

The Feasibility of Early Neutral Evaluation in Managing Obstacles to Discovery in Complex Civil Litigation

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Abstract

Discovery in complex cases is never an easy task even if it comes with a court order. Complex cases not only demand extra judicial attention but are full of uncertainties. Due to such uncertainties, the parties to the action would go for 'fishing expeditions' in order to obtain better particulars of the adversary's position. The purpose of this article is to discover how Early Neutral Evaluation is capable of dealing with the obstacles associated with the process of discovery in complex civil litigation. This article uses a doctrinal analysis method in analyzing related literature (including cases especially reported in Malaysia and England and Wales) and the procedures regulating the mechanism in the United States. The study found that subject to certain modification of any local procedural rules, Early Neutral Evaluation is a viable mechanism to be integrated into the civil court system to counter obstacles in discovery. It is hope that this study will benefit policy makers to carry out more extensive studies to support Early Neutral Evaluation as a viable court programme especially in managing complex matters.

Keywords: Early Neutral Evaluation, discovery, complex civil litigation, recommendations

1. Introduction

The discovery process exists in the pre-trial stage and involves a process of gathering relevant evidence prior to trial from the adversary party (Duryana 2008). Similarly, in England and Wales, there is an existing provision in the Civil Procedure Rules 1998 (CPR 1998) on Discovery. It is known as 'disclosure' (Part 31, CPR 1998). The gathering of evidence during the pre-trial stage proves to be useful in the sense of assisting the court as well as the parties or their lawyers in the elucidation of facts, shortening the duration of trial by eliminating the need to adduce evidence on matters which have been admitted by the parties and thus, is a cost-saving exercise. In this context, the process of gathering evidence usually involves four (4) pre-trial procedures, namely discovery, inspection of documents, interrogatories and admissions. However, parties to an action usually encounter numerous problems especially in gathering evidence in complex cases. According to the Reorganised California Rules of Court 2007 (Chapter 5, Rule 3.400), a 'complex case' "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.”(Available: http://www.flcourts.org/gen_public/cmplx_lit/bin/reference/Other%20States/California/california%20rules%20excerpt.pdf (May 7, 2014).

Maycock (2001a) suggests that Early Neutral Evaluation (ENE) is suitable for resolving “complicated and unusual cases”. Her view is shared by Engro and Lenihan (2008a). According to Gates (2008), a systematic approach to case evaluation is essential in a dispute resolution programme. However, not much is known about the feasibility of ENE in managing problems related to discovery in complex cases, especially before the granting of a Discovery Order. Thus, this article intends to shed light on the feasibility of ENE as an effective tool to manage problems associated to Discovery in complex cases.

2. Overview of Early Neutral Evaluation (ENE) and Discovery

Lande (2008a) states that ENE in civil cases have had been given a favourable assessment. Wissler (2004) in her summary of empirical research conclude that ENE cases slightly less likely to proceed to trial although she found that there were no differences in measuring costs or time before resolution. Notwithstanding this, in Malaysia and in England and Wales, the previous and current literatures place little emphasis on ENE as a recommended ADR process. Most of the literature generally emphasize on mediation. In the international level, there are limited studies being conducted on ENE. In 2010, a study was conducted by Hay, McKenna and Buck (2010) to establish the cost effectiveness of ENE in the area of social security and child support tribunal. The aim was to investigate whether it produces swifter, more proportionate resolution of cases. Apart from that, the research also aimed to establish appellant satisfaction with the process and the impact on and views of stakeholders.

Engro and Lenihan (2008) describe ENE as evaluative process which is not intended for settlement alone 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 disputing parties to reach settlement but ENE’s purpose is not limited to settlement alone but extends to providing them with a better understanding of their dispute. 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 narrow the dispute and suggests guidelines for managing discovery”.

Garay (2012) among others 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. In Malaysia, discovery is a pre-trial procedure under the Rules of Court 2012 (RC 2012). Under Order 24, RC 2012) a party can seek discovery by way of application from the Court during the pre-trial case conference. Notably, neither the RC 2012 nor the CPR 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 Sultan 2012a). Similarly, in England and Wales, there is an existing provision on discovery. It is known as ‘disclosure’ under the CPR 1998 (Part 31, CPR 1998) which allows disclosure and inspection of documents. 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. Part 31 of the CPR 1998 is similarly worded to that of the Malaysian rules 7 and 12 of O.24 RC 2012.

3. Problems Related the Discovery

Some identified problems relating to discovery are mentioned below:

3.1 Discovery is dependable on what have been stated in pleadings

The discovery exercise involves the gathering of key facts and evidence throughout the pre-trial process by parties or their counsel (Order 24, RC 2012). The gathering of key facts must be within what has been mentioned in the pleadings. Authoritative English cases have 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 pleadings, especially statement of claims and defences were found to be not in compliance with court guidelines. This neglect has far-fetching consequences to any party to the action if he intends to file for discovery in future. This is because he needs to relate the matters he seeks to discover from his adversary with the facts he has averred or rebutted in his pleadings.

3.2 Discovery in electronically stored information (ESI) is 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 2012a). Duryana (2012b) stresses on the possibility of obtaining discovery order that can be made against Internet Service Providers (ISPs) in Malaysia for illegal activities committed by their internet users. In England and Wales, 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). Being court-controlled, not much of revealed information can be expected.

3.3 Discovery is not a matter of right

Hamid Sultan (2012b) reminds that Discovery is not a matter of right but is one which is within the court’s discretion. Part 31 of the CPR 1998 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. Thus, a disputant might pray for disclosure of certain documents from his adversary but it is for the court to decide on whether to grant such an order or otherwise.

The objective of Discovery is best illustrated in the 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”.

3.4 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.

As observed, the functions of discovery are numerous. It is also observed that discovery can enlighten the party foraging for information on the strength and weaknesses of each other position. Unfortunately, discovery could also be used to prolong, harass as well as 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.”

The above observation restrains a party to go on a fishing expedition. Thus, he can only make a discovery over certain documents only which are related to the issue of the pending case.

3.5 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). 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. Under the RC 2012, the process of discovery begins by a party to an action who applies by way of notice of application to the court (“the applicant”) for an order to compel the other party to serve a list of documents which are or have been in his possession, custody or power (O.24 r.5 RC 2012).

Be that as it may, 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, r.8 RC 2012). Another limitation of discovery by court order (non-automatic discovery) is that it can only be limited to documents (O.24, r.1(1) RC 2012). It is worth noting that the court order is limited to certain documents or particular class of documents only (O.24, r.7(1) RC 2012). Certain documents are statutorily privileged from being produced. For example, section 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,Court of Appeal's decision in the case of *Waugh v British Railways Board* [1959] 1 WLR 955).

4. How Early Neutral Evaluation Can Manage Problems Associated with Discovery

4.1 The dynamics of ENE

The dynamics of ENE need to be uncovered in order to know whether it is a feasible tool to manage problems associated with Discovery. The Discovery exercise involves the gathering of key facts and evidence throughout the pre-trial process by any party to the action or his counsel (Order 24, RC 2012).The object of the discovery is notably to: (i) ascertain the case of an adversary; (ii) to narrow points in issue; and (iii) to avoid expenses in proving admitted facts. In a complex case, it is a difficult task for a lay or inexperience counsel to ascertain merits of the case as a whole as well as to narrow down complex issues which necessitates professional advice.

The United States District Court Northern District Court of California ADR Local Rules, Rule 5-1 states as follows:

“5-1. Description

In Early Neutral Evaluation (ENE) the parties and their counsel, in a confidential session, 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 evaluator also helps identify areas of agreement, offers case-planning suggestions and, if requested by the parties, settlement assistance.”

Thus, it can be summed up that the United States District Court Northern District Court of California ADR Local Rules, notably ADR LR 5-1 states that the goals of ENE are to:

- enhance direct communication between the parties to the action about their claims and supporting evidence,
- provide an assessment of the merits of the case by a neutral expert,
- provide a “reality check” for clients and lawyers,
- identify and clarify the central issues in dispute,
- assist with discovery and motion planning or with an informal exchange of key information, and
- facilitate settlement discussions, when requested by the parties.

In Ohio, the procedures regulating the conduct of ENE under the Ohio Rules (N.D. Ohio Local Civ. R. 16.5) are stated specifically under its Rule 16.5(g)(2)(A)-(J). The rule 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) stipulates that the 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:

- Evaluator begins by introducing himself/herself and seeks parties to introduce each other.
- Evaluator explains the purposes of ENE and describes the process and the governing rules.
- Evaluator explains confidentiality rules and request parties to execute confidentiality agreement.
- Preliminary presentation by Plaintiff.
- Preliminary presentation by Defendant.
- Evaluator clarifies issues or elicits extra information by probing parties.
- Evaluator offer parties to respond to presentations.
- Evaluator poses extra questions.
- Evaluator provides summary to his or her understanding of each disputant’s position and seek them to correct or clarify his or her summary report.
- Evaluator identifies area of agreement and explores parties’ willingness to accept stipulations.
- Evaluator identifies key issues of parties’ disagreements and seeks parties to correct or clarify to such identification.
- Evaluator enters room to prepare written evaluation;

- Evaluator returns to session room with written evaluation and seek parties' to explore possible settlement prior to hearing his or her evaluation;
- Evaluator presents evaluation if requested by any parties.
- If parties 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 made out, parties 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 Evaluator assists parties to develop an effective case development plan.
- Even if parties did not enter any stipulation, the 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.

4.2 ENE identifies the centre-point of the dispute early and even before the Discovery Order

Hamid Sultan (2012c) reminds that discovery is normally held at the first case management stage. It is noted that at the early stages of the litigation process in a complex case, the parties to the action or their lawyers needed much guidance. Most commentators agree that the ENE conference can be held at an early stage of the litigation process. According to Germain (2008) ENE can be conducted very early, based on existing allegations and information whereas Brazil (1990) 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 (2008) also stresses that ENE can be conducted very early, based on existing allegations and information, thus possibly avoiding substantial "discovery" costs. Lande (2008b) 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.

Maycock (2001b) emphasises that ENE is suitable in cases where misvaluation of a case has taken place. 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 centre-point of the issues. Notably, early identification of the central 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, the court's ENE programme, the evaluator is court-appointed and possesses expertise in the substantive legal area of the lawsuit, with no apparent conflict of interest (Available: <http://www.cand.uscourts.gov/ene> (April 14, 2014). Under the ADR Local Rule, 2-5(b), the court's panel of neutral evaluators possess the following qualifications: "admission to the practice of law for at least 15 years; experience with civil litigation in federal court; expertise in the substantive law of the case; and training by the court (Some evaluators also have received the court's mediation training)".

4.3 Encourage Parties to adopt a Cooperative Approach to Manage Complexity in a Case

As previously mentioned, the functions of discovery are numerous such as to: (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 eliminate the element of surprise at or prior to the trial, relating to unknown documentary evidence; and (c) to save costs (which can include discovery costs and other ancillary costs).

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. Since the outcome of the ENE conference is confidential, informal exchange of key information can also be made pertaining to privilege documents which would not be allowed in discovery by way of court order. Thus, working cooperatively reduces the 'temptation' to misuse court processes in order to achieve 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 the action to possible settlement.

The neutral evaluator encourages the parties to participate and communicate actively and freely in the ENE Conference. Brazil (2007) emphasizes that in an ENE Conference, there is privilege for the parties to the action and their lawyers 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 disputant 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).

5. Results

- (a) The findings of this study revealed that ENE is a viable mechanism that can be used to allow parties to the action to conduct informal discovery before the formal discovery by way of court order. They might even reduce the subject matter in the formal discovery by way of court order upon being briefed by the neutral evaluator about the central 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 based on law, industry practice, or technology. In this instance, the neutral evaluator has the requisite qualifications, training, experience and/or objectivity to assist parties to the action and even their lawyers. The dynamics of ENE allow parties to the action to achieve 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 central issues in dispute. With better knowledge of their positions, a party to the action may seek discovery on certain matters which are deemed necessary for either settlement discussion or preparation for trial.

6. Recommendations

In complex cases, the court must be ready to allow the use of ENE to reduce complexity in discovery. This is because the introduction of ENE might lead to either settlement or even reduce the complexity in discovery by way of court order. The courts must also be made aware of the value and viability of ENE in managing complex civil cases. In Malaysia, for instance, there is room for its application under the RC 2012. The Federal Court Practice Direction No.5 of 2010 (Practice Direction) allows judges to employ “other modes of settlement” and need not necessarily 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. It is also suggested that more in-depth studies and assessments on other “non-judicial dispute mechanisms” be carried out to reduce the burden of the courts by providing satisfactory resolution of disputes. For Commonwealth countries which 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 lawyers and providing them with appropriate training in order to turn them into qualified neutral evaluator

7. Conclusion

The study has found evidence that ENE is a viable mechanism to address the obstacles commonly associated to discovery in complex cases. However, it is worth noting the advice of Kuhner (2005, p. 31) 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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