

COMPARISON OF ALTERNATIVE DISPUTE RESOLUTION OPTIONS

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

This chart was prepared by members of the Mediation Council of Western Pennsylvania and the Allegheny County Bar Association’s Alternate Dispute Resolution Committee* to help counsel and unrepresented parties determine which form of ADR may be best suited for their case. It is not a substitute for review of the applicable rules, policies and procedures, which should always be consulted.

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	<u>Early Neutral Evaluation (“ENE”)</u>	<u>Mediation</u>	<u>Arbitration</u>	<u>Summary Jury Trial (“SJT”)</u>
What is it?	A process in which the parties receive a non-binding evaluation of their case from a neutral evaluator who has substantial experience in similar cases. The neutral evaluator also may assist the parties to streamline the litigation and help them explore settlement, if requested.	A process in which a neutral third person assists the parties to a dispute to resolve some or all of their differences.	A process in which a single arbitrator or a group of three arbitrators makes a decision on the merits of a case after a hearing.	A process in which a jury hears a condensed version of a case and renders an advisory verdict which the parties use as a basis for settlement negotiations.
Is the process private or is it open to the public?	The session is private and is not open to the public.	The session is private and is not open to the public.	The hearing could be open to the public if it is held in an open courtroom.	The SJT is private in the sense that the public is not admitted. However, the jury is not prohibited from talking about the case to the public.
Is the process confidential?	Yes, with very limited exceptions.	Yes, with very limited exceptions.	May not be confidential, depending on the circumstances.	No.
What is the neutral called and who serves as the neutral?	A neutral evaluator is an attorney with subject matter expertise.	A mediator can be an attorney or non-attorney and is someone who has special training in mediation.	An arbitrator is an attorney who has experience in litigation matters or who has experience serving as a neutral.	The jurors are the impartial fact finders.

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Are there standards that govern the conduct of the neutral?	Yes, the Model Standards of Conduct for Mediators govern the conduct of neutral evaluators. The Standards can be found at www.abanet.org/dispute/documents/model_standards_conduct_april_2007.pdf	Yes, the Model Standards of Conduct for Mediators govern the conduct of mediators. The Standards can be found at www.abanet.org/dispute/documents/model_standards_conduct_april_2007.pdf	Yes, the Code of Ethics for Arbitrators in Commercial Disputes governs the conduct of arbitrators. The Code of Ethics can be found at www.abanet.org/dispute/commercial_disputes.pdf	Not applicable.
Who selects the neutral?	The parties select the neutral evaluator from the court’s panel or from a private provider.	The parties select the mediator from the court’s panel or from a private provider.	The parties select the arbitrator(s) from the court’s panel or from a private provider.	The jurors are chosen from the same jury pool that the court uses for regular jury trials.
At what point in the litigation does this process take place?	An ENE session usually takes place early in the case.	Mediation usually takes place early in the case, but can occur at any time until trial.	Arbitration generally takes place after the parties have exchanged some information and usually occurs sooner than a jury trial.	A SJT usually occurs at the end of the case and closer to the trial date.
<u>Nature and Scope of the Proceeding</u>				
- Who participates in the process?	The parties, their attorneys and any other person whose agreement to any settlement is necessary.	The parties, their attorneys and any other person whose agreement to any settlement is necessary.	The parties, their attorneys and any other person whose agreement to any settlement is necessary. Witnesses may also be present to give testimony.	The attorneys, parties and decision makers or persons with settlement authority. Witnesses also may be present to give testimony.
- What is the nature of the process?	Adversarial in nature, but ENE has the potential for becoming a collaborative problem-solving process.	Informal, flexible, and non-adversarial in nature.	Adversarial and less formal than a jury trial.	Adversarial, but the format is less formal than a regular jury trial.

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- What is the role of the attorney during the session?	The attorney supplies key information about the client’s case and position to the neutral evaluator and the other party.	The attorney assists the client in explaining what the client wants and why to the mediator and other party.	The attorney tries the case before the arbitrators.	The attorney presents the client’s case through a combination of summarization, argument and the introduction of evidence.
- What is the role of the parties during the session?	Parties answer questions, listen to the other party’s presentation, listen to the neutral evaluator’s assessment, consider and/or make agreements to streamline the litigation process, and consider the possibility of settlement.	Parties make all decisions about whether to settle, assist in answering questions and explaining their views, listen as the other party describes how they view the case, and consider and explore alternative outcomes and resolutions.	Parties may give testimony and listen to the other party’s testimony and evidence.	Parties listen to the presentations and possibly give testimony, listen to the jury’s verdict, and participate in subsequent settlement negotiations based on the jury’s advisory verdict.
- How does the process work?	After hearing presentations by both sides, and asking appropriate questions, the neutral evaluator gives the parties a non-binding assessment of which party is most likely to prevail, why and for how much.	After meeting with the parties together to hear how each party views the case, the mediator normally meets with each party privately and shuttles back and forth between the parties with settlement offers in an attempt to resolve the case.	After the arbitrator(s) listens to opening statements, testimony and closing arguments, the arbitrator(s) makes a decision on the merits of the case.	After the jury listens to the attorneys summarize and argue a case, the jury renders an advisory verdict and is available to share its reaction to the case with the parties and their attorneys.
- What rules apply?	Other than the court’s ADR Policies and Procedures, none.	Other than the court’s ADR Policies and Procedures, none.	The Federal Rules of Civil Procedure, the local rules for the U.S. District Court for the Western District of PA, the court’s ADR Policies and Procedures and the Federal Rules of Evidence.	The Federal Rules of Evidence apply, but are not strictly adhered to so as to permit the parties to expeditiously present their case.

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- Is <i>ex parte</i> contact with the neutral permitted? (<i>ex parte</i> means talking to the neutral without the other party being present)	Only for scheduling issues, unless all parties agree otherwise.	Yes.	No, except for scheduling issues.	No.
- Are there any pre-session conferences with the neutral?	Yes.	Yes.	Yes.	Not applicable.
- Is anything submitted to the neutral in advance?	Yes, a written Statement.	Mediation statements are not required.	A written Arbitration Statement is required. However, the arbitrator(s) may dispense with/modify this requirement.	Not applicable.
- Where does this process take place?	Anywhere the parties and the neutral evaluator agree. Often the session is held in a conference room at the neutral evaluator’s offices.	Anywhere the parties and the mediator agree. Often the session is held in a conference room at the mediator’s offices.	At any location within the Western District of Pennsylvania selected by the arbitrator(s), including a room at a federal courthouse, if available.	In a courtroom.
- Is there opportunity to discuss settlement?	Yes. As long as all parties agree, the neutral evaluator can conduct settlement discussions, including meeting privately with each party and the party’s attorney.	The purpose of the mediation is to discuss settlement.	Arbitrators are prohibited from conducting settlement discussions.	The jury’s non-binding verdict and reactions to the legal and factual arguments are used as a basis for subsequent settlement negotiations.

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- How much time is required?	Typically lasts two to four hours, but could go longer if the parties decide to explore settlement.	Varies, but be prepared to spend the entire day in mediation.	Varies, but is generally shorter than a jury trial.	Usually conducted in less than a day and a court order will specify time limitations.
- Does the neutral make a decision that’s binding on the parties?	No.	No.	The arbitrator(s) renders a non-binding decision that may be rejected by the parties. The decision is only binding on the parties if they agree ahead of time that the decision will be binding.	The jury renders a non-binding decision which is advisory in nature.
- What is the outcome of this process? What remedies are available?	The parties receive an assessment of their case by the neutral evaluator. If the parties choose to have the neutral evaluator assist with settlement discussions, the session could result in a settlement agreement. Settlement could be based on any terms the parties choose and the terms of the settlement are not limited to what is permitted by the law.	The goal is to reach a mutually acceptable settlement. The settlement could be based on any terms that the parties choose and the terms of the settlement are not limited to what is permitted by the law.	The arbitrator(s) renders a decision which is based on what the law permits.	The jury renders a verdict which is based on what the law permits.
<u>Costs</u>				
- What are the costs and who pays?	The fee of the neutral evaluator is based on market rates and is usually split between the parties, unless they agree on, or the court orders, a different split.	The fee of the mediator is based on market rates and is usually split between the parties, unless they agree on, or the court orders, a different split.	No cost to the parties because the court pays the fee of the arbitrator(s).	No cost to the parties.

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<u>What are the Primary Purposes of this Process?</u>	The neutral evaluator’s assessment of the case provides a “reality check” for the parties and their attorneys. The neutral evaluator helps to clarify the central issues in dispute and can assist the parties with discovery or motion planning. The neutral evaluator also assists with settlement discussions if requested by the parties.	Mediation provides the parties with an opportunity to fully discuss and explore possible settlement options, including those outside of the remedies available in court, in a confidential setting.	Arbitration is primarily used when the parties would like an expedited hearing which is conducted in a more cost-efficient manner than traditional litigation and which results in a decision on the merits of the case.	SJTs are designed to promote settlement in complex, trial-ready cases headed for lengthy trials by helping the parties to understand how a jury might view their case. With its condensed format, the SJT is useful in getting to the heart of the case.
<u>When is this Process Most Useful?</u>	Most useful when: <ul style="list-style-type: none"> • The parties want guidance or direction towards settlement based on law, industry practice, or technology. • The evaluator has requisite qualifications, training, experience and/or objectivity. 	Most useful when: <ul style="list-style-type: none"> • The parties want guidance or direction towards settlement. • The parties are capable of working together. • The parties can develop solutions with assistance. 	Most useful when: <ul style="list-style-type: none"> • The parties are unlikely to work together to find resolution. • Evidence or witness testimony is a key component of the case. 	Most useful when: <ul style="list-style-type: none"> • There is uncertainty as to how a jury will react to the evidence and that uncertainty is deterring settlement. • Traditional means of attempting to resolve the case have failed.