

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

EARLY NEUTRAL EVALUATION PROGRAM GUIDELINES

As used within these Guidelines:

“ADR” refers to “Alternative Dispute Resolution”

“ENE” refers to “Early Neutral Evaluation”

1. Description.

The Superior Court of California, County of Orange, offers an Early Neutral Evaluation (ENE) program. The ENE program provides the parties and their counsel, on a voluntary basis and in a confidential session, the opportunity to make summary presentations of their claim and defenses, including key evidence as developed, and receive a non-binding evaluation by an experienced neutral lawyer with subject matter expertise.

The evaluator will also help identify areas of agreement, and may offer case-planning suggestions for the purpose of assisting all of the parties to more efficiently resolve the lawsuit. If requested by the parties, the evaluator may provide settlement assistance. Although settlement is not the primary goal of ENE, the ENE process can reduce litigation time and costs and promote settlement.

ENE program information will be provided to counsel at the time of filing a new complaint, as part of the Alternative Dispute Resolution (ADR) Information Package. The ADR Information package must be served on all parties with the summons and complaint.

2. Eligible Cases.

The ENE program will be available for unlimited civil cases filed in the Central Justice Center in which all parties are represented by counsel. All such cases will be eligible for ENE subject to the availability of an evaluator with the appropriate subject matter expertise.

The ENE program offers evaluators with subject matter expertise in the following areas:

Business	Employment	Medical Malpractice	Personal Injury
Real Estate	Trade Secrets	Unfair Competition	

Cases with the following characteristics may be particularly appropriate for ENE:

- Counsel or the parties are far apart on their views of the law and/or the value of the case;
- The case involves technical or specialized subject matter;

- Communication across party lines (about merits or procedure) could be improved;
- Equitable relief is sought and the parties, with the aid of a neutral expert, might agree on the terms of an injunction or consent decree; and/or
- The parties wish to communicate with each other about the case, but are not ready to discuss settlement.

3. Initiation of ENE Process.

ENE is available on a voluntary basis only. If the case meets the eligibility criteria, the parties may, at any time, prompt a referral to the ENE process by filing the Stipulation to Participate in ADR, completing and submitting a Selection of ADR Neutral and Party List. The parties must choose from the Court's ENE Panel an available neutral evaluator with expertise in the substantive legal area of the lawsuit and no apparent conflict of interest and an alternate evaluator. The parties must also provide on the Selection of ADR Neutral and Party List four mutually agreeable dates on which the ENE session may be held. Upon receipt of the required documents, the Court may refer the parties to ENE. Parties will be required to make arrangements to pay the required fees (\$150 for each side in the dispute) directly to the Evaluator.

4. Assignment of Evaluator.

Once the parties have selected an evaluator, the Court will immediately send the Notice of Assignment and a copy of the Party List to the Evaluator and counsel. Upon receiving the Notice of Assignment, the evaluator should check for conflicts and check his/her schedule for availability.

Within ten (10) days of receipt of the Notice of Assignment, the evaluator must submit a completed ADR Neutral Acceptance or Recusal to the Court and send a copy to the parties.

5. Disclosures and Notification of Inability to Serve.

Upon receipt of the Notice of Assignment, the evaluator should review the case to ascertain the existence of any possible conflicts of interest or other grounds for inability to serve as evaluator. The evaluator should make a full and complete disclosure to the parties and the court of any fact that could cause a reasonable person to question the evaluator's impartiality. The evaluator must submit an ADR Acceptance or Recusal within ten (10) days of the Notice of Assignment if he or she is unable to serve for any reason, so that another evaluator can be appointed and the evaluation can still be conducted within the required time.

6. Timing and Scheduling the ENE Session.

- a. Telephone Conference.** The evaluator may arrange a brief telephone conference with counsel to discuss matters such as the date, time and location of the ENE session, the procedures to be followed, the nature of the case, who will attend, and how to maximize the

benefit of engaging in neutral evaluation. The discussion should also include an estimate of the time necessary to complete the ENE and reasonable time limits on each side's presentation.

b. Deposit of Fees. The Evaluator may require the parties to provide a deposit of the initial fees prior to commencing the session, and should inform counsel of this requirement prior to the date of the ENE session.

c. Location of Session. The ENE sessions must be conducted in a suitable, professional environment. With the agreement of all participants, the sessions may be conducted at the office of the evaluator or of an attorney or party in the action.

d. Deadline for Conducting Session. Unless otherwise ordered, the ENE session must be held within 90 days after the date specified in the Notice of Assignment.

e. Notice of ADR Session. The evaluator shall serve the Notice of ADR Session on all parties and the ADR Administrator within fifteen (15) days of the submission of the ADR Neutral Acceptance or Recusal. Copies of the ENE Statement Form will be included with the Notice of ADR Session served on all parties.

f. Continuances. Requests for continuance may not exceed 20 days and may be granted only for good cause found by the evaluator. In no event will the ENE session be continued beyond the completion date ordered by the Court except by order of the Court. Requests for extension of the deadline for conducting an ENE session will only be made by order of the Court upon stipulation by all parties and the evaluator filed no later than 10 days before the completion date. The stipulation must detail the considerations that support the request, indicate whether the other parties concur in or object to the request, and propose a new deadline by which the ENE session shall be held.

7. *Ex Parte* Contact Prohibited.

Unless otherwise agreed to by the parties, counsel, and evaluator, and except with respect to scheduling matters, *ex parte* communications between parties or counsel and the evaluator are prohibited, including private caucuses to discuss settlement, until after the evaluator has committed his or her evaluation to a writing or all parties have agreed that *ex parte* communications with the evaluator may occur.

8. ENE Statements.

a. Time for Submission. No later than ten (10) calendar days before the first ENE session, each party must submit directly to the evaluator, and must serve on all other parties, a completed ENE Statement.

b. Prohibition Against Filing. The ENE statements must not be filed with the Court.

c. Content of Statement. The statements must include the following:

(1) Identification, by name and title or status:

(a) The person(s) with decision-making authority, who, in addition to counsel, will attend the ENE session as representative(s) of the party, and

(b) The person(s) connected with a party opponent (including an insurer representative) whose presence might substantially improve the utility of the ENE session or the prospects for settlement;

(2) Presentation of case:

(a) A brief statement of the facts of the case;

(b) A description of what the party must prove in order to prevail and how the party intends to make such proof, and

(c) A statement of the types and amounts of damages claimed.

(3) A description of any legal or factual issues whose early resolution would reduce significantly the scope of the dispute or contribute to settlement negotiations;

(4) An identification of the discovery that is necessary to equip the parties for meaningful settlement negotiations;

(5) A description of the history and status of any settlement negotiations; and

(6) Copies of relevant documents (*e.g.*, accident reports, medical reports, contracts, invoices evidencing special damages, dispositive motions and rulings, if any, etc.), whose availability would materially advance the purposes of the evaluation session.

9. Attendance at ENE Session

a. Parties. All named parties and their counsel are required to attend the ENE session unless excused under paragraph d, below. This requirement reflects the Court's view that the principal values of ENE include affording litigants opportunities to articulate directly to other parties and a neutral their positions and interests and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case and the relative strengths of each party's legal positions.

(1) Corporation or Other Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) who has authority to settle and who is knowledgeable about the facts of the case.

(2) Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's

position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.

b. Counsel. Each party must be accompanied at the ENE session by the attorney who will be primarily responsible for handling the trial of the matter.

c. Insurers. Insurer representatives are required to attend in person, unless personal attendance is excused by the evaluator.

10. Procedure at ENE Session.

The evaluator will convene the ENE session.. The session will be informal. Rules of evidence do not apply. There will be no formal examination or cross-examination of witnesses and no recording of the presentations or discussion may be made. During the session, the following will occur:

- Each side, through counsel, clients or witnesses, will present evidence and argument supporting its case.
- After the initial presentations, the evaluator may ask questions and raise issues. Thereafter, each side may present a responsive presentation. This process does not preclude an evaluator from asking questions during a party's presentation in the interests of clarity and efficiency.
- Following the presentations and questioning by the evaluator, the evaluator will identify areas of agreement and disagreement, clarify and focus the issues, and encourage the parties to enter procedural and substantive stipulations.
- The evaluator is required to prepare an evaluation, outside the presence of the parties, which may include:
 - An estimate, where feasible, of the likelihood of liability and the dollar range of damages, if any;
 - An assessment of the relative strengths and weaknesses of each party's case; and
 - The reasoning that supports these assessments.
- The evaluator will offer to present the evaluation to the parties, who may then ask either to:
 - Hear the evaluation (which must be presented if any party so requests); or
 - Conduct focused discovery or make additional disclosures; or

- Postpone hearing the evaluation in order to engage in settlement discussions facilitated by the evaluator, which may be conducted in separate meetings with each side.
- If settlement discussions do not occur or do not resolve the case, the evaluator may:
 - Help the parties devise a plan for sharing additional information and/or conducting the key discovery that will expeditiously equip the parties to enter meaningful settlement discussions or position the case for disposition by motion or trial;
 - Help the parties to realistically assess litigation costs; and/or
 - Determine whether some form of follow-up to the ENE would contribute to case development or settlement.

11. ENE Session Time.

a. Termination of ENE Session After Three Hours. The evaluator must advise the parties at the outset of the session that all parties should plan to complete the session within three (3) hours and, if the session is not completed within that time frame, that the evaluator will terminate the session.

b. Continuation of ENE Session After Three Hours. If all parties request a continuation of the session and sign the Stipulation re Fee for Service, the evaluator may continue the session beyond three (3) hours for such fee as has been agreed upon.

c. Evaluator's Time. The evaluator's time incurred in preparing for the ENE session and in preparing the evaluation is included in the fee of \$150 per side in addition to the three (3) hour hearing time described above.

12. Confidentiality and Waiver.

a. Confidential Treatment. All participants in the ENE session will be required to sign a Confidentiality Agreement. Except as provided in subdivision (b) below, no communications made in connection with ENE, including the evaluation, may be disclosed to the Court or to anyone else not involved in the ENE, unless otherwise agreed to by all parties.

b. Limited Exceptions to Confidentiality. This confidentiality requirement does not prohibit:

(1) disclosures as may be stipulated by all parties and the evaluator; or

(2) disclosures as are otherwise required by law.

c. Waiver and Release of Claims Against Evaluator. The evaluator may require all participants to sign a Waiver and Release of Claims Against Evaluator prior to commencing the evaluation session.

13. Follow Up

a. Discussion at Close of ENE. At the close of the ENE session, the evaluator and the parties should discuss whether it would be beneficial to schedule any follow up to the session.

b. Stipulation to Follow Up Session. With the consent of all parties, the evaluator may schedule one or more follow up ENE sessions that may include additional evaluation, settlement discussions, or case development planning.

c. Limitations on Authority of Evaluator. Evaluators have no authority to compel parties to conduct or respond to discovery or to file motions. Evaluators do not have authority to determine what the issues in any case are, to impose limits on parties' pretrial activities, or to impose sanctions.

14. Follow Up Reporting.

a. Report of Evaluator. Within ten (10) days of the close of each ENE session, the evaluator must return to the ADR Administrator the following:

- Confidential Program Evaluation by ENE Neutral; and
- ADR Outcome Report

b. Evaluation by Parties and Counsel. The evaluator will distribute to parties and counsel the Evaluation Forms, and ask them to complete the forms and return them to the ADR Administrator.

15. Preservation of Right to Trial. The evaluator will have no power to impose settlement and will not attempt to coerce a party to accept any proposed terms. The parties' formal discovery, disclosure and motion practice rights will be fully preserved. The confidential evaluation will be non-binding and will not be shared with the trial judge. The parties may agree to a settlement. If no settlement is reached, the case will remain on the ordinary litigation track.

16. Evaluators.

a. Qualifications. Evaluators are required to have the following qualifications:

- (1) A member of the California State Bar for a minimum of ten years;
- (2) Experience with civil litigation;
- (3) Demonstrated subject matter expertise;
- (4) Completion of the court orientation and training program;

- (5) Two references concerning the evaluator's litigation and subject matter expertise;
- (6) Be a member in good standing with the State Bar; and
- (7) Agree to comply with the Court's ENE Program Guidelines and other Court rules and policies.

b. Application and Selection. Persons wishing to become Evaluators in the ENE program must complete and submit the ENE Evaluator Application Form. ADR staff will review the application for completeness, and will forward complete applications to the Quality Assurance Subcommittee (QAS) of the ADR Committee for evaluation. The Subcommittee will determine if the applicant meets the requirements to serve as an Evaluator. The ADR Office will then notify all successful applicants of their acceptance as an Evaluator.

c. Compensation. ENE evaluators will receive a payment from the parties of \$300 for their preparation time and the first three hours in an ENE session. After three hours in an ENE session, the evaluator may either (1) continue to volunteer his or her time or (2) give the parties the option of concluding the procedure or paying the evaluator for additional time at the evaluator's hourly rate. The ENE procedure will continue only if all parties and the evaluator agree. No party may offer or give the evaluator any gift.

d. Payment. Each side must pay \$150 to the evaluator. For all other payments, all terms and conditions of payment must be clearly communicated to the parties by the evaluator at the beginning of the ENE session.. The parties may agree to pay the additional fees in other than equal portions.

e. Standards for Evaluators. Evaluators will be held to the ethical standards as specified in the Standards of Professional Conduct for Evaluators attached to these Guidelines.

f. Pro Bono Requirements. Evaluators must agree to serve as an evaluator on a pro bono or modest-means basis in at least one case per year, not to exceed eight (8) hours, if requested by the Court.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
PROGRAM FOR EARLY NEUTRAL EVALUATION
STANDARDS OF PROFESSIONAL CONDUCT
FOR NEUTRAL EVALUATORS

1. Introduction

- a. All persons serving on the Orange County Superior Court Neutral Evaluator Panel must adhere to these standards, which will serve as fundamental guidelines of practice within this program and be complementary to other professional codes.

2. General Responsibilities

- a. Evaluators must be honest, diligent, unbiased, act in good faith, and not seek to advance their own interest at the expense of the parties.
- b. Evaluators bear the responsibility of conducting evaluation sessions in a manner that instills confidence in the process, promotes trust in the integrity and competence of evaluators, and meets the highest ethical standards.
- c. At no time may an evaluator offer specific legal advice to participating parties.
- d. The role of a neutral evaluator should not be confused with that of an attorney who is an advocate for a client.
- e. Evaluators must inform the Arbitration and Mediation Oversight Committee if:
 - i. Public discipline has been imposed on him/her by any public disciplinary or professional licensing agency;
 - ii. The evaluator has resigned her/his membership in the State Bar or another professional licensing agency while disciplinary or criminal charges are pending;
 - iii. A felony charge is pending against him/her;
 - iv. The evaluator has been convicted of a felony or of a misdemeanor involving moral turpitude; or
 - v. There has been an entry of judgment in a civil action against the evaluator based on actual fraud or in which there has been an award of punitive damages.

3. Impartiality

- a. Evaluators must conduct all evaluation sessions in an impartial manner.
- b. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.
- c. If at any time the evaluator is unable to act in an impartial manner, the evaluator is obligated to withdraw.
- d. The standard of impartiality is not violated if an evaluator expresses opinions concerning the merits of a case, or recommends that a party accept a certain condition or dollar amount for settlement.

4. Conflict of Interest

- a. Evaluators may not enter into or continue any neutral evaluation session if she/he believes or perceives that participation as a neutral evaluator would present a conflict of interest or compromise one's neutrality. Such conflicts of interest would include:
 - i. The evaluator is biased or prejudiced concerning a party in the case.
 - ii. The evaluator has personal knowledge of evidentiary facts that are disputed in the case.
 - iii. The evaluator has served or is serving as a lawyer in the case.
 - iv. The evaluator's spouse or any of the persons listed below is serving as a lawyer in the case:
 - Child
 - Parent
 - Sibling
 - Grandchild
 - Grandparent
 - Great grandchild
 - Great grandparent
 - Uncle or Aunt
 - Niece or Nephew
 - The spouse of any of the above persons
 - v. A partner or an associate in the evaluator's firm has served or is serving as a lawyer in the case.
 - vi. A lawyer with whom the evaluator practiced in the past served, while the evaluator was associated with that lawyer, as a lawyer in the case.
 - vii. While in government employment, the evaluator offered advice or served as a material witness with respect to the case, or expressed an opinion about the merits of the case.
 - viii. The evaluator, the evaluator's spouse, or any of the persons identified in 4.1.4 above are a party to the case or are an officer, director, or trustee to a party in the case.

- ix. The evaluator, the evaluator's spouse, or any of the persons identified in 4.1.4 above have been or are likely to be a material witness in the case.
 - x. A lawyer, with whom the evaluator practiced in the past, or with whom the evaluator currently practices, has been or is likely to be a material witness in the case.
 - xi. The evaluator (directly or as a fiduciary), the evaluator's spouse, or any of the evaluator's minor children who live with the evaluator have a financial interest in the case or in any party to it.
 - xii. The evaluator, the evaluator's spouse (directly or as a fiduciary), or any of the persons identified in 4.1.4 above have any kind of interest, financial or otherwise, of which the evaluator is aware that could be substantially affected by the outcome of the case.
 - xiii. The evaluator currently represents a party in another case in which one of the lawyers who would appear before the evaluator at the ENE session also represents a party.
 - xiv. The evaluator currently represents in some other case one of the parties who would appear before the evaluator at the ENE session, or the evaluator has been engaged by such a party to perform some other kind of service.
- b. Evaluators must disclose all actual or potential conflicts of interest reasonably known to them.
 - c. The duty to disclose is a continuing obligation.
 - d. After disclosure, the evaluator must decline to evaluate unless all parties choose to retain the evaluator.
 - e. The need to protect against conflicts of interest also governs conduct that occurs during and after the neutral evaluation.
 - f. A conflict of interest is a dealing or relationship that creates or might reasonably create an impression of bias.
 - g. If all parties agree to a neutral evaluation after being informed of conflicts, the evaluator may proceed with the neutral evaluation.
 - h. If, however, the conflict of interest casts serious doubt on the integrity of the process, the evaluator must decline to proceed.
 - i. Evaluators must avoid the appearance of conflict of interest both during and after the neutral evaluation.

5. Confidentiality

- a. Confidentiality in neutral evaluation is important to encourage all participants to speak truthfully and candidly, to enable a full exploration of issues in dispute and to reach a complete and satisfactory resolution.

- b. Evaluators must preserve and maintain the confidentiality of all neutral evaluation proceedings except where required by law to disclose information.

6. Competence

- a. Evaluators may conduct neutral evaluations only when they have the necessary skills and subject matter expertise to satisfy the reasonable expectations of the parties.
- b. Evaluators must, upon request, provide to all participants information on his/her neutral evaluation training, education and experience.
- c. Evaluators should possess the awareness and experience to assess when they are unable to render adequate services or cannot meet the participants' reasonable expectations.
- d. Academic degrees or professional licenses, in and of themselves, do not define evaluator competence.
- e. Every evaluator is personally responsible for her/his professional growth.
- f. An evaluator should endeavor to continually improve and increase his/her knowledge about the practice of neutral evaluation and developments in relevant substantive fields through continuing education, consultation, peer review and use feedback.

7. Advertising and Solicitation

- a. Evaluators must be truthful and accurate in marketing their services and may not promise nor guarantee results.
- b. All advertising must honestly represent the services to be rendered.
- c. No claims of specific results or promises should be made.