

WISCONSIN – EASTERN

CIVIL L.R. 16 – Pretrial Conferences; Scheduling; Management; ADR

(d) Alternative Dispute Resolution.

(1) Participation. Each judge may conduct an alternative dispute resolution (ADR) evaluation conference during the early stages of case development to determine whether a civil case is appropriate for ADR. This conference may be held in conjunction with a pretrial conference or as a separate conference. If the judge determines that a case is appropriate for ADR, the judge may encourage the parties to participate in ADR before a magistrate judge or an appropriate neutral evaluator.

(2) Exemptions. The following types of cases are exempt from this procedure: administrative proceedings, including all Social Security cases; habeas corpus cases or other proceedings to challenge a criminal conviction or sentence; pro se prisoner litigation; actions by the United States to recover benefit payments or to collect on a student loan guaranteed by the United States; cases in which the only relief sought is an order compelling arbitration or enforcing an arbitration award; actions to enforce or quash an administrative summons or subpoena; proceedings ancillary to proceedings in other Courts; and mortgage foreclosure actions in which an agency of the United States is a secured party.

(3) Confidentiality. The Court, the neutral, all counsel and parties, and any other persons attending an ADR session under these rules must treat as confidential all written and oral communications made in connection with or during any ADR session. Except to the extent otherwise stipulated or ordered, the disclosure of any written or oral communication made by any party, counsel, or other participant in connection with or during any ADR session is prohibited. ADR proceedings pursuant to these rules must be treated as compromise negotiations for purposes of the Federal Rules of Evidence and state rules of evidence.

(4) Early Neutral Evaluation. Early Neutral Evaluation (ENE) is a procedure in which the parties and their counsel, early in the case after an opportunity for limited discovery, meet with a neutral evaluator who is knowledgeable in the subject matter. The purpose is to reduce the cost and duration of litigation by providing an early opportunity for the parties to obtain a neutral evaluation of their case and to engage in meaningful settlement negotiations.

(A) Cases Subject to ENE. Any civil case may be referred to ENE if all parties agree. A case may be selected for ENE at the preliminary pretrial conference held pursuant to Civil L. R. 16(a), or at any other time by stipulation of the parties.

(B) ENE Process. Within 30 days of the case being referred to ENE, the neutral evaluator, an experienced attorney with expertise in the subject matter of the case, hosts a confidential and informal meeting of clients (companies are to be represented by someone knowledgeable about the case and with full settlement authority) and lead counsel at which each side, through counsel, clients or witnesses, presents evidence and

arguments supporting its case (without regard to the rules of evidence and without direct or cross-examination of witnesses). The neutral evaluator identifies areas of agreement, clarifies and focuses the issues and encourages the parties to enter into procedural and substantive stipulations. The neutral evaluator in private prepares an evaluation that includes an assessment of the case, the reasoning that supports the assessment, and, where feasible, an estimate of the likelihood of liability and range of damages. Before the neutral evaluator provides the evaluation to the parties, the parties may engage in settlement discussions facilitated by the neutral evaluator. If settlement does not result, the neutral evaluator will present the parties with the evaluation. The neutral evaluator's evaluation is not shared with the trial judge.

(C) Preservation of Right to Trial. The neutral evaluator has no power to impose settlement. The confidential evaluation is nonbinding. If no settlement is reached, the case remains on the litigation track.

(D) The Neutral Evaluator. The neutral evaluator must have experience in the substantive legal area of the lawsuit. The parties must attempt to agree upon a neutral evaluator. If the parties cannot agree upon a neutral evaluator, the trial judge will appoint an available neutral evaluator. The trial judge may, but is not required to, appoint one of the magistrate judges of this District as the neutral evaluator.

(E) Compensation of Neutral Evaluators. Neutral evaluators volunteer their preparation time and the first four hours in an ENE session. After four hours in an ENE session, the neutral evaluator may either (1) continue to volunteer his or her time, or (2) give the parties the option of concluding the session or paying the neutral evaluator for additional time at 60% of the neutral evaluator's standard hourly billing rate, to be split equally among the parties unless they agree to a different apportionment. The ENE session will continue only if all parties and the neutral evaluator agree. After eight hours in one or more ENE sessions, if all the parties agree that further assistance of the neutral evaluator is desired, the neutral evaluator may charge his or her standard hourly billing rate or such other rate that is acceptable to the neutral evaluator and all parties.

Committee Comment: Civil L. R. 16(a) has been updated to expand the list of topics the parties must be expected to discuss at the Rule 16 conference. Counsel for the parties are expected to have good faith and meaningful discussions of all of the enumerated topics in advance of the Rule 16 conference.

Nothing in Civil L. R. 16(d)(3) prohibits parties from entering into written agreements resolving some or all of the case or entering into and filing procedural or factual stipulations based on suggestions or agreements made in connection with these ADR processes. Any written agreements or stipulations filed with the Court are public records, unless otherwise sealed pursuant to General L. R. 79(d)(4).

Civil L. R. 16(d) has been expanded to include an additional form of alternative dispute resolution (ADR)—Early Neutral Evaluation (ENE)—that each judge is to consider at the ADR evaluation conference held during the early stages of the case. As with other forms of ADR, the judge may encourage and even order the parties to participate in ENE. Unlike some other forms of ADR, which typically take place after substantial discovery has been completed, ENE is intended to occur early in the litigation, before the parties have invested substantial time and resources in the case and before substantial attorney fees have been incurred. ENE is intended to

be inexpensive and is not a substitute for other forms of ADR. It may be used in addition to other forms of ADR that typically occur later in the case.