

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

HANDBOOK FOR EARLY NEUTRAL EVALUATION - ENE

WHAT EARLY NEUTRAL EVALUATION (ENE) IS :

DEFINITION: ENE is an ADR process that brings all parties and their counsel together early in the pretrial period to present summaries of their cases and receive a nonbinding assessment by an experienced neutral attorney with subject-matter expertise. The evaluator may also provide case planning guidance and, if requested by the parties, settlement assistance.

PURPOSE: **PRIMARILY** to reduce pretrial costs, to sharpen the pleading process, help plan/ narrow discovery, receive early assessment - case management. Education and Mentoring as well. **SECONDARILY** to assist with negotiation and possible settlement. **Please refer to Local Rules Supplement - LCvR16.3, Supp. §§ 4.1 - 4.9.**

WHAT ENE IS NOT:

• **ENE IS NOT CLASSIC MEDIATION.**

1. **ENE** is explicitly **evaluative**. In classic mediation, the mediator is not explicitly evaluative and evaluation is not a principal objective of the process. In **mediation**, evaluation often is indirect and could be based on information learned in confidence. In **ENE**, evaluation is direct and explicit, and should be based only on information that all parties know the evaluator knows.

2. The principal purpose of **mediation** is **settlement**. **ENE** has multiple purposes, only one of which is settlement and that purpose is secondary.

3. In **mediation**, the neutral often has **process expertise** but sometimes no special subject matter expertise. In **ENE** the neutral always has **subject matter expertise** and may have less process sophistication.

4. Formally, the **presentations may be directed to different targets**. In **mediation**, the presentation are directed to **the other side**. In **ENE**, the presentation are directed to **the evaluator**.

5. **The principal focus of the process may be different**. In **mediation**, the focus is on **interests** (rather than positions), with each side trying to identify and explain it's situation, needs, and perspective. In **ENE**, the focus at the case presentation stage is on **evidence and law**.

• **ENE IS NOT COURT-ANNEXED, NON-BINDING, ARBITRATION**

1. **ENE** involves **no "award" or filed result** with deadlines for payment due if parties wish to pursue trial.

2. **ENE** is generally **earlier** than an arbitration.

3. In **ENE**, the neutral not only passes judgment, but also helps with case development planning or often settlement assistance.

• **ENE IS NOT A JUDICIAL SETTLEMENT CONFERENCE.**

1. In **ENE** the parties are under **no duty to discuss or try to negotiate settlement**. Often judicial officers do not have time to offer parties in-depth planning assistance.

2. Evaluators can often improve the quality of information offered the litigants because of subject matter expertise.

EARLY NEUTRAL EVALUATION - A Brief History

I. History of Development of the ENE Program in the Western District of Oklahoma

With the passing of the Civil Justice Reform Act of 1990 (the Act), all federal district courts were required to form Civil Justice Advisory Groups that included both members of the bar and lay members, to study issues of costs and delay in civil litigation, conduct an assessment of the court, report to the court and make recommendations for improvements based on requirements, criteria, etc., found in the Act. The courts then issued their CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS. This court issued its PLAN in December of 1991, as a pilot court under the Act. The Report of the Advisory Group recommended the addition of a mediation program modeled after the one developed in Oklahoma County and did not recommend any additional ADR procedures at that time. This was adopted by the court and is successfully operated to this day.

The Civil Justice Advisory Group continued to meet annually and annually assess the condition of this court. The court always has had and continues to have an excellent record in terms of fair and prompt disposition of civil cases helped in large measure by the successful settlement conference program which was designed to have a full time settlement magistrate judge hold judicial settlement conferences shortly before the trial setting, when discovery was completed. Mediation and non-binding arbitration, although held relatively early in the case, were also designed to focus on settlement of cases - presumably contributing to reduction in both cost and delay of civil litigation.

In the summer of 1996, at one of the annual meetings of the Advisory Group, several of the members began to question if there were any other ways to achieve any additional cost reduction for expensive federal litigation. This court clearly did not have a problem with prompt disposition of cases but were there any ways to make the process less expensive for the clients? Two sub-committees were formed - one would develop and recommend a new cost reduction trial track for the actual trial of cases, and the other would contribute what is nationally known today as "Early Neutral Evaluation."

II. The Theory Underlying Early Neutral Evaluation in the Western District of Oklahoma

The theory that drove the inclusion of an ENE program in this court was straightforward: again try to identify any principal sources of unnecessary cost and delay. Discussion began with the idea that if lawyers have good support and expertise in their firms, they will often sit down and review issues and evidence, dissect claims and proof, plan for the most expedient discovery and maybe get an idea what the case is worth. But this ideal does not always occur in our fast pace world. All agreed that the court should offer a program that would occur **very early** in the litigation process to help lawyers and clients get an early grip on case development planning and case management. **It should be a process that would give perspective to the case, sharpen it, and focus not so much on settlement as in improving the quality of thinking of both the client and counsel.** The sub-committee consisting of Ed Abel, Chair, Melvin Hall, Guy

Hurst, Bob Dennis and Ann Marshall, studied the ENE program as developed in the Northern District of California and found it to meet all our needs. It became the model for our new ADR local rules on Early Neutral Evaluation and the training information to be taught today.

That California court and other Federal courts across the country that have investigated and begun to utilize and offer ENE and many attorneys who have selected this process find that it is an externally imposed event in the litigation process that helps counsel and parties to (among other things):

- Conduct core investigative work early,
- Communicate directly across party lines,
- Confront systematically their situations in the case,
- Seriously consider the wisdom of early settlement, and
- Attempt, early, to devise ways to position the case as efficiently as possible for disposition by settlement, some other form of ADR, motion, or trial.

And while the principal goals that initially drove the design of ENE were to reduce cost and delay, contribution more directly to the **quality of justice** has emerged as both a primary objective and a major product of the ENE process. Many who have been involved in an ENE procedure have found that through the leadership and discussion with the experienced evaluator, access to more evidence can be developed and the reliability of the parties' thinking about what inferences are likely to be drawn from the evidence is frequently improved. Finally, many have described the experience as improving the accuracy of the parties' identification and understanding of the relevant law and legal issues as well. Therefore, the Court encourages the use of this program; and those who have already tried the procedure, have recommended it highly.

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.

If you have questions, please call the ADR Administrator, Ann Marshall at (405)609-5078.