

United States District Court District of Vermont



Early Neutral Evaluation Program

2011 ANNUAL REPORT

November 1, 2010 - October 31, 2011

INTRODUCTION

Early Neutral Evaluation

Early Neutral Evaluation is a nonbinding, confidential process that occurs early in a case, before much discovery has been taken. A neutral evaluator (typically an attorney who is experienced in the subject matter) is retained by the parties to assess the strengths and weaknesses of their case, provide assistance to identify and narrow the issues, structure discovery, and promote settlement. This informal process provides opportunity for each side to view the case from another perspective.



The purpose of this report is to present relevant historical and statistical data in a clear and concise manner. The reporting period contained herein is *November 1, 2010 through October 31, 2011*.

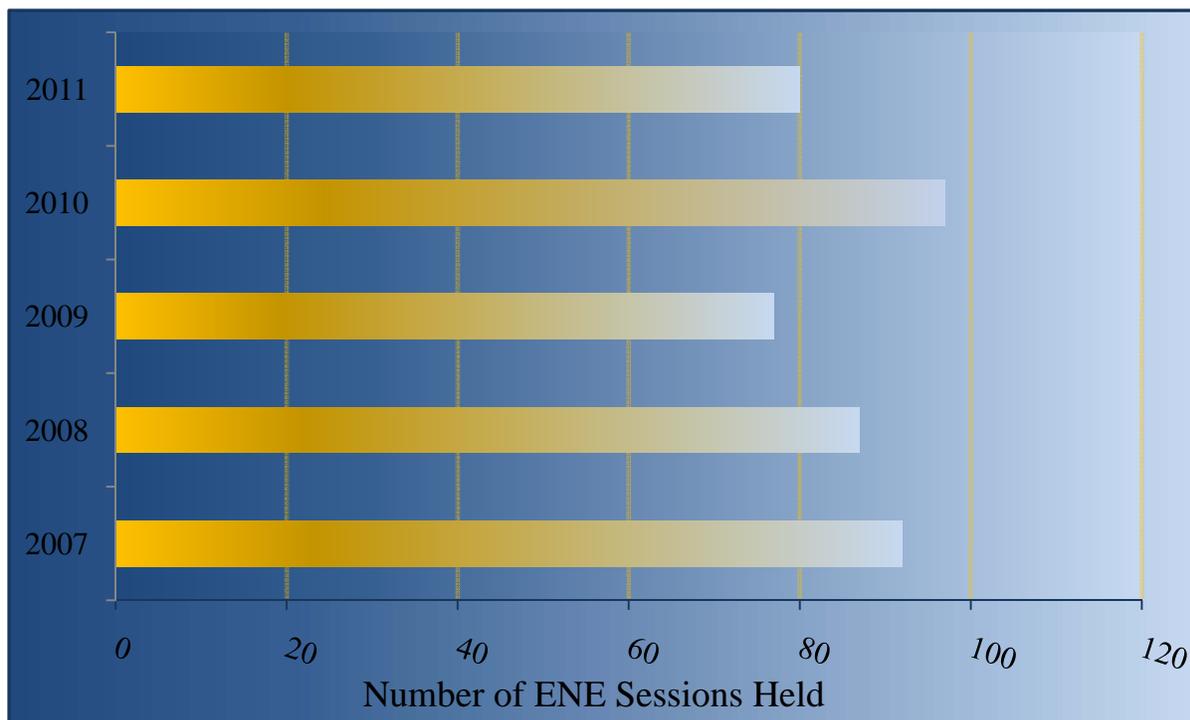
STATISTICAL ANALYSIS

ENE Usage

The aggregate number of ENE eligible¹ cases since the program's inception date of July 1, 1994 is **3,313**.

1,644 (49%) of eligible cases were either settled or dismissed prior to an ENE session. **35** (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 five years.



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

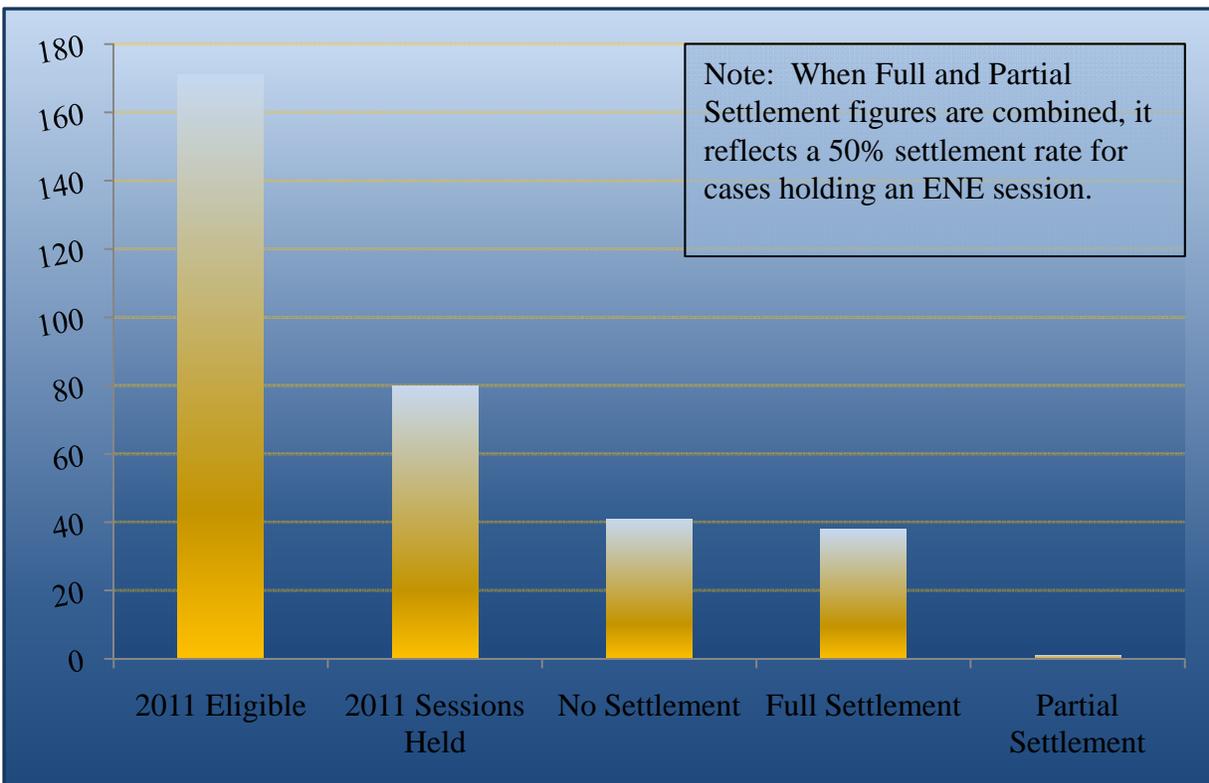
ENE Results

Of the 1,697 sessions held since inception, 987 (58%) resulted in no settlement; 674 (40%) resulted in full settlement; and 37 (2%) resulted in partial settlement.

2011 Results

As depicted in the graph below, there were 171 cases eligible for ENE in the 2011 reporting period. Of the 171 cases, 80 (47%) held ENE sessions. This is an 18% decrease from the 97 sessions held in 2010.

Of those 80 sessions held, 41 (51%) resulted in no settlement; 38 (48%) resulted in full settlement; and one (1%) 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%	19%	29%	379
190 Contract: Other	58%	15%	27%	335
350 PI: Motor Vehicle	26%	34%	40%	366
360 PI: Other	34%	31%	35%	379
362 PI: Med Malpractice	51%	23%	26%	404
365 PI: Product Liability	48%	21%	31%	406
440 Civil Rights: Other	63%	14%	23%	327
442 Civil Rights: Jobs	33%	28%	39%	383
791 Labor: ERISA	46%	27%	27%	307

ATTORNEY FEEDBACK

Throughout the reporting period, the Court mailed Case Closing Questionnaires to counsel who participated² in the ENE program. A summary of the responses is attached as APPENDIX 1.

² Participation begins with the assignment of an evaluator. Counsel in cases resulting in full settlement at session were NOT sent questionnaires.

Responses to the questionnaires were generally very positive. Most parties see the program as “...*helpful in moving [the] case forward.*” While others felt “*It was helpful to informally exchange discovery documents and explain their significance in person.*” 2011 will be remembered as a year of adversity and challenge for the State of Vermont. Specifically, the challenges faced as a result of Hurricane Irene, and the impact on residents, businesses, and the State Government. One attorney shared how the Hurricane completely influenced the outcome of a particular case (see **APPENDIX 1).

As in previous years, comments regarding the timing and scheduling of ENE as “too early” in the case were expressed. “*More discretion should be given to parties as to scheduling ENE.*” Comments of this type seem to be on the decline, however. This may be due to increased awareness of the 2009 revision to the Local Rule directing ENE. The revision was the Court’s effort to allay certain timing concerns, and to provide for some flexibility with regard to rescheduling ENE sessions. L.R. 16.1(f).

EVALUATOR FEEDBACK

APPENDIX 2 summarizes the responses to the Court’s Annual Early Neutral Evaluator Questionnaire. The responses reveal a 100% increase in evaluators who deem attorney participation in the ENE process as **Good**, while **Excellent** attorney participation decreased by 16%. A small decrease was also reflected in parties’ participation as **Full**, active participation.

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

Panel Refresh

In March 2011, ENE Panel Retention and Training Request forms were mailed to each active panel member. As a result of the forms returned, and previous recommendations of the ENE Subcommittee, the panel was refreshed as of April 1, 2011. Eleven evaluators were ultimately removed from the panel, and 14 were added. The refreshed panel consists of 41 civil and six bankruptcy practitioners.

The Court welcomes its new evaluators and looks forward to the insight, experience and professionalism each bring to the ENE program.

Training

On June 9, 2011, the Court sponsored “Early Neutral Evaluation In Federal Court – A Professional Training Forum” at the Capitol Plaza Hotel & Conference Center. With input from Chief Judge Reiss and panel members, proposed topics for the agenda were plentiful. The evaluator presenters provided a full day of informative, entertaining and extremely relevant information. All of the discussions triggered valuable and lively dialog about the ENE program. By all accounts, the forum was a tremendous success. Attendees were awarded with 6.0 hours credit for Continuing Legal Education.

The Court would like to express a special thank you to the following evaluators for their role in making the training forum both educational and fun.

Gary Barnes ~ Chris Davis ~ Bob Hemley ~ Mary Kehoe ~ Michael Marks ~
Tom McCormick ~ Bill Meub ~ Art O’Dea ~ Jerry O’Neill ~ Potter Stewart

It is the Court’s intention to sponsor future ENE training opportunities every two years.

ENE Annual Reporting Period

After some discussion, it was established that beginning with 2012, the annual reporting period for ENE data will be modified from the existing November 1 through October 31 period to an actual calendar year. The residual data from October 31, 2011 to December 31, 2011 has been gathered and saved for posterity.

Bankruptcy

A total of three cases were referred to ENE during this reporting period.

CONCLUSION & VISION

2011 was a very productive year for ENE. With a refreshed panel and a strategy for future training, the Court remains committed to the administration of the important and valuable Early Neutral Evaluation program.

The Court looks forward to another positive year in 2012.



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

Comments or suggestions related to the ENE program are welcomed and encouraged, and may be forwarded to H. Beth Cota, ENE Administrator, at (802) 951-6301, or to 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

- 32% a. Facts/Issues were straightforward so lengthy discovery was not needed
- 8% b. Settlement was at least partly worked out before the case was filed
- 8% c. Client changed mind – case dropped or to be pursued in another venue
- 10% d. ENE process imminent – discovery checklist, case summary, etc. due soon
- 42% e. Other (please explain) _____

If your Case Closed After ENE Session was Held

- 20% 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
- 26% i. Decision on controlling motions by the Court
- 24% j. Trial date set/approaching
- 2% k. Attorney/client schedule only recently permitted full attention on this case
- 28% 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.)

- 11% Very helpful
- 25% Somewhat helpful
- 62% 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)

- 30% Active participation of client in the session, i.e., direct communication with other party(ies), hearing strengths and weaknesses of their own case, etc.
- 9% Prompted counsel to exchange information and/or “get moving” on discovery sooner than we otherwise might have
- 7% \$500 fee prompted consideration of settlement before that stage was reached
- 17% Evaluator’s methods of conducting the session and discussing the case
- 20% Prompted all to consider settlement earlier than we otherwise might have
- 2% Combination of all
- 4% Improved pretrial settlement discussion as trial approached, i.e., court pretrial conference
- 11% Other (please explain) _____

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

- 18% Yes
- 60% No
- 22% 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?

- 23% Yes If yes, please explain: _____
- 77% No _____

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

“More discretion should be given to parties as to scheduling ENE.”

**“This case settled only because of Hurricane Irene. We settled the case for a low number because we believed presenting a “slip & fall” case to Vermonters who many have just suffered a horrible loss (or at least knew someone who did) would most likely not result in a verdict more favorable than what we settled for. In other words, our client’s injury paled in comparison to the devastation all around us. As for the ENE, I don’t find them helpful in PI cases. Defense attorneys come in and say that it is “too early” in discovery to properly evaluate the case and then throw out unreasonably low numbers. Having the session after discovery has ended might be more productive.”

“Despite ENE not impacting settlement in this case, I am a strong proponent of the ENE program and believe it ordinarily has a significant impact in getting cases resolved.”

“In my opinion, the ENE in this case and in most of my federal cases takes place too early in the litigation process. The parties began to focus on the prospect that they will not get all they want only when the trial date draws near. Until then both sides are inclined to posture and threaten. This particular case settled just before trial (days before). I suggest that instead of requiring ENE in the mid-point of a lawsuit, that the court call the lawyers in for a pre-trial conference 9 months after the answer is filed – set a trial date and then direct the parties to mediation with a “drop dead” date of say, 30 days before trial. Allow the parties to conduct an ENE (instead of mediation) earlier if they want to.”

“ENE process was helpful but unfortunately, through no fault of the evaluator, did not resolve.”

“I believe the process was helpful even though the case did not settle. The neutral selected to mediate the case was excellent and he made the participants feel that the court took early case resolution seriously and that this wasn’t just another “hoop” the parties had to jump through. The process also did not seem overly burdensome or costly compared with many private ADR/mediation services.”

“ENE really didn’t play any role in this case – which isn’t to say that it isn’t very useful generally.”

2b. Other (please explain):

“It was helpful to be able to informally exchange discovery documents and explain their significance in person.”

“Put more focus on the value of the claim.”

“Defendant needed to hear Plaintiff’s position on settlement repeatedly.”

“Caused parties to take a hard look at strengths and weaknesses.”

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: “Because we knew ENE session was to be held, we agreed to put some depositions on hold.”

Yes: “By tableing unnecessary/duplicative discovery.”

Yes: "Settlement at ENE saved time and money associated with trial."

Yes: "It was a help in moving case forward."

No: "Discovery continued and case evaluation continued to just prior to trial."

Yes: "Early settlement."

Yes: "Avoided trial."

Yes: "Pushed parties to meet and confer which led to settlement."

Yes: "The process was very helpful, especially with Michael Marks!"

Yes: "Plaintiff did not want to spend further \$."

No: "Increased costs because my clients had to travel from Ireland with no benefit."

No: "Not in this case because one side was unrealistic in its demands. Jury sided with the other (reasonable) side."

No: "Resulted in very weak offer that forced trial although admittedly offer was vindicated at trial."

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>69</u>	%	Excellent – thorough preparation and honest efforts toward success
<u>28</u>	%	Good – some efforts made, but appear hesitant and/or skeptical
<u>3</u>	%	Indifferent – participate minimally to comply with the Local Rule
<u>1</u>	%	Negative – little or no preparation with no chance given to process
<u>0</u>	%	Other – please explain

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

<u>19</u>	%	An increase in attorney preparedness and participation
<u>75</u>	%	The same level of attorney preparedness and participation
<u>6</u>	%	A decline in attorney preparedness and participation

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

<u>76</u>	%	Full active participation
<u>19</u>	%	Some participation
<u>4</u>	%	Neutral – present, but not actively participating in the process
<u>1</u>	%	Negative participation harming case progress
<u>0</u>	%	Other – please explain

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:

“I think it is working well – perhaps give the parties more latitude on timing to maximize effectiveness.”

“ERISA cases are not well suited to ENE or mediation.”

“Very frustrating that the court order is not strong enough to “encourage” out-of-state counsel to negotiate. Zero settlements!”

“It’s past time to raise the basic fee. I am willing to do more pro bono if those who can pay, pay fairer compensation.”

APPENDIX 3

Current Court Roster (as of 10/31/2011)

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 W.	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 H.	11	6		2	3	
Bell, Alison J.	20	5		9	2	2
Bergeron, John J.	16	2		8	3	2
Bisson, Leo	35	12	1	15	3	
Blackwood, Eileen M.	56	20		21	7	5
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.	2			1		
Carroll, James F.	1			1		
Cassidy, Richard T.	83	31		28	15	2
Chadurijian, Mark	2	1			1	
Clapp, Michael	1			1		
Clayton, Gregory S.	3	1				
Cleary, David L.	40	15	1	14	5	
Coffrin, James	1			1		
Cohen, Jerry	1	1				
Collins, John	2			2		
Coughlin, Patrick	3	2		1		
Crampton, Stephen R.	6	1		1	3	
Crawford, Geoffrey	1			1		
Crispe, Lawrin P.	1			1		

Evaluator	Cases Assigned	Full Settlement	Partial Settlement	No Settlement	Settled Prior to Session	Dispositive Motion Prior to Session
Davis, Christopher L.	74	16		36	15	6
Deitz, Roger M.	1	1				
Deschenes, Denise J.	3	1		2		
Diamond, M. Jerome	1			1		
Dier, Jr., Hon. Hilton H.	40	9	1	21	8	1
Dolak, Lisa	1			1		
Dumont, James A.	34	9		13	10	2
Eaton, Gregory M.	1	1				
Ekman, Christopher D.	1			1		
Ellis, Stephen D.	1					
Fallon, Ellen M.	21	4		8	6	3
Fead, William A.	27	8		8	9	2
Feinberg, Kenneth	1			1		
Fitzhugh, John	40	5	1	24	6	2
Foote, Richard P.	2		1	1		
Furlong, Michael G.	1			1		
Gallagher, James C.	35	5		17	8	2
Gerety, Jr., Robert P.	51	10		30	5	6
Gum, Hon. Carl	1			1		
Hall, Hon. Peter	72	13	2	42	10	4
Hanley, Michael F.	32	7		13	7	3
Hemley, Robert B.	46	12	2	15	10	3
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	
Joseph, Hon. Ben W.	0					
Joslin, Peter B.	75	21	2	32	14	2
Kaplan, Mark A.	20	7	1	7	1	4
Kassel, John	1	1				
Katz, Hon. Matthew I.	0					
Kauders, Christopher	1			1		
Kehoe, Mary P.	22	5		9	7	1
Keiner, Robert P.	1			1		
Kellner, John L.	1					1

Evaluator	Cases Assigned	Full Settlement	Partial Settlement	No Settlement	Settled Prior to Session	Dispositive Motion Prior to Session
Keyes, Allan R.	1			1		
Kirkpatrick, Mary G.	4			2	2	
Knapp, Spencer	1				1	
Kronk, Catherine	17	4		7	4	1
Kunin, Peter *	3	2				
Lamb, Anthony B.	24	7	2	7	6	2
Lobel, Ira B.	1			1		
Lotty, Robert	1				1	
Luce, Robert B.	1	1				
Maley, John P.	1				1	
Manchester, Robert E.	14	1		10	2	
Manitsky, Andrew D.	1				1	
Mapes, Stephanie	3				1	1
Marks, Michael J.	93	42	4	15	11	3
Martin, Hon. Stephen B.	1	1				
Mazzone, Hon. David A.	3				1	
McAndrew, Karen	31	6		13	6	2
McClallen, Robert	3	1		2		
McCormick, Thomas E.	69	15		36	11	3
McGee, P. Scott	6	1		4		
McKearin, Robert R.	42	9		20	7	4
McNeil, Joseph E.	1					
Meaker, Hon. John P.	6				1	5
Mello, Robert A.	17	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.	4	2		1		
Murdoch, James W.	31	4	1	22	3	
Norton, Hon. Richard W.	5	2		2	1	
O'Dea, Hon. Arthur J.	260	117	1	76	46	10
O'Neill, Jerome F.	28	10		10	6	1
Olanoff, Jerrold A.	1			1		
Otterman, David A.	1	1				
Pearl, Mitchell	2	1		1		

Evaluator	Cases Assigned	Full Settlement	Partial Settlement	No Settlement	Settled Prior to Session	Dispositive Motion Prior to Session
Pessin, Myron Stuart	2	1		1		
Powers, Donald	9	3		4		
Rachlin, Robert	3		1	1	1	
Reis, Robert K.	1				1	
Rendall, Donald J.	12			5	7	
Richards, Douglas	42	4	1	28	9	
Rothstein, Amy	1				1	
Runcie, James W.	17	5		4	6	2
Sabalis, Patricia M.	0					
Saltonstall, Stephen L.	21	4		10	5	2
Sartore, John T.	3	1		1		
Simons, Hon. Richard B.	1			1		
Smith, Jr., Shapleigh	2		1	1		
Spink, James W.	167	59	3	68	26	5
Stewart, Jr., Potter	66	12		25	15	10
Suskin, James	67	24	2	30	8	3
Sussman, Susan M.	7	2		3	1	1
Taylor, Julie	3	1		1	1	
Troy, Gordon	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	7
Woolmington, Robert E.	9	1		4	1	3
Yates, Glen	8			7		1
Yessne, Dinah	4			1	2	1
Zawistoski, John J.	2	1				
	2400	674	37	987	433	154
		1698				
* Actual total sessions held = 1697 +1 for co-evaluator participation = 1698.						