



Early Neutral Evaluation: Getting An Expert's Assessment

Introduction

The American Arbitration Association (AAA®) is the world's leading provider of alternative dispute resolution (ADR) services. AAA resolution options, which consists of conflict management processes, neutrals and client assistance, is part of a continuum of dispute resolution options available through the AAA. AAA resolution options assist parties to minimize the impact of disputes by resolving them earlier. This guide outlines the Early Neutral Evaluation (ENE) process, including the steps involved from case initiation through resolution, and covers the procedures utilized in ENE cases.

Early Neutral Evaluation: Getting an Expert's Assessment

Early Neutral Evaluation (ENE), the proceedings of which are considered confidential, encourages direct communication between adversarial parties about possible claims and supporting evidence-particularly important in situations where the disputants are far apart in their views on how the law applies to the case in question or what the case is worth.

In these instances, an evaluation of the dispute that seeks to determine best and worst case alternatives can point the way to a negotiated agreement.

When working with the AAA, parties engaging in the ENE process receive access to the AAA's diverse panel of neutrals-experts in their industries or businesses who are able to effectively evaluate the issues in dispute. At the conclusion of the review, the neutral evaluator's non-binding report, which consists of an unbiased opinion of the issues presented, can serve as a catalyst for settlement negotiations, can enhance communication between the parties and can be employed to dispose of specific issues prior to proceeding with other dispute resolution options.

Getting Started with Early Neutral Evaluation

The Early Neutral Evaluation process can be triggered by written agreement in the parties' contract or by mutual agreement if such a settlement procedure is not contemplated by their contract. Once the process has been initiated, the parties are given a list of potential neutral evaluators who possess the required expertise to hear the dispute. The parties then mutually agree to an evaluator.

The evaluator then works with the parties to arrange an appropriate schedule for exchanging initial written statements. Generally, an initial statement describes the substance of the dispute, the parties' views of the critical liability and damage issues, important evidence and any other information that may be useful to the evaluator. The evaluator and the parties also jointly agree to the length and extent of the initial written statements.



The Early Neutral Evaluation Process

At the evaluation, each party presents its claims or defenses and describes the principal evidence on which its claims or defenses are based. The evaluation session is informal and the rules of evidence do not apply. There is no formal examination or cross-examination of witnesses and the presentations and discussions are not recorded. After the evaluation session concludes, the parties may agree to participate in follow-up sessions to further facilitate settlement.

Generally, a written evaluation is rendered approximately 14 days after the evaluation concludes. The parties can seek additional clarification of the evaluation from the evaluator. If all parties stipulate, they may proceed to discussions of settlement or utilize the evaluator as their mediator.

If the parties want to adopt Early Neutral Evaluation as a part of their contractual dispute settlement procedure, they may insert the following Early Neutral Evaluation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by Early Neutral Evaluation administered by the American Arbitration Association under its Early Neutral Evaluation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties wish the option of including the Early Neutral Evaluation process as a part of their contractual agreement to arbitrate any potential dispute, they may use the following provision:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The parties to this contract agree that either party may, within ___ days after the filing of a Demand for Arbitration, demand that the parties' dispute first be submitted to a neutral evaluator pursuant to the American Arbitration Association's Early Neutral Evaluation Procedures prior to proceeding with arbitration.

If the parties wish to utilize the services of an Early Neutral evaluator to resolve an existing dispute that is not covered contractually, they may complete an ADR Submission Form, a copy of which can be found on www.adr.org.

Early Neutral Evaluation Procedures

ENE-1. Initiation of Early Neutral Evaluation

Any party may initiate an Early Neutral Evaluation by sending the AAA the following information:

1. Parties' agreement to Early Neutral Evaluation
2. Names, addresses and telephone numbers of the parties and their representatives
3. Appropriate administrative fee



ENE-2. Appointment of the Evaluator

The evaluator shall be selected by mutual agreement of the parties. To facilitate the selection process, the AAA will make available to the parties a list of individuals to serve as the evaluator. Biographical information on the proposed evaluators will be provided to the parties at the same time.

ENE-3. Qualifications of the Evaluator

No person shall serve as an evaluator in any dispute in which that person has any financial or personal interest in the result of the early neutral evaluation, except by the written consent of all parties. Prior to accepting an appointment, the prospective evaluator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties. Upon receipt of such information, the AAA shall either replace the evaluator or immediately communicate the information to the parties for their comments. In the event that the parties disagree as to whether the evaluator shall serve, the AAA will appoint another evaluator. The AAA is authorized to appoint another evaluator if the appointed evaluator is unable to serve promptly.

ENE-4. Submission and Exchange of Initial Written Statements

The evaluator will work with the parties in setting forth an appropriate schedule for exchanging initial written statements and submitting those to the evaluator. The initial statement describes the substance of the dispute, the parties' views of the key liability and damage issues, key evidence and any other information that may be useful to the evaluator. The evaluator and the parties will decide on the length and extent of the initial written statements.

ENE-5. Evaluation Session

At the evaluation, each party will verbally and through documents or other media present its claims or defenses and describe the principal evidence on which they are based.

The evaluation session is informal and the rules of evidence do not apply. Each party shall have in attendance throughout the evaluation session a representative with settlement authority. There is no formal examination or cross-examination of witnesses and the presentations and discussions are not recorded. After the evaluation session concludes, the parties may agree to participate in a follow-up session if it would be productive or proceed to receive the evaluation.

ENE-6. The Evaluation

Unless the parties and evaluator agree to another timeline, a written evaluation will be rendered within 14 days after the conclusion of the evaluation. The evaluation may also be presented verbally upon the request of any party. After the receipt of the evaluation, the parties can make further inquiry about issues and points made in the evaluation.



ENE-7. Confidentiality

The evaluator shall not divulge confidential information disclosed to an evaluator by the parties or by witnesses in the course of the Early Neutral Evaluation. All records, reports or other documents received by an evaluator while serving in that capacity shall be confidential.

The evaluator shall not be compelled to divulge such records or to testify in regard to the Early Neutral Evaluation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the Early Neutral Evaluation and shall not rely on or introduce as evidence in any arbitral, judicial or other proceeding:

- Views expressed or suggestions made by another party with respect to a possible settlement of the dispute which take place during the Early Neutral Evaluation;
- Admissions made by another party in the course of the Early Neutral Evaluation proceedings;
- Proposals made or views expressed by the evaluator; or
- The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the evaluator.

ENE-8. Applications to Court and Limitation of Liability

- Neither the AAA nor any evaluator is a necessary party in judicial proceedings relating to the evaluation.
- Neither the AAA nor any evaluator shall be liable to any party for any act or omission in connection with any evaluation conducted under this process.

ENE-9. Evaluator Fees and Expenses

The fees and expenses of the evaluator shall be borne equally by the parties, and each party is responsible for its own costs, including legal fees, incurred in connection with the Early Neutral Evaluation. The parties may, however, in their written agreement alter the allocation of fees and expenses.

Administrative Fees

The nonrefundable case set-up fee is \$525 per party. In addition, the parties are responsible for compensating the evaluator at his or her published rate for conference and study time (hourly or per diem).

Early Neutral Evaluation costs are generally borne equally by the parties. The parties may adjust this arrangement by agreement submitted to the AAA in writing.



Before the commencement of the Early Neutral Evaluation, the AAA shall estimate anticipated total cost and each party shall be required to pay its portion prior to the Early Neutral Evaluation session. When the Early Neutral Evaluation has terminated, the AAA shall render an accounting and return any unexpended balance to the parties.

Parties that have filed an AAA Arbitration and then agree to utilize Early Neutral Evaluation will have the ENE fee waived. In addition, the current AAA Arbitration refund schedule will be extended to allow for a 25% refund of the Arbitration fees if the parties resolve their matter prior to the appointment of the arbitrator(s).