

The Upshots of Using Early Neutral Evaluation in Pre-Discovery of Documents in Complex Civil Litigation

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ABSTRACT

The preparation of complex cases are challenging to parties to the action and their counsels. Observably, the complexity of a case and the inability to manage it effectively make the successful conduct of discovery of documents difficult. Thus, the main purpose of this study is, firstly; to identify the impediments to formal discovery of documents in complex civil litigation; and secondly; to discover the effects of using Early Neutral Evaluation in pre-discovery of documents in complex civil cases. This study relied on a doctrinal analysis method in analyzing related literature (including procedural laws and case reports from Malaysia and England) apart from procedural rules regulating the use of Early Neutral Evaluation in selected courts in the United States) on Early Neutral Evaluation, discovery and civil litigation in general. This study found that subject to certain modification of any local procedural rules in a jurisdiction, Early Neutral Evaluation is theoretically a viable mechanism to be integrated into the civil court system to counter obstacles in discovery of documents in complex civil litigation.

1. Introduction

The process of gathering evidence generally involves four (4) pre-trial procedures, namely discovery, inspection of documents, interrogatories and admissions (Hamid, 2012a). Discovery of documents involves the process of gathering information in the form of documents from the adversary party (Duryana, 2008a). If properly done, it can ease the process of elucidation of facts and dispenses off with the necessity of adducing evidence on matters which have been duly admitted by the parties. However, in the early life of a complex case, parties to the action (even with the assistance of their counsels) usually failed to identify the midpoint of their dispute and to comprehend the facts and relevant laws governing its disposal. Such failures, if not checked, often lead to the filing of unproductive discovery that does not serve the very purpose it was introduced as a procedure for gathering documents. To counter this problem, Skinner (2011a) suggests the use of Alternative Dispute Resolution mechanism (ADR) because it promotes "judicial economy". As indicated by Gates (2008), a systematic approach to case evaluation is essential in a dispute resolution programme. In this connection, commentators such as Maycock (2001a) and Engro and Lenihan (2008a) suggest the use of Early Neutral Evaluation (ENE), an evaluative ADR mechanism, to resolve "complicated and unusual cases". In spite of the suggestion, there is little research done to confirm whether in complex civil cases, the neutral evaluator is capable of guiding parties to the action in identifying the midpoint of their dispute and eventually to narrow down the issues in discovery. Thus, this article made an attempt to identify the perceived potentials of using ENE in pre-discovery of complex civil cases.

2. Theoretical Framework of Early Neutral Evaluation and Discovery

2.1 Early Neutral Evaluation

ENE is a court programme that was pioneered in the United States by the United States District Court for the Northern District of California (NDCA) in the 1980s (Brazil, 1990a). It is now a court programme in not less than 20 states in the United States. Lande (2008a) reports that ENE in civil cases have had been given a favourable assessment. The United States District Court District of Vermont 2012 Early Neutral Evaluation Program 2012 Annual Report (January 1, 2012-December 31, 2012) disclosed that out of the 89 ENE conferences held, 36 (40%) resulted in no settlement; 49 (55%) resulted in full settlement; and 5 (5%)

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resulted in partial settlement. Overall, most parties to the action believed that the programme is “...very helpful.”

Wissler (2004) in her summary of empirical research concluded that ENE cases slightly less likely to proceed to trial *albeit* there were no differences in measuring costs or time before resolution. Garay (2012) mentions that the main advantages of ENE include but not limited to reducing discovery, getting to know about a dispute much earlier, allowing free participation, obtain more information about a case early and the ability to evaluate the “strengths and weaknesses of evidence and legal issues and pave way to discussion about settlement. Engro and Lenihan (2008b) describe ENE as evaluative process which is not intended solely for settlement purpose but is capable of designing better ways to manage cases more efficiently. They based their assumption on the argument that the purpose of mediation is not similar to ENE. This is because mediation’s purpose is to encourage the parties to reach settlement. In contrast, the purpose of ENE is not limited to settlement alone but extends to clarification of their dispute with the help of an expert third party neutral. In the Minnesota State Supreme Court, Rule 14, developing planning (a feature of ENE) is emphasised, whereby ENE is defined as a conference which involves “attorneys who will present the core of the dispute to a neutral evaluator in the presence of the parties. This occurs after the case is filed but before discovery is conducted. The neutral then give an assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral helps to narrow down the dispute and suggests guidelines for managing discovery”.

2.2 Discovery

In England, there is an existing provision on discovery. It is known as ‘disclosure’ under Part 31 of the Civil Procedure Rules 1998. Notably, neither the Rules of Court 2012 nor the Civil Procedure Rules 1998 defines the meaning of discovery. Despite the fact that there is no specific definition, discovery is explained as the “process of finding out material facts, and documents from an adversary in order to know and ascertain the nature of the case or in order to support his own case or in order to narrow the points in issue or to avoid proving material facts” (Hamid, 2012b). In Malaysia, under Order 24 of the Rules of Court 2012, discovery is described as a process which involves the gathering of key facts and evidence throughout the pre-trial process by parties to the action or their counsels. Discovery of documents can be a complicated affair for it involves discovery of documents that exists or has once been known to have been in existence. Rule 7 of the Rules of Court 2012 speaks of the Court order for discovery of particular documents whereas rule 12 of Order 24 of the Rules of Court 2012 speaks on order for production to Court any document in a person’s possession, custody and power. Part 31 of the Civil Procedure Rules 1998 is similarly worded to that of the Malaysian rules 7 and 12 of Order 24 of the Rules of Court 2012. Obviously, both jurisdictions generally allow a party to disclose to the other party the relevant documents he seeks to rely upon in the trial. This may include the disclosure of documents classified as “confidential” if they are related to the dispute in question. Under Order 24 of the Rules of Court 2012, a party can seek discovery by way of application to the Court during the pre-trial case conference.

2.3 Complex Case

The word “complex” is not defined under the interpretation clause of the Rules of Court 2012 or the Civil Procedure Rules 1998. Nevertheless, Chapter 5, Rule 3.400 of the Reorganised California Rules of Court 2007 define a “complex case” as an action that “requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel”. Further, paragraph (b) of Rule 3.400, Reorganised California Rules of Court 2007 specifies factors that the court must consider in determining whether a case should be classified as complex or otherwise. These factors are: (i) numerous pre-trial motions involving difficult or novel legal issues; (ii) involving large number of witnesses or documentary evidence; (iii) the existence of a large number of “separately represented parties”; (iv) coordinated action with one or more courts in other counties, states, or counties or in a federal court; or (v) substantial post judgment judicial supervision.

Under the Reorganised California Rules of Court 2007, cases can also be provisionally designed as complex cases if they involve one of more of the following types of claims: (i) antitrust or trade regulations claims; (ii) construction defects claims involving many parties or structures; (iii) Securities claims or investment involving many parties; (iv) environmental or toxic tort claims involving many parties; (v) claims involving mass torts; and (vi) claims involving class actions; or insurance coverage claims (paragraph (c) of Rule 3.400). Skinner (2011b) states that certain cases which are inherently complex are Industrial disease claims or

clinical negligence claims. Brazil (2012) avers that ENE provides a cost-effective method to discovery and pretrial motions, and even settlement. However, not much is known as to whether ENE is effective in complex cases. Engro and Lenihan (2008c) suggest that ENE should be considered for “complicated and unusual cases” that involve diversified issues of facts and law, uncertain damage issues, perplexing evidentiary issues, or cases that require expert opinion.

The National Centre for State Courts in the United States describes a case as complex in nature if it carries the following features: “multiple parties, multiple attorneys, geographically dispersed plaintiffs and defendants, numerous expert witnesses, complex subject matter, complicated testimony concerning causation, procedural complexity, complex substantive law, extensive discovery, choice of law, requisites of a class-certification order, complex damage determinations, diversity, and res judicata implications for plaintiffs not within the proposed class.” (The National Centre for State Courts in the United States, 2014). Thus, complexity in litigation is believed to be closely linked to issues on parties, legal representation, evidence and legal procedure.

3. Circumstances That Impedes Effective Discovery of Documents

Discovery may, at times become unproductive or inappropriate, and at times, does little to assist the courts and parties to the action (or their counsels) in the disposal of cases. Some identified impediments to discovery are mentioned below:

3.1 Attempts to Stay Discovery in Complex Cases is Subject to Court’s Discretion

In the United States, evidence had shown that attempts to stay discovery had either not been successful or were subjected to strict consideration on case per case basis. Examples are as follows:

(a) In *Landis v N. Am. Co.*, 299 (US.248, 254-255, 57 S.Ct.163, 81 L.Ed.153(1936), the court held that the power of the court to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. (at p.3);

(b) In *Carrie Fancher (Jayne), Plaintiff v. Bank of America, N.A., Defendant.* (2012 U.S. Dist. LEXIS 150834), Kathleen M. Tafoya, United States Magistrate Judge handed down the decision of the court as follows:

While the court declines to stay discovery, it will grant the parties’ alternative request for an extension of the expert disclosure and discovery deadlines. The court notes that the parties have requested an early neutral evaluation and, based on that request, the court has directed the parties to submit confidential position statement to the court on or before October 18, 2012. (Doc.No.52.). The court (*7) finds that the possibility that an early neutral evaluation may foster a resolution of this matter constitutes good cause for the proposed extension of these deadlines. (at p. 6).

(c) In *String Cheese Incident*, 2006 (U.S. Dist. LEXIS 97388, 2006 WL 894955, at p.2) (citing *FDIC v. Renda*, (U.S. Dist. LEXIS 8305, 1987 WL 348635, at 2), the court held that in considering a stay of discovery, the following factors are taken into consideration: “(1) the plaintiff’s interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of person not parties to the civil litigation; and (5) the public interest.”

3.2 Documents That Are Discoverable Must Correlate to Content of Pleadings

In general, the gathering of key facts must be within what has been averred in the pleadings. In England, the issuance of the claim form must be accompanied by the particulars of a claim. Similarly, in Malaysia, the issuance of the writ of summons must be accompanied by a statement of claim. Authoritative English decisions have routinely recognized and clearly illustrated the importance of observing the fundamental rules of drafting pleadings: *Shaw v Shaw* (1954) 2 Q.B.429,441; where Lord Denning, M.R. observed that every pleading must state facts and not law, thus bad pleadings disclose no cause of action; same principle applied

in earlier case of *Rassam v Budge* (1893) 1 QBD 57.1 ; *Bruce v Odham Press Ltd* (1936) 1 K.B. p 712., per Scott L.J. who observed that every pleading must state the material facts only that are used to formulate the cause of action; *Williams v Wilcox* (1838) 8 A & E p. 331. (per Lord Denman C.J. who observed that every pleading must state facts and not the evidence sustaining such facts by which they are to be proved. Notwithstanding clear court guidelines on pleadings, it is common to note that many critical pleadings, especially statement of claims and defences were found to be not in compliance with drafting guidelines on court documents. This neglect has far-fetching consequences to any party to the action if he intends to file an application for discovery in the near future. This is because the averments and rebuttals mentioned in the pleadings must correlate with the documents on which a party relies, or adversely affect his own case or the other party's case; or support the other party's case.

3.3 Discovery in Electronically-Stored-Information (ESI) is Complex and Costly

Disclosure of documents termed as electronically stored information (ESI) in a discovery process include e-mails, word processed documents, data bases, metadata and even deleted files (Duryana, 2012b). In England, discovery (or disclosure as is commonly known) is considered as one of the most expensive and time consuming aspect in the civil litigation process especially now that e-mail and ESI have now been universally used in global transactions (Bell, 2009). Thus, active case management must include the role of the Court in controlling the nature and extent of discovery of documents between the parties to the action. This is vital to ensure that discovery is proportionate to the issues raised in the action (see decision in *Crossley v Crossley* [2007] E.W.C.A. Civ. 1491). However, if discovery is court-controlled, not much information can be expected. Further, s2A.2 and s2A.3 of the Practice Direction to Part 31 of the Civil Procedure Rules 1998 stipulates that parties must discuss about searches and preservation of e-documents prior to the hearing of the first case management conference. Rule 31.22 of the Civil Procedure Rules 1998 also stipulates rules on the use of e-documents in disclosure (discovery) process. Unfortunately, inexperience or the "not-so-technology-savvy counsel" may find it difficult to comprehend matters relating to the preservation of e-data or discovery of personal data.

3.4 Difficulty in Identifying Relevant Documents in Complex Cases

Hamid (2012c) reminds that discovery is not a matter of right but is one which is within the court's discretion. In Malaysia, under the repealed Rules of High Court 1980, discovery was granted automatically within fourteen (14) days after the close of pleadings (Order 24 rule 1 (1) and r (2) of the Rules of High Court 1980). However, under the current Rules of Court 2012, it is now court ordered upon successful application by a party to the action (Order 24 rule 8 of the Rules of Court 2012) and is usually dealt with at the first case management date. Part 31.6 of the Civil Procedure Rules 1998 (which bears a striking similarity with Order 24, rules 7 and 12 of the Rules of Court 2012) stipulates that a party to the action may be ordered to disclose only: (a) documents on which he relies; and (b) the documents which - (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case; and (c) the documents which he is required to disclose by a relevant practice direction.

The guide for testing the relevancy of documents for discovery is best illustrated in the authoritative case of *Compagnie Financier du Pacifique v Peruvian Guano Co*, (1882) 11 QBD 55, where Brett LJ observed:

The documents to be produced are not confined to those which would be evidence either to prove or to disprove any matter in question in the action;...It seems to me that every document relates to the matters in question in the action which it is reasonable to suppose contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.

Unfortunately, in a complex case, it is difficult for a party to the action to: (i) ascertain the documents that are actually in the care, custody or power of his adversary; (ii) identify the documents that might strengthened his position; or (iii) identify the documents that might not strengthened his position but might throw some light to the disposal of the case. There a various possibilities to such critical state such as inability of counsels to manage voluminous documents and inability to comprehend complex facts and laws or legal arguments.

3.5 In Certain Situations, Discovery Can Be Deemed As Abuse of Court Process

Gurmit Kaur (2001a) explains that in general, the functions of discovery are as follows:

- a) To provide the parties with relevant documentary materials prior to trial to enable them to appraise the strength and weaknesses of their cases;
- b) To provide the basis for the fair disposal of the proceedings prior or at the trial;
- c) To enable the parties to use before the trial or adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against them;
- d) To eliminate the element of surprise at or prior to the trial, relating to documentary evidence; and
- e) To reduce the costs of litigation.

Unfortunately, discovery could also be used to prolong, harass, persuade the other party into either financial exhaustion or early settlement. This observation was made by Menzies, J. in the case of *Mulley v. Manifold* (1959) 103 CLR 341, at p 345 as follows: "Discovery is a procedure directed towards obtaining a proper examination and determination of these issues – not towards assisting a party upon a fishing expedition. Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to train of inquiry which would, either advance a party's own case or damage that of his adversary."

3.6 Discovery Involves a Cumbersome Three-Step-Process

The Discovery process involves a three-step-process. It begins with disclosure, inspection and taking of copies and production of documents (Gurmit 2001b). The court would make an order of discovery unperturbed by the fact that producing voluminous numbers of documents is complex (*Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd* [1981]1 MLJ 105). Such disclosure is essential to enable them to appraise the strength and weaknesses of their cases. In theory, it is the legal duty of each party to the action to disclose any documents in their possession or control which are relevant to the issue in the action. There are certain documents which are categorized as "privilege documents". On the hearing of an application for discovery, the court will only order discovery if it is satisfied that discovery is necessary. The court may in its discretion dismiss or adjourn the application or refuse to make such order by reason of either for disposing fairly of the case or for saving costs (Order 24 rule 8 of the Rules of Court 2012).

Another limitation of discovery by court order (non-automatic discovery) is that it can only be limited to documents (Order 24 rule 1(1) of the Rules of Court 2012). It is worth noting that the court order is limited to certain documents or particular class of documents only (Order 24 rule 7(1) of the Rules of Court 2012). Certain documents are statutorily privileged from being produced. For example, sections 121 to section 132 of the Malaysian Evidence Act 1950 (Act 56) stipulates that certain matters are privilege from disclosure such as marital communication (unless with the person who made it gives consent), unpublished official records relating to affair of states and legal professional communication (unless with client's express consent. Examples can be seen in the cases of *Chua Su Yin & Co v Ng Sung Yee* [1991] 2 MLJ 348, *Dato' Au Ba Chi and Ors v Koh Keng Kheng and Ors* [1989]3 MLJ 445 at 447 and *Greenough v Gaskell* [1833] 1 My & K 98). Apart from that, there are cases where a party to an action may claim privilege from producing medical report (*Parch v. United Bristol Hospitals Board* [1059] 1 WLR 955 and the Court of Appeal's decision in the case of *Waugh v British Railways Board* [1959] 1 WLR 955).

4. Effects of Using Early Neutral Evaluation in Pre-discovery

The dynamics of ENE as a feasible tool to manage problems associated with discovery in complex civil cases are evidenced by the way the ENE Conference is held and the preparation by both sides before attending the ENE Conference. Under Local Rule 5-1 of the United States District Court Northern District Court of California ADR Local Rules Rule 5-1 states that in an ENE conference, "the parties and their counsel, in a confidential conference, make compact presentations of their claims and defenses, including key evidence", as developed at that juncture, and receive "a non-binding evaluation by an experienced neutral lawyer with subject matter expertise. The neutral evaluator also helps identify areas of agreement, offers case-planning suggestions and, upon request by the parties to the action, settlement." The neutral evaluator can encourage the parties to agree mutually on certain information or documents which can be disclosed to each other prior to the ENE

Conference, thus saving them in terms of cost in actual discovery. These information or documents might even shed light to the settlement of issues during the ENE Conference.

In Ohio, the procedures regulating the conduct of ENE is stated under the Ohio Rules ([N.D. Ohio Local Civil Rule 16.5](#)). Rule 16.5(g)(2)(A)-(J) states as follows:

At the initial ENE Conference, or at additional conferences, the Evaluator shall:

- (1) Permit each disputant to make a brief presentation of his position without interruption of counsel or otherwise;
- (2) Assist the parties to identify areas of agreement and if possible, stipulations'
- (3) Determine whether the parties wish to negotiate with or without his assistance;
- (4) Assist the parties to identify issues and evaluate the relative strengths and weaknesses of each party's position;
- (5) Assist the parties to exchange information and conducting discovery;
- (6) Assist the parties to evaluate litigation costs realistically;
- (7) Assist the parties to decide on whether to hold one or more ENE Conferences for the purpose of settlement or case development;
- (8) At the final Conference (which may be the Initial Conference), provide an evaluation of the strength and weaknesses of each disputant's position and the probable outcome if the case is tried, including value of each claim and counterclaim;
- (9) Advise the parties, if appropriate, about other ADR mechanisms that might assist them in resolving their dispute; and
- (10) Report to the ADR Administrator in writing within ten (10) days of the close of the ENE Conference regarding the fact that the session was completed, any agreement reached by the parties, and his recommendation, if any, as to the future ADR mechanisms that might assist in resolving the dispute.

In addition to the above, Rule 16.5(g)(3)(A)-(C) of the Ohio Rules stipulates that the neutral evaluator is allowed to: (i) Determine the structure of the ENE Conference; (ii) Hold separate private caucuses with any disputant or counsel but may not divulge the contents of such discussion to any other disputant or counsel; and (iii) Act as a mediator or otherwise assist in settlement negotiations either before or after presenting the evaluation called for under item (8) above.

Brazil (2012) sets out 18 key elements of an ENE process in the Northern District of California in the following chronological order:

- Neutral Evaluator starts by giving a self-introduction of himself/herself and requests the parties to the action to do the same.
- Neutral Evaluator explains the purposes of ENE and the process and the rules.
- Neutral Evaluator explains rules on confidentiality and request parties to the action to execute confidentiality agreement.
- Opening presentation by Plaintiff.
- Opening presentation by Defendant.
- Neutral Evaluator clarifies issues or elicits extra information by probing parties to the action.
- Neutral Evaluator offer parties to the action to respond to presentations.
- Neutral Evaluator poses additional questions.
- Neutral Evaluator makes a summary to his or her understanding of each party's position and seeks them to correct or clarify his or her summary report.
- Neutral Evaluator ascertains area of agreement and explores parties to the actions' willingness to accept stipulations.
- Neutral Evaluator ascertains key issues of parties to the action' disagreements and seeks parties to correct or clarify to such identification.
- Neutral Evaluator enters room to complete written evaluation;
- Neutral Evaluator returns to conference room with written evaluation and seek parties' to explore possible settlement prior to hearing his or her evaluation;
- Neutral Evaluator presents evaluation if requested by any of the parties.
- If parties to the action intend to explore prospect of settlement prior to hearing the evaluation, then they need to a format for that purpose and negotiate straightaway.

- If settlement is reached, parties to the action may elect to either hear the evaluation or to defer hearing it until they have completed a follow-up process that might include a settlement negotiation.
- If settlement fails or no agreement is reached, then Neutral Evaluator assists parties to develop an effective case development plan.
- Even if parties to the action did not enter any stipulation, the Neutral Evaluator may require follow-up after the ENE Conference by reports by phone from counsel about the results of certain discovery or pre-trial rulings.

6.2 ENE Identifies the Midpoint of the Dispute Early and Even Before the Discovery Order

In the early pre-trial stage of a complex case, parties to the action naturally encounter difficulty in identifying the midpoint of their dispute. This obstacle might be due to their counsels' inexperience in handling complex cases. It might also be due to the reason that priority has been given to certain matters such as meeting strict time-line, filing of cause papers before the close of pleadings and interlocutory applications, to mention a few. Rationally, complex cases not only demands extra judicial scrutiny but also extra precautionary measure on the part of counsels to preserve their clients' interests. In this regard, Brazil (2007b) argues that most counsels are reluctant to use mediation at an early stage unless they have completed most of discovery or the presiding judge has made his rulings on all potential motions. Lande (2008b), on the other hand, shares similar view with Brazil on the point that counsels believe mediation is only appropriate when discovery has been conducted and adds that most counsels believe that it is imperative to obtain sufficient information prior to making any sound decision. In another writing, Brazil (2012a) stresses that parties to the action might opt for ENE to achieve some purpose "relatively early in the pre-trial period, then turn to mediation later when they are ready to get a hard run at getting a deal."

Most commentators agree that the ENE conference can be held at an early stage of the litigation process. Hamid (2012d) reminds that discovery is normally held at the first case management stage. According to Germain (2008a) ENE can be conducted very early, based on existing allegations and information whereas Brazil (1990b) states that the evaluation "takes place early in the pre-trial period." Some commentators also state that implementing ENE at an early stage of the litigation process has many benefits. Germain (2008b) also stresses that ENE can be conducted very early, based on existing allegations and information, thus possibly avoiding substantial "discovery" costs. Brazil (2007b) expresses the view that the overreliance on case management is not a wise idea as a presiding judge is too judiciously careful to offer his view about the merits of a case especially at its early life. Lande (2008c) avers that implementing ENE early in the track of litigation provides the parties to the action the opportunity to present a summary of its position before a neutral expert.

It is noted that at the early stages of the litigation process in a complex case, the parties to the action or their counsels needed much guidance. In an ENE Conference, the neutral evaluator identifies key disputed issues after allowing the parties and their counsels presented claims/defences and made their respective responses (Engro and Lenihan, 2008d).

The United States District Court Northern District Court of California ADR Local Rules, notably ADR LR 5-1 states that one of the goals of ENE is to clarify and identify the midpoint of the issues. Notably, early identification of the midpoint issue is made possible by the neutral evaluator who possesses experience in doing so. Burns (2012) avers that the evaluator is a neutral person who provides a non-binding evaluation on the merits and flaws of the dispute. Under the United States District Court Northern District Court of California ENE programme, the evaluator is court-appointed and possesses expertise in in the substantive legal area of the lawsuit, with no apparent conflict of interest (The United States District Court Northern District Court of California ENE programme, 2014). The clarification and probing done by the neutral evaluator might assist the parties (and their counsels) in determining the level of complexity of their case or whether there is possibility of the court to stay discovery pending the resolution of an impediment to discovery. (Examples: In *Siegert v. Gilley*, 500 U.S. 226, 231-32, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991), the court held that when issues of immunity or jurisdiction are pending, discovery is not suitable). This determination can be done early even before the filing of discovery.

6.3 Encourage Parties to Adopt a Cooperative Approach to Manage Complexity in a Case

Based on the aforementioned procedure regulating the conduct of ENE, the ENE framework emphasizes on the need of each party to the action to adopt a cooperative approach in obtaining information from each other in a fair manner. Theoretically, the outcome of the ENE conference is confidential. On this account, it is submitted that parties to the action can exchange information pertaining to privilege documents in a safe manner.

Under the American Arbitration Association, parties to the action may choose to include ENE as part of their contractual agreement to arbitrate any dispute whereby ENE will be used prior to arbitration. Alternatively, in the absence of any contractual agreement to use the service of a neutral evaluator prior to arbitration, the parties to the action may also use the service of the neutral evaluator to settle dispute that is not covered by contract by completing the ADR Submission Form of the American Arbitration Association. According to Rule ENE-7. Confidentiality” of the American Arbitration Association Rules on ENE Process: (i) The evaluator is restraint from divulging confidential information disclosed to an evaluator by parties to the action or by witnesses in the course of the Early Neutral Evaluation; (ii) All documents received by an evaluator shall be confidential; (iii) The evaluator is not under compulsion to divulge records or testify in regard to the ENE in any adversary proceeding or judicial forum; (iv) The parties to the action maintain confidentiality of the ENE and shall not rely on or introduce as evidence in any arbitral, judicial or other proceeding; (v) Secrecy of views or suggestions made during the ENE conference; (vi) Admissions in the course of the ENE proceedings; (vii) Proposals made or views expressed by the neutral evaluator; or (viii) That another party had or had not indicated voluntariness settlement proposal offered by neutral evaluator. It also seems that working cooperatively reduces the ‘temptation’ of a party to the action to misuse court processes in order to obtain certain documentary evidence from the adversary. During the ENE Conference, the neutral evaluator chaired the conference and thus is able to control the session and eliminates any sign of unfair bargaining power. In fact, the neutral evaluator has the opportunity to guide the parties to possible settlement or better ways to conduct discovery.

The neutral evaluator encourages the parties to participate and communicate actively and freely in the ENE Conference. Brazil (2007b) emphasizes that in an ENE Conference, there is privilege for the parties and their counsels to have a face-to-face interaction and the freedom to participate; and this privilege also extends to their experts who are allowed to present their views in the same conference. Thus, each party can call in his own expert especially in disputes relating to electronically-stored-information (ESI) documents. Each party has the privilege to see how each other argue out their cases throughout the ENE conference and each other’s witnesses giving testimony. According to the American Arbitration Association (AAA) the ENE Conference encourages “direct communication” between parties about possible claims and supporting evidence- especially in situation where there is disparity of views on how “the law applies to the case in question or what the case is worth.” (American Arbitration Association 2014).

7. Findings

(a) The findings of this study revealed that ENE is a viable mechanism that can be used to allow parties to the action (and their counsels) to conduct pre-discovery way earlier than the formal discovery which must be made by way of court order. They might even reduce the subject matter in the formal discovery upon being briefed by the neutral evaluator about the midpoint issue of their case and their positions based on merits.

(b) ENE is most useful to parties to the action who are looking for guidance or direction towards settlement or even preparation for trial of a complex case. In this instance, the neutral evaluator has the requisite qualifications, training, experience and/or objectivity to assist parties to the action and even their counsels. The dynamics of ENE allow parties to the action to have an early view of the objective of discovery, notably to: (i) ascertain the case of an adversary; (ii) to narrow points in issue; and (iii) to avoid expenses in proving admitted facts.

(c) Some of the main goals of ENE are in terms of enhancing direct communication between the parties about their claims and supporting evidence and allow them to identify and clarify the midpoint issues in dispute. With better knowledge of their positions, a party to the action may seek a tailored discovery on certain matters which are deemed necessary for either settlement discussion or preparation for trial.

8. Recommendations

In complex cases, the court must be ready to encourage the use of ENE in the earliest possible time especially when complexity has been identified, this is essential to reduce complexity in discovery. Moreover, the introduction of ENE might lead to either settlement or even reduce the complexity in discovery and interrogatories by way of court order. It is prudent that before integrating ENE into the process of managing complex cases, the court need to first determine a method on how to differentiate between complex cases and non-complex cases.

In Malaysia, for instance, there is room for its application of ENE under the Rules of Court 2012. The Federal Court Practice Direction No.5 of 2010 (Practice Direction) allows judges to employ “other modes of settlement” and need not necessary be mediation. Paragraph 3.1 of the Practice Direction states that judges may encourage parties to settle their disputes at the pre-trial case management stage or at any stage, whether prior to, or even after a trial has commenced. Further, paragraph 2.2 of the Practice Direction states that the Practice Direction is only a guideline for settlement and the judge and the parties may suggest or introduce any other modes of settlements.

For Commonwealth countries that have not imported ENE into their legal system, it is recommended that further in-depth study and evaluation be embarked pertaining to its suitability in terms of application under its civil procedural rules. It is also recommended that an organised regulatory framework for ENE be introduced to the public in order to provide awareness of the dynamics of ENE. However, an upheaval task would then be in selecting the experienced senior counsels to act as neutral evaluator and providing them with appropriate training.

9. Conclusion

This study has found evidence that ENE is a viable mechanism to address the obstacles commonly associated to discovery in complex cases. It suggested that ENE be held at the pre-discovery stage, notably, at a stage which is earlier than the formal discovery. However, it is worth noting the advice of Kuhner (2005) who suggests that in taking on any form of legislation for a new programme, the legislators ‘...should think carefully about their vision for dispute processing and whether that vision accords with their countries’ fundamental concepts of justice’. In this connection, it is vital for policy makers to appreciate how ENE works in various complex situations. This ensures that the introduction of a new dispute resolution is effective and not burdensome.

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