NEW YORK-NORTHERN

83.7-4 Selection and Compensation of Arbitrator

(a) **Selection of Arbitrators.**

The Clerk shall maintain a roster of arbitrators qualified to hear and determine actions under this Rule. The Court shall select arbitrators from time to time from applications submitted by or on behalf of attorneys willing to serve. To be eligible for selection, an attorney (1) shall have been admitted to practice for not less than five (5) years; (2) shall be a member of the bar of this Court or a member of the New York bar and reside within the Northern District of New York; and (3) shall either (i) for not less than five (5) years have devoted 50% or more of the attorney's professional time to matters involving litigation, or (ii) have substantial experience serving as a "neutral" in dispute resolution proceedings, or (iii) have substantial experience negotiating consensual resolutions to complex problems. Each attorney shall, upon selection, take the oath or affirmation prescribed in 28 U.S.C. § 453 and shall complete any training that the Court requires.

(b) **Selection of the Panel.**

Whenever an action has been referred to arbitration through consent of the parties pursuant to this Rule, the parties shall nominate the arbitrator or arbitrators whom they select to serve as an arbitrator(s) in full compliance with L.R. 83-7-4 (a), or the Clerk shall promptly furnish to each party a list of arbitrators whose names shall have been drawn at random from the roster for the division in which the case is pending. If the parties have elected to proceed with a single arbitrator, the Clerk shall provide five (5) names for the selection process. If the parties have elected to proceed with a panel of three (3) arbitrators, the Clerk shall provide seven (7) names for the selection process.

1. Each side shall be entitled to strike two names from the list. All parties shall sign the list and return it to the Clerk within fourteen (14) days of receipt. Failure of the parties to timely notify the Clerk of strikes shall result in the Clerk's selection of the panel.

2. The Clerk shall promptly notify the person or persons whom the parties did not strike. If the parties have elected to proceed with a single arbitrator, and the arbitrator selected is unable or unwilling to serve, the process of selection under this Rule shall begin anew. If the parties have elected to proceed with a panel of arbitrators and any person whom they select is unable or unwilling to serve, the Clerk shall select an additional individual at random who shall constitute the third member of the panel. If the Clerk is still unable to form a panel of three arbitrators for any reason, the process of selection under this Rule shall begin anew. When a single arbitrator, or when three of the selected arbitrators have agreed to serve, the Clerk shall promptly send written notice of the membership of the panel to each

arbitrator and the parties.

(c) **Disqualification.**

No person shall serve as an arbitrator in an action in which any of the circumstances specified in 28 U.S.C. § 455 (conflict of interest) exist or in good faith shall be believed to exist.

(d) **Withdrawal by Arbitrator.**

Any person whose name appears on the roster maintained in the Clerk's office may ask at any time to have his or her name removed or, if selected to serve on a panel, decline to serve but remain on the roster.

(e) **Compensation and Reimbursement.**

Arbitrators shall be paid $250.00 per day or portion of each day of hearing in which they participate serving as a single arbitrator or $100.00 for each day or portion of a day if serving as a member of a panel of three (3). Compensation for an arbitrator's services outside of the hearing shall be supported by an affidavit setting forth in detail the time required for pre- and post-hearing matters. When the arbitrators file their decision, each shall submit a voucher, on the form that the Clerk prescribes, for payment by the Administrative Office of the United States Courts of compensation and out-of-pocket expenses necessarily incurred in the performance of their duties under this Rule. No reimbursement shall be made for the cost of office or other space for the hearing.

83.7-5 <u>Arbitration Hearings</u>.

(a) **Hearing date.**

After an answer is filed in a case in which the parties have consented to arbitration and the Court has approved the consent and on completion of the parties' selection of the panel, the arbitration clerk shall send a notice to the attorneys setting forth the date, time and location for the arbitration hearing. The date of the arbitration hearing set forth in the notice shall be approximately five (5) months, but in no event later than 180 days, from the date the answer was filed, except that the arbitration proceeding shall not, in the absence of the parties' consent, commence until thirty (30) days after the Court's disposition of any motion to dismiss the complaint, motion for judgment on the pleadings, or motion to join necessary parties if such a motion was filed and served within twenty-one (21) days after the filing of the last responsive pleading. Motions for summary judgment pursuant to Fed. R. Civ. P. 56 shall be filed in accordance with L.R. 83.7-3(a). The Court may modify the 180-day and twenty-one (21) day periods specified in L.R. 83.7 for good cause shown.

The notice shall also advise the attorneys that they may agree to an earlier date for the arbitration hearing provided the arbitration clerk is notified within thirty (30) days of the date of the notice.

The notice shall also advise the attorneys that they have 120 days to complete discovery unless the Court orders a shorter or longer period for discovery. If a third party has been brought into the action, this notice shall not be sent until the third party has filed an answer.

(b) Upon entry of the order designating the arbitrator(s), the arbitration clerk shall send to each arbitrator a copy of the order designating the arbitrator, a copy of the court docket sheet and a copy of the guidelines for arbitrators. On receipt of the notice scheduling the case to proceed to arbitration and appointing an arbitrator, the plaintiff's attorney shall promptly forward to the arbitrator copies of all pleadings, including any counterclaim or third-party complaint and respective answer. Thereafter, and at least ten (10) days prior to the arbitration hearing, each attorney shall deliver to the arbitrator(s) and to the adverse attorney pre-marked copies of all exhibits, including expert reports and all portions of depositions and interrogatories to which reference shall be made at the hearing (but not including documents intended solely for impeachment).

(c) **Default of a Party.**

The arbitration hearing shall proceed in the absence of any party who, after notice, fails to be present. If a party fails to participate in the arbitration process in a meaningful manner, the arbitrator(s) shall make that determination and shall support it with specific written findings filed with the Clerk. The Court shall then conduct a hearing, on notice to all attorneys and personal notice to any party adversely affected by the arbitrator's determination, and may impose any appropriate sanctions, including, but not limited to, the striking of any demand for a trial de novo which that party has filed.

(d) **Conduct of Hearing.**

The arbitrator is authorized to administer oaths and affirmations and all testimony shall be given under oath or affirmation. Each party shall have the right to cross-examine witnesses, except as otherwise provided. In receiving evidence, the arbitrator shall be guided by the Federal Rules of Evidence. These rules, however, shall not preclude the arbitrator from receiving evidence that the arbitrator considers to be relevant and trustworthy and that is not privileged. A party desiring to offer a document, otherwise subject to hearsay objections, at the hearing shall serve a copy on the adverse party not less than ten (10) days in advance of the hearing, indicating intent to offer it as an exhibit. Unless the adverse party gives written notice in advance of the hearing of intent to cross-examine the author of the document, the arbitrator shall deem that the adverse party has waived any hearsay objection to the document. Attendance of witnesses and production of documents shall be compelled in accordance with Fed. R. Civ. P. 45.

(e) **Transcript or Recording.**

A party may cause a transcript or recording to be made of the proceedings at its expense but shall, at the request of the opposing party, make a copy available to that party at no charge,

unless the parties have otherwise agreed. Except as provided in L.R. 83.7-7(c), no transcript of the proceeding shall be admissible in evidence at any subsequent de novo trial of the action.

(f) **Place of Hearing.**

Hearings shall be held at any location within the Northern District of New York that the arbitrator(s) designates. Hearings may be held in any courtroom or other room in any federal courthouse that the Clerk makes available to the arbitrator(s). When no room is available, the hearing shall be held at any suitable location that the arbitrator(s) selects. In selecting a hearing location, the arbitrator shall consider the convenience of the panel, the parties and the witnesses. The date for the hearing shall not be continued except for extreme and unanticipated emergencies.

(g) **Time of Hearing.**

Unless the parties agree otherwise, hearings shall be held during normal business hours.

(h) **Authority of Arbitrator.**

The arbitrator(s) shall be authorized to make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing before the arbitrator(s). Any two members of a panel shall constitute a quorum; but, unless the parties stipulate otherwise, the concurrence of a majority of the entire panel shall be required for any action or decision.

(i) **Ex Parte Communication.**

There shall be no ex parte communication between an arbitrator(s) and any attorney or party on any matter related to the action except for purposes of scheduling or continuing the hearing.

83.7-6 <u>Award and Judgment</u>

(a) **Filing of Award.**

The arbitrator(s) shall file the award with the Clerk promptly following the close of the hearing and in any event not more than fourteen (14) days following the close of the hearing. As soon as the arbitrator(s) files the award, the Clerk shall serve copies on the parties.

(b) **Form of Award.**

The award shall state clearly and concisely the name or names of the prevailing party or parties, the party or parties against which the award is rendered, and the precise amount of money and other relief, if any, awarded. The award shall be in writing; and, unless the parties stipulate otherwise, the arbitrator or at least two members of a panel must sign the award. No panel member shall participate in the award without having attended the hearing.

(c) **Entry of Judgment on Award.**

Unless a party has filed a demand for a trial de novo (or a notice of appeal which shall be treated as a demand for trial de novo) within thirty (30) days of the filing of the arbitration award, the Clerk shall enter judgment on the arbitration award in accordance with Fed. R. Civ. P. 58. A judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the Court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

(d) **Sealing of Arbitration Awards.**

The contents of any arbitration award made under this Rule shall not be made known to any judicial officer who might be assigned to the case until the Court has entered final judgment on the action or the action has otherwise terminated.

83.7-7 Trial De Novo

(a) **Time for Demand.**

If either party files and serves a written demand for a trial de novo within thirty (30) days of entry of judgment on the award, the Clerk shall immediately vacate the judgment and the action shall proceed in the normal manner before the assigned judge.

(b) **Restoration to Court Docket.**

On a demand for a trial de novo, the Clerk shall restore the action to the Court's docket, trial ready, and the action shall be treated for all purposes as if it had not been referred to arbitration. In such a case, any right of trial by jury that a party otherwise would have had, as well as any place on the Court calendar which is no later than that which a party otherwise would have had, is preserved.

(c) **Limitation on Admission of Evidence**.

At the trial de novo, the Court shall not admit any evidence that an arbitration proceeding has occurred, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding unless

1. The evidence would otherwise be admissible in the Court under the Federal Rules of Evidence; or

2. The parties have stipulated otherwise.

(d) **Arbitrator's Costs.**

The party requesting a trial de novo shall deposit the cost of the arbitrator's services as a prerequisite to the trial. If the requesting party fails to obtain judgment in an amount which,

exclusive of interest and costs, is more favorable to that party, the Clerk shall retain those funds. However, if that party is successful in obtaining a more favorable result, the Clerk shall return the prepaid costs to the party who deposited them.

(e) **Opposing Party's Costs.**

If a party has rejected an award and the action proceeds to trial, that party shall pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the arbitrator's award on that claim. If the opposing party has also rejected that award, however, a party is entitled to costs only if the verdict is more favorable to that party than the arbitrator's award.

1. Actual costs include those costs and fees taxable in any civil action and attorney's fees for each day of trial not to exceed $500.00.

2. For good cause shown, the Court shall order relief from payment of any or all costs.

3. The provisions of L.R. 83.7-7 (d) and (e) shall not apply to claims to which the United States or one of its agencies is a party.

83.7-8 Cases Pending Prior to the Implementation of Arbitration

Notwithstanding the provisions of the Rules set forth above, each district judge shall select cases from the docket currently in process and notify the attorneys involved of the availability of the consensual arbitration program. A case shall qualify for referral to arbitration if it complies with the provisions of this Rule.

83.11-1 Mediation

(a) **Purpose**. The purpose of this Rule is to provide a supplementary procedure to the Court's existing alternative dispute resolution procedures. This Rule provides for an earlier resolution of civil disputes resulting in savings of time and cost to litigants and the Court without sacrificing the quality of justice rendered or the right of litigants to a full trial on all issues not resolved through mediation.

(b) **Definitions**. Mediation is a process by which an impartial person, the mediator, facilitates communication between disputing parties to promote understanding, reconciliation and settlement. The mediator is an advocate for settlement and uses the mediation process to help the parties fully explore any potential area of agreement. The mediator does not serve as a judge or arbitrator and has no authority to render any decision on any disputed issue or to force a settlement. The parties themselves are responsible for negotiating any resolution(s) to their dispute.

83.11-2 Designation and Qualifications of Mediators

(a) **Designation of Mediators.** The judges of this Court may authorize those persons who are eligible and qualified to serve as mediators under this Rule in such numbers as the Court shall deem appropriate. The Court may withdraw such designation of any mediator at any time. Applications for designation as an ADR panel member are available at the Clerk's office.

(b) **List of Mediators.** The Alternative Dispute Resolution clerk (ADR clerk) shall maintain a list of court-approved mediators and make that list available to counsel and the public upon request.

(c) **Required Qualifications of Mediators.**

1. An individual may be designated as a mediator if he or she:

(1) has practiced law for at least five (5) years; and

(2) is a member in good standing of the bar of this Court or of the New York bar and resides within the Northern District of New York; or

(3) is a professional mediator who would otherwise qualify as a special master or is a professional whom the Court has determined to be competent to perform the duties of the mediator and has completed appropriate training in the process of mediation as the Court may from time to time determine and direct; and

(4) shall attend and complete a mediation training course that the Court sponsors. Upon Court approval as a mediator, every mediator shall take the oath prescribed by 28 U.S.C.§ 453.

2. No person shall serve as a mediator in an action in which any of the circumstances specified in 28 U.S.C. § 455 exists, or may in good faith be believed to exist. Additionally, any mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144. Furthermore, the mediator has a continuing obligation to disclose any information that may cause a party or the court to believe, in good faith, that such mediator should be disqualified.

(d) **Removal from the Panel.**

Membership in the ADR Panel is a privilege, not a right, which the Board of Judges may terminate at any time, as it, in its sole discretion may determine.

(e) **Service to the Bar and Court Provided by Mediators.**

The individuals serving as mediators in the Northern District of New York perform their mediation duties as a pro bono service for the Court, litigants and the bar.

83.11-3 Actions Subject to Mediation

(a) The Court may refer any civil action (or any portion thereof) to mediation under this Rule

1. By order of referral; or

2. On the motion of any party; or

3. By consent of the parties

(b) The parties may withdraw from mediation any civil action or claim that the Court refers to mediation pursuant to this Rule by application to the assigned judge at least ten (10) days prior to the scheduled mediation session.

(c) Notwithstanding the provisions of the Rules set forth above, each judge shall select cases from the docket currently pending and notify the attorneys involved of the availability of the mediation program.

(d) The Court may from time to time select cases from its prisoner civil rights docket for judicial mediation on such terms as it deems appropriate.

83.11-4 Procedures for Referral, Selecting the Mediator, and Scheduling the Mediation Session

(a) The parties shall discuss with the Court the possibility and appropriateness of mediation under this Rule at the initial status/scheduling conference of the case that the Court holds in accordance with the provisions of General Order #25.

(b) In every case in which the Court determines that referral to mediation is appropriate pursuant to L.R. 83.11-3, the Court shall enter an order of reference, which shall define the period of time during which the mediation session shall be conducted. The Court intends that mediation under this Rule shall occur at the earliest practical time in an effort to encourage earlier, less costly resolutions of disputes. Referral to mediation under this Rule shall not delay or stay other proceedings, including but not limited to discovery, unless the Court so orders.

(c) Within fourteen (14) days of the order of reference, parties are to select a mediator of their choice from a list of mediators available from the Court and submit the selection to the ADR clerk in the Clerk's office. If the parties do not select a mediator in a timely manner or if the parties cannot agree upon a mediator, the ADR clerk shall select a mediator for them. The ADR clerk shall work with the selected mediator and counsel of record to set a mutually agreeable date for the mediation within the time prescribed in the order of reference.

(d) Mediation sessions under this Rule may be held in any available court space or in any other suitable location agreeable to the mediator and the parties. Consideration shall be given to the convenience of the parties and to the cost and time of travel involved.

(e) There shall be no continuance of a mediation session beyond the time set in the referral order except by order of the Court upon a showing of good cause. If any rescheduling occurs within

the prescribed time, the parties or the mediator must notify the ADR clerk and select the location of the rescheduled hearing.

(f) The parties shall promptly report any settlement that occurs prior to the scheduled mediation to the mediator and to the ADR clerk.

83.11-5 The Mediation Session

(a) **Memorandum for Mediation**. At least two days prior to the mediation session, each party shall provide to the mediator and all other such parties a "memorandum for mediation." This memo shall

1. State the name and role of each person expected to attend;
2. Identify each person with full settlement authority;
3. Include a concise summary of the parties' claims or defenses;
4. Discuss liability and damages; and
5. State the relief sought by such party

The memorandum for mediation shall not exceed five pages, and the parties shall not file these documents in the case or otherwise make them part of the court file.

(b) **Attendance Required.** The attorneys who are expected to try the case for the parties shall appear and shall be accompanied by an individual with authority to settle the lawsuit. Those latter individuals shall be the parties (if the parties are natural persons) or representatives of parties that are not natural persons. These latter individuals may not be counsel (except in-house counsel). Attorneys for the parties shall notify other interested parties such as insurers or indemnitors who shall attend and are subject to the provisions of this Rule. Only the assigned judge may excuse attendance of any attorney, party, or party's representative. Anyone who wants to be excused from attending the mediation must make such request in writing to the presiding judge at least forty-eight (48) hours in advance of the mediation session.

(c) **Good Faith Participation in the Process.** Parties and counsel shall participate in good faith, without any time constraints, and put forth their best efforts toward settlement. Typically, the mediator will meet initially with all parties to the dispute and their counsel in a joint session and thereafter separately with each party and their representative. This process permits the mediator and the parties to explore the needs and interests underlying their respective positions, generate and evaluate alternative settlement proposals or potential solutions, and consider interests that may be outside the scope of the stated controversy including matters that the Court may not address. The parties will participate in crafting a resolution of the dispute.

(d) **Confidentiality.** Mediation is regarded as a settlement procedure and is confidential and private. No participant may disclose, without consent of the other parties, any confidential information acquired during mediation. There shall be no stenographic or electronic record, e.g., audio or video, of the mediation process.

1. All written and oral communications made in connection with or during the mediation session are confidential.

2. No communication made in connection with or during any mediation session may be disclosed or used for any purpose in any pending or future proceeding in the U.S. District Court for the Northern District of New York.

3. Privileged and confidential status is afforded all communications made in connection with the mediation session, including matters emanating from parties and counsel as well as mediators' comments, assessments, and recommendations concerning case development, discovery, and motions. Except for communication between the assigned judge and the mediator regarding noncompliance with program procedures (as set forth in this Rule), there will be no communications between the Court and the mediator regarding a case that has been designated for mediation. The parties will be asked to sign an agreement of confidentiality at the beginning of the mediation session.

4. Parties, counsel and mediators may respond to inquiries from authorized court staff which are made for the purpose of program evaluation. Such responses will be kept in strict confidence.

5. The mediator may not be required to testify in any proceeding relating to or arising out of the matter in dispute. Nor may the mediator be subject to process requiring disclosure of information or data relating to or arising out of the matter in dispute.

6. **Immunity.** Mediators, as well as the Mediation Administrator (ADR clerk), shall be immune from claims arising out of acts or omissions incident to service as a court appointee in the mediation program. See, e.g., Wagshal v. Foster, 28 F. 3d 1249 (D.C. Cir. 1994).

7. **Default**. Subject to the mediator’s approval, the mediation session may proceed in the absence of a party, who, after due notice, fails to be present. The Court may impose sanctions on any party who, absent good cause shown, fails to attend or participate in the mediation session in good faith in accordance with this Rule.

8. Conclusion of the Mediation Session. The mediation shall be concluded

a. By the parties' resolution and settlement of the dispute;
b. By adjournment for future mediation by agreement of the parties and the mediator; or
c. Upon the mediator's declaration of impasse that future efforts to resolve the dispute are no longer worthwhile.

Unless the Court authorizes otherwise, mediation sessions shall be concluded at least fourteen (14) days prior to any final pretrial conference that the Court has scheduled. If the mediation is

adjourned by agreement for further mediation, the additional session shall be concluded within the time the Court orders.

83.11-6 Mediation Report; Notice of Settlement or Trial

(a) Immediately upon conclusion of the mediation, the mediator shall file a mediation report with the ADR clerk, indicating only whether the case settled, settled in part, or did not settle.

(b) In the event the parties reach an agreement to settle the case, the representatives for each party shall promptly notify the ADR clerk and promptly prepare and file the appropriate stipulation of dismissal.

(c) If the parties reach a partial agreement to narrow, withdraw or settle some but not all claims, they shall file a stipulation concisely setting forth the resolved claims with the ADR clerk within five (5) days of the mediation. The stipulation shall bind the parties.

(d) If the mediation session does not conclude in settlement of all the issues in the case, the case will proceed toward trial pursuant to the scheduling orders entered in the case.

83.12-1 Early Neutral Evaluation

The ENE Process. Early neutral evaluation (ENE) is a process in which parties obtain from an experienced neutral (an "evaluator") a nonbinding, reasoned, oral evaluation of the merits of the case. The first step in the ENE process involves the Court appointing an evaluator who has expertise in the area of law in the case. After the parties exchange essential information and position statements early in the pretrial period (usually within 150 to 200 days after a complaint has been filed), the evaluator convenes an ENE session that typically lasts about two hours. At the ENE meeting, each side briefly presents the factual and legal basis of its position. The evaluator may ask questions of the parties and help them identify the main issues in dispute and the areas of agreement. The evaluator may also help the parties explore options for settlement. If settlement does not occur, the evaluator then offers an opinion as to the settlement value of the case, including the likelihood of liability and the likely range of damages. With the benefit of this assessment, the parties are again encouraged to discuss settlement, with or without the evaluator's assistance. The parties may also explore ways to narrow the issues in dispute, exchange information about the case or otherwise prepare efficiently for trial.

The evaluator has no power to impose a settlement or to dictate any agreement regarding the pretrial management of the case. The ENE process, whether or not it results in settlement, is confidential.

3.12-2 Designation and Qualifications of Evaluators

(a) **Designation of Evaluators**. The judges of this Court may authorize those persons who are eligible and qualified to serve as evaluators under this Rule in such numbers as the Court shall

deem appropriate. The Court may withdraw such designation of any evaluator at any time. Applications for designation as an ADR panel member are available at the Clerk's office.

(b) **List of Evaluators.** The ADR clerk shall maintain a list of court-approved evaluators that shall make the list available to counsel and the public upon request.

(c) **Required Qualifications of Evaluators**.

1. An individual may be designated as an Early Neutral Evaluator if he or she (1) has practiced law for at least fifteen years; and (2) is a member in good standing of the bar of this court or of the New York bar and resides within the Northern District of New York; or (3) is a professional whom this Court determines to be competent to perform the duties of the evaluator and has completed appropriate training in the process of Early Neutral Evaluation as the Court may from time to time determine and direct. Upon Court approval as an evaluator, every evaluator shall take the oath prescribed by 28 U.S.C. § 453.

2. No person shall serve as an evaluator in an action in which any of the circumstances specified in 28 U.S.C. § 455 exist or may in good faith be believed to exist. Additionally, any evaluator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144. Furthermore, the evaluator has a continuing obligation to disclose any information which may cause a party or the Court to believe in good faith that such evaluator should be disqualified.

(d) **Removal from the Panel.** Membership in the ADR Panel is a privilege, not a right, which the Board of Judges may terminate at any time, as it, in its sole discretion, may determine.

(e) **Service to the Bar and Court Provided by Evaluators**. The individuals serving as evaluators in the Northern District of New York perform their duties as a pro bono service to the Court, litigants, and the bar.

83.12-3 <u>Actions Subject to Early Neutral Evaluation</u>

(a) The Court may refer any civil action (or any portion thereof) to ENE under this Rule

1. By order of referral;
2. On the motion of any party; or
3. By consent of the parties

(b) The parties may withdraw any civil action or claim that the Court has referred to the ENE Process pursuant to this Rule by application to the assigned judge at least ten (10) days before the scheduled evaluation session.

(c) Notwithstanding the provisions of the rules set forth above, each judge shall select cases from the docket currently pending and notify the attorneys involved of the availability of the ENE Process.

(d) When a case is designated for ENE, the ADR clerk will provide counsel with copies of the judge's designation order, a listing by division of the available early neutral evaluators, and a copy of the ENE procedure guide.

83.12-4 Administrative Procedures and Requirements

(a) In most cases, the Court will issue the ENE order early enough in the pretrial period to allow the ENE session to be held within 150 to 200 days from the filing of the complaint.

(b) When the ADR clerk receives a copy of a judicial order designating a case for ENE, the ADR clerk will give the parties a date by which they must choose an evaluator from the list provided to counsel. If the parties do not select an evaluator by the designated date, the ADR clerk will assign an evaluator with expertise in the subject matter of the lawsuit and notify counsel.

(c) The evaluator will contact all attorneys and set the date and place of the evaluation session. Whenever possible, the evaluator shall hold the ENE session within 150 to 200 days of the filing of the complaint and within forty-five days of the date that the ADR clerk notifies counsel of the identity of the evaluator.

(d) The ADR clerk and evaluators shall schedule ENE proceedings in a manner that does not interfere in any way with the management of case processing or the actions of the referring judge. No party may avoid or postpone any obligation imposed by the order of reference on any ground related to the ENE process.

83.12-5 Evaluation Statements

(a) No later than ten (10) days prior to the ENE session, each party shall submit directly to the evaluator, and shall serve on all other parties, a written evaluation statement not to exceed ten (10) pages excluding exhibits and attachments.

Such statements must:

1. Identify person(s), in addition to counsel, who will attend the ENE session and who have decision-making authority;

2. Address whether the case involves legal or factual issues the early resolution of which might reduce the scope of the dispute or contribute significantly to settlement negotiations; and

3. Identify the discovery that will contribute most to meaningful settlement negotiations.

(b) Parties may also identify persons whose presence at the ENE session might improve significantly the productivity of the session.

(c) Parties shall attach to the evaluation statements, copies of key documents out of which the suit arose (e.g., contracts) or materials that might advance the purposes of the ENE session (e.g.,

medical reports). The parties shall NOT file written evaluation statements with the Court. Evaluation statements are considered confidential between the parties and the evaluator.

83.12-6 Attendance at ENE Sessions

(a) The Court requires parties to attend evaluation sessions. The main purposes of an ENE session are to give litigants the opportunity (1) to present their positions; (2) to hear their opponents' view of the issues in dispute; and (3) to hear a neutral assessment of the strengths of each side's case.

(b) When a party to a case is not a natural person (e.g., a corporation), a person other than the outside counsel who has authority to enter stipulations and to bind the party in a settlement must attend.

(c) In cases involving insurance carriers, company representatives with settlement authority shall attend.

(d) When a party is a unit of the federal government, an agency representative and counsel from the U.S. Attorney's Office must attend the ENE session.

(e) An attorney for each party who has primary responsibility for handling the trial of the matter must attend the ENE session.

(f) A party or attorney may be excused from attending an ENE session only after petitioning the referring judge in writing no fewer than ten (10) days before the scheduled ENE session. Such a petition must show that attendance at the ENE session would impose an extraordinary or unjustifiable hardship.

(g) Default. Subject to the evaluator's approval, the evaluation session may proceed in the absence of a party, who, after due notice, fails to attend. The Court may impose sanctions on any party who, absent good cause shown, fails to attend or participate in the evaluation session in good faith in accordance with this Rule.

83.12-7 Procedures at ENE Sessions

(a) The evaluator has broad discretion to structure the ENE session. The evaluator will determine the time and place of the session and will structure the session and any follow-up sessions. Rules of Evidence shall not apply and there is no formal examination or cross-examination of witnesses.

(b) The evaluator shall

1. Permit each party, or counsel, to make an oral presentation of its position;
2. Help parties identify areas of agreement and enter stipulations, wherever feasible;
3. Assess the relative strengths and weaknesses of the parties' positions and explain the reasons for the assessments;

4. Help parties explore settlement;

5. Estimate, where possible, the likelihood of liability and the range of damages;

6. Help parties develop an information-sharing or discovery plan to expedite settlement discussions or to position the case for disposition by other means; and

7. Determine what, if any, follow-up measures will contribute to case development or settlement (e.g., written reports; telephone reports; additional ENE sessions; or other forms of ADR, such as arbitration, mediation, settlement conference, or consent before a Magistrate Judge).

(c) When an evaluator completes work on a case, the evaluator will, regardless of case outcome, submit an evaluator-assessment form to the ADR clerk.

83.12-8 Confidentiality

Early Neutral Evaluation is regarded as a settlement procedure and is confidential and private. No participant may disclose, without consent of the other parties, any confidential information acquired during the ENE session. There shall be no stenographic or electronic record, e.g., audio or video, of the ENE process.

(a) All written and oral communications made in connection with or during any ENE sessions are confidential.

(b) No communication made in connection with or during any ENE sessions may be disclosed or used for any purpose in any pending or future proceeding in this Court.

(c) Privileged and confidential status is afforded all communications made in connection with ENE sessions, including matters emanating from parties and counsel as well as evaluators' comments, assessments, and recommendations concerning case development, discovery and motions. Except for communication between the assigned judge and the evaluator regarding noncompliance with program procedures as set forth in this Rule, there will be no communications between the Court and the evaluator regarding a case that has been designated for evaluation. The parties will be asked to sign an agreement of confidentiality at the beginning of the evaluation session.

(d) Parties, counsel, and evaluators may respond to inquiries from authorized court staff which are made for the purposes of program evaluation. Such responses will be kept in strict confidence.

(e) The evaluator may not be required to testify in any proceeding relating to or arising out of the matter in dispute. Nor may the evaluator be subject to process requiring disclosure of information or data relating to or arising out of the matter in dispute.

83.12-9 Role of Evaluators

(a) Evaluators may not compel parties or counsel to conduct or respond to discovery or to file motions.

(b) Evaluators may not determine the issues in a case or impose limits on pretrial activities.

(c) Evaluators, and any parties who encounter a problem during the ENE session and have discussed such problem with the evaluator without obtaining a satisfactory resolution of the matter, shall report to the assigned judge any instances of noncompliance with ENE procedures that, in their view, may disrupt the evaluation process or threaten the integrity of the ENE program.

(d) Immunity. Evaluators, as well as the ADR clerk, shall be immune from claims arising out of acts or omissions incident to service as a court appointee in this Early Neutral Evaluation Program.

83.12-10 Early Neutral Evaluation Report

(a) Immediately upon conclusion of the evaluation session, the evaluator shall file a report with the ADR clerk indicating only whether the case settled, settled in part, or did not settle.

(b) In the event the parties reach an agreement to settle the case, the representatives for each party shall promptly notify the ADR clerk and promptly prepare and file the appropriate stipulation of dismissal.

(c) If the parties reach a partial agreement to narrow, withdraw, or settle some but not all claims, they shall file a stipulation concisely setting forth the resolved claims with the ADR clerk within seven (7) days of the evaluation session. The stipulation shall bind the parties.

(d) If the Early Neutral Evaluation Session does not conclude in settlement of all the issues in the case, the case will proceed toward trial pursuant to the scheduling orders entered in the case.