

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN**

**EARLY NEUTRAL EVALUATION
PROGRAM DESCRIPTION**

Definition Early Neutral Evaluation (ENE) is a form of alternative dispute resolution conducted by an experienced, objective and neutral attorney, who generally meets with the parties early in their case to evaluate its strengths, weaknesses and value, and who also attempts to negotiate a settlement.

Authorization W.D. Mich. LCivR 16.4

THE EARLY NEUTRAL EVALUATORS

Evaluators The Court does not maintain a list of early neutral evaluators. The parties may choose as an evaluator any attorney who is qualified as a neutral under W.D. Mich. LCivR 16.2.

Disqualification Rules No person serves as an evaluator in any action in which any of the circumstances specified in 28 U.S.C. § 455 exist, or, in good faith, are believed to exist.

Immunity Early neutral evaluators are entitled to quasi-judicial immunity as officers of the Court.

CASE SELECTION

Eligible Cases All civil cases except habeas corpus and social security cases are eligible for early neutral evaluation.

Referral Method and Notice to Parties In preparation for the initial Rule 16 scheduling conference, all parties are required to discuss the use of alternative dispute resolution and indicate their preference in the joint status report. If the district or magistrate judge is satisfied that the selection of early neutral evaluation has the full approval of all parties, the judge incorporates that selection in the case management order with instructions to the parties to jointly select an evaluator within fourteen (14) days.

THE EARLY NEUTRAL EVALUATION PROCESS

Selection of Early Neutral Evaluator

The parties jointly choose one early neutral evaluator within fourteen (14) days of the issuance of the case management order. Plaintiff is responsible for notifying the ADR Administrator of the name of the selected evaluator. If the parties are unable to reach agreement, they notify the ADR Administrator, who then selects an evaluator for them. The ADR Administrator notifies the selected evaluator, and requests a check for potential conflicts of interest. If a conflict is found to exist, the evaluator notifies the ADR Administrator, who either selects an alternate evaluator or requests the parties make a new selection. Once an evaluator's selection is finalized, the ADR Administrator notifies the judge, who issues an order of referral for early neutral evaluation.

Fees

Evaluators are paid their normal hourly rate, assessed in as many equal parts as there are separately represented parties. The evaluator is responsible for billing counsel. In the event of noncompliance, the evaluator may petition the district or magistrate judge for an order directing payment of his or her fees.

Timing for the Early Neutral Evaluation Session

Within fourteen days of the issuance of the order of referral, the evaluator consults with the parties and sets a time and place for the evaluation session. The session is held within the timeframe ordered by the Court. The evaluator sends a notice of hearing as soon as practicable to all parties and the ADR Administrator.

Timing and Nature of Submissions Required Before the Early Neutral Evaluation Session

- A. Seven (7) days before the evaluation session, each party provides the evaluator with a written evaluation statement with copies to all counsel. The evaluation statement must not exceed fifteen (15) pages (not counting exhibits and attachments). The statements should: 1) identify in addition to counsel, which person(s) with decision-making authority will attend the session, 2) identify persons connected to a party opponent, including an insurance carrier, whose presence at the session would enhance the prospects for making the session productive, 3) describe briefly the substance of the action, 4) address whether there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement negotiations, and 5) identify the discovery that promises to contribute most to equipping the parties for meaningful settlement negotiations.
- B. The parties attach to their written evaluation statements copies of documents out of which the action arose (e.g., contracts) or the availability of which would materially advance the purposes of the evaluation session (e.g., medical reports or documents by which special damages might be determined).
- C. The written evaluations are not filed with the Court and/or shown to the assigned judge.

Special Provisions for Patent, Copyright, and Trademark Cases

- A. Patent Cases: In a case where a party is basing claims on a patent, that party must attach to its written statement an element-by-element analysis of the relationship between the applicable claims in the patent and the allegedly infringing product. In addition, each party who asserts a patent claim must describe in its written statement its theory or theories of damages and must set forth as much information that supports each theory as is then available. Any party who asserts a defense against the patent based on “prior art” must attach an exhibit that identifies each known example of alleged prior art and that describes the relationship between each such example of prior art and the claims of the patent. In addition, if such party denies infringement, it must describe the basis for such denial.
- B. Copyright cases: A party who bases a claim on copyright must include as exhibits the copyright registration and exemplars of both the copyrighted work and the allegedly infringing work(s), and must make a systematic comparison showing points of similarity. Such party also must present whatever direct or indirect evidence it has of copying, and must indicate whether it intends to elect statutory or actual damages. Each party in a copyright case who is accused of infringing must set forth in its written statement the dollar volume of sales of and profits from the allegedly infringing works that it and any entities for which it is legally responsible have made.
- C. Trademark Cases: A party who bases a claim on trademark or trade dress infringement, or on other unfair competition, must include as an exhibit its registration, if any, exemplars of both its use of its mark and use of the allegedly infringing mark, both including a description or representation of the goods or services on or in connection with which the marks are used, and any evidence it has of actual confusion. If “secondary meaning” is in issue, such a party also must describe the nature and extent of the advertising it has done with its mark and the volume of goods it has sold under its mark. Both parties must describe in their evaluation statements how the consuming public is exposed to their respective marks and goods or services, including, if available, photographic or other demonstrative evidence. Each party in a trademark or unfair competition case who is accused of infringement must set forth the dollar volume or sales of and profits from goods or services bearing the allegedly infringing mark.

Duration of the Evaluation Process

The process may involve a minimum of one session or several, at the discretion of the evaluator, counsel and the parties. Parties are free to continue the process as long as they feel it is productive.

Attendance at the Evaluation Session

The *parties themselves* must attend the evaluation session . A party other than a natural person (e.g., a corporation or association) satisfies this attendance requirement if it is represented at the session by a person (other than outside counsel) with ultimate authority to bind the party to terms of a settlement. A party that is a unit of government need not have present at the session the persons who would be required to approve a settlement before it could become final (e.g., the members of a city council or the chief executive of a major agency), but must send to the session

an executive officer, in addition to counsel, knowledgeable about the facts of the case and the governmental unit's position. In cases involving insurance carriers, representatives of the insurance companies, with ultimate authority, must attend the evaluation session. A party or lawyer will be excused from attending the evaluation session only after a showing that attendance would impose an extraordinary or otherwise unjustifiable hardship.

Status of Discovery and Motions During Evaluation Process

Any case referred to early neutral evaluation continues to be subject to management by the judge to whom it is assigned. Unless otherwise ordered, parties are not precluded from filing pretrial motions or pursuing discovery.

Evaluation Logistics and Location

- A. The evaluator has considerable discretion in structuring the evaluation session. The session proceeds informally. Rules of evidence do not apply. There is no formal examination or cross examination of witnesses.
- B. The evaluator permits each party to make an oral presentation; helps identify areas of agreement; assesses the relative strengths and weaknesses of the parties' positions and evidence, giving reasons; estimates the likelihood of liability and the dollar range of damages.
- C. The evaluator may assist parties to explore the possibility of settlement; to draft stipulations where agreement is reached; to devise a plan for sharing the important information and/or to conduct the key discovery or to posture the case for disposition by other means, and to determine if some form of follow-up to the session would contribute to the case development process or to settlement.

Filing of Evaluation Outcome

At the conclusion of evaluation, if settlement is reached, the evaluator helps the parties draft a settlement agreement, along with a stipulation and proposed order to dismiss, which is then filed with the Court. If settlement is not reached, the parties have seven (7) days to inform the evaluator whether they desire to continue with the early neutral evaluation process. Within seven (7) days of the completion of evaluation, the evaluator files a brief report with the ADR Administrator, with copies to all parties. The report indicates only who participated in the evaluation session, and whether settlement was reached, or in the event of no settlement, whether the process will be continuing. The ADR Administrator is responsible for keeping the Court informed of the status of the early neutral evaluation process.

Confidentiality

All evaluation proceedings are considered to be compromise negotiations within the meaning of Fed. R. Evid. 408.

**COURT ADMINISTRATION OF THE
EARLY NEUTRAL EVALUATION PROGRAM**

**Administrative
Structure**

The early neutral evaluation program is administered by the Clerk's Office. Problems are initially handled by the ADR Administrator.

**Evaluation of the
Program**

The ADR Administrator gathers data relevant to a careful, in-depth analysis of the efficacy of the program, and reports to the Court on a regular basis. In an effort to gather information, the Court may develop questionnaires for participants, counsel and evaluators, to be completed and returned at the close of the evaluation process. Responses will be kept confidential and not divulged to the Court, the attorneys or the parties. Only aggregate information about the program will be reported.