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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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CLERK, U.S. DIST. COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY OB DEPUTY CLERK

Clerk, U. S. Dist. Court  
Sacramento

RE: EARLY NEUTRAL EVALUATION )  
PILOT PROJECT (Phase I) )

GENERAL ORDER NO. 247

IT IS HEREBY ORDERED that the Early Neutral Evaluation Pilot Project, detailed in the attachment hereto is adopted effective August 14, 1989.

DATED: 7/25/89

Raul A. Ramirez  
RAUL A. RAMIREZ  
U.S. DISTRICT COURT JUDGE

Lawrence K. Karlton  
LAWRENCE K. KARLTON, CHIEF  
U. S. DISTRICT COURT JUDGE

Robert E. Coyle  
ROBERT E. COYLE  
U.S. DISTRICT COURT JUDGE

Milton L. Schwartz  
MILTON L. SCHWARTZ  
U.S. DISTRICT COURT JUDGE

Edward J. Garcia  
EDWARD J. GARCIA  
U.S. DISTRICT COURT JUDGE

Edward Dean Price  
EDWARD DEAN PRICE  
U.S. DISTRICT COURT JUDGE

GENERAL ORDER NO.

REGARDING EARLY NEUTRAL EVALUATION

PILOT PROJECT

1. PURPOSE

The Court recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay the resolution of disputes. There is presently no court mandated procedure that requires the parties to confront the facts and issues in their case before engaging in expensive and time-consuming discovery procedures or that encourages the parties to engage in early discussions of the issues, the views of the opposing side, and the projected costs of future proceedings in an effort to settle the case before costs and attorney fees have made settlement more difficult.

Experience in other federal judicial districts, namely the Northern District of California with "Early Neutral Evaluation," as more specifically described below, has indicated that such a procedure will provide litigants with a means to resolve their disputes expeditiously and at a lower cost. The procedures established by this General Order are designed to establish a pilot project to determine whether the proceedings outlined in this order will provide litigants with a means to resolve their disputes more expeditiously and at a lower cost.

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

Only civil matters shall be eligible for inclusion in the Early Neutral Evaluation Pilot Project (the "Project"). Among civil matters, cases in which the principal relief being sought is equitable shall not be eligible for inclusion in the Program. Suits of the following nature, as designated on the Civil Cover Sheet, shall be eligible for inclusion in the Project: CONTRACT (civil cover sheet categories 110-140 and 160-195, excluding categories 150-153); TORTS (all categories, i.e., 310-385); CIVIL RIGHTS (all categories, i.e., 440-444); LABOR (all categories, i.e., 710-791); PROPERTY RIGHTS (all categories, i.e., 820-840); ANTITRUST, category 410; BANKS AND BANKING, category 430; SECURITIES/COMMODITIES/EXCHANGE, category 850; and ENVIRONMENTAL MATTERS, category 893.

**3. PROJECT ADMINISTRATOR**

The Court has assigned responsibility for administering certain aspects of the Project to the Clerk of the Court (hereinafter referred to as the "Project Administrator"). The Project Administrator will have responsibility for (i) coordinating the selection of cases for the Project with direction from the judges, (ii) providing a copy of this General Order to each eligible Plaintiff, as provided in paragraph 4(a), and (iii) directing the Plaintiff to provide copies to all other parties.

The Court has also asked the ADR Committee of the Sacramento and San Joaquin Valley Chapters of the Federal Bar Association to handle certain other aspects of the Project, including the selection of an Early Neutral Evaluator for each case selected to be included in the Project (as discussed further in Paragraph 5).

**4. ADMINISTRATIVE PROCEDURE**

a. The Project Administrator is hereby directed to provide a copy of this General Order (including the Notice of the E.N.E. Pilot Project, attached hereto as Exhibit A) to all Plaintiffs who are on the calendar selected pursuant to paragraph "d" below. The Notice will order the Plaintiff to provide all other parties with copies of the Notice and General Order. Plaintiff will provide all parties with this material at the time service is effected or, for parties already served, no more than ten days after Plaintiff receives the 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 and this General Order. Each party who has a duty under this paragraph to serve documents on another party shall file proof of service promptly after effecting service.

b. Cases will be selected for participation in the Project randomly (as explained in subparagraph "d" below), within the guidelines of Paragraph 2. If a case is selected for inclusion, that selection will be announced at the initial status conference. Accordingly, the parties should be prepared to address whether their case should or should not be included in the Project at the initial status conference. Cases may be excluded upon a showing of good cause, which may include a showing of undue hardship caused by substantial expense, inconvenience, or travel time if the case is selected for inclusion. Parties are invited to ask that their case be included in the Project.

c. The parties to any case selected for inclusion in the Project may opt out by agreeing to binding arbitration pursuant to Local Rule 252.

d. The random selection referred to above will occur as follows. Ten cases filed during a particular time period will be chosen from each Judge's status conference calendar. The Clerk's Office will provide the necessary materials to the attorneys of record shortly after the answer is filed. Thereafter the cases will be given a random numerical sequence by the project administrator and returned to the respective judge. Then, at the status conference, the court will determine whether each case should or should not be included

in the Project, referring to matters such as the type of case (see Paragraph 2), the parties' preferences, the parties' articulation of good cause for exclusion (see Paragraph 4(b)), and such other matters as the Court deems relevant.

e. Upon selecting a case for inclusion in the Project, the Court may make such orders regarding discovery as it deems appropriate, which orders may include a stay of discovery pending further order of the court. The parties are encouraged not to engage in discovery during the evaluation process, unless it is believed that the noticed discovery will facilitate the evaluation process.

f. At the status conference, the court will determine the number of "sides" in the litigation for the purpose of paragraph 5(a) infra.

## **5. SELECTION OF EVALUATOR**

a. In cases selected for inclusion in the Project, the parties will be given a list of potential evaluators. The number of potential evaluators on the list will be twice the number of "sides" in the litigation plus one. (For example, in litigation having two "sides," the list will contain five names.) The parties will have ten days to select an evaluator and report their selection, in writing, to the Project Administrator or his designee. If the parties are unable to agree on an evaluator, each side of the action may strike up to two of the potential evaluators, doing so by indicating its "strikes" in writing to the Project Administrator or his

designee. Such strikes must be submitted in writing within ten days of the date of the letter notifying the parties of the potential evaluators. The Project Administrator or his designee shall then designate one of the remaining evaluators as the evaluator assigned to the case and shall promptly notify the parties (and the evaluator) of that designation.

b. 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. If a circumstance covered by 28 U.S.C. § 455(a) exists, such as the Evaluator's law firm represents or has represented one of the parties or one of the lawyers who would appear before the Evaluator at the session is involved in a case the Evaluator is handling in his or her private practice, the Evaluator shall promptly disclose to all the parties, in writing, that circumstance. A party who believes that the assigned Evaluator has a conflict of interest shall bring this concern to the attention of the Project Administrator within ten days of learning the source of the conflict or shall be deemed to have waived objection.

c. The date of the Early Neutral Evaluation session will be fixed by the Evaluator after conferring with the parties. The evaluation session will be held as soon as reasonably possible, but in no event more than 90 days after an evaluator is designated, unless otherwise ordered at the initial status conference upon a showing of good cause.

## 6. WRITTEN EVALUATION STATEMENTS

a. No later than seven calendar days in advance of the evaluation session, each party shall submit to the Evaluator, and serve on all parties, a written evaluation statement. Such statements may not exceed ten pages and shall conform to the following guidelines: While they may include any information that would be useful, they must (1) give a brief statement of the facts; (2) identify the pertinent principles of law; (3) identify the legal and factual issues that are in dispute; (4) address whether there are any legal or factual issues whose early resolution might reduce the scope of the dispute or contribute significantly to the productivity of settlement discussions; (5) identify the discovery that promises to contribute most to equipping the parties for meaningful settlement negotiations; and (6) identify the person(s), in addition to counsel, who will attend the session as that party's representative with decision making authority. Parties may identify in these statements persons associated with a party opponent whose presence at the evaluation session would improve significantly the prospects for making the session productive; the fact that a person has been so identified shall not be a sufficient basis for compelling the presence of that person at the evaluation session. Parties should attach to their statement any photographs, declarations or other documentary evidence (e.g., contract, medical reports, relevant photos, or

statements of key witnesses), the availability of which will advance the purposes of the session and assist the Evaluator as well as the other parties in appreciating the merits of each party's case. Documents shall be indexed so that they are easily accessed by the Evaluator.

b. These statements shall not be filed with the Court, and the assigned judge shall not have access to them.

#### **7. 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, opposing parties' versions of matters in dispute. A party other than a natural person (e.g., a corporation, association, partnership, unit of government, etc.) satisfies this attendance requirement if it is represented at the session by a person or persons (other than outside counsel) with reasonable settlement authority and authority to enter stipulations. In cases involving insurance carriers, an adjuster with reasonable settlement authority shall also be present at the evaluation session. In cases in which a government agency is a party, it will be sufficient for the agency to be represented at the E.N.E. session by an attorney who has authority either to settle or to recommend settlement.

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. The evaluation session shall be held in a suitable, neutral setting, e.g., at the office of the Evaluator.

**8. PROCEDURE AT THE EVALUATION SESSIONS**

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 to make an oral presentation;

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

(3) assess strengths and weaknesses of the parties' contentions and evidence; and

(4) explore the possibility of settling the case through private caucusing and mediation techniques such as:

(i) Draw each party out in private caucus as to their opinion of their chance of success on each important issue, the consequences of an unfavorable verdict on that issue to the value of

their case, the number of witnesses needed to be deposed regarding that issue, and the cost and fees entailed in proving that issue through discovery and the trial; and

(ii) Draw each party out on settlement offers they are willing to make at this time and whether that offer can be communicated to the opposing party.

c. If settlement negotiations and mediation do not result in settlement, the Evaluator shall:

(1) estimate, where feasible, his or her view of the likelihood of liability and the dollar range of damages;

(2) give his or her opinion of the verdict if he/she were the trier of fact; and

(3) help the litigants 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 another session or other form of disposition.

d. At the close of the evaluation session, the Evaluator shall determine whether it would be appropriate to schedule some kind of follow-up to the session. While the nature of any such follow-up shall be fixed by the Evaluator, in his or her discretion, it might include written or

telephonic reports by the parties to one another or to the Evaluator, or, if the parties consent, a second evaluation session or a settlement conference hosted by the Evaluator.

e. Within 30 days following the evaluation session, the evaluator shall advise the court, via a letter directed to the Project Administrator, whether the case has settled and, if not, whether a follow-up session is scheduled. In so advising the Court, however, the evaluator shall not report any of the substantive matters discussed in the evaluation.

#### **9. CONFIDENTIALITY**

This Court shall treat as absolutely confidential all written and oral communication made in connection with or during any Early Neutral Evaluation session. The court hereby extends to all such communications all the protections federal courts and Federal Rule of Evidence 408 give to communications made in settlement negotiations or as offers of compromise. In addition, no communication made in connection with or during any Early Neutral Evaluation session may be disclosed (by either the parties, their counsel, or the evaluator) or used for any purpose (including impeachment or to prove bias or prejudice of a witness) in any pending or future proceeding in this court. The privileged and confidential status afforded to communications made in connection with or during any Early Neutral Evaluation session is extended to include (but not limited to) the Evaluator's comments, assessments,

evaluations, and recommendations about case development, discovery, or motions. Evaluators shall not discuss matters addressed at the evaluation session outside the proceedings, except with the permission of the parties or as necessary to facilitate an evaluation of the Pilot Project.

Nothing in this paragraph shall be construed to prevent parties, counsel, or Evaluators from responding, in absolute confidentiality, to inquiries by the independent analyst who is assessing the value of this Project under paragraph twelve (12) of this Order. The analyst shall preserve the confidentiality of the sources of such responses.

#### **10. 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 structure and conduct evaluation sessions and to fix the time and place thereof. Except as described here and in paragraph 8 of this General Order, Evaluators shall have no authority to order parties or counsel to take any action outside the evaluation session, to compel parties to produce information, to rule on disputed matters, or to determine what the issues are in the case.

b. Evaluators shall promptly report 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, to the magistrate assigned to the case.

**11. ENFORCEMENT**

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

**12. MONITORING AND ANALYSIS**

a. The Court shall monitor the operation of the Project established by this General Order, which shall remain in effect until modified or withdrawn.

b. The Court also has arranged to have faculty from the McGeorge School of Law, University of the Pacific, conduct an analysis of the effects and utility of this Project. These analysts shall collect data and opinions from parties, counsel, and Evaluators who participate in the Project but shall not disclose, to the Court or to any other person, the source of any such data or opinions.

ADOPTED:

AMENDED:

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Wendell H. Williams, R. Martinez  
U. S. District Court  
Eastern District of California

United States District Court  
Eastern District of California  
Sacramento, California

(Letter to Plaintiff or removing Defendant before case selected for Early Neutral Evaluation so that selection will not be total surprise and parties can commence preparation)

Re: \_\_\_\_\_  
(Case Title and Civil No.)

Dear (Plaintiff/Removing Defendant):

This is to advise you that your case is eligible for inclusion in the Eastern District's Pilot Project for Early Neutral Evaluation. You are directed to provide a copy of this letter and General Order No. \_\_ to all other parties to this action either upon service or, if service has been made, within ten days of your receipt of the order.

During the Pilot Project, the court will select cases which meet the general eligibility requirements for inclusion in the Project (see paragraph 2 of General Order No. \_\_\_\_). However, this is not a notice that your case has been selected for early neutral evaluation.

The purpose of Early Neutral Evaluation is to help parties reduce the cost of litigation. Toward this end, the Project gives litigants an early opportunity to present their

case to a neutral lawyer with considerable experience in the relevant subject area, to see a comparable presentation by their opponent, to learn how the neutral lawyer assesses the relative strengths and weaknesses of the parties' positions, to discuss early settlement, and, if no settlement can be reached, to develop a streamlined discovery plan that will produce efficiently the information the parties need to explore the settlement possibilities more thoroughly.

The selection of cases for participation in the Pilot Project will occur at the initial status conference. Accordingly, the parties are asked to address the issue of whether their cases should be included in or excluded from the Pilot Project in their status conference reports. Parties are encouraged to request inclusion in the Pilot Project. Cases may be excluded upon a demonstration of good cause.

There are a few important points that should be highlighted. If your case is selected for Early Neutral Evaluation:

1. You and your client will be required to attend the evaluation session in person.
2. There is no charge of any kind for the service this Project provides.
3. You should limit your pre-evaluation discovery to matters essential to making the evaluation session meaningful because one of the purposes of ENE is to save the parties some of the costs of discovery.

4. You will be required to submit a written statement to the evaluator (and to send a copy to opposing counsel) no less than 7 calendar days before the date set for the session.

5. At the evaluation session you and/or your client will be expected to make a short (perhaps 15-30 minutes) informal presentation of your side of the case, supporting your position with documents to the extent practicable.

6. All written and oral statements made in connection with the evaluation session are absolutely confidential and cannot be used in trial for any purpose. The evaluator will not communicate with the assigned judge about the merits of the case or about what occurred at the evaluation session (see paragraph 9 of General Order No. \_\_\_\_).

7. After the parties present their case and answer questions, the Evaluator will explore settlement by caucusing with the parties, communicating offers and counter offers, and utilizing mediation techniques to get the parties and their attorneys to focus on their chances of success on legal and factual issues, to quantify that chance of success, and to assess the costs of continuing to litigate unresolved issues.

8. If settlement efforts fail, the Evaluator will give his/her opinion of each party's chance of success, the range of damages, and his/her opinion of the probable outcome if the case were tried.

9. The Evaluator's assessments and recommendations will be purely advisory; they will not be communicated to the court and can have no binding effect on discovery, motion practice, or other aspects of preparation for trial. Only the assigned judge can control these matters.

If your case is selected for the E.N.E. Pilot Project, you will be notified at the initial status conference.

Sincerely,

Lawrence K. Karlton *or other assigned judge*  
Chief Judge

[Also to be signed by the Fresno-based judges for cases out of the Fresno division]