

EARLY NEUTRAL EVALUATION IN THE WESTERN DISTRICT OF PENNSYLVANIA

What and When???

By: Karen Engro and Hon. Lisa Pupo Lenihan

Commencing in June 2006 the United States District Court for the Western District of Pennsylvania (WDPA) piloted a program requiring the parties to use a form of alternative dispute resolution (ADR) as a part of the litigation process in civil cases. The Court's main ADR menu includes mediation, early neutral evaluation (ENE) and arbitration. The ADR pilot program is applicable to four judges (Ambrose, Cercone, Fischer and Schwab), until the end of 2007, and is expected to be in place for all the Court's active judges beginning in 2008.

While mediation and arbitration have been options available to litigants since the 1990's, ENE is new and, to date, relatively infrequently chosen. One theory as to why ENE is used in less than 25% of cases is a lack of understanding of the process. The purpose of this article is to clarify ENE and address some of the misconceptions about it.

WHAT ENE IS

Early neutral evaluation was developed in the United States District Court for the Northern District of California (NDCA) in the early 1980's by a task force of 20 lawyers charged with finding ways to reduce the expense of litigation for civil litigants. After studying developments in the field of ADR, the task force designed what was at the time a *sue generis* procedure it called early neutral evaluation. In essence, ENE is a hybrid of mediation and arbitration the goal of which is to help litigants gain a better understanding of their case.

The ENE process entails having an experienced third-party neutral examine the parties' positions and give his/her evaluation of the case. As any seasoned attorney could testify, an all-too-common problem in adjudicating claims is that one or more of the parties has misunderstood or misevaluated the case. Frequently this misevaluation leads to unrealistic expectations about the probable outcome. ENE is designed to focus the parties on the important issues so that time and money is not wasted chasing unrealistic results, *i.e.*, a reality check for attorneys and clients.

The ENE in the NDCA is court sponsored and highly regulated. The Policies and Procedures governing ENE in the WDPA allow for greater flexibility in the process, depending on the parties' and evaluator's expectations/needs/expertise. Because the process is more fluid, it is essential that evaluators establish objectives prior to

conducting the ENE. The question, “How can ENE be most helpful to you?” is key to establishing the outline for an individual session.

Generally, the essential elements of the ENE process include:

1. Introduction and opening remarks by evaluator
2. Presentation of claims/defenses by parties
3. Responsive presentations by parties
4. Questions by evaluator to clarify/probe
5. Evaluator identifies common ground and possible stipulations
6. Evaluator identifies key disputed issues (issue clarification)

At this point in the process, the evaluator can ask if the parties wish to explore settlement before the evaluation is presented and conduct settlement negotiations if the parties agree to do so. If not, the evaluator orally presents his/her assessment of the case to all present. This evaluation may include an amount that the evaluator thinks will be awarded at trial, what the settlement range of the case should be, and/or an assessment of the strengths and weaknesses of each party’s case. Evaluators can also assist with case planning. The parties may request that the oral evaluation be supplemented with a written evaluation within ten days of the ENE. It is important that clients, corporate representatives, government entity representatives and insurance company representatives attend this session so that they can hear first hand the independent neutral’s opinion of the case.

Persons qualifying as early neutral evaluators under the Court’s program are required to have been practicing for a minimum of 15 years, have substantial experience with civil litigation in federal court, together with substantial expertise in the subject matter of the cases for which they are chosen. The Court’s web site provides the areas in which the neutrals have indicated subject matter expertise. In addition, most of the neutrals have provided a link to additional information about their background and experience. Parties are also free to choose a neutral outside those identified on the Court’s ADR web site.

WHAT ENE IS NOT

ENE is not a “classic” mediation. The principle purpose of mediation is settlement. ENE has multiple purposes, only one of which is settlement. In mediation, the neutral has process expertise but not necessarily subject matter expertise. In ENE, the neutral is chosen because she has subject matter expertise. In mediation, the focus is on parties’ interests (rather than positions). In ENE, the focus is on evidence and law.

ENE is not arbitration. It does not involve taking testimony or cross-examination. No “award” is made.

WHEN TO CHOOSE ENE

The determination of when to use ENE is case specific but should be considered for complicated or unusual cases that involve mixed issues of fact and law, unclear damage issues or challenging evidentiary issues, or cases that will turn on expert opinion. If one or both parties is adamantly opposed to any settlement of the case, ENE may prove a more useful tool than a mediation. Similarly, if the parties have adopted highly disparate views of the value of the case, soliciting an evaluation by an objective third party may be of greater assistance than trying to resolve the case through mediation and may also assist the parties in developing and evaluating their case moving forward.

Comments received by participants in the Court's ADR pilot program may help in determining if a case is appropriate for ENE:

"ENE is a valuable tool in educating parties about the facts, strengths and weaknesses of the case."

"ENE provided a candid read of the claims given by someone other than the parties to the action, which is always valuable."

"ENE is the best format when (one side) believes the (other sides') case is without merit."

More information about ENE can be found in Section Four of the ADR Policies and Procedures posted at www.pawd.uscourts.gov.