

# Neutral Evaluation: The Forgotten Option

By Dennis Ducharme

Neutral Evaluation was available under Superior Court Rule 170 from the inception of New Hampshire's alternative dispute resolution (ADR) program and continues to be available under our revised Superior Court Rule 30 (b).

Perhaps because our rules have offered little insight into its workings, the process has been mostly ignored, other than during a brief period in the early days of Rule 170 when some judges were inclined to sanction those taking a no-offer position in mediation. It became a no-risk, lowest-common-denominator choice that met the ADR requirement, but led to few

settlements.

In some jurisdictions, Early Neutral Evaluation (ENE) has been a frequently used and successful ADR option. The key components of ENE are the submission of case summaries by the opposing parties, presentation of claims and defenses in a joint session, questions from the neutral to the parties and counsel about their positions, and the issuance of an evaluative statement of the strengths and weaknesses of the parties' relative positions, as well as the potential outcomes at trial.

The United States District Court for The Northern District of California has maintained an active ENE program since the early 1980s. Its local ENE rule is seven

pages long and contains significant detail as to how the process works. Its key procedural components include:

- Mandatory attendance by decision makers, including insurance representatives
- The parties' presentation of their positions; first in written submissions and then in a joint session
- Discussion of areas of agreement and disagreement as well as relative strengths and weakness of liability positions taken
- Discussion of possible ranges of damages that could be awarded
- Verbal evaluation and discussion in the

group setting

- Issuance of a written evaluation
- Follow up sessions when appropriate and agreed to by the parties

See, Local Rule 5, United States District Court for The northern District of California.

ENE has been described by some as a hybrid process with some attributes of mediation and some attributes of arbitration. It gives the parties an opportunity to lay out their views of a case, hear the other side's perspectives, and discuss the relative positions with the input of a neutral facilitating

NEUTRAL EVAL *continued on page 34*

## Lessons from the Trenches: What Makes a Good Mediator?

By David W. McGrath

There are mediators who inspire confidence in us and our clients, and those who don't.

With the former, mediations that appear doomed can ultimately succeed. In those instances, one can sense a skilled and determined mediator at work, helping to move a recalcitrant client or opposing party.

Then there are those cases that should have settled at mediation but do not. In those instances, we usually have a sense that the mediator gave up too soon or was not fully engaged during the entire process.

Mediators do not decide factual or legal issues, but parties recognize and appreciate helpful insights offered by an experienced mediator through adroit questioning.

During many years in the trenches, representing both plaintiffs and defendants, I have noted a few key attributes of highly effective mediators:

### Good mediators don't give up.

At one mediation located in a mid-western state chosen only because it offered a compromise distance for all of the involved parties, the mediator worked tirelessly for three days. At one point toward the end of the third day, one party packed up and walked out. We watched and started doing the same. The other parties did



the same. The mediator was nonplussed. While we all considered the marathon mediation finished, he was just getting started. He quickly arranged for a room at the airport; instructed all parties to meet there; and then worked for several hours at the designated room at the airport, helping the

parties to settle the case.

In contrast, at another paid mediation outside of New Hampshire a highly touted, but ineffective (at least that day) mediator was seen working on other matters and reading unrelated material, apparently convinced the case would not settle and was

not worthy of his full effort. The case did later settle, in spite of the enervated mediator.

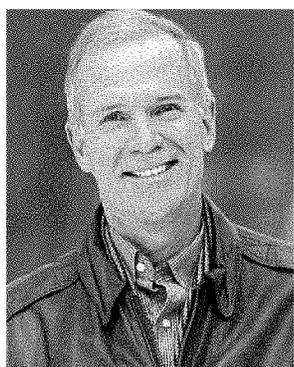
The point seems obvious but often overlooked when selecting a mediator: the parties are much less likely to engage fully in the process if the mediator isn't fully engaged.

### Good mediators are calm under pressure.

Imagine the following: after the joint session has completed, you lose sight of your client. You search but cannot find him. A few minutes later your client emerges from the emergency exit stairwell looking extremely stressed. He explains to you that the opposing party invited him there after the joint session, suggesting they settle the dispute as Jack Dempsey would.

While neither party actually reenacted Raging Bull in the stairwell, it was a close call and one that would justifiably put an immediate end to the mediation. The highly capable mediator kept her cool and first focused on a basic ground rule that parties need to feel safe and protected in a mediation. After moving the parties to different floors in an office building, she shuttled back and forth until midnight. At all times she was calm and confident, which had the beneficial effect of calming everyone else.

MEDIATOR *continued on page 35*



John Burwell Garvey



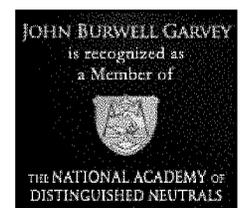
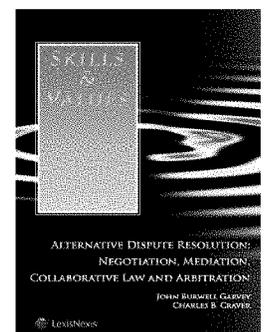
## Professor John Burwell Garvey

Mediator and Arbitrator  
Teacher and Author  
2014 Mediator of the Year

2015 NH Bar Distinguished Service to the Profession Award

John is a member of the National Academy of Distinguished Neutrals – the *only* peer reviewed panel of mediators and arbitrators approved by *both* the American Association for Justice *and* the DRI.

Use his online calendar to view availability and request a date: [JohnGarveyADR.com](http://JohnGarveyADR.com) or call 603-513-5214.



**Mediator** from page 29

**Good mediators understand people.**

At most mediations, there is a lot going on. The facts and law command our attention, but the interpersonal dynamic is often just as important.

We are usually not entirely forthcoming with the mediator. Sometimes our clients are not entirely forthcoming with us. The other interested parties and lawyers have their own issues, and everyone is trying to communicate something through the mediator for some intended effect.

We are always looking for subtext and hidden meaning. A good mediator understands this and is able to get a quick but accurate read on the cast of characters. She seems to know instinctively, for example, that my insurance adjuster is inexperienced, feels insecure, and is throwing his weight around as a result. So, she spends more time developing a rapport with him.

Or, she knows exactly how to deal with the grandstanding lawyer who reveals at the outset that he has a 4 p.m. "hard stop." She takes his "hard stop" instruction seriously, of course, but she keeps working diligently, knowing that progress is the

best antidote to impatience.

She might even sense a divide between two business partners or spouses in the same room and through respectful communication and real connection find the necessary common ground that leads to settlement. She observes everything, she listens intently and she thinks actively about the people, their motivations, and their interests.

We are fortunate in New Hampshire to have so many good mediators from which to choose. It makes a big difference to our clients that the right one is selected. We spend countless hours during litigation poring over thousands of documents and

deposing even peripheral witnesses in the hope of finding something that might benefit our client. We should apply that same discipline when selecting our mediator. If we spend the extra time and select a mediator who won't quit, won't get rattled and won't miss the key personal dimensions of the case, it often leads to a good result for all parties.

*Dave McGrath serves as president and managing director at Sheehan Phinney Bass + Green. He is a certified mediator and maintains an active general commercial litigation and employment practice.*

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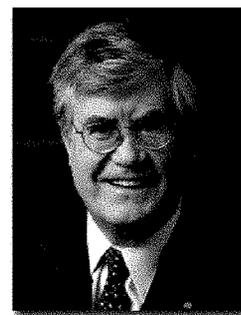
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