undertaking of "Presumptive ADR" in New York courts.

Every attorney has come across Dick and Jane at some point in their careers. They may be a potential client, friend, neighbor or family member. Every attorney has also walked away or advised a Dick and Jane to consider walking away from a dispute because the economics of achieving justice simply do not add up. In ENE, we suggest a process by which they can achieve justice much quicker than by taking the route of traditional litigation. Adoption of these processes might incentivize parties coming to court for lower dollar amount disputes, which are, after all, what our courts are for; but it will also incentivize early resolution. Dick and Jane, by having more to lose, would have much to gain. So too would our courts, bar and clients.

Endnotes

1. For the purposes of this article, this is assuming that there is not a fee shifting clause in a contract, or a statutory provision, such as exists in federal and state labor laws, that might relieve one of the parties from the burden of paying legal fees. This also assumes that the case is not being handled on a contingency fee basis.
2. We reveal our ages by making "Dick" and "Jane" our hypothetical parties.
3. What is a "lesser value"? $25,000? $30,000? $50,000? It may vary from county to county throughout the state, where the costs of litigation—including the fees lawyers charge—are different.
4. Flexibility should include the scheduling of hearings and the ways hearings are conducted. Emerging virtual technology, such as Skype for Business, Zoom and other platforms that are now being used in our court system for court conferences, oral arguments, and mediations, could be used so that that these conferences can take place, where necessary, after normal court hours. In this way, the parties themselves, and not just their attorneys, could participate without having to take time off from work.
5. The penalty would be more than an award of court costs, as provided for in CPLR 3219 and 3221, or even "expenses" as provided for in CPLR 3220 with respect to contract claims, which may include legal fees related to proving damages from the time an offer of judgment is made.
6. One cannot evaluate the reasonableness of the ENE proposal as if it was made at a later date after new information, which was not available or presented to the evaluator, is uncovered.
7. The parties could also proceed to mediation, which would likely be more efficient than litigating the dispute to judgment. However, mediation would also involve investments of time and resources.

Reprinted with permission from: *New York Dispute Resolution Lawyer*, Summer 2020, Vol. 13, No. 2, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.