

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI**

**I**

**INTRODUCTION TO EARLY NEUTRAL EVALUATION (ENE)**

**A. INTRODUCTION**

1. This Commentary is a reference source for guiding participants in Early Neutral Evaluation (ENE). It is not a substitute for reviewing L.R. 6.01-6.05.
2. The local rules use the term neutral, mediator, and early neutral evaluator interchangeably. All Rules applicable to mediation are also applicable to ENE, from pre-ENE communication, appointment of evaluator, confidentiality, attendance, good faith and post ENE activities.

## II FREQUENTLY ASKED QUESTIONS

1. **WHAT IS EARLY NEUTRAL EVALUATION?** Early neutral evaluation is a process that may take place soon after a case has been filed in court. The case is referred to an expert, usually an attorney, who is asked to provide a balanced and unbiased evaluation of the dispute. The parties either submit written comments or meet in person with the expert. The expert identifies each side's strengths and weaknesses and provides an evaluation of the likely outcome of a trial. This evaluation can assist the parties in assessing their case and may propel them towards a settlement.
2. **WHEN MAY ENE BE REQUESTED?** An ENE may be requested at any time and is used at every stage of litigation. Usually, the first ENE is held shortly after the Rule 16 conference.
3. **HOW LONG DOES ENE TAKE?** ENE proceedings before an evaluator typically takes five or more hours, although the evaluator may call off the sessions when appropriate.
4. **WHAT ARE THE STAGES OF ENE?** ENE is very flexible. The parties are also permitted to decide upon the steps that are to be followed in the procedure. In general, procedure of early neutral evaluation involves the following steps:
  - a. **Appointment of evaluator:** The first and foremost requisite is the appointment of an evaluator. The parties must ensure that the evaluator appointed has special knowledge and expertise in the subject- matter of the suit. This makes the process of evaluation more effective and reliable. Other criteria that should be adhered to while appointing a neutral evaluator is fairness, impartiality, and a skill of evaluating facts and circumstances. There is no specified number of evaluators that have to be appointed. The parties may agree to appoint one or more evaluators.
  - b. **Preparation of neutral evaluation:** Before the ENE proceedings commence, the parties are required to submit a written statement stating the facts and issues from their point of view. This enables the evaluator to understand the perspective of both the parties. Simultaneously, the parties decide the day, date and venue at which the proceedings shall commence.
  - c. **Evaluator's opening statement:** The evaluator begins with an opening statement, describing the role of a neutral third party, the rules and the various stages of ENE.
  - d. **Parties' presentations:** The next step is the oral presentation of the parties. The disputants make a presentation of the case from their point of view, the issues that are important pertaining to the case, and the outcome they are seeking from the proceedings. This step is very important because it makes the parties aware about the perspective of the other party. It also clears any sort of misunderstanding between the disputants. It also helps the evaluator in identifying the primary and secondary issues of the dispute.
  - e. **Evaluator's opinion:** The final step of the proceedings is the opinion of the evaluator. The neutral third party will provide an opinion on every issue of the dispute, and then suggest possible points on which parties may negotiate and compromise. The evaluator also mentions the possible outcomes of litigation if the parties decide to move to court. It should be

kept in mind that the opinion and the evaluation of the neutral third party is not binding on the parties.

5. **WHAT IS A CASE ASSESSMENT?** The evaluator prepares and announces an assessment of each party's position. He or she may offer a reasoned judgment of the value of the case, anticipating the likelihood of liability and estimating the possible range of damages or other relief.
6. **CAN THE EVALUATOR ASSIST WITH CASE PLANNING?** The evaluator may help the parties discuss and reach an agreement on case management issues. Parties may be able to reduce cost and delay by streamlining discovery, reducing motion activity, and eliminating unnecessary pleading in this way.
7. **WHAT CASES ARE APPROPRIATE FOR ENE?** Any civil case may be appropriate for ENE, if the judge believes the parties are likely to mutually benefit from such referral and if the court has an available Evaluator with the appropriate subject matter expertise. When the case involves technical or specialized subject matter it is important to have a neutral with expertise in that subject. ENE may aid counsel or the parties when they are far apart on their view of the law and/or value of the case, when case planning and assistance would be useful, when central issues need clarification, when the case may be complex, or when equitable relief is sought. With the aid of a neutral expert, parties may agree on the terms of an injunction or consent decree. The Evaluator may facilitate mediation of the case, if requested by the parties. See L.R. 6.01(B) which suggests that Neutral Evaluation may lead to settlement.
8. **WHICH CASES ARE INAPPROPRIATE FOR ENE?** Cases where ENE cannot be used are: appeals from rulings of administrative agencies, habeas corpus and extraordinary writs, bankruptcy appeals, and social security cases. Also, cases sometimes considered unsuitable for ADR include substantial issues of public policy. See LR 6.01(A)(1).
9. **SHOULD THE PARTIES TRY TO PRESERVE THEIR TRIAL STRATEGY?** Most civil cases are resolved without a trial. If counsel/parties do not raise their best arguments in evaluation discussions, they risk failing to achieve the best results. Although it is not necessary to reveal sensitive information related to trial strategy, it may be useful to raise it in a confidential separate session with the evaluator. Counsel/parties will learn the evaluator's views of the significance of the information and the evaluator's opinion as to whether or when sharing it with the other side may be of benefit in the negotiations.
10. **WHAT IS THE ROLE OF THE EVALUATOR?** The evaluator enables parties to communicate directly about their claims and supporting evidence, provides an assessment of the merits of the case, provides a "reality check" for clients and lawyers, identifies and clarifies the central issues in dispute, assists with discovery and motion planning or with an informal exchange of key information, and facilitates settlement discussions, when requested by the parties. See LR 6.01(B).

11. **WHAT FALLS OUTSIDE THE ROLE OF THE EVALUATOR?** The evaluator has no power to impose settlement or coerce a party to accept any proposed terms.
12. **WHAT IS THE EVALUATOR'S ROLE IN REPORTING GOOD FAITH PARTICIPATION?** The evaluator will report to the judge any willful or negligent failure to attend any ADR conference, to substantially comply with the Order Referring Case to Alternative Dispute Resolution, or otherwise participate in the ADR process in good faith. See LR 6.05(A).
13. **WHAT HAPPENS IF THE PARTIES AGREE ON SCHEDULES AND CASE MANAGEMENT MATTERS?** If an ENE referral results in decisions or agreements regarding scheduling or other case management matters, the parties must file a Proposed Litigation Plan which includes a proposed litigation plan or motion to amend an existing Case Management Order. The proposed Order must be filed with the Court no later than fourteen (14) days after the last ENE conference. See LR 6.04(D).

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