

GENERAL ORDER NO. 26

EARLY NEUTRAL EVALUATION

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Notice Regarding Cases in the Case Management Pilot Program

In all cases which are assigned to the Case Management Pilot Program and to Early Neutral Evaluation, requests for extension of time to serve the summons and complaint shall be addressed to the judge to whom the case is assigned rather than to the ENE Magistrate Judge. This notice supersedes section 3.f.(4) of Amended General Order No. 26.

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1. PURPOSE

The Court recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay resolution of disputes for considerable periods. The procedure established by this General Order provides litigants with means to resolve their disputes faster and at less cost.

2. CATEGORIES OF CASES ELIGIBLE FOR INCLUSION IN THE EARLY NEUTRAL EVALUATION PROGRAM

a. Only civil matters are eligible for inclusion in the Early Neutral Evaluation (ENE) program. Among civil matters, class actions, cases in which the principal relief sought is injunctive, or in which one or more of the parties is proceeding in **pro per**, shall not be automatically ordered into the program. Cases in which a declaratory judgment is sought may be automatically ordered into the program except when the only parties to the action are insurance carriers, sureties, or bonding companies. Suits of the following nature, as designated on the Civil Cover Sheet, may be automatically ordered into the program: CONTRACT: Insurance (110), Miller Act (130), Negotiable Instrument (140), Stockholders Suits (160), Other Contract (190), and Contract Product Liability (195); TORTS: Motor Vehicle (350), Motor Vehicle Product Liability (355), Other Personal Injury (360), Personal Injury -Product Liability (365), and Other Fraud (370); CIVIL RIGHTS: Employment (442); PROPERTY RIGHTS: Copyrights (820), Patent (830), and Trademark (840); OTHER STATUTES: Antitrust (410), Racketeer Influenced and Corrupt Organizations (470), and Securities/Commodities/Exchange (850). To the extent that qualified evaluators are available, individual judges may designate cases in other subject matter categories for inclusion in the program.

b. Absent a written stipulation executed by all parties (through counsel), cases that meet the criteria for inclusion in the Court's arbitration program under Local Rule 500 shall not be designated for Early Neutral Evaluation.

3. ADMINISTRATIVE PROCEDURE

a. Subject to the availability of qualified evaluators and of administrative resources in the Court, every even numbered case that meets the criteria set forth in paragraph 2., above, and that has been assigned to a judge who is participating in the program, shall be designated for Early Neutral Evaluation. Any judge of this Court, on motion from a party or acting *sua sponte*, may designate additional individual cases for inclusion in the program.

b. The Court has assigned responsibility for all procedural matters related to the Early Neutral Evaluation program to the ENE Magistrate Judge (see attached Order). Appeals from his decisions will be heard by the judge to whom the case is assigned only if they are filed within ten calendar days of service of the order containing the Magistrate Judge's ruling.

c. A party who believes that some extraordinary circumstance makes it unfair to have its case go through the evaluation process may petition the ENE Magistrate Judge for relief, but must do so within ten calendar days of receiving notice that the case has been designated for the program. Such petitions shall be presented in letter form, shall set forth in detail the considerations supporting the petition, shall indicate realistically the amount in controversy in the case, and shall be accompanied by a proposed order.

d. At the time a case is designated for ENE the Clerk shall provide plaintiff's counsel with a notice of such designation, a copy of this General Order and such other materials as required by the Court or the ENE Magistrate Judge. The plaintiff shall provide all defendants with copies of the Notice, General Order, and materials explaining the ENE program at the time the defendants are served or within ten calendar days of the date plaintiff's counsel receives this material from the Court. Any party who, after the filing of the original complaint, causes a new party to be joined in the action (*e.g.*, by way of impleader) shall promptly serve on that new party a copy of the Notice described in this paragraph, this General Order, and the material that explains the ENE program.

e. Each party who has a duty under this Order to serve documents on another party shall file proof of service promptly after effecting same.

f. Cases designated for ENE are subject to the following requirements:

(1) The evaluation session described hereafter shall be held within 150 days of the filing of the complaint unless otherwise ordered by the ENE Magistrate Judge on a showing of good cause.

(2) Service of the summons and complaint on all defendants shall be effected within forty (40) days of the filing of the complaint. Failure to effect service within this period will result in the issuance of an order to show cause why the complaint should not be dismissed for lack of prosecution.

(3) Subparagraph (a) of Local Rule 220-10, which permits parties to stipulate to one 60-day extension of time to comply with deadlines fixed by the Federal Rules of Civil Procedure, shall not apply to pleadings or responses to pleadings that are filed in cases designated for ENE. In cases designated for ENE, pleadings and responses to pleadings shall be filed by the deadlines set in the Federal Rules of Civil Procedure unless, prior to those deadlines, a party has secured permission from the ENE Magistrate Judge to file by another date. These rules for "pleadings" do not apply to requests for or responses to "discovery."

(4) To seek relief from any of the deadlines referred to in the preceding subparagraphs, a party must submit a letter directly to the ENE Magistrate Judge, with a copy to the evaluator (if appointed), detailing the considerations that support the request and indicating whether any other party objects to it. Such letter requests must be accompanied by a proposed order setting forth the date by which the party shall meet the obligation in question or the ENE session shall be held.

g. When the Clerk ascertains the identity of the lawyers who will be representing the named parties in the action, he or she will designate an evaluator with expertise in the subject matter of the lawsuit. After being satisfied that the evaluator has no conflict of interest and will be available during the appropriate period, the Clerk will disclose the identity of the evaluator to the assigned judge and to counsel.

h. No evaluator may serve in any matter in violation of the standards set forth in Section 455 of Title 28 of the United States Code. If an evaluator is concerned that a circumstance covered by subparagraph (a) of that section might exist, *e.g.*, if the evaluator's law firm has represented one or more of the parties, or if one of the lawyers who would appear before the evaluator at the ENE session is involved in a case on which an attorney in the evaluator's firm is working, the evaluator shall promptly disclose that circumstance to all counsel in writing. A party who believes that the assigned evaluator has a conflict of interest shall bring this concern to the attention of the ENE Magistrate Judge, in writing, within ten calendar days of learning the source of the potential conflict or shall be deemed to have waived objection.

i. Within the time frames fixed by the Court, the evaluator shall fix the specific date and place of the evaluation session. The evaluation session shall be held in a suitable neutral setting, *e.g.*, at the office of the evaluator or in the courthouse. Unless otherwise ordered by the ENE Magistrate Judge or the judge to whom the case is assigned, the evaluation session shall be held within 150 days of the filing of the complaint and within forty-five (45) days of the date on which the Clerk's office notifies plaintiff's counsel of the identity of the evaluator. Requests for extensions of these deadlines shall be presented in the first instance to the ENE Magistrate Judge and shall be granted only after a showing of extraordinary circumstances. Such requests shall be delivered to the Magistrate Judge's chambers, and a copy provided to the evaluator, no later than ten calendar days after the requesting party has received notice of the date set by the evaluator for the session and shall be in writing in the form specified in paragraph 3.f.(4), above, accompanied by a proposed order.

j. The Clerk and the evaluators shall schedule ENE events and administer the program in a manner that does not interfere in any way with the management of the action by the assigned judge. Any follow-up to an ENE session that is ordered by an evaluator may not impose duties or fix schedules that are inconsistent with orders entered by the assigned judge. No party may seek to avoid or postpone any obligation imposed by the assigned judge on any ground related to the ENE program.

4. WRITTEN EVALUATION STATEMENTS

a. No later than ten calendar days prior to the evaluation session each party shall submit directly to the evaluator, and shall serve on all other parties, a written evaluation statement. Such statements shall not exceed fifteen (15) pages (not counting exhibits and attachments) and shall conform to Local Rule 120.1. While such statements may include any information that would be useful, they must:

(1) identify the person(s), in addition to counsel, who will attend the session as representative of the party with decision making authority,

(2) describe briefly the substance of the suit,

(3) 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

(4) identify the discovery that promises to contribute most to equipping the parties for meaningful settlement negotiations.

b. Parties may identify in these statements persons connected to a party opponent (including a representative of a party opponent's insurance carrier) whose presence at the evaluation session would improve substantially the prospects for making the session productive; the fact that a person has been so identified, however, shall not, by itself, result in an order compelling that person to attend the ENE session.

c. Parties shall attach to their written evaluation statements copies of documents out of which the suit arose, *e.g.*, contracts, or whose availability would materially advance the purposes of the evaluation session, *e.g.*, medical reports or documents by which special damages might be determined.

d. The written evaluation statements shall not be filed with the Court and the assigned judge shall not have access to them.

e. Special Provisions for Patent, Copyright, and Trademark Cases.

(1) **Patent Cases:** In a case where a party is basing claims on a patent, that party shall 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 claim based on a patent shall describe in its written statement its

theory or theories of damages and shall 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" shall 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 shall describe the basis for such denial.

(2) **Copyright Cases:** A party who bases a claim on copyright shall include as exhibits the copyright registration and exemplars of both the copyrighted work and the allegedly infringing work(s), and shall make a systematic comparison showing points of similarity. Such party also shall present whatever direct or indirect evidence it has of copying, and shall indicate whether it intends to elect statutory or actual damages. Each party in a copyright case who is accused of infringing shall 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.

(3) **Trademark Cases:** A party who bases a claim on trademark or trade dress infringement, or on other unfair competition, shall 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 shall 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 shall 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 shall set forth the dollar volume of sales of and profits from goods or services bearing the allegedly infringing mark.

5. ATTENDANCE AT THE EVALUATION SESSION

a. The parties themselves shall attend the evaluation session unless excused as provided in this section. This requirement reflects the Court's view that one of the principal purposes of the evaluation session is to afford litigants an opportunity to articulate their position and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the relative strengths of the two sides' cases. 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 authority to enter stipulations (of fact, law, or procedure) and 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 a representative, in addition to counsel, who is knowledgeable about the facts of the case and the governmental unit's position. In cases involving insurance carriers, representatives of the insurance companies, with authority, shall attend the evaluation session.

b. Each party shall be accompanied at the evaluation session by the lawyer expected to be primarily responsible for handling the trial of the matter.

c. 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. A party or lawyer seeking to be excused must petition the ENE Magistrate Judge, in writing, and provide a copy to the evaluator, no fewer than fifteen (15) calendar days before the date set for the session. Any such petition should be in the form of a letter, shall set forth all considerations that support the request, shall state realistically the amount in controversy in the case, and shall be accompanied by a proposed order. A party or lawyer who is excused from appearing in person at the session shall be available to participate by telephone.

6. PROCEDURE AT THE EVALUATION SESSION

a. The evaluators shall have considerable discretion in structuring the evaluation sessions. The sessions shall proceed informally. Rules of evidence shall not apply. There shall be no formal examination or cross examination of witnesses.

b. In each case the evaluator shall:

(1) permit each party (through counsel or otherwise) to make an oral presentation of its position;

(2) help the parties identify areas of agreement and, where feasible, enter stipulations;

(3) assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain as carefully as possible the reasoning by the evaluator that supports these assessments;

(4) if the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case;

(5) estimate, where feasible, the likelihood of liability and the dollar range of damages;

(6) help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to posture the case for disposition by other means; and

(7) determine whether some form of follow-up to the session would contribute to the case development process or to settlement.

7. FOLLOW-UP

At the close of the evaluation session, the evaluator and the parties shall discuss whether it would be beneficial to schedule some kind of follow-up to the session.

The evaluator may order limited forms of follow-up, for example (1) responses to settlement offers or demands, (2) a focused telephone conference, (3) exchanges of letters between counsel addressing specified legal or factual issues, or (4) written or telephonic reports to the evaluator, *e.g.*, describing how discovery or other events occurring after the ENE session have affected a party's analysis of the case or position with respect to settlement. If appropriate, the evaluator may order that written follow-up reports be signed not only by counsel, but also by their clients.

With the parties' consent, the evaluator may schedule a follow-up evaluation or settlement session.

8. CONFIDENTIALITY

This Court and all counsel and parties shall treat as confidential all written and oral communications made in connection with or during any Early Neutral Evaluation session. The Court hereby extends to all such communications all the protections afforded by Federal Rule of Evidence 408 and by Federal Rule of Civil Procedure 68. In addition, no communication made in connection with or during any Early Neutral Evaluation session may be disclosed to anyone not involved in the litigation. Nor may any such communication be used for any purpose (including impeachment) in any pending or future proceeding in this Court. The privileged and confidential status afforded to communications made in connection with any Early Neutral Evaluation session is extended to include not only matters emanating from parties and counsel but also evaluators' comments and assessments, as well as their recommendations about case development, discovery and motions. There shall be no communication about such matters between evaluators and judges of this Court. Nothing in this paragraph shall be construed to prevent parties, counsel, or evaluators from responding, in absolute confidentiality, to inquiries by any person duly authorized by this Court to analyze the utility of the ENE program. Nor shall anything in this paragraph be construed to prohibit parties from entering and filing procedural or factual stipulations based on suggestions or agreements made in connection with an ENE session.

9. LIMITS ON POWERS OF EVALUATORS

a. Within limits imposed by this Order or by individual judicial officers of this Court, evaluators shall have authority to fix the time and place for and to structure evaluation sessions and follow-up events. Evaluators shall have no powers other than those described here and in paragraphs 6 and 7 of this Order. Evaluators shall have no authority to compel parties to conduct or respond to discovery or to file motions. Nor shall evaluators have authority to determine what the issues in any case are, or to impose limits on parties' pretrial activities.

b. Evaluators shall promptly report to the ENE Magistrate Judge violations of this Order, including failures to submit timely Written Evaluation Statements or failures to comply with the attendance requirements set forth in this Order.

10. COMPENSATION OF EVALUATORS

ENE evaluators shall volunteer their preparation time and the first four hours of their time in ENE sessions. After four hours of ENE sessions, 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 neutral for additional time at an hourly rate of \$150. The ENE procedure will continue only if all parties and the evaluator agree.

11. ENFORCEMENT

The ENE Magistrate Judge shall conduct evidentiary hearings, make findings of fact, and recommend conclusions of law with respect to alleged violations of this Order. The Magistrate Judge's reports shall be made to the judge assigned to the case in which the violation(s) allegedly occurred. Objections to the Magistrate Judge's report shall be made in writing within ten days after service of notice that the report has been filed.

12. QUESTIONS ABOUT ENE

Please direct any questions about ENE to the ADR Unit at 415/556-3167.

ADOPTED: May 21, 1985
AMENDED: July 22, 1986
AMENDED: August 12, 1988
AMENDED: January 1, 1990
AMENDED: July 1, 1993

FOR THE COURT



CHIEF JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORDER APPOINTING MAGISTRATE
TO SUPERVISE ADMINISTRATION OF
EARLY NEUTRAL EVALUATION PROGRAM

The Court hereby appoints Magistrate Wayne D. Brazil to supervise administration of the Early Neutral Evaluation program and authorizes him to exercise the powers set forth in the General Order that establishes that program.

May 21, 1985

Chief United States District Judge

~~By~~