

# **United States District Court District of Vermont**



## **Early Neutral Evaluation Program**

### **2010 ANNUAL REPORT**

**November 1, 2009 - October 31, 2010**

## INTRODUCTION

“Early neutral evaluation (ENE) is a nonbinding alternative dispute resolution process designed to improve case planning and settlement prospects by providing litigants with an early advisory evaluation of the likely court outcome.... [T]he ENE session is generally held before much discovery has taken place.”

The Judicial Conference of the United States Committee on Court Administration and Case Administration, *Civil Litigation Management Manual* 69 (2d ed. 2010).



This report offers an updated and restructured view of this district’s ENE program. The goal of this report is to provide the most relevant historical and statistical data in a clear and concise manner. The reporting period contained herein is *November 1, 2009* through *October 31, 2010*.

The ENE process is now in its teenage years. It continues to grow and improve, and achieves success one case at a time. The Court remains, with renewed vigor, committed to the ENE process.

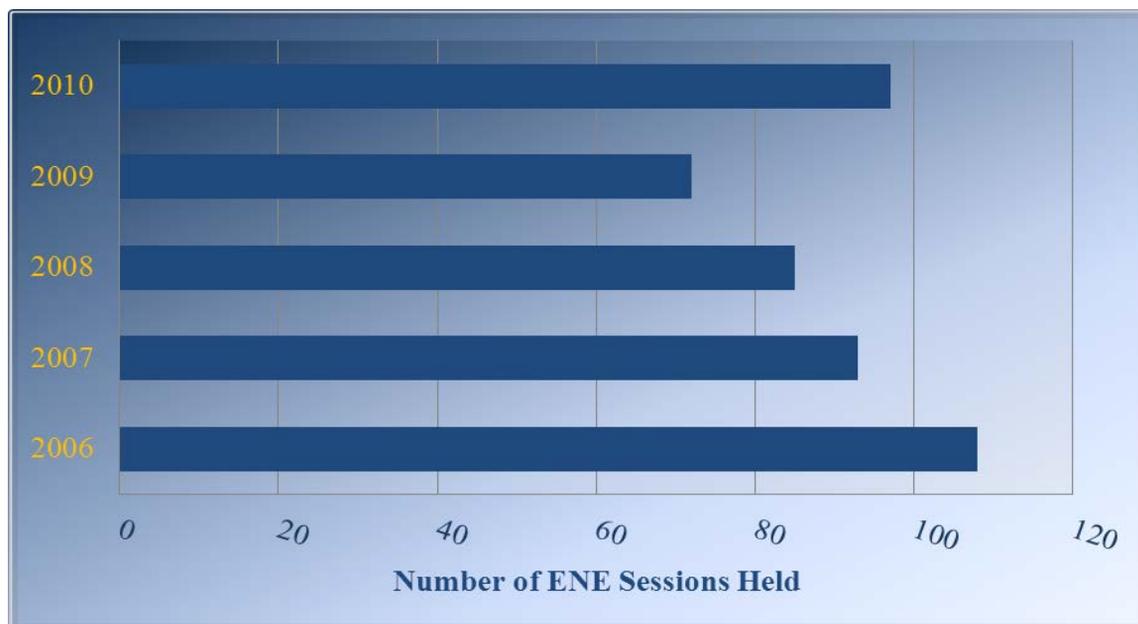
# STATISTICAL ANALYSIS

## ENE Usage

The aggregate number of ENE eligible<sup>1</sup> cases since the program's inception date of July 1, 1994 is **3,142**.

**1,564** (50%) of eligible cases were either settled or dismissed prior to an ENE session. **34** (1%) of eligible cases successfully opted out of the ENE process.

This graph illustrates the number of ENE sessions held each year for the past 5 years.



<sup>1</sup> Cases filed with nature of suit statistical code categories as specified in L.R. 16.1(b)(1)(A)-(G).

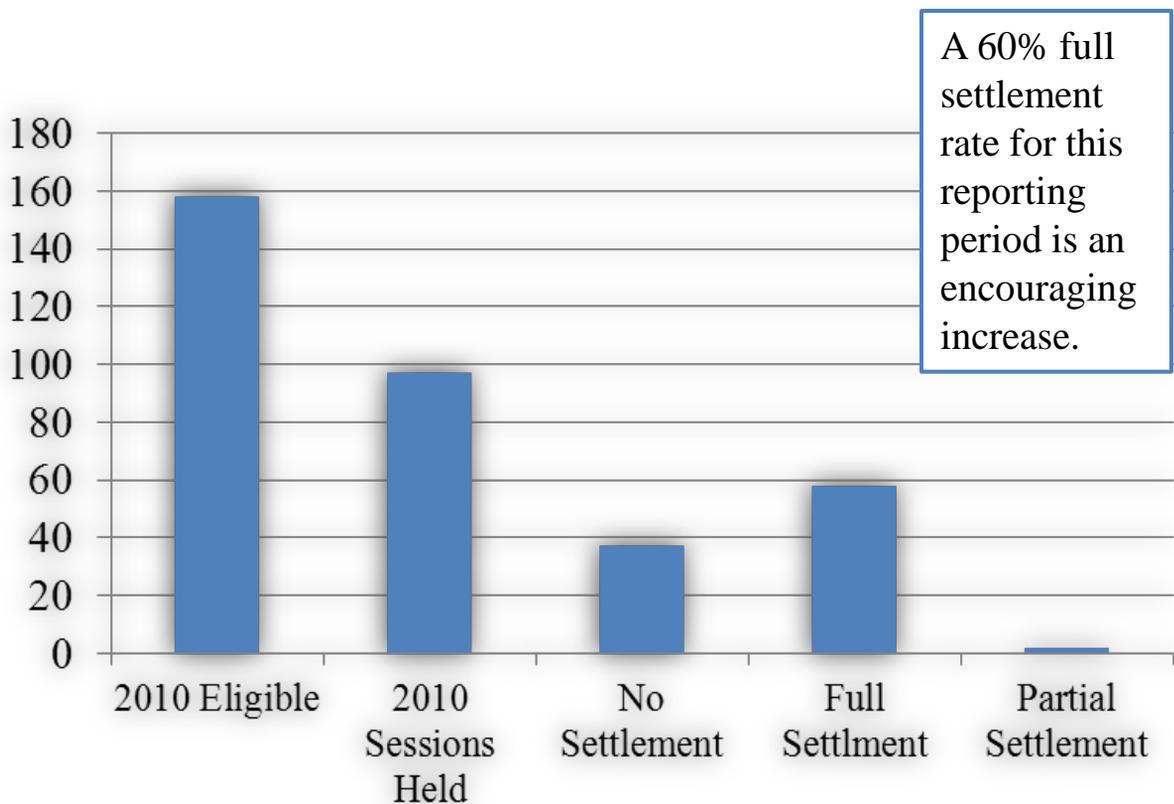
## ENE Results

Of the 1,616 sessions held since inception, 946 (59%) resulted in no settlement; 634 (39%) resulted in full settlement; and 36 (2%) resulted in partial settlement.

## 2010 Results

As depicted in the graph below, there were 158 cases eligible for ENE in the 2010 reporting period. Of the 158 cases, 97 (61%) held ENE sessions. This is a 35% increase from the 72 sessions held in 2009.

Of those 97 sessions held, 37 (38%) resulted in no settlement; 58 (60%) resulted in full settlement; and 2 (2%) resulted in partial settlement.



## Disposition of ENE Eligible Cases

This table compares the **point of disposition** for ENE eligible cases in specific nature of suit categories. It also displays the mean disposition time for each category. This information suggests what case types benefit most from the program.

Nature of Suit	When Disposed			Mean Disposition Time (in days)
	Pre-ENE Session	At ENE Session	After ENE Session	
110 Contract: Insurance	52%	18%	30%	368
190 Contract: Other	58%	15%	27%	328
350 PI: Motor Vehicle	26%	33%	41%	364
360 PI: Other	34%	31%	35%	372
362 PI: Med Mal	51%	24%	25%	400
365 PI: Product Liability	47%	22%	31%	416
440 Civil Rights: Other	63%	14%	23%	324
442 Civil Rights: Jobs	33%	28%	39%	382
791 Labor: ERISA	47%	27%	26%	284

## ATTORNEY FEEDBACK

Throughout the reporting period, the Court mailed Case Closing Questionnaires to counsel who participated<sup>2</sup> in the ENE program. A summary of the responses is attached as APPENDIX 1.

Based on the comments received, ENE is regarded as a “valuable resolution tool,” but is “often set too early in the case.” Many responses spoke to the fact that some cases/participants “make ENE of little use...as far as settlement.” This statement simply affirms there will always be cases which will never resolve at ENE – no matter the evaluator – the attorney/party preparation – the good faith efforts. However, it is important to keep in mind many cases benefit from ENE in ways which are not always immediately evident.

## EVALUATOR FEEDBACK

APPENDIX 2 summarizes the responses to the Court’s Annual Early Neutral Evaluator Questionnaire. These results signify a 17% increase in evaluators who felt that attorney participation in the process was **Excellent**, with thorough preparation and honest efforts toward success. An increase of 16% was also reflected by those who observed parties’ participation in the process as **Full**, active participation.

These increases are a strong indication that ENE has become an important aspect of litigation management.

<sup>2</sup> Participation begins with the assignment of an evaluator.

## EVALUATOR USAGE

Attached as APPENDIX 3, is a spreadsheet presenting the **combined** efforts of **all** evaluators – those who are, or were at one time, on the official Court roster, and those who have been stipulated to by parties.

## UPDATES

➤ Beth Cota was named ENE Administrator during the reporting period, and since that time has worked to transfer all ENE related data into a new electronic platform. This transfer of information subjected the data to a thorough analysis of necessity, accuracy and organization. It identified the strengths and limitations of the manner in which the data is collected and kept. The transfer and review of ENE data will be complete by year's end.

➤ With the recommendations of the ENE Subcommittee, the Court continues to develop a refreshed panel. Some considerations for panel structure include the necessity for various areas of practice and the geographical location of evaluators. Proposals for panel content are being circulated for consideration. The Court is optimistic a refreshed ENE panel will be realized in the very near future.

➤ There were no training seminars within this reporting period. It is the Court's intention, however, that upon finalization of a new panel, priority will be given to providing training opportunities.

➤ Bankruptcy made minimal use of ENE this reporting period. A total of 2 cases were referred to ENE.

## CONCLUSION & VISION

2010 was an active and successful year for ENE. Success has many forms, and it is important that the value and underlying principle of Early Neutral Evaluation not become misplaced among the figures. Indeed, statistics are essential, but the weight of success cannot always be measured in numbers.

With the new data platform in place, the ability to maintain and organize all ENE session, case, and evaluator data has become streamlined. This should prove to be an invaluable tool in providing prompt and accurate information.

The Court recognizes the value of ENE and is committed to providing litigants with a fair and expedient means to advance and protect their interests. The Court looks forward to implementing many new changes in 2011.



The United States District Court for the District of Vermont would like to thank the evaluators and members of the legal community for their continued support of, and participation in, its ENE program.

### Comments

Any comments or suggestions relating to the ENE program may be forwarded to H. Beth Cota, ENE Administrator, at (802) 951-6301, or to [Beth\\_Cota@vtd.uscourts.gov](mailto:Beth_Cota@vtd.uscourts.gov).

# APPENDIX 1

## ENE CASE CLOSING QUESTIONNAIRE DISTRICT OF VERMONT

1. The primary reason(s) this case closed when it did: (check all that apply)

**If your Case Closed Before ENE Session was Held**

- 17% a. Facts/Issues were straightforward so lengthy discovery was not needed  
0% b. Settlement was at least partly worked out before the case was filed  
17% c. Client changed mind – case dropped or to be pursued in another venue  
12% d. ENE process imminent – discovery checklist, case summary, etc. due soon  
54% e. Other (please explain) \_\_\_\_\_

**If your Case Closed After ENE Session was Held**

- 28% f. Recent receipt of needed written discovery materials, i.e., interrogatories, requests to admit/produce, expert reports  
g. Deposition(s) of experts were completed  
h. Deposition(s) of key fact witnesses were completed  
29% i. Decision on controlling motions by the Court  
19% j. Trial date set/approaching  
1% k. Attorney/client schedule only recently permitted full attention on this case  
22% l. Other (please explain) \_\_\_\_\_

2. Was the ENE process *as a whole* helpful in settling this case? (Please consider “intangible effects” of ENE, such as opening communication between the parties, identifying strengths and weaknesses of each side, getting clients to be more realistic, etc.)

- 12% Very helpful  
22% Somewhat helpful  
64% No effect  
1% Detrimental

- 2a. If you checked “Very” or “Somewhat” helpful above, what about the ENE process helped most in resolution of the case? (check all that apply)

- 27% Active participation of client in the session, i.e., direct communication with other party(ies), hearing strengths and weaknesses of their own case, etc.  
13% Prompted counsel to exchange information and/or “get moving” on discovery sooner than we otherwise might have  
5% \$500 fee prompted consideration of settlement before that stage was reached  
22% Evaluator’s methods of conducting the session and discussing the case  
17% Prompted all to consider settlement earlier than we otherwise might have  
2% Combination of all  
10% Improved pretrial settlement discussion as trial approached, i.e., court pretrial conference  
5% Other (please explain) \_\_\_\_\_

3. Do you think this case settled any earlier than it would have if there were no ENE process?

- 15% Yes  
62% No  
23% No way to tell

4. Did the ENE process help decrease the costs of the litigation, either because of early settlement, or in other ways?

- 30% Yes If yes, please explain: \_\_\_\_\_  
70% No \_\_\_\_\_

**PLEASE USE THE AREA BELOW FOR ANY OTHER COMMENTS OR SUGGESTIONS YOU MAY HAVE REGARDING THE ENE PROGRAM.**

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“ENE is helpful in many cases. But in some cases, such as this particular case, the parties’ views of the merits of the case are simply too far apart to permit meaningful discussion. In this case, the plaintiff was convinced his claim had merit and was worth a substantial sum; the defendant believed the case was meritless, and not valuable even if meritorious. Defendant filed for summary judgment and prevailed. Settlement was not possible because the plaintiff’s view of the case was unrealistic.”

“We settled the old fashioned way with a direct dialog between counsel.”

“The ENE process had no impact on the dismissal of this case.”

“In general, ENE is most helpful in resolving these cases. However, the deadline for ENE is often set too early in the case. It needs to be scheduled late enough in the process that the parties are more likely to settle – too early and it won’t happen.”

“Sometimes the requirement in the rule that the ENE occur mid-way through discovery means that the ENE is scheduled before expert discovery is complete. In some cases, conducting an ENE before expert discovery is complete is not productive. (Ex. Medical malpractice cases)”

“I was not a fan of ENE when adopted here, believing that good lawyers do not need to be required to meet, speak or negotiate. I confess the process has worked well in practice.”

“The ENE process seemed very good. We had a party on the other side that made the ENE of little use in this case as far as settlement. Nonetheless, we felt the neutral feedback from the ENE neutral was helpful.”

“Federal court ENE should be in the hands of the attorneys and not subject to inflexible scheduling by the Clerk’s office.”

“Regretfully, I must say the first ENE resulted in a very troubling end I have never seen before in 20+ years of practice. My client rep attended from Florida. He is a long time practicing attorney, now general counsel. After the ENE, the evaluator sent us a long, very biased one sided letter taking us to task for what he felt was a low final offer (at the second ENE we settled at or near that number). The harsh criticism was unprofessional and not neutral. My client was dismayed. Personally, I feel the evaluator was out-of-line and when later told of the letter, plaintiff’s counsel was quite dismayed.”

“The ENE program is good. However, in this complicated patent case, a non-patent ENE was selected. That did not help the process. Consider having specialized ENEs for specialized cases. – Patent-Trademark-Copyright-Environmental-Securities-ERISA and so on.”

“The ENE process is a valuable resolution tool whose results have far exceeded my expectations when the process was formalized many years ago.”

“The ENE evaluator was ineffective, but judge was effective in getting parties to settle.”

“ENE in this case occurred too early in litigation to be helpful.”

**2b. Other (please explain):**

“It created a clear point in time where evaluation of the case by all parties was necessary and required focusing on the case.”

“Waste of time. Great evaluator, but he had overbooked himself and had another mediation in the afternoon. Client flew in from NY. But don’t think case would have settled anyway.”

**4. Did the ENE process help decrease the costs of the litigation, either because of early settlement, or in other ways? Yes or No.**

Yes: “It caused the case to settle earlier.”

Yes: “Imminence of ENE prompted Defendant’s insurer to settle to avoid costs. Case was strong, and insurer was just holding on as long as possible.”

Yes: “Settlement occurred prior to expert payments and expert deposition costs.”

Yes: “No substantive motion work and limited discovery.”

Yes: “We settled to avoid further costs.”

Yes: “Cost of litigation via settlement immediately following meet & confer.”

Yes: “All Plaintiffs’ experts yet to depose.”

Yes: “The cards were put on the table early on.”

No: “We needed a dispositive motion from the court decided, which did help the case resolve.”

No: “This case is an aberration. The mediator allowed the carrier to act in bad faith.”

No: “Since case settled on eve of trial, but the process was still helpful.”

## APPENDIX 2

### UNITED STATES DISTRICT COURT DISTRICT OF VERMONT

#### ANNUAL EARLY NEUTRAL EVALUATOR QUESTIONNAIRE

In the Court's continued effort to ascertain the degree of participation in the Early Neutral Evaluation process, please answer the following questions based on your experiences and observations.

1. As to **attorneys'** participation in the process, please indicate what percentage applies to each statement below.

<u>82</u> %	<b>Excellent</b> – thorough preparation and honest efforts toward success
<u>14</u> %	<b>Good</b> – some efforts made, but appear hesitant and/or skeptical
<u>3</u> %	<b>Indifferent</b> – participate minimally to comply with the Local Rule
<u>1</u> %	<b>Negative</b> – little or no preparation with no chance given to process
<u>0</u> %	<b>Other</b> – please explain

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- 1a. Compared to previous years, do your responses above represent

<u>27</u> %	An <b>increase</b> in attorney preparedness and participation
<u>64</u> %	The <b>same</b> level of attorney preparedness and participation
<u>9</u> %	A <b>decline</b> in attorney preparedness and participation

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2. As to **parties'** participation in the process, please indicate what percentage applies to each statement below.

<u>79</u> %	<b>Full</b> active participation
<u>13</u> %	<b>Some</b> participation
<u>6</u> %	<b>Neutral</b> – present, but not actively participating in the process
<u>2</u> %	<b>Negative</b> participation harming case progress
<u>0</u> %	<b>Other</b> – please explain

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3. In your experience, are there any types of cases that are currently subject to ENE that should not be? **None suggested.**
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#### Comments or suggestions regarding the ENE program:

**“To remain an effective ENE evaluator, you need to receive more than one assignment per year.”**

**“It's always helpful to have MSJ decided and not pending at time of mediation.”**

**“It's a good program. For the most part, participants are prepared and competent.”**

**“I think the program is going well. A modest increase in evaluator compensation would be good.”**

**“I think the program is a good one and hope to continue to be involved.”**

### APPENDIX 3

Current Court Roster (as of 10/31/2010)

Previous Court Roster

By Stipulation

Evaluator	Cases Assigned	Full Settlement	Partial Settlement	No Settlement	Settled Prior to Session	Dispositive Motion Prior to Session
Affolter, Richard	3	1			1	1
Allen, Frederic W.	24	6	1	12	5	
Amidon, Jr., Edwin	51	7		29	12	3
Archer, Evan	11			7	3	1
Badgewick, Joseph	16	2		4	7	1
Barnes, Gary	11	6		2	3	
Bell, Alison J.	17	4		9	2	2
Bergeron, John J.	16	2		8	3	2
Bisson, Leo	26	10	1	11	3	
Blackwood, Eileen M.	53	18		18	7	4
Blodgett, Stephen S.	42	8		22	4	8
Bloomberg, Samuel S.	18	1	1	10	5	1
Boylan, III, John J.	9	3		4	1	1
Briggs, Heather	1			1		
Brown, Victoria J.	1				1	
Bryan, Hon. Alden T.	24	4	1	6	8	5
Burchard, Daniel	1					1
Cahill, Jr., Joseph F.	29	4	1	16	6	2
Carlson, Thomas Z.	1			1		
Carroll, James F.	1			1		
Cassidy, Richard T.	75	29		24	10	1
Chadurjian, Mark	2	1			1	
Clapp, Michael	1			1		
Clayton, Gregory S.	1	1				
Cleary, David L.	38	14	1	12	4	
Coffrin, James	1			1		
Cohen, Jerry	1	1				
Collins, John	2			2		
Coughlin, Patrick	2	1		1		
Crampton, Stephen R.	6	1		1	3	
Crawford, Geoffrey	1			1		
Crispe, Lawrin P.	1			1		
Davis, Christopher L.	74	16		34	14	6
Deitz, Rogert	1	1				

Evaluator	Cases Assigned	Full Settlement	Partial Settlement	No Settlement	Settled Prior to Session	Dispositive Motion Prior to Session
Deschenes, Denise	3	1		2		
Diamond, M. Jerome	1			1		
Dier, Jr., Hon. Hilton H.	41	9	1	21	8	1
Dolak, Lisa	1			1		
Dumont, James A.	34	9		13	9	2
Ekman, Christopher D.	1			1		
Fallon, Ellen M.	21	4		8	6	3
Fead, William A.	27	8		8	8	2
Feinberg, Kenneth	1			1		
Fitzhugh, John	40	5	1	23	7	2
Foote, Richard P.	2		1	1		
Furlong, Michael G.	1			1		
Gallagher, James C.	34	5		17	8	2
Gerety, Jr., Robert P.	52	10		30	5	6
Gum, Hon. Carl	1			1		
Hall, Hon. Peter	72	13	2	42	10	4
Hanley, Michael F.	29	7		12	7	3
Hemley, Robert B.	40	10	2	11	10	2
Hoar, Jr., Samuel	6	1		5		
Holland, Donald S.	1	1				
Hughes, Jr., John R.	20	2	1	7	5	4
Iandiorio, Joseph	2			1	1	
Infante, Edward	1				1	
Joslin, Peter B.	69	19	2	29	13	2
Kaplan, Mark A.	20	7	1	7	1	4
Kassel, John	1	1				
Kauders, Christopher	1			1		
Kehoe, Mary P.	22	5		9	7	1
Keiner, Robert	1			1		
Kellner, John	1					1
Keyes, Allan R.	1			1		
Kirkpatrick, Mary	4			2	2	
Knapp, Spencer	1				1	
Kronk, Catherine	17	4		7	4	1
Kunin, Peter *	2	2				
Lamb, Anthony B.	23	7	2	7	6	1
Lobel, Ira B.	1			1		
Lotty, Robert	1				1	

<b>Evaluator</b>	<b>Cases Assigned</b>	<b>Full Settlement</b>	<b>Partial Settlement</b>	<b>No Settlement</b>	<b>Settled Prior to Session</b>	<b>Dispositive Motion Prior to Session</b>
Luce, Robert B.	1	1				
Maley, John P.	1					
Manchester, Robert E.	14	1		10	2	
Manitsky, Andrew	1				1	
Mapes, Stephanie	3				1	1
Marks, Michael	71	34	3	16	9	3
Martin, Hon. Stephen B.	1	1				
Mazzone, Hon. David A.	3				1	
McAndrew, Karen	28	6		13	6	2
McClallen, Robert	3	1		1		
McCormick, Thomas E.	66	15		35	11	3
McGee, P. Scott	3			2		
McKearin, Robert R.	40	9		19	6	4
McNeil, Joseph	1					
Meaker, Hon. John P.	6				1	5
Mello, Robert	18	4		11	1	1
Mertz, Gregory	1	1				
Meub, William H.	40	18		12	4	4
Monahan, Jr., John	1			1		
Morgan, Glenn	1				1	
Mulvey, Jr., William A.	3	1		1		
Murdoch, James W.	29	4	1	20	3	
Norton, Hon. Richard W.	5	2		2	1	
O'Dea, Hon. Arthur J.	249	111	1	74	44	10
O'Neill, Jerome F.	27	8		10	6	1
Olanoff, Jerrold A.	1			1		
Otterman, David A.	1	1				
Pearl, Mitchell	2	1		1		
Pessin, Myron Stuart	2	1		1		
Powers, Donald	7	2		1		
Rachlin, Robert	3		1	1	1	
Reis, Robert K.	1				1	
Rendall, Donald J.	12			5	7	
Richards, Douglas	42	4	1	29	8	
Rothstein, Amy	1				1	
Runcie, James W.	17	5		4	6	2
Saltonstall, Stephen L.	21	4		10	5	2
Sartore, Jon T.	2	1		1		

<b>Evaluator</b>	<b>Cases Assigned</b>	<b>Full Settlement</b>	<b>Partial Settlement</b>	<b>No Settlement</b>	<b>Settled Prior to Session</b>	<b>Dispositive Motion Prior to Session</b>
Simons, Hon. Richard B.	1			1		
Smith, Jr., Shapleigh	2		1	1		
Spink, James W.	162	53	3	63	22	4
Stewart, Jr., Potter	62	12		24	14	10
Suskin, James	67	24	2	30	8	3
Sussman, Susan M.	7	2		3	1	1
Taylor, Julie	3	1		1	1	
Valsangiacomo, Jr., Oreste V.	1			1		
Vana, James	1			1		
Watts, Jr., Norman E.	1	1				
Webber, John B.	6	1	1	1	2	1
Wing, Joan Loring	72	32	3	17	10	6
Woolmington, Robert E.	9	1		4	1	3
Yates, Glen	8			6		1
Yessne, Dinah	4			1	2	1
Zawistowski, John	1	1				
	<b>2292</b>	<b>635</b>	<b>36</b>	<b>946</b>	<b>411</b>	<b>148</b>
		1617				
* Actual total sessions held = 1616 +1 for co-evaluator participation = 1617.						