

Form Order for Case Evaluation

IN THE _____ COURT
FOR _____ COUNTY, TENNESSEE

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Plaintiff,)

)

v.)

NO. _____

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)

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Defendant.)

ORDER FOR CASE EVALUATION

This case has been scheduled for Early Neutral Evaluation ("ENE") pursuant to Tennessee Rule of Civil Procedure 16 and Tennessee Supreme Court Rule 31.

The Court, by entering this memorandum and order, is not depriving the parties of their right to proceed to trial in accordance with the applicable law. The pendency of ENE shall not interfere with the right and obligation of the parties to proceed with discovery and/or to make such motions to the Court as they may deem appropriate with respect to the preparation of their cases for trial.

It is accordingly ORDERED

1. Evaluation Session

An Evaluation Session shall be conducted in this case within 60 days of the date of this memorandum and order. The Evaluation Session shall be conducted in accordance with the procedure, directions and conditions noted in this memorandum and order.

2. Appointment of Evaluators

The Court hereby appoints [____], [____] and [____] as Evaluators. The Evaluators shall serve as a panel, with [____] acting as Chair. The Evaluators shall be subject to the Standards of Conduct for Rule 31 neutrals, incorporated into Rule 31 as Appendix A.

For purposes of determining whether the Evaluators have or represent any conflicting interests, the standards set forth in [____] TCA [____] for disqualification of any justice, or judge have, and shall be, applied. If any of the Evaluators believe that they have or represent conflicting interests, they shall promptly disclose that circumstance to all counsel and to the Clerk in writing. Any party who believes that the assigned Evaluators have or represent conflicting interests shall provide written notice to the Clerk of same within 10 calendar days of learning of the potential conflict, or shall be deemed to have waived any opposition.

3. Written Evaluation Statements

3.1 Form of Evaluation Statements

No later than 10 calendar days prior to the Evaluation Session, each party shall submit directly to the Evaluators, and shall serve on all other parties, a written Evaluation Statement. Such Evaluation Statement shall be double-spaced and shall not exceed 15 pages (not counting exhibits and attachments).

3.2 Required Contents of Evaluation Statements

While the Evaluation Statements may, and should, include any information that would be useful, they must: (1) identify the person(s), in addition to counsel, who shall attend the Evaluation Session pursuant to 4.1 below as the representative of the party with full decision-making authority; (2) describe briefly the substance of the suit; (3) delineate the primary disputed factual and legal issues; (4) address whether there are factual and legal issues, the early resolution of which might appreciably reduce the scope of the dispute or contribute significantly to settlement negotiations; and (5) identify the discovery that promises to contribute most to equipping the parties for meaningful settlement discussions.

3.3 Identification of Other Persons Whose Presence is Thought to be Desirable

The parties may identify in these Evaluation Statements persons connected to a party opponent (including a representative of the party opponent's insurance carrier) whose presence at the Evaluation Session would improve substantially the prospects for making the Evaluation Session productive. The fact that a person has been so identified, however, shall not, by itself, result in an instruction compelling that person to attend the Evaluation Session.

3.4 Attachments to Evaluation Statements

The parties shall attach to their written Evaluation Statements copies of documents out of which the suit arose, e.g., contracts, or the availability of which would materially advance the purposes of the Evaluation Session, e.g., medical reports or documents by which special damages might be determined.

3.5 Filing of Evaluation Statements Prohibited

The written Evaluation Statements shall not be filed with or provided to the Court or clerk, and the judge assigned to this case shall not have access to them. Instead, the Evaluation Statements shall be sent directly to the Evaluators with copies to adversary counsel.

4. Attendance at the Evaluation Session

4.1 Parties to Attend

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 positions and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the relative strengths of every party's case. A party other than a natural person (e.g., a corporation or association) satisfies this attendance requirement if it is represented at the Evaluation Session by a person (other than outside counsel) with authority to enter stipulations (of fact, law, or procedure) and to bind the party to terms of a settlement. A party that is a governmental unit need not have present at the Evaluation Session the persons who would be required to approve a settlement before it could become final (e.g., the members of a city council or the chief executive of a county or major agency), but must send to the session a representative, in addition to trial counsel, who is knowledgeable about the facts of the case and the party's position and is the person who has the authority and responsibility to make recommendations to the ultimate decision-making body. In cases involving insurance carriers, representatives of the insurance companies, with authority, shall attend the Evaluation Session.

4.2 Attorneys to Attend

Each party shall be represented at the Evaluation Session by the lawyer expected to be primarily responsible for handling the trial of the matter.

4.3 Excuses for Non-Attendance

A party or lawyer shall be excused from attending the Evaluation Session only after showing that attendance would impose an extraordinary or otherwise unjustifiable hardship. A party or

lawyer seeking to be excused must petition the Evaluators, in writing, no fewer than 15 calendar days before the date set for the Evaluation Session. Any such petition shall be in the form of a letter to the Chair of the panel of Evaluators, a copy of which shall be sent to all parties, and which shall set forth all considerations that support the Request and shall state realistically the amount in controversy in the case. The Chair of the panel of Evaluators shall rule on any such petition and may do so without consulting the other Evaluators. A party or lawyer who is excused from appearing in person at the Evaluation Session shall be available to participate by telephone.

4.4 Attendance of Non-Parties

The Evaluators may request the presence of non-parties but do not have the authority to compel their attendance.

4.5 Persons Entitled to Attend

Persons other than the parties, their representatives, their counsel, representatives of insurance carriers, and the Evaluators may attend the Evaluation Session only with the consent of the Chair.

5. Procedure at the Evaluation Session

The Evaluators shall have considerable discretion in structuring and conducting the Evaluation Session, and the Evaluation Session shall proceed informally. Rules of Evidence shall not apply, and there shall be no formal examination or cross-examination of witnesses.

In each case, however, the Evaluators shall, at least: (a) permit each party (through counsel or otherwise) to make an oral presentation of its position; (b) help the parties identify areas of agreement and, where feasible, reach stipulations; (c) assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain as carefully as possible the reasoning by the Evaluators that support these assessments; (d) if the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case; (e) estimate, to the extent feasible, the likelihood of liability and the dollar range of damages; (f) help the parties devise a plan for sharing the important information and/or conducting the key discovery that shall equip them as expeditiously as possible to enter meaningful settlement discussions or to posture the case for disposition by other means; and (g) determine whether some form of follow-up to the Evaluation Session would contribute to the case development process or to settlement.

6. Follow-Up Session(s)

At the close of the Evaluation Session, the Evaluators may determine whether it would be appropriate to schedule some kind of follow-up to the Session. Such follow-up sessions could include, but need not be limited to, written or telephonic reports that the parties might make to one another or to the Evaluators, the exchange of specified kinds of information, and/or a second evaluation or settlement session. If appropriate, the Evaluators may direct that written follow-up reports be signed not only by counsel, but also by the parties themselves.

7. Confidentiality and Admissibility

The Court, and all counsel and parties, shall treat as confidential all written and oral communications made in connection with or during the ENE process including, but not limited to, the Evaluation Session. The Court hereby extends to all such communications all the protections afforded by Tennessee Rule of Evidence 408. In addition, no communication made in connection with or during any ENE may be disclosed to anyone not involved in the litigation, nor may any such communication be used for any purpose (including impeachment) in any pending or future proceeding in this Court. The privileged and confidential status afforded to communications made in connection with the ENE process is intended to include not only matters emanating from parties and counsel, but also the Evaluators' comments and assessments, as well as any recommendations made by the Evaluators about case development, discovery and/or motions. There shall be no communication about such matters between the Evaluators and the presiding judge. Nothing in this paragraph, however, shall be construed to prevent parties, counsel or the Evaluators from responding, in absolute confidentiality, to inquiries by any person duly authorized by this Court to analyze the utility of the ENE program, nor shall anything in this paragraph be construed to prohibit parties from entering and filing procedural or factual stipulations based on suggestions or agreements made in connection with an ENE session.

8. Limits on Powers of Evaluators

Within limits imposed by this memorandum and order, and as it may be modified by further order, the Evaluators shall have authority to fix the time and place for, and to structure, Evaluation Sessions and follow-up events. The Evaluators shall have no power other than those described here, and in sections 5 and 6 of this memorandum and order. The Evaluators shall have no authority to compel parties to conduct or respond to discovery or to file motions. The Evaluators shall have no authority to determine the issues in any case, to impose limits on parties' pretrial activities, or assess costs.

9. Fees of the Evaluators

The Evaluators shall be compensated at an hourly rate not to exceed [____] per hour. Unless by agreement otherwise, Evaluator fees shall be shared equally by the parties, and, if necessary, shall be taxed as costs.

10. Evaluators Not Witnesses

Evaluators shall be disqualified as counsel, witnesses, consultants or experts for any party as to this dispute and as arbitrators between the parties, and their oral and written opinions shall be inadmissible for all purposes in this or any other dispute involving the parties thereto.

ENTER:

JUDGE