

**REPORT TO THE COURT
EARLY NEUTRAL EVALUATION PROGRAM
DISTRICT OF VERMONT
July 1, 1994 - October 31, 1995**

I. BACKGROUND

Pursuant to 28 U.S.C. Sections 472 and 473, which require each district court to develop and implement a civil justice expense and delay reduction plan, the District's Civil Justice Reform Act (CJRA) Committee recommended that the district adopt an alternative dispute resolution program. In looking at statistics for our district, it was noted that the vast majority of civil cases settle before trial, but that they remain pending for a long time before settling. The CJRA Committee believed that forcing parties to realistically consider settlement at the earliest feasible time provided the best opportunity for minimizing cost and delay of civil cases. Their recommendation resulted in the adoption of our new Local Rule 12, which establishes our Early Neutral Evaluation (ENE) program. This mandatory evaluation of eligible civil cases became effective for cases filed on or after July 1, 1994.

Our Local Rule 12 is unique in that it is the only program within the federal system mandating participation in an alternative dispute resolution program while also requiring payment of a fee. All other federal court ADR or ENE programs are either voluntary, or if mandatory, do not require the payment of a fee by the participating parties.

Implementation of Local Rule 12 began with sponsorship of a two day training seminar for the thirty-six attorneys who would form the Court's panel of neutral evaluators pursuant to Section (e) of Local Rule 12. The seminar was conducted on October 27-28, 1994, by ADR Associates of Washington, D.C., a firm specializing in training others in alternate dispute resolution techniques. Michael K. Lewis led the sessions, while Linda Singer and Eleanor Nace acted as co-trainers. The cost to the district was \$14,115, which includes fees of \$12,470 plus expenses of \$1,645.

The aim of this report is to provide quantitative and qualitative results to the committee, so that they can realistically evaluate the first 16 months of the ENE program and decide whether the goals have been met, and where the future of this program lies.

II. PROCEDURES

After the last answer is filed, the Clerk's Office mails a list of three potential evaluators to parties in each ENE-eligible case (one more potential evaluator than the number of "sides" in the case). (See Attachment 1) The parties must stipulate to an evaluator and notify the Clerk's Office within ten days. If they cannot stipulate, the rule provides that each can strike one name, and the remaining one will be assigned by the Clerk's Office. Additionally, parties may select an evaluator of their own choosing - as long as they notify the court. Another alternative that developed when parties could not agree, was that the Clerk's Office would send the *complete* list of evaluators out, assuring a choice that was agreed to by all.

Once notified of the selection, the Clerk's Office mails another letter, notifying the evaluator of their assignment, and reminding everyone of the next steps in the process. (See Attachment 2) In addition to the letter, the evaluator receives questionnaires to distribute to the

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attorneys and parties at the conclusion of the process. (See Attachment 3) After the ENE session is held, the evaluator submits an "ENE Report" which contains basic information about the session, and informs the Court whether full, partial, or no settlement was reached. The report contains no substantive information about the settlement discussions to avoid possible prejudice to the judge who may try the case later.

III. STATISTICAL ANALYSIS

To gain a comprehensive view, analysis was done in two areas. First, empirical data was captured regarding ENE eligible cases. Second, subjective data was sought via questionnaire responses by attorneys, evaluators, and parties.

Empirical statistics were obtained from two groups. The test group, which included the ENE eligible cases, contained cases filed between July 1, 1994 and October 31, 1995. The control group included cases filed from July 1, 1992 to October 31, 1993, so that direct comparisons could be made to cases not subject to ENE.

One point that should be made at the outset is that this program is still very young. The "start up" time for this program, i.e., the time it took for cases to reach the point where an ENE session could be held, was about six months. This means that for this study the sample period is really ten months, since the first evaluator's report was filed January 3, 1995. The sample of cases completing the ENE process is large enough to allow us to form reasonable *initial* opinions, but too small to draw absolute conclusions about the success or failure of the program. The tables below show very positive results in several areas, such as the fact that 31 percent of cases completing an ENE session obtained full settlement, and the mean disposition of cases settling under ENE averaged 83 days *less* than the control group. However, the fact that only 29 cases have completed the ENE process, of 289 eligible, would seem to caution us about finalizing our opinions yet.

One limitation of this report is the relatively small amount of data available, and the necessity of structuring our evaluation to the short time period that Local Rule 12 has been in effect. For example, when figuring the mean disposition for ENE eligible cases in Table A, we included cases filed *and closed* within the two 16 month (test and control) periods. Because 16 months was the maximum time available for the test group, we had to use that same period for the control group, even though we had more data for the older cases, since many more of them had closed. Including the additional closings from the control group would have given us a broader view of disposition times for control group cases, but would not have been an "apples to apples" comparison to the test group. We had to sacrifice some data to obtain an accurate comparison. As time passes and we are able to lengthen the test periods, including more cases and results, this weakness should be corrected.

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A look at the status of current ENE eligible cases gives a good "snapshot" of the progress of cases through the process. Of 289 eligible cases, 73 (25.5 percent) are still pre-answer (too new to start the process), 11 (3.8 percent) are in the process of choosing an evaluator, 87 (30 percent) have evaluators assigned and are waiting for their session to be held, 29 (10 percent) have held ENE sessions, and 86 (30 percent) closed before the ENE process was completed. Of those in the pre-answer stage, about 35 percent are over five months old, indicating that they are being seriously delayed *before* entering the ENE process. Cases with an evaluator chosen, but no session held yet, form 30 percent of the ENE caseload. Of these cases, the filing dates range from July 26, 1994 to August 22, 1995, pointing out that cases can stay in this category for extended periods for various reasons, such as extensions of discovery, or even lack of contact between the evaluator and attorneys.

Forty percent of eligible cases were closed, ten percent through the ENE process and 30 percent by settlement or dismissal before completion of ENE. About 95 percent of those cases that closed before ENE closed prior to choosing an evaluator. Until more data can be analyzed, it is difficult to tell if those cases are ones that would have settled anyway, even without the prospect of ENE, or if Local Rule 12 spurred them into discussions earlier than usual, but the substantially shorter mean disposition period for cases terminated since ENE was initiated suggests an effect.

A few general conclusions present themselves after looking at the empirical data. First, that the program has been slow getting started due to the length of time it takes a case to progress to the midpoint of discovery. In addition to occasional service difficulties, delays occur because dispositive motions often postpone the filing of an answer, and all answers must be filed before the first ENE letter is sent. Second, with few exceptions, the attitudes of the participants have been positive and cooperative. Third, although there was some concern about the mandatory nature of the program, not one party moved to be excused from the process. Fourth, there are indications that the holding of an ENE session has some indirect effects that may help the case later, even if an ENE settlement is not reached.

Indirect effects of the ENE session are pointed to by several questionnaire responses. (See Table D and Attachment 3, questions 2a,b,c,d,g,h,i,j) Over 50 percent of parties and 55 percent of attorneys answered that ENE was helpful in moving the parties toward settlement and prompting for early definition of the issues. Sixty-eight percent of parties and 58 percent of attorneys said ENE helped to identify the strengths and weaknesses of their case, and 52 percent of both parties and attorneys responded that ENE encouraged them to be more realistic about their respective positions in the case. Even in cases not resolved through ENE, the experience of having a neutral person assess a case several months before trial seems to, in some respects, "open the eyes" of parties and attorneys, a process which may make later settlement somewhat easier to approach and accomplish.

One of the strongest points of agreement was the rating of the evaluators, which points both to the personal skills of the evaluators and the quality of the training. Answers to questions involving the preparedness, impartiality, and listening abilities of the evaluators were overwhelmingly positive, ranging from 88 to 100 percent for both parties and attorneys. (See questions 3b,c,d,h) As noted by question 3i, evaluators were also highly rated by parties (83.3 percent), and attorneys (85.7 percent), in the ability to make a realistic assessment of the case. Also on the subject of the evaluators, question 3j indicates that 92 percent of parties and 78 percent of attorneys thought that greater subject matter expertise would *not* have made a significant difference in the ENE session.

Generally, the evaluators rated most aspects of the process and its effects higher than did the parties or attorneys. Their answers to the questions that were asked only of evaluators seems to indicate that the set-up of the program worked well. Just over 88 percent agreed that settlement was a realistic goal in their case, while none felt that the issues of their case were too complex to be handled by ENE. However, responses to questions 3b and d indicate, by 29.4 and 23.5 percent respectively, that the sessions in some cases were held too early, and that more discovery would have improved the usefulness of the session. Only one evaluator (5.9 percent) agreed that the session was too brief to allow meaningful discussion of the case. Evaluators also strongly agreed (94.1 percent), that the training received had adequately prepared them to conduct the ENE sessions.

A couple of interesting variations in ratings occurred, pointing out how important the different perspectives are in assessing this program. Question 3a asks respondents to agree or disagree about the statement, "Some parties did not participate in good faith." While 48 percent of parties and 40.7 percent of attorneys agreed, *no* evaluators agreed. Question 2g asks if ENE improved communication between the parties. Evaluators and parties agreed that it was helpful, by 70.6 and 60 percent, respectively, while only 44.8 percent of attorneys agreed. Seventy-five percent of attorneys agreed that the procedures used during the conference were fair, but only 58.3 percent of parties agreed. Looking at all of the responses to questions 2a-k, the evaluators had almost no responses in the "detrimental" column, while attorney's and parties' "detrimental" responses ranged from 3.4 to 25 percent, though those are still low numbers.

A few questions asked for overall ratings of the program. Question one, "Overall, how helpful or detrimental was the ENE conference in this case?", received very high marks from the evaluators (93.3 percent), and somewhat lower but still excellent ratings from the parties (70.8 percent), and attorneys (72.4 percent). To number six, "If the case settled, did the ENE process aid in the settlement?", yes was indicated by 86.7 percent of attorneys, 69.2 percent of evaluators, and 56.3 percent of parties. Asked only of parties and attorneys, question seven inquired whether the benefits of ENE outweighed the costs, to which 60.7 percent of attorneys and 54.2 percent of parties said yes. To the question, "How satisfied were you with the ENE program in this case?", very/somewhat satisfied answers were given by 89.7 percent of attorneys, 83.3 percent of parties, and 82.4 percent of evaluators. When judging satisfaction

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with the final results of the *case*, the level dropped to 64.7 percent for evaluators, 68.2 percent for attorneys, and 47.6 percent for parties.

Given that one of our aims is to reduce expense to litigants and the court, one point that the committee may need to give further thought to is indicated by the responses to question 2f, "Was ENE helpful or detrimental in reducing the costs to litigate?" Evaluators had the most positive view with 64.7 percent saying it was helpful, 23.5 percent responding "no effect", and 11.8 percent indicating "detrimental". Perhaps notably, this was the *only* category in which the evaluators showed any negative responses. Fifty percent of attorneys and 41 percent of parties thought ENE was helpful, while 3.6 percent and 25 percent, respectively, thought it was detrimental. This could be for various reasons. A few cases may not be helped at all by ENE, so to them it is only an unnecessary expense. Also, parties may not be fully aware of the larger expenses that will be incurred if no settlement is reached. Lastly, the questionnaires are completed immediately after the session. At that point it may be too soon for any benefits, either indirect or direct, to be felt. Those benefits may be achieved later, but we cannot know that without more data.

A. MEAN DISPOSITION OF ENE ELIGIBLE CASES

Cases	Test Group 7/1/94 thru 10/31/95	Control Group 7/1/92 thru 10/31/93
Civil Cases filed	526	524
Cases ENE Eligible	289/54.9%	298/56.9%
Mean disposition of ENE Eligible cases filed & closed during test periods	129.7	147.9

B. ENE SESSION RESULTS

ENE Status of Case	ENE Cases	Control Group
ENE Sessions held	29*	NA
Full settlement	9/31%	NA
Partial settlement	3/10.3%	NA
No settlement	17/58.6%	NA
Mean disposition time for cases completing ENE (days)	263.3	346

* The average session length was 3.41 hours, and the average evaluator preparation time was 1.94 hours.

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C. EVALUATORS

Evaluators	ENE Period
Total Evaluators trained	36**
Evaluators chosen 0 - 3 times	23
Evaluators chosen 4 or more times	11
Evaluators who have <i>held</i> at least 1 session	19

** Subtraction of our three judges leaves us with 33 evaluators available to hold sessions.

D. SELECTED QUESTIONNAIRE RESPONSES

Complete questionnaire results are appended. (See Attachment 3) All percentages were calculated using as the divisor the total number of responses for *that question only*.

PARTY RESPONSES	Very/Somewhat Helpful	No Effect	Very/Somewhat Detrimental
Overall how helpful or detrimental was the ENE conference in this case?	17/70.8%	3/12.5%	4/16.7%
Improving communication between the parties	15/60%	7/28%	3/12%
Encouraging parties to be more realistic about their respective positions	13/52%	10/40%	2/8%
Allow parties to be more involved than they otherwise would have been	14/56%	9/36%	2/8%
Encourage parties to resolve case by means other than formal litigation	13/52%	9/36%	3/12%

PARTY RESPONSES	AGREE	DISAGREE
Some did not participate in good faith	12/48%	13/52%
You were able to better understand & evaluate the other side's position***	17/68%	8/32%
Evaluator's assessment was realistic***	20/83.3%	4/16.7%

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ATTORNEY RESPONSES	Very/Somewhat Helpful	No Effect	Very/Somewhat Detrimental
Overall how helpful or detrimental was the ENE conference in this case?	21/72.4%	5/17.2%	3/10.3%
Improving communication between the parties	13/44.8%	13/44.8%	3/10.3%
Encouraging parties to be more realistic about their respective positions	15/51.7%	11/37.9%	3/10.3%
Allow parties to be more involved than they otherwise would have been	20/69%	9/31%	2/8%
Encourage parties to resolve case by means other than formal litigation	11/36.9%	17/58.6%	1/3.4%

ATTORNEY RESPONSES	AGREE	DISAGREE
Some parties did not participate in good faith	11/40.7%	16/59.3%
You were able to better understand & evaluate the other side's position***	18/64.3%	10/35.7%
Evaluator's assessment was realistic***	18/85.7%	3/14.3%

*** These questions were asked only of parties and attorneys

EVALUATOR RESPONSES	Very/Somewhat Helpful	No Effect	Very/Somewhat Detrimental
Overall how helpful or detrimental was the ENE conference in this case?	14/93.3%	1/6.7%	0/0%
Improving communication between the parties	12/70.6%	5/29.4%	0/0%
Encouraging parties to be more realistic about their respective positions	12/70.6%	5/29.4%	0/0%
Allow parties to be more involved than they otherwise would have been	10/58.8%	7/41.2%	0/0%
Encourage parties to resolve case by means other than formal litigation	10/58.8%	7/41.2%	0/0%

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EVALUATOR RESPONSES	AGREE	DISAGREE
Some parties did not participate in good faith	0/0%	16/94.1% [1/5.9% = can't say]
ENE session occurred too early for it to be useful****	5/29.4%	11/64.7% [1/5.9% = can't say]
Some attorneys were not well prepared for the ENE session****	2/11.8%	15/88.2%

**** These questions were asked only of evaluators

IV. EVALUATOR USAGE

One aim of the Clerk's Office in administering this program was to equitably distribute the case assignments, given any geographic limitations dictated by the location of the parties and attorneys of record. Attachment Five shows that, of 129 evaluator assignments made so far, every evaluator has been chosen at least once, with 70 percent of them being chosen for three or more cases. Statistically, this works out to an average of 3.9 selections per evaluator. Over the twelve months that we have been making assignments, this calculates to approximately one selection for an evaluator every three months, which does not seem to be an undue burden on their time. In fact, fourteen evaluators (42 percent), have not yet conducted their first ENE session, illustrating again how long it can take some cases to become "ripe" for an ENE session.

In spite of our efforts to equalize assignments, some evaluators have been chosen many times more than the average. This has usually happened for two reasons: First, the geographic location of the attorneys and parties limited the evaluator names that could be proposed to them in the first letter. This is discussed further below, under paragraph one of "Recommendations". Second, parties would stipulate to selection of an evaluator that was not proposed by the Clerk's Office, but that they chose based on their knowledge of the attorney's practice or reputation.

V. RECOMMENDATIONS

According to the number of cases situated in Burlington, there seems to be an adequate number of evaluators in the surrounding area to avoid conflicts of interest and equalize the work among the evaluators. However, in some other cities, having only one or two evaluator names to send has resulted in a disproportionately large number of cases being assigned to those evaluators. Also, sometimes there were no evaluators in a city, or in close proximity, who didn't have a conflict with an attorney of record, causing an evaluator from some distance away to be assigned. If the committee decides to train more evaluators, it could help alleviate these problems if consideration were given to training at least one additional attorney from the following areas: Middlebury, Rutland, Springfield, Norwich, White River Junction, Montpelier, and St. Johnsbury. Another factor to weigh if the Court is contemplating another formal training

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session, is that procurement regulations will require funding through participant fees with possible subsidizing through the Special Court Fund. Because of this, the Court and/or the CJRA Committee may wish to consider utilizing existing evaluators under a "train-the-trainer" concept.

More than one evaluator has suggested that a gathering of current evaluators be held to discuss and share their various experiences, techniques, and results. Considering that fourteen (42 percent) of our current evaluators have not held their first session yet, and one year has passed since their training, this seems like an excellent way to refresh and update all the participants on the process, and to provide an opportunity for them to learn from each other.

Most comments on the questionnaires were positive, but of the negative ones, several mentioned that more discovery should have been done before the ENE session was held, or that the evaluator should check with the attorneys in advance of the session to be sure the case is far enough along for ENE to be useful. Although Local Rule 12(d) states that the lawyers have the responsibility to "plan discovery to ensure that they are prepared for serious and productive settlement negotiations", it seems that that is not always the reality at the session. It may be worth asking the evaluators if a mechanism for checking the sufficiency of discovery, and rescheduling the session if necessary, would be a useful tool for them, and whether some flexibility can be built into the timing requirement for the ENE session.

The original goal of the ENE program was to decrease the time from filing to disposition for certain types of civil cases, and so decrease the expense to litigants and the court. Examination of all of the data, both empirical and subjective, points out that it may be to our advantage to widen our view of the benefits of ENE and to consider those other factors in determining the program's usefulness. Indirect effects, such as improved communication, better understanding of the other side's view and of the strengths and weaknesses of your own case, and evaluation of the case by a neutral observer, could benefit us in the long run, even though not obvious in the data gathered to date.

As this program gets older, it will be important to develop more and better focused measures of its long-term impact. Better long-term data will help us in three ways: First, it will allow us to accurately assess the cost-effectiveness of ENE sessions for both the court and parties. Second, it will tell us the types of cases that do not settle even after the ENE session, and so indicate those cases where our judges' time is most needed. Third, it can help us gauge whether the scope of the program, i.e., the natures of suit, should be expanded, decreased, or remain the same. Some methods to accomplish this could include gathering additional data and writing new reports to capture and view information in new ways. For example, to test the hypothesis of indirect effects of the ENE session helping cases later, we could send a second questionnaire to attorneys in ENE cases that did not settle, when their cases do close. Another idea that would help us better judge the long term effects of ENE is to do more detailed tracking of ENE cases between the time they enter the ENE process and when and how they close. The

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specifics of gathering this long-term data should be developed soon, while the current methods and their limitations are fresh in our minds.

VI. CONCLUSION

The empirical data indicates that 29 ENE sessions have been held in the 289 eligible cases, and that approximately one-third of those 29 cases have reached full settlement. If the partially settled cases are added in, the total "effectiveness" of the ENE sessions climbs to about 40 percent, a figure which merits serious consideration. As stated above, these figures are tempered by the fact that this is still a young program, having been in effect for about six months before any cases had reached the stage where an ENE session could be held.

The subjective data from the questionnaires indicates overwhelmingly that all participants benefit from the program. Ninety-three percent of evaluators, 70.8 percent of the parties, and 72.4 percent of the attorneys answered that the ENE program was very or somewhat helpful in their cases. Several indirect effects of the ENE sessions were also noted, such as increased communication, moving the parties toward settlement, identifying strengths and weaknesses of a case, and prompting for early definition of the issues.

The combination of subjective and empirical data available so far provide evidence that this program *is* having a positive impact on the district's civil caseload, and point to the probability that the modest dividends seen so far will increase in the future. The most important conclusion to be drawn from the information and opinions presented is that this program is proving to be a success, albeit a limited one so far, and should continue. As discussed above, our program is too young for final determinations to be made about its future, but we do have significant enough results to tell us we are headed in the right direction.

UNITED STATES DISTRICT COURT

OFFICE OF THE CLERK

DISTRICT OF VERMONT

FEDERAL BUILDING

BURLINGTON, VERMONT 05402-0945

RICHARD PAUL WASKO

CLERK

☐ BURLINGTON:
(MAIN HEADQUARTERS)
P.O. BOX 945
(802 951-6301)
☐ RUTLAND 05702-0607
(DIVISIONAL OFFICE)
P.O. BOX 607
(802 773-0245)

November 13, 1995

RE: 2:93-cv-00001 Jones v. Smith

Dear Counsel:

Pursuant to Local Rule 12 regarding Early Neutral Evaluation, I am transmitting to you the names of the following potential evaluators for the above referenced case. It is intended that all parties try to agree upon one evaluator.

Potential Evaluator #1, City Location

Potential Evaluator #2, City Location

Potential Evaluator #3, City Location

If parties cannot stipulate to one of the above evaluators, then pursuant to Rule 12(f)(1), each "side" may, but need not, strike the name of one potential evaluator. Parties also have the option, pursuant to Rule 12(e)(3), of stipulating to an evaluator of their own choosing.

Whichever method is used, please note that you are required to report your response to me within ten days of the date of this letter. Please call me at the number below if you have any questions.

Marjorie E. Krahm
Chief Deputy Clerk
802-951-6301

Copies to:
Counsel of record
Pro Se Parties

UNITED STATES DISTRICT COURT

OFFICE OF THE CLERK

DISTRICT OF VERMONT

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☐ BURLINGTON:
(MAIN HEADQUARTERS)
P.O. BOX 945
(802 951-6301)
☐ RUTLAND 05702-0607
(DIVISIONAL OFFICE)
P.O. BOX 607
(802 773-0245)

RICHARD PAUL WASKO
CLERK

November 13, 1995

RE: 2:93-cv-00001 Jones v. Smith

Dear Counsel:

The following evaluator has been assigned to your above referenced case.

Assigned Evaluator, Mailing Address, Phone Number

Pursuant to Local Rule 12, the parties must now do the following:

- In consultation with the evaluator, agree on a date and time for the ENE session, taking into account the requirements of Local Rule 12(g).
- Include the ENE session date and time in the Stipulated Discovery Schedule that is due to be filed in district court on or before 11/28/95.
- Discuss compensation with your evaluator. The standard fee under Local Rule 12 is \$500 per case to be shared equally by the parties. In all cases, fees are to be paid directly to the evaluator. No money should be sent to the U.S. District Court.
- Please take note of the provisions of Local Rule 12(h) and (i) with regard to preparation for and conduct of the ENE session.

Please call me at the number below if you have any questions.

Marjorie E. Krahn
Chief Deputy Clerk
802-951-6301

Copies to:
Counsel of record
Pro Se Parties

1. Overall, how helpful or detrimental was the Early Neutral Evaluation conference in this case?

/[9] Very helpful
72.4%
\[12] Somewhat helpful
[5\17.2%] It had no effect on the case
/[2] Somewhat detrimental
10.3%
\[1] Very detrimental

2. An Early Neutral Evaluation conference may be helpful or detrimental in a number of different ways. Please indicate whether the conference was helpful or detrimental in:

	<u>Helpful</u>	<u>No Effect</u>	<u>Detrimental</u>
2a. Moving the parties toward settlement.	[16\55.2%]	[10\34.5%]	[3\10.3%]
2b. Prompting the parties for early definition of the issues.	[17\60.7%]	[11\39.3%]	[0]
2c. Prompting the parties for early exchange of essential documents.	[7\25%]	[21\75%]	[0]
2d. Aiding you to identify the strengths and weaknesses of your client's case.	[17\58.6%]	[12\41.4%]	[0]
2e. Encouraging an early resolution.	[16\57%]	[10\35.7%]	[2\7%]
2f. Reducing the costs to litigate.	[14\50%]	[13\46.4%]	[1\3.6%]
2g. Improving communication between the parties in this case.	[13\44.8%]	[13\44.8%]	[3\10.3%]
2h. Encouraging the parties to be more realistic about their respective positions in this case.	[15\51.7%]	[11\37.9%]	[3\10.3%]
2i. Allowing the parties to become more involved in resolution of this case than they otherwise would have been.	[20\69%]	[9\31%]	[0]
2j. Encouraging the parties to find a method other than formal litigation to resolve this case.	[11\37.9%]	[17\58.6%]	[1\3.4%]
2k. Prompting the parties for early definition to the scope of discovery.	[6\22.2%]	[21\77.8%]	[0]

3. Below are several statements about the Early Neutral Evaluation Program. Please indicate whether or not it describes this case.

	<u>Yes</u>	<u>No</u>
3a. Some parties did not participate in good faith in the conference.	[11\40.7%]	[16\59.3%]
3b. The evaluator was adequately prepared.	[26\96.3%]	[1\3.7%]
3c. The evaluator was effective in getting the parties to engage in meaningful discussion.	[25\89.3%]	[3\10.7%]
3d. The evaluator was fair and impartial.	[26\96.3%]	[1\3.7%]
3e. The procedures used during the conference were fair.	[21\75%]	[7\25%]
3f. The parties had discussed settlement prior to the conference.	[12\42.8%]	[16\57.1%]
3g. You were able to better understand and evaluate the other side's position.	[18\64.3%]	[10\35.7%]
3h. The Evaluator was a good listener.	[29\100%]	[0]
3i. The Evaluator's assessment, if made, was realistic.	[18\85.7%]	[3\14.3%]
3j. The Early Neutral Evaluation conference would have been more effective had it been conducted by someone with greater subject matter expertise.	[6\22.2%]	[21\77.8%]

4. The questions below ask about the administration of the Early Neutral Evaluation program in this case.

	<u>Yes</u>	<u>No</u>
4a. Did you receive timely notice (of the date) of the conference?	[28\96.6%]	[1\3.4%]
4b. Did you receive adequate information about the time and location of the conference?	[29\100%]	[0]
4c. Were you adequately informed about the purpose of the conference and your responsibilities?	[29\100%]	[0]
4d. Were your scheduling constraints, if any, adequately taken into account?	[28\96.6%]	[1\3.4%]
4e. Was the location of the conference convenient for you?	[24\85.7%]	[4\14.3%]

5. Was a settlement worked out at the evaluation conference?

[9\31%] Yes
[20\69%] No

6. If your case settled (partially or fully), did the Early Neutral Evaluation program aid in the settlement of this case?

[13\86.7%] Yes
[2\13.3%] No

7. Did the benefits of being involved in the Early Neutral Evaluation program outweigh the costs?

[17\60.7%] Yes
[11\39.3%] No

8. How satisfied were you with the Early Neutral Evaluator in this case?

/[20] Very satisfied
89.7%
\[6] Somewhat satisfied

/[2] Somewhat dissatisfied
10.3%
\[1] Very dissatisfied

9. How satisfied were you with the final result of this case?

/[8] Very satisfied
68.2%
\[7] Somewhat satisfied

/[5] Somewhat dissatisfied
31.8%
\[2] Very dissatisfied

10. The following questions ask about your experience in mediation/evaluation programs and your general view toward such programs.

Yes No

10a.	Have you participated in a mediation/evaluation program in another federal or state court?	[16\55.2%]	[13\44.8%]
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10b.	In general, do you approve of mediation/evaluation programs?	[26\89.7%]	[3\10.3%]
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11. Should the District of Vermont's Early Neutral Evaluation program be continued?

[26\92.9%] Yes
[2\7.1%] No

1. Overall, how helpful or detrimental was the Early Neutral Evaluation conference in the resolution of this case?

/[12] Very helpful
 70.8%
 \[5] Somewhat helpful
 12.5% - [3] It had no effect on the case
 /[1] Somewhat detrimental
 16.7%
 [3] Very detrimental

2. An Early Neutral Evaluation conference may be helpful or detrimental in a number of different ways. Please indicate whether the conference was helpful or detrimental in:

	<u>Helpful</u>	<u>No Effect</u>	<u>Detrimental</u>
2a. Moving you toward settlement.	[13\52%]	[8\32%]	[4\16%]
2b. Prompting you for early definition of the issues.	[14\56%]	[10\40%]	[1\4%]
2c. Prompting you for early exchange of essential documents.	[9\36%]	[15\60%]	[1\4%]
2d. Aiding you to identify the strengths and weaknesses of your case.	[17\68%]	[7\28%]	[1\4%]
2e. Encouraging an early resolution.	[11\44%]	[10\40%]	[4\16%]
2f. Reducing your costs for litigation.	[10\41.7%]	[8\33.3%]	[6\25%]
2g. Improving communication between you and the other party or parties in this case.	[15\60%]	[7\28%]	[3\12%]
2h. Encouraging you to be more realistic about your respective position in this case.	[13\52%]	[10\40%]	[2\8%]
2i. Allowing you to become more involved in resolution of this case.	[14\56%]	[9\36%]	[2\8%]
2j. Encouraging you to find a method other than formal litigation to resolve this case.	[13\52%]	[9\36%]	[3\12%]

3. Below are several statements about the Early Neutral Evaluation Program. Please indicate whether or not it describes this case.

	<u>Yes</u>	<u>No</u>
3a. Some parties did not participate in good faith in the conference.	[12\48%]	[13\52%]
3b. The evaluator was adequately prepared.	[22\88%]	[3\12%]
3c. The evaluator was effective in getting you to engage in meaningful discussion.	[22\88%]	[3\12%]
3d. The evaluator was fair and impartial.	[22\88%]	[3\12%]
3e. The procedures used during the conference were fair.	[14\58.3%]	[10\41.7%]
3f. You had discussed settlement prior to the conference.	[13\52%]	[12\48%]
3g. You were able to better understand and evaluate the other side's position.	[17\68%]	[8\32%]
3h. The Evaluator was a good listener.	[22\88%]	[3\12%]
3i. The Evaluator's assessment was realistic.	[20\83.3%]	[4\16.7%]
3j. The Early Neutral Evaluation conference would have been more effective had it been conducted by someone with greater subject matter expertise.	[2\8%]	[23\92%]

4. The questions below ask about the administration of the Early Neutral Evaluation program in this case.

	<u>Yes</u>	<u>No</u>
4a. Did you receive timely notice (of the date) of the conference?	[23\92%]	[2\8%]
4b. Did you receive adequate information about the time and location of the conference?	[24\96%]	[1\4%]
4c. Were you adequately informed about the purpose of the conference?	[23\92%]	[2\8%]
4d. Were your scheduling constraints, if any, adequately taken into account?	[21\87.5%]	[3\12.5%]
4e. Was the location of the conference convenient for you?	[18\72%]	[7\28%]
4f. Would you have preferred to have participated in selecting the evaluator?	[7\33.3%]	[66.7%]

5. Was a settlement worked out at the evaluation conference?

[8\32%] Yes

[17\68%] No

6. If your case settled (partially or fully) did the Early Neutral Evaluation program aid in the settlement of this case?

[9\56.3%] Yes

[7\43.7%] No

7. Did the benefits of being involved in the Early Neutral Evaluation program outweigh the costs?

[13\54.2%] Yes

[11\45.8%] No

8. How satisfied were you with the Early Neutral Evaluator in this case?

/[15] Very satisfied
83.3%

\[5] Somewhat satisfied

/[1] Somewhat dissatisfied
16.7%

\[3] Very dissatisfied

9. How satisfied were you with the final result of this case?

/[6] Very satisfied
47.6%

\[4] Somewhat satisfied

/[2] Somewhat dissatisfied
52.4%

\[9] Very dissatisfied

1. Overall, how helpful or detrimental was the Early Neutral Evaluation conference in this case?

- [6\] Very helpful
93.3%
- [8/] Somewhat helpful
- [1\6.7%] It had no effect on the case
- [0\] Somewhat detrimental
0%
- [0/] Very detrimental

2. An Early Neutral Evaluation conference may be helpful or detrimental in a number of different ways. Please indicate whether the conference was helpful or detrimental in:

	<u>Helpful</u>	<u>No Effect</u>	<u>Detrimental</u>
2a. Moving the parties toward settlement.	[12\70.6%]	[5\29.4%]	[0]
2b. Prompting the parties for early definition of the issues.	[9\52.9%]	[8\47%]	[0]
2c. Prompting the parties for early exchange of essential documents.	[7\41.2%]	[10\58.8%]	[0]
2d. Aiding the attorneys to identify the strengths and weaknesses of their client's case.	[10\58.8%]	[7\41.2%]	[0]
2e. Encouraging an early resolution.	[12\70.6%]	[5\29.4%]	[0]
2f. Reducing the costs to litigate.	[11\64.7%]	[4\23.5%]	[2\11.8%]
2g. Improving communication between the parties in this case.	[12\70.6%]	[5\29.4%]	[0]
2h. Encouraging the parties to be more realistic about their respective positions in this case.	[12\70.6%]	[5\29.4%]	[0]
2i. Allowing the parties to become more involved in resolution of this case than they otherwise would have been.	[10\58.8%]	[7\41.2%]	[0]
2j. Encouraging the parties to find a method other than formal litigation to resolve this case.	[10\58.8%]	[7\41.2%]	[0]
2k. Prompting the parties for early definition to the scope of discovery.	[4\23.5%]	[13\76.5%]	[0]

3. Below are statements regarding the Early Neutral Evaluation program. Please indicate whether you agree or disagree.

	<u>Agree</u>	<u>Disagree</u>	<u>Can't Say</u>
3a. Some parties did not participate in good faith.	[0]	[16\94.1%]	[1\5.9%]
3b. The evaluation conference occurred too early in this case for it to be useful.	[5\29.4%]	[11\64.7%]	[1\5.9%]
3c. Settlement was not a realistic goal in this case.	[1\5.9%]	[15\88.2%]	[1\5.9%]
3d. Additional discovery was needed before the evaluation conference to make it useful.	[4\23.5%]	[13\76.5%]	[0]
3e. The issues in this case were too complex for this case to be considered in the Early Neutral Evaluation program.	[0]	[17\100%]	[0]
3f. The evaluation conference was too brief to permit a meaningful discussion of the case.	[1\5.9%]	[16\94.1%]	[0]
3g. Some attorneys in this case were not well prepared for the evaluation conference.	[2\11.8%]	[5\88.2%]	[0]

4. The following questions ask about your experience in mediation/evaluation programs and your general view toward such programs.

4a. How many times have you served as a mediator/evaluator in the District of Vermont's Early Neutral Evaluation program? 2.06 Average

4b. Have you served as mediator or evaluator in a court mediation/evaluation program in another court?

[5\29.4%] Yes
[12\70.6%] No

4c. In general, do you approve of court-sponsored mediation/evaluation programs?

[17\100%] Yes
[0] No

5. Was a settlement worked out at the evaluation conference?

[5\29.4%] Yes
[12\70.6%] No

6. Did the Early Neutral Evaluation program aid in the settlement of this case?

[9\69.2%] Yes

[4\30.8%] No

7a. Approximately how many hours did the evaluation conference last? 3.41 Average hours

7b. How much time was required for you to prepare for the evaluation conference? 1.94 Average hours

8. How satisfied were you with the Early Neutral Evaluation program in this case?

/[10] Very satisfied
82.4%

\[4] Somewhat satisfied

/[2] Somewhat dissatisfied
17.6%

\[] Very dissatisfied

9. How satisfied were you with the final result of this case?

/[6] Very satisfied
64.7%

\[5] Somewhat satisfied

/[4] Somewhat dissatisfied
35.3%

\[2] Very dissatisfied

10. Did the evaluator training that you received adequately prepare you to conduct the Early Neutral Evaluation session?

[16\64.7%] Yes

[1\5.9%] No

11. Should the District of Vermont's Early Neutral Evaluation program be continued?

[17\100%] Yes

[0] No

Comments on Questionnaires

Attorneys:

- In an employment discrimination case, settlement is more likely to occur post-deposition. If this procedure is going to be used for Pro Se plaintiffs, the evaluator should have a greater range of power. The major problem with the procedure in this case was that the Pro Se plaintiff has unrealistic expectations and does not have enough knowledge to know whether case is strong or whether to listen to evaluator's assessment.

- Plaintiff is pro se with an unrealistic view of his case. The process in this case was a waste of everyone's time and money except the evaluator was able to explain to the plaintiff something about the discovery procedure.

- Scheduled too early in the case. Discovery was progressing nicely, however. Plaintiffs were not in a position to make a demand at the time of ENE because discovery was not advanced enough.

- Plaintiff's were very disappointed that the evaluator did not issue a bell weather report - when he did after a month or so the case settled.

- It made the defendant's attorney to focus on settlement proposals made over a period of five months.

- A few days prior to the ENE session serious settlement negotiations were not anticipated by the attorneys. Early on in the meeting, the parties realized both were willing to resolve the matter fairly, and the rest of the session was spent in serious, good faith settlement discussions. The ENE Evaluator greatly asserted the parties in the effort. Because of substantial movement, the parties are meeting to hopefully conclude the case. Because of the good faith environment, parties have agreed to postpone numerous schedule depositions resulting in probable substantial savings to the parties.

- The ENE program should continue with modifications: 1) evaluator must have expertise or at least possess working knowledge of subject matter, and 2) early neutral evaluation statements should only be sent to the evaluator, not the other side as well.

- The evaluation in this instance was simply too early in the process to be helpful.

- There was a helpful exchange of information, even beyond formal discovery requests. This, however, is a relatively simple fact pattern.

- Requiring all litigants to have ENE is not always useful or

cost effective.

Evaluators:

- Court enforcing mandate that adjuster attend was extremely helpful.
- Evaluator training did not adequately prepare evaluator. Evaluator made several mistakes: assumed the people calling the shots would be present, should have confirmed before session; pltf's counsel didn't do a good summary of the case. It may be asking too much to expect that the training would have helped, experience will do so.
- Ongoing discovery was halted (anticipated to cost parties thousands of dollars) to allow for a promptly scheduled second negotiation session and stand by ENE that same date.
- Open discussion allowed evaluation of parties as witnesses. Venting may help. Caused parties to seriously consider positions.
- Training could be improved. Refresher on mediation skills could be helpful. Also opportunity to meet and discuss ENE problems with other evaluators after having been through actual experience would help.
- The parties never had a scheduling order, so the ENE session was held after all discovery was completed and the Friday before a scheduled Monday trial date. The defendant did not attend in person, but attended by phone. There was inadequate time to pursue the potential bases of settlement discussed at the session. One party's lawyer felt I could do nothing more to bring the parties together, so I felt I had no more authority to continue mediation efforts after the session. I do think my continued involvement would have increased the likelihood of settlement.
- There was big savings and the issue is proximate cause. defendant had not conducted all discovery and it was difficult to avail without existence of defendant's likely causation expert.
- ...some thought needs to be given to better scheduling of ENE sessions in cases of multiplicity of facts and legal issues that are still up in the air through no fault of the parties. Perhaps there should be built into the process one or more periodic telephone contacts with the evaluator to ensure that the case is far enough along in discovery for the evaluator to be able to assist in mediation. For it to be most effective, we need to ensure that it is not a "one size fits all" process.

Parties:

- Improvement: allow the evaluator to decide if there is a case and go by his/her decision. If no case, the action will end there.

- Very well organized program.

- It ought to be made easier for insurers to participate by phone. Perhaps a dollar threshold might be set (at \$50,000) below which an insurer can be excused from attending automatically upon request, if the insurer is available by phone.

- The evaluator was not NEUTRAL. It was clear that he "represented" the interests of the Pro Se plaintiff. He was not interested in hearing all sides and gave the plaintiff false hope and moved us further away from settlement.

- I was dissatisfied because the plaintiffs reasons for not settlement was because all people they transfer would also try to sue them, this reasoning had nothing to do with my case.

- Came in with attitude that the plaintiff was right, we were wrong and that we should compromise our beliefs to just get this case settled and not go to court. He gave the plaintiff the hope that he will win and we would lose.

- This was a waste of time.

- Attorneys must have better facts and exhibits on hand for the ENE hearing.

- I think the ENE program was well designed and much worth the effort. Can't think of any ways I would have modified it.

- Defendant was not prepared to discuss case substantively and representative of the insurance company did not attend. This, ENE became simply a forum for "free" discovery/deposition of plaintiff, notwithstanding efforts by the evaluator.

- Improvements: carrier must attend, there must be some settlement authority, and both parties must at least have completed initial file evaluation.

- I believe that the overall result will be seriously detrimental to the possibility of the parties reaching an early settlement. I am not pleased that the related attorneys' fees for preparation and attendance were largely wasted. It would be preferable if there were some procedure to assure the evaluator that both sides had met some minimum criteria for investigating and documenting their positions prior to the hearing. After meeting twice with each side without the other party being present, it was clear that no settlement would be reached and both parties again met jointly with the evaluator. To my astonishment, he proceeded to tell each of us what he had written two hours prior and then qualified his statement by saying that if he had met with each party separately before writing down his preliminary conclusion his thoughts would have been substantially different.

	<u><i>Evaluator</i></u>	<u><i># of Times Chosen</i></u>	<u><i>Results of Session</i></u>
1	Edwin Amidon, Jr.	9	1-No Settlement
2	Evan C. Archer, Jr.	3	1-No Settlement
3	Joseph H. Badgewick	3	
4	Eileen M. Blackwood	3	
5	Stephen S. Blodgett	3	1-Full Settlement
6	Samuel S. Bloomberg	3	
7	Joseph F. Cahill, Jr.	3	
8	Richard T. Cassidy	3	1-No Settlement
9	Stephen R. Crampton	2	1-Full Settlement
10	Christopher L. Davis	4	
11	Hon. Hilton H. Dier, Jr.	6	1-Partial Settlement 1-Full Settlement
12	James A. Dumont	2	
13	William A. Fead	2	
14	John H. Fitzhugh	9	1-No Settlement 2-Full Settlement
15	James C. Gallagher	3	2-No Settlement
16	Robert P. Gerety, Jr.	3	1-No Settlement
17	Peter W. Hall	10	2-Full Settlement
18	John R. Hughes, Jr.	1	1-Partial Settlement
19	Peter B. Joslin	8	2-No Settlement
20	Mark A. Kaplan	2	1-Partial Settlement
21	Mary Kehoe	3	
22	Catherine Kronk	3	
23	Robert E. Manchester	2	1-No Settlement 1-Settled Before Session
24	Stephanie J. Mapes	2	
25	Karen McAndrew	4	1-No Settlement 1-Settled Before Session
26	Thomas E. McCormick	8	2-No Settlement 1-Full Settlement

	<u><i>Evaluator</i></u>	<u><i># of Times Chosen</i></u>	<u><i>Results of Session</i></u>
27	Robert R. McKearin	5	1-No Settlement 1-Full Settlement
28	William H. Meub	4	
29	James W. Murdoch	2	
	J. Garvan Murtha	1	1-Settled Before Session
	Arthur O'Dea (stipulated to/untrained) .	1	1-No Settlement
30	Jerome F. O'Neill	1	
31	Douglas Richards	7	1-No Settlement
32	Stephen L. Saltonstall	2	1-No Settlement
	William K. Sessions III	0	
33	Potter Stewart, Jr.	3	
	TOTAL	129	Average = 3.9

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