

How to Prepare for an Early Neutral Evaluation Conference in Federal Court in the Southern District of California

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After three years working as a judicial law clerk in federal court in San Diego, let me tell you, I saw plenty of attorneys who had absolutely no idea what they were doing. In their defense, litigating in federal court can be *hard*, man. I get it. Especially if you are used to practicing in state court and all of a sudden you are thrown into this new arena where the rules are sort of the same — but also sort of different — and you are expected to know how to play by all of them.

There are plenty of things I don't know how to do as a lawyer. But, after working for the court I know how to do two things well. First, I can research and write my butt off (thus my affiliation with Inter Alia Lawyers as a freelance attorney providing legal research and writing services to other attorneys on a project-by-project basis). And second, I know how the federal court in San Diego operates in civil cases. The purpose of this series of articles is to provide some insight into how federal court differs from state court in San Diego, do's and don'ts, and lessons learned from my experience, which will hopefully help you become a better lawyer and a better advocate for your clients. Subsequent articles will address case progression in federal court, what to expect at settlement conferences, and how to handle discovery issues, to name a few.

This article covers the how you pregame for the first settlement conference in a civil case, typically called the early neutral evaluation conference (or the “ENE,” if you know cool court slang). So, let's get into it.

The first settlement conference

The formal settlement process starts when you open your e-mail inbox and you have a court order from the judge telling you that you need to come in for the early neutral evaluation conference. If your immediate reaction is “What the hell is this?” you are not alone. Plenty of attorneys have asked me the same question. Basically, the ENE is the court-ordered opportunity to mediate your case with a federal judge, for free. It's actually a really great service that the Southern District of California offers, so don't let it scare you. You get the benefits of mediation, without having to pay for it.

At the ENE, all the attorneys and all the litigants in your case are going to be put in a room together and the judge is going to try to settle the case. The vast majority of ENE's are in-person, but every once in a while one may be held telephonically. An in-person conference may be slotted to last anywhere from an hour to an entire morning or an entire afternoon. To get a better feel for exactly how long the conference might last, check the judge's calendar on the court's web site (usually posted a few days in advance) to see if another hearing or conference follows yours.

The ENE is the first settlement conference you have with the court. The court sua sponte sets it once the answer has been filed. Many attorneys mistakenly call all settlement conferences with the court “ENE’s.” But, only the first conference should technically be called the “ENE.” Subsequent conferences are more properly referred to just as “settlement conferences.”

The ENE notice

The ENE notice you receive via e-mail will tell you (1) when the ENE will be held and (2) a bunch of rules for the ENE. YOU NEED TO READ THE ENE NOTICE CAREFULLY. Many, many attorneys do not and it causes major problems, as you’ll see below.

Of crucial importance, the ENE notice will tell you who you need to bring to the conference. If your client is an individual, you will probably need to bring him or her. If your client is a company, you will need to bring the correct client representative (in accordance with the ENE notice) and a claims adjuster if an insurance company is involved. The proper client representative (1) knows all the fact of the case and (2) has the full and unlimited authority to settle. The president or CEO of a company is usually a safe bet. Corporate counsel is usually *not* an acceptable representative. The ENE notice will be very clear about who needs to be there, but if you have questions you can call the court and ask. Unlike in Los Angeles, in federal court in San Diego you can call each chambers and ask questions of the judicial staff.

I can’t tell you how many times the judge and I would be ready to start to start the conference only to find out that one side didn’t bring the right client or client representative. In such circumstances, the court staff collectively groans. If you don’t bring the correct client representative in accordance with the ENE notice, (1) you have violated a court order and can be sanctioned, (2) the individuals best suited to answer factual questions and/or agree to a settlement are probably not in attendance, thus severely hampering any prospect of settlement, and (3) you’ve likely angered opposing counsel who presumably read the ENE notice, went to the trouble of finding the right client representative, and persuaded them to get off work and come to the ENE.

If you don’t bring the right person the judge may decide to immediately adjourn the conference and issue an order to show cause why sanctions should not be imposed against you for failing to follow the court’s order. Assuming the other side brought the right clients, you may end up having to pay (1) the costs incurred by opposing counsel and their clients in traveling to San Diego and (2) the attorney’s fees incurred in preparing for and attending the conference. Let me tell you, it’s not pretty. Read the ENE notice.

ENE briefs

When I clerked, the question I was asked most frequently was, “Do I need to provide an ENE (or settlement conference) brief?” The answer varies by chambers and type of case, so it is not a stupid question to ask. In some scenarios, briefs will be mandatory. In others, a brief may be merely optional. The answer to this

question can usually be found in either the ENE notice or in the chambers rules (available on the court's web site).

If you do decide to submit a brief it should be lodged, not filed. The second most frequently asked question of me when I was a judicial law clerk was, "How do I lodge something?" "Lodging" can be done by either (1) e-mailing it to the court or (2) dropping off a hard copy at chambers (the latter is usually preferable if the brief is long or has lengthy exhibits). "Lodging" is simply a means of providing the court with a document without filing it on the docket. The e-mail address for chambers can usually be found on the court's web site, the CM/ECF homepage, or in the chamber's rules.

If you are not given a deadline to lodge a settlement conference brief, usually 2-3 days before the conference is adequate. If you submit a brief too far in advance it may not reference recent settlement discussions that the judge will probably want to know about. Your settlement conference briefs should not be more than a few pages – just long enough to brief the judge on the facts, the legal arguments, any recent settlement discussions, and any other information you might want the judge to know. If your brief contains sensitive information, you may mark it as confidential.

How to pregame

Ok, so you have read the ENE notice multiple times, you have the right client lined up to appear, and you e-mailed your 5-page brief to chambers. Now you need to do your homework to get ready for the ENE itself. How do you prepare?

Know the facts like the back of your hand

At the ENE, the judge is probably going to ask you a lot of factual questions. In doing so, he is exploring the strengths and weaknesses of your case. Review the facts of the case ahead of time so that you know them inside and out. Bring all notes and supporting documents with you. We had one attorney show up for a conference literally with one pencil and nothing else. He was, as you might imagine, miserably ill prepared in all facets of the case.

Because the ENE is the first settlement conference, it is understandable if you don't have a great response to every legal question the judge asks you. It's less understandable if you don't have a good handle of the known universe of facts.

Reach out to opposing counsel prior to the ENE

The judge will usually start the conference by asking if the parties have engaged in any settlement discussions prior to the ENE. If you want to look like you have it together, you should talk to opposing counsel about settlement before coming in for the ENE. Although it seems like a small thing, to be able to say "We offered X, and they countered at Y," shows that you have put some thought into the conference and are ready

to get rolling on a settlement. It gives the judge a jumping off point for negotiations and creates a bracket to work from. The pre-ENE negotiations do not need to be elaborate by any means. The simple act of reaching out to opposing counsel beforehand, in my opinion, always created a much more productive conference and reflected well on the attorneys.

Discuss numbers with your client beforehand

And at a very minimum, you should talk to your client about a settlement range and an opening offer before coming in. It was always cringeworthy when the judge would ask one side for their opening offer, only for the attorney to say that he needed to confer with his client first. ENE's are usually set weeks (if not months) in advance, so there really is no excuse for failing to talk to your client about an opening offer ahead of time.