

**United States District Court
Western District of Oklahoma**

EARLY NEUTRAL EVALUATION

GUIDELINES FOR EVALUATORS

Introduction

Early Neutral Evaluation (ENE) is one of the Court's dispute resolution programs assisted by a panel of trained attorney evaluators intended for early case intervention to advance issue clarification, direct communication, case assessment/evaluation, case planning guidance and possibly settlement facilitation.

I. Appointment to the Panel of Evaluators

- ▶ Process of appointment to the Court's panel of evaluators begins with a need for experienced attorneys in particular areas of law to assist the Court. Attorneys may indicate an interest in service to the Court by contacting the ADR Administrator. Applications are generally solicited by the ADR Advisory Committee once a need has been identified. This committee then reviews the applications and refers them to the district judges for final panel approval.
- ▶ Qualifications for an early neutral evaluator and other pertinent information about federal panels are found in the ADR Plan in the Supplement to the Local Rules at Part II. A. Federal Panels at LCvR16.3, Supp. § 2.1 through 2.8 and in General Order 00-2, Court-Appointed Federal Panels. Generally, an evaluator must be an attorney in good standing; must have been in practice for at least 5 years; must have subject matter knowledge; be knowledgeable about civil litigation in federal court and be willing and able to take the requisite training.
- ▶ Specific ENE process training required for Court panel early neutral evaluators is arranged and scheduled by the ADR Administrator shortly after approval by the Court and must be completed before listing on the panel. Continuing panel service includes attendance at any refresher courses or other training the Court may require. Obviously fulfilling you OBA-CLE requirements helps maintain subject matter expertise.

The Early Neutral Evaluation Process

II. Pre-Session Preparation

- ▶ Selection, Arrangements, Conflicts of Interest Check and Order of Appointment
 - ▶ Once counsel have agreed to ENE as the appropriate process for their case and jointly selected the evaluator, one will call and make the necessary arrangements for the session to be held before the completion date set forth in the Court's order of referral typically discussed pursuant to the Status/Scheduling Conference and as a part of the Scheduling Order in the case. Help counsel meet this deadline or get proper relief.

- ▶ Please conduct a thorough Conflicts of Interest check and disclose any 28 USC § 455 circumstance that might be a disqualification.
- ▶ Please remind counsel to file the Selection and Arrangements form along with a proposed Order of Appointment. This Order protects both the client and you, the neutral evaluator (authority and immunity).
- ▶ Review “*An Evaluator’s Primer on Early Neutral Evaluation*” found in your training materials.
- ▶ Fees. When arranging your fee, it is permissible to charge your hourly rate but remember that fees received in conjunction with a Court ADR service are to be reasonable and in keeping with the cost reduction and litigation satisfaction precepts that are at the foundation of many Court ADR programs. The ADR Plan contemplates fees will be split between the parties but other arrangements can be made by agreement. Pro bono service is also expected if appropriate.
- ▶ Engagement and Scheduling Letters are highly recommended. Continuances are certainly permissible but remind counsel that court approval is only required of the extension is beyond that of the ordered deadline completion date. Help counsel be prepared for a timely and meaningful session by indicating when you need ENE Statements and any other specified materials.
- ▶ Telephone Conferences are a must for efficiently planing each case specific ENE session and usually best set after you receive the written material and have had a chance to review it. Procedural issues can be discussed and resolved. Review your training materials as to other suggestions. Don’t forget to have counsel send/bring case law as well as information for litigation cost analysis. Begin to use the Pre-evaluation form provided in the training materials as well as on the Court’s ADR web page as that will ultimately help you formulate your assessment/evaluation of the case.

III. The ENE Session

- ▶ Process Steps: Evaluator’s Opening Statement, Case Presentation & Preparing for The Evaluation, Possible Settlement Discussions, Delivery of Evaluation, Case Planning and Follow-up.
- ▶ Authority of Evaluator: Evaluators (1) help the parties focus and identify areas of agreement and, where feasible, enter stipulations; (2) assess the relative strengths and weaknesses of parties' contentions and evidence, and explain carefully the reasoning that supports these assessments; (3) estimate, where feasible, the likelihood of liability and dollar range of damages; (4) help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to position the case for disposition by other means; (5) issue a written evaluation; (6) conduct settlement discussions if requested and stipulated; (7) hold follow-up conferences by telephone or, with consent of all parties, schedule and hold an additional session for additional evaluation, settlement discussions, or case

development planning. Evaluators have no authority to compel parties to conduct or respond to discovery or to file motions. Nor do evaluators have authority to determine what the issues in any case are, to impose limits on parties' pretrial activities, or to impose sanctions.

- ▶ Appropriate attendance in accordance with the local court rules and ADR Rules of Practice is necessary to any successful or fruitful evaluation session. The Court expects compliance - clients with full settlement authority - and Evaluators can help insure this by full discussion of all such requirements during pre-session conversations with counsel. Contact ADR Administrator.
- ▶ Confidentiality is an important aspect of this process. All communications, materials, written or oral shall be treated as confidential in accordance with the rules governing this program. The only information concerning the ENE that the Court should have is that in the required ADR Reports.

IV. Conclusion of the Session and Report to Court

- ▶ ADR Report - Report of Evaluator. Please electronically file at ADR Report for Mediators and Evaluators (see the Attorney Menu) promptly after the session is completed.
- ▶ Forms for Program Evaluation (ENE Session Attendance Form & Questionnaire for ENE Evaluators) should also be finalized but **are not filed**. Please mail or e-mail to the ADR Administrator (ann_marshall@okwd.uscourts.gov) or to U. S. Courthouse, 200 N.W. 4th St. Oklahoma City, OK 73102.

V. Other Important Information

- ▶ Please utilize the ENE model presented at your training. Obviously adjustments may be necessary depending on the case before you but the Court does expect the general format that was taught to be used. Please use the Forms supplied by the Court to assist you as needed. Of course you may develop other forms that may be more useful to you as you continue to evaluate cases.
- ▶ Please keep the ADR administration advised of any change of office address, telephone/fax numbers, e-mail address, fee changes or updated in areas of expertise. **WE NEED UP TO DATE INFORMATION FOR ALL PANEL LISTS AND THE WEB SITE.**

The Court truly appreciates you service.

For assistance, please call: Ann Marshall, ADR Administrator and Settlement Staff Attorney (405)609-5078.

SEQUENCE OF EVENTS FOR AN EARLY NEUTRAL EVALUATION

1. Counsel agree and select the ENE process usually at the time of the Status/Scheduling Conference (LCvR16.3 compliance).
2. Counsel/parties receive an ENE Packet which includes a list of Evaluators from our Panel with expertise in the subject matter of the lawsuit and counsel agree on an evaluator. See Court website.
3. Counsel call the proposed evaluator (typically plaintiff's counsel) to begin the selection and scheduling process. Counsel should give the evaluator case style, type of case, names of all parties and the outside date by which the ENE session is to be held if it has been so referred by the Court.
4. Then the evaluator runs a "Conflicts of Interest" check (with firm as well, if applicable) and checks for availability during that time.
5. If the evaluator determines that he or she cannot serve, evaluator calls counsel back immediately so that they can select another evaluator. If the evaluator can serve, counsel are advised promptly and a practical and convenient date is set for the ENE session. **Counsel will need to send the Court a Selection and Order Form which refers and appoints the evaluator to the specific case.**
6. The evaluator usually sends out an "engagement/ scheduling letter" telling counsel when to send the ENE Statements and when the evaluator wants to have the joint pre-conference telephone conference call. Usually evaluators hold at least only joint pre-session telephone conference call to discuss the parameters of the session and answer any questions.
7. The Evaluator may also ask for copies of certain case materials such as relevant pleadings filed so far - i.e. Complaint, Answer, Status Report, Scheduling Order, etc.
8. The pre-session conference call is held and all final arrangements for the ENE session are made
9. Prepare for the ENE session and client preparation.
10. The ENE session. -Opening Statement, Presentations, Identification of Common Ground and Issues, Preparation of Written Case Evaluation, Offer of Evaluation and/or Exploration of Settlement, Developing a Plan for Trial, and determination of Follow-up Sessions, if appropriate.
11. The Parties file their Report to the Court and the evaluator sends the ADR Report - ENE to the ADR Staff at the U.S. Courthouse indicating only that it was held and whether there was a settlement.
12. If the case settles, counsel should advise the judge/judge's staff when to expect closure. If claims or defenses are to be dismissed, or if other stipulations are agreed to, counsel are to so advise the court and file the appropriate pleadings.

If the case continues toward trial or other disposition, hopefully counsel and parties will be following a more streamlined discovery or motion plan and have made progress in negotiation.