United States District Court
District of Vermont

Early Neutral Evaluation Program

2015 ANNUAL REPORT

January 1– December 31, 2015

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INTRODUCTION

In response to the Civil Justice Reform Act of 1990, the District of Vermont adopted Early Neutral Evaluation (ENE) as its program for alternative dispute resolution. Officially established July 1, 1994 and governed by Local Rule 16.1, the program effectively provides litigants with an early advisory evaluation of the likely court outcome and promotes settlement negotiations.

The purpose of this Annual Report is to provide relevant historical and statistical data regarding this district's ENE program. To draw the most complete picture of the program, it is necessary to examine the statistical information as it relates specifically to **ENE-eligible cases** filed and disposed, and to **individual evaluation sessions**. This Report also includes a review of **evaluator** usage and participating attorney feedback.

Reporting period:
January 1–December 31, 2015

"In one of our concert grand pianos, 243 taut strings exert a pull of 40,000 pounds on an iron frame. It is proof that out of great tension may come great harmony."

— Theodore E. Steinway

STATISTICAL ANALYSIS

Eligible[1] Cases

The cumulative number of eligible cases filed since the program was officially launched on July 1, 1994 is **3,892**. Of those eligible cases, 1,920, or 49%, either settled or were dismissed prior to an evaluation session; 42, or 1%, successfully opted out of the process altogether; and the remaining 50% proceeded to session. Fig. A illustrates these numbers.

Fig. A

Fig. B simply compares the number of eligible cases filed over the previous five reporting periods.

Fig. B

Eligible Cases Filed	
2015	138
2014	133
2013	119
2012	158
2011	171

[1] All cases filed with nature of suit statistical code categories specified in L.R. 16.1(b)(1)(A)–(G) are subject to the ENE process.

Disposition of Eligible Cases

Fig. C compares the point of disposition for eligible cases in the most active nature of suit (NOS) categories.

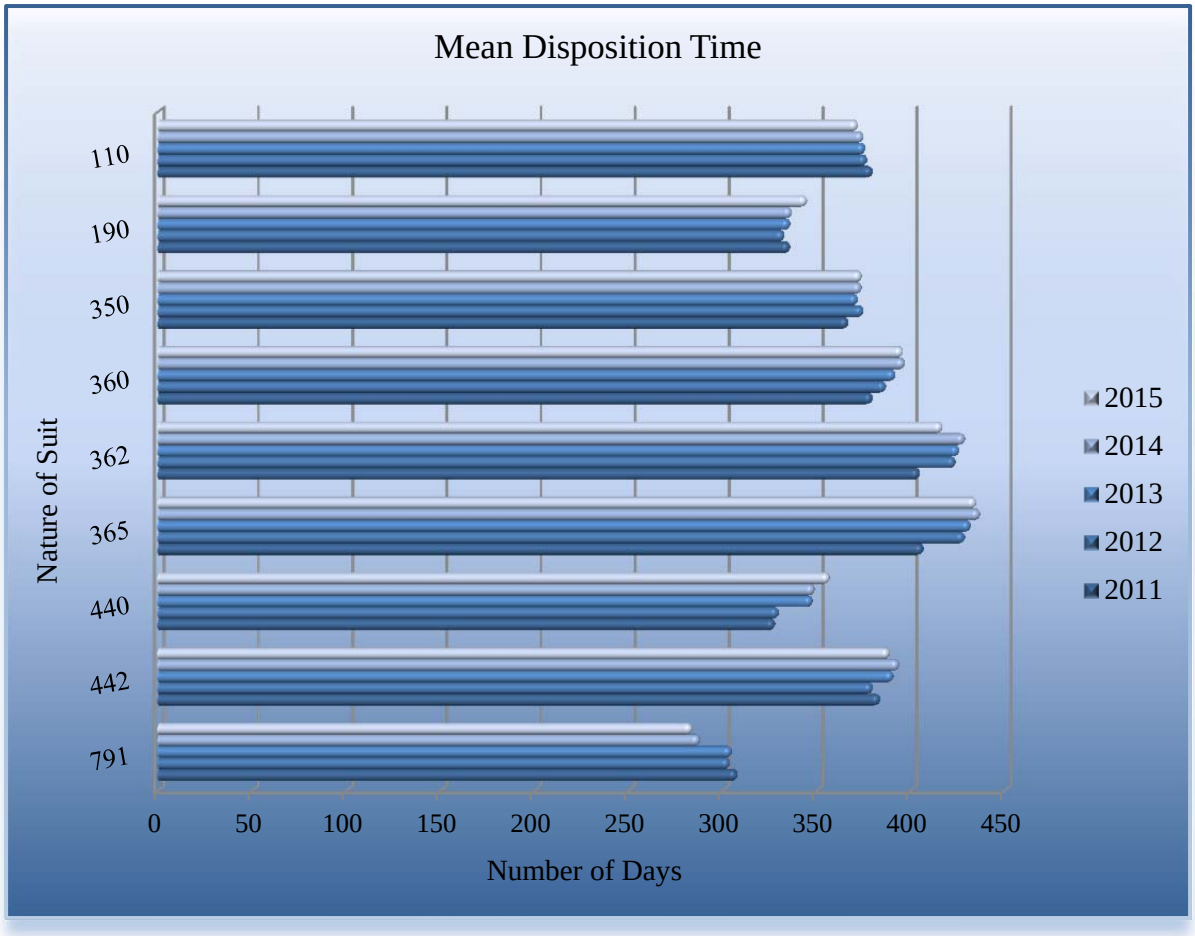
Fig. C

NATURE OF SUIT	WHEN DISPOSED		
	Prior to Session	At Session	After Session
110 Contract: Insurance	49%	22%	29%
190 Contract: Other	59%	16%	25%
350 PI: Motor Vehicle	24%	37%	39%
360 PI: Other	32%	32%	36%
362 PI: Med Malpractice	50%	25%	25%
365 PI: Product Liability	48%	23%	29%
440 Civil Rights: Other	60%	17%	23%
442 Civil Rights: Jobs	32%	32%	36%
791 Labor: ERISA	51%	28%	21%

Mean Disposition Time of Eligible Cases

Using the same NOS categories as Fig. C, the graph below exhibits the number of days to disposition over the previous five years. The information reveals that the trending increase in days to case closure waned slightly in categories 360, 362, 365, and 442 during this reporting period.

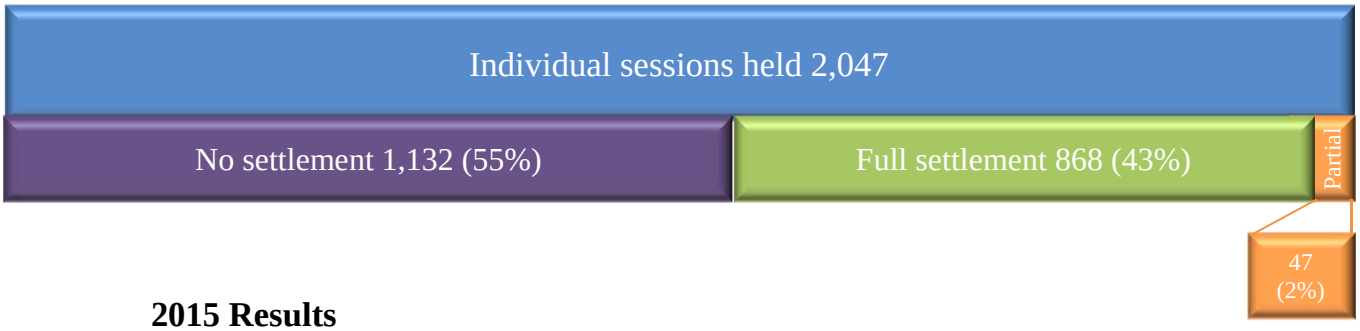
Fig. D



Individual Evaluation Sessions

A total of **2,047** individual sessions have been held since the program began. The total number of sessions include: 1) the remaining 50% of eligible cases proceeding to session (*see* Fig. A); 2) non-eligible cases opting into the program; and 3) cases holding more than one session. Fig. E illustrates the settlement results of those sessions.

Fig. E

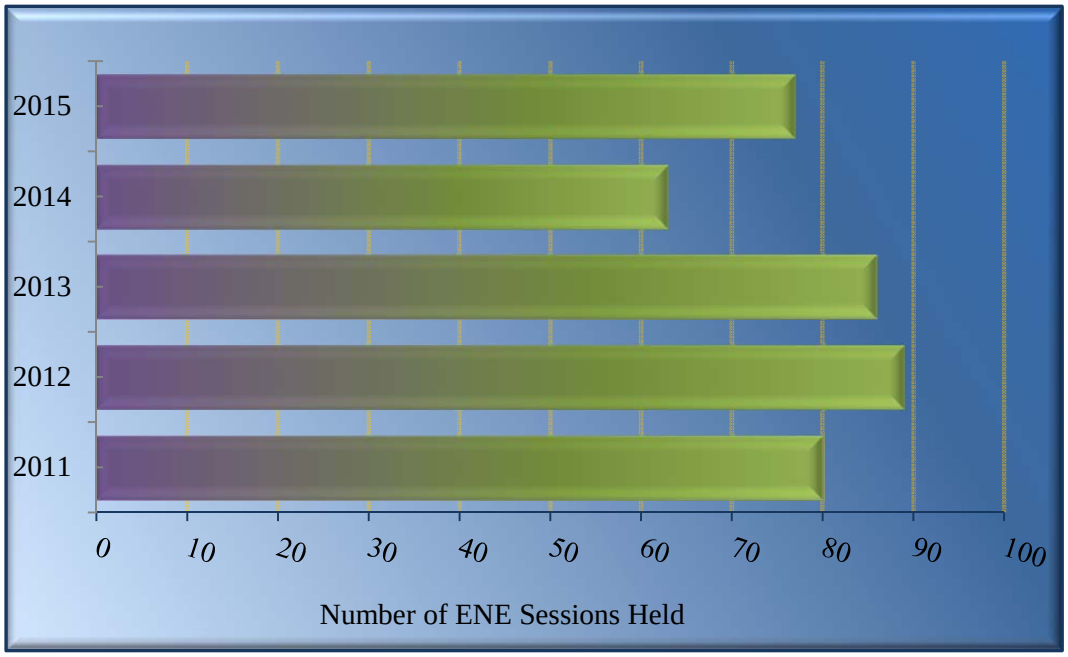


2015 Results

In the 2015 reporting period, 138 eligible cases were filed and 77 sessions were held. The number of sessions held represents a 22% increase over 2014.

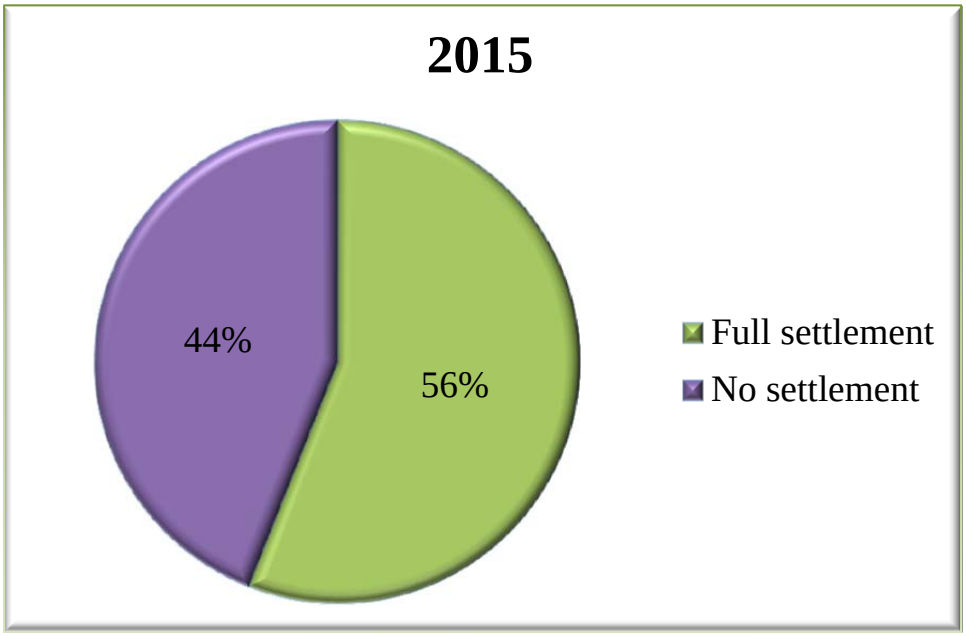
Fig. F compares the number of ENE sessions held during each of the previous five reporting periods.

Fig. F



Of the 77 sessions held during this reporting period, 34 resulted in no settlement and 43 resulted in full settlement. The overall success of the sessions that did occur is significant, as further illustrated below.

Fig. G



EVALUATOR USAGE

Attached as APPENDIX 1, is a spreadsheet displaying 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.

EVALUATOR FEEDBACK

APPENDIX 2 summarizes the responses to the Court's Annual Early Neutral Evaluator Questionnaire. The percentages provided show no change in *attorneys'* participation in the process, although more evaluators reported an increase over previous years in *attorneys'* preparedness and participation. (*See* APPENDIX 2, question 1a.) Conversely, evaluators reported a decline in *parties'* full, active participation with a resulting increase in *parties* who were neutral—present, but not actively participating in the process. (*See* APPENDIX 2, question 2.)

PARTICIPATING ATTORNEY FEEDBACK

Case Closing Questionnaires are mailed throughout the reporting period to counsel who participated[2] in the ENE process. A summary of responses to the Questionnaires is attached as APPENDIX 3.

Responses to the Questionnaires remain generally positive. *"[The s]ession facilitated other discovery and ultimate resolution." "It brought settlement discussions to a clear demarcation point so the parties could proceed with a better understanding of the respective positions." "Any ADR process to assist in settling is valuable—ENE is excellent in that it is 'Early' usually before significant discovery expense."*

UPDATES

Panel Refresh

Review of the existing Panel is underway. Refreshment of the Panel is expected to occur in the near future once the current program requirements have been considered. All affected evaluators—existing and prospective—will be contacted by U.S. Mail.

Training

No ENE-specific training was offered during this reporting period. However, as the Court endeavors to maintain a panel of skilled and effective evaluators, training opportunities for 2016 are being explored.

[2] Participation begins with the assignment of an evaluator. Questionnaires were NOT sent to counsel in cases achieving full settlement at session.

Evaluator Reports and Supplemental Report Procedure

A fillable Evaluator Report Form is available on the Court's website. Evaluators are again encouraged to utilize the form as it will assist in efficiently filing reports that are consistent and compliant with the requirements of L.R. 16.1(j).

We often hear from counsel and parties about cases that settle after, but as a result of an ENE session and the evaluator's continuing efforts. (*See* APPENDIX 3.) Because this occurs frequently, evaluators are reminded of the procedure developed for submission of a Supplemental Evaluator Report. This procedure allows evaluators to file a Supplemental Report within 60 days of the initial ENE session and receive credit for their continued work *after* the initial session resulting in settlement. Please see the Procedure on the Court's website for complete information.

Bankruptcy

No bankruptcy cases were referred to ENE during this reporting period.

CONCLUSION & VISION

2015 was another successful year for the ENE program. It continues to be an effective litigation tool that opens communication and provides the opportunity for neutral case assessment. Parties are encouraged to fully utilize the process for its many benefits.

The Court stands allegiant to its ENE program and would like to recognize and thank the evaluators and members of the legal community for their commitment to, and full participation in, the ENE process.

Comments

The Court encourages and welcomes comments and suggestions related to the ENE program. Please forward to H. Beth Cota, ENE Administrator, at (802) 951-8113, or to Beth_Cota@vtd.uscourts.gov.

APPENDIX 1

Current Court Roster (as of 12/31/2015)
Current Court Roster - Bankruptcy (B) (as of 12/31/2015)
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 H.	51	7		29	12	3
Archer, Evan	11			7	3	1
Badgewick, Joseph	16	2		4	8	2
Barnes, Gary H.	12	6		2	4	
Bell, Alison J.	24	7		9	5	3
Bergeron, John J.	16	2		8	4	2
Bisson, Leo A.	43	17	3	16	5	
Blackwood, Eileen M.	56	20	1	22	8	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, Alden T.	24	4	1	6	8	5
Burchard, Daniel L.	1					1
Cahill, Jr., Joseph F.	29	4	1	16	6	2
Carlson, Thomas Z.	4	2		1	1	
Carroll, James F.	4	1		2		
Cassidy, Richard T.	102	39		37	18	2
Chadurijian, Mark	3	1			2	
Clapp, Michael	1			1		
Clayton, Gregory S.	12	5		3		
Cleary, David L.	66	27	1	25	8	
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		
Davis, Christopher L.	81	19		38	15	7
Deitz, Roger M.	1	1				

Evaluator	Cases Assigned	Full Settlement	Partial Settlement	No Settlement	Settled Prior to Session	Dispositive Motion Prior to Session
Deschenes, Denise J.	3	1		2		
Diamond, Jerome M.	1			1		
Dier, Jr., Hon. Hilton H.	40	9	1	21	8	1
Dolak, Lisa	1			1		
Dumont, James A.	35	9		14	10	2
Eaton, Gregory M.	1	1				
Ekman, Christopher D.	1			1		
Ellis, Stephen D.	2			1		1
Emens-Butler, Jennifer (B)	2	1			1	
Fallon, Ellen M.	23	4		8	7	3
Fead, William A.	27	8		8	9	2
Feinberg, Kenneth	1			1		
Fitzhugh, John	40	5	1	23	7	3
Foote, Richard P.	2		1	1		
Furlong, Michael G.	1			1		
Gallagher, James C.	37	6		17	11	2
Garvey, John B.	2	2				
Gebauer, Jr., Gordon C. (B)	9	4		3		2
Gerety, Jr., Robert P.	51	10		30	5	6
Geronemus, David	1			1		
Gum, Carl	1			1		
Hall, Peter	72	13	2	42	11	4
Hanley, Michael F.	39	10		17	8	4
Hemley, Robert B.	50	16	2	18	11	2
Hoar, Jr., Samuel	6	1		5		
Holden, Peter V.	1			1		
Holland, Donald S.	1	1				
Hughes, Jr., John R.	20	2	1	7	5	4
Iandiorio, Joseph	2			1	1	
Infante, Edward	3	1			1	
Jentes, William	2	1		1		
Joseph, Ben W.	0					
Joslin, Peter B.	81	23	3	36	16	2
Kaplan, Mark A.	20	7	1	7	1	4
Kasper, Keith J.	1			1		
Kassel, John	1	1				
Katz, Matthew I.	0					
Kauders, Christopher	1			1		

Evaluator	Cases Assigned	Full Settlement	Partial Settlement	No Settlement	Settled Prior to Session	Dispositive Motion Prior to Session
Kehoe, Mary P.	24	5		11	7	1
Keiner, Robert P.	1			1		
Kellner, John L.	1					1
Keyes, Allan R.	1			1		
Kirkpatrick, Mary G.	4			2	2	
Knapp, Spencer	1				1	
Kronk, Catherine	16	4		7	4	1
Kunin, Peter B.	3	2		1		
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	3	
Manitsky, Andrew D.	4			1	3	
Mapes, Stephanie	3				1	1
Marks, Michael J.	220	115	6	41	28	7
Martin, Stephen B.	1	1				
Mazzone, David A.	3				1	
McAndrew, Karen	34	8		16	7	2
McClallen, Robert	3	1		2		
McCormick, Thomas E.	75	18		40	12	4
McGee, P. Scott	9	3		4	2	
McKearin, Robert R.	44	9		21	8	4
McNeil, Joseph E.	2			2		
Meaker, John P.	6				1	5
Mello, Robert A.	17	4		11	1	1
Mertz, Gregory	1	1				
Meub, William H.	41	19		12	7	3
Monahan, Jr., John	2			2		
Morgan, Glenn	1				1	
Mulvey, Jr., William A.	13	4		3	2	
Murdoch, James W.	35	4	1	24	4	1
Norton, Richard W.	5	2		2	1	
O'Dea, Arthur J.	276	130	1	81	51	11
O'Neill, Jerome F.	34	12		13	7	1
Obuchowski, Raymond J. (B)	1				1	
Olanoff, Jerrold A.	1			1		

Evaluator	Cases Assigned	Full Settlement	Partial Settlement	No Settlement	Settled Prior to Session	Dispositive Motion Prior to Session
Otterman, David A.	1	1				
Palmer, Michael (B)	1	1				
Pearl, Mitchell	2	1		1		
Pessin, Myron Stuart	2	1		1		
Pyle, Antonio D.	0					
Powers, Donald	24	5	2	13		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
Sabalis, Patricia M.	2	1		1		
Saltonstall, Stephen L.	22	4		10	6	2
Sartore, John T.	5	3		2		
Scholes, Richard A. (B)	2			1	1	
Simons, Richard B.	1			1		
Smith, Jr., Shapleigh	2		1	1		
Spink, James W.	235	87	4	90	39	6
Stewart, Jr., Potter	77	17		30	18	10
Suskin, James S.	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.	4	1		2		1
Webber, John B.	6	1	1	1	2	1
Wing, Joan Loring	72	32	3	17	13	7
Wolinsky, Douglas J. (B)	3	1		1		1
Woolmington, Robert E.	9	1		4	1	3
Yates, Glen	8			7		1
Yessne, Dinah	4			1	2	1
Zawistoski, John J.	4	1	1	2		
	2817	**868**	**47**	**1132**	**519**	**171**
Sessions Pending	-62	**2047**				
Opted out after assignment	-18	**2737**				
	2737					

APPENDIX 2

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.

*2014 figures in green.

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

86%	**86**	**%**	**Excellent** – thorough preparation and honest efforts toward success
12%	**12**	**%**	**Good –** some efforts made, but appear hesitant and/or skeptical
2%	**2**	**%**	**Indifferent –** participate minimally to comply with the Local Rule
0%	**0**	**%**	**Negative** – little or no preparation with no chance given to process
0%	**0**	**%**	**Other** – please explain: **See 1. below**

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

17%	**25**	**%**	An **increase** in attorney preparedness and participation
83%	**75**	**%**	The **same** level of attorney preparedness and participation
0%	**0**	**%**	A **decline** in attorney preparedness and participation

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

82%	**73**	**%**	**Full** active participation
17%	**20**	**%**	**Some** participation
1%	**6**	**%**	**Neutral** – present, but not actively participating in the process
1%	**1**	**%**	**Negative** participation harming case progress
0%	**0**	**%**	**Other** – please explain: **See 2. below**

3. In your experience, are there any types of cases that are currently subject to ENE that should not be? **See 3. below**

1. Other (please explain):

"One issue is the amount of time it takes some attorneys to pay the evaluator's fees. I have had to wait 10 months in one case. In another, an out of state lawyer never paid my fee!"

2. Other (please explain):

"It varies depending on type of case, emotional involvement, etc."

3.

"ERISA appeals continue to be difficult, given that they are based on the admin[istrative] record and (generally) subject to an arbitrary [and] capricious standard."

"Not in my experience. I really enjoy being on the panel."

Comments or suggestions regarding the ENE program:

"A very worthwhile program but it should fall <u>later</u> in the process is my view."

"The program continues to be very successful. The only tweak I can think of is to formalize the practice of allowing the ENE to take place later in the process. Practitioners mostly ignore the default of having the ENE half-way through discovery, but out of town attorneys sometimes need persuasion or comfort in that regard."

APPENDIX 3

ENE CASE CLOSING QUESTIONNAIRE

This questionnaire is being sent to all counsel in ENE eligible cases which closed either **before** or **after** the actual ENE session was held. Please answer the following questions about how and why your case closed to help us determine what effects, if any, the ENE process has on eligible cases.

*2014 figures in green.

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%	**32%**	a.	Facts/Issues were straightforward so lengthy discovery was not needed
14%	**7%**	b.	Settlement was at least partly worked out before the case was filed
23%	**14%**	c.	Client changed mind – case dropped or to be pursued in another venue
5%	**18%**	d.	ENE process imminent – discovery checklist, case summary, etc. due soon
27%	**29%**	e.	Other (please explain) **See 1e. below**

If your Case Closed After ENE Session was Held

39%	**19%**	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
25%	**41%**	i.	Decision on controlling motions by the Court
8%	**15%**	j.	Trial date set/approaching
2%	**0%**	k.	Attorney/client schedule only recently permitted full attention on this case
25%	**26%**	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.)

24%	**15%**	Very helpful
24%	**40%**	Somewhat helpful
52%	**45%**	No effect
0%	**0%**	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)

33%	**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.
9%	**11%**	Prompted counsel to exchange information and/or "get moving" on discovery sooner than we otherwise might have
7%	**11%**	$500 fee prompted consideration of settlement before that stage was reached
26%	**27%**	Evaluator's methods of conducting the session and discussing the case
9%	**8%**	Prompted all to consider settlement earlier than we otherwise might have
2%	**0%**	Combination of all
5%	**5%**	Improved pretrial settlement discussion as trial approached, i.e., court pretrial conference
9%	**11%**	Other (please explain)_____

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

32%	**12%**	Yes
48%	**50%**	No
20%	**38%**	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?

39%	**26%**	Yes If yes, please explain: _____
61%	**74%**	No _____

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

"Any ADR process to assist in settling is valuable – ENE is excellent in that it is "Early" usually before significant discovery expense."

"I think the ENE program is great. In this case plaintiff decided to drop suit."

1. Before ENE Session was held
e. Other (please explain):

"Expensive expert discovery imminent."

"Parties were able to negotiate following fact discovery."

"Parties agreed on valuation [and] wanted early settlement."

"Underlying case settled."

"The parties resolved the case on their own."

"Substantial fact issues were resolved in a manner that made clear settlement was advisable by plaintiff."

1. After ENE Session was held
l. Other (please explain):

"Mediator conducted several post-mediation telephone calls w[ith] defense counsel and was able to persuade defendant to re-evaluate and increase settlement offer."

"Court granted summary judgment."

"A neutral evaluator's assistance was necessary to convince plaintiff to settle where she did."

"More sensible, new ins[urance] co[mpany] adjuster took over file."

"Change in insurance adjusters."

2a. Other (please explain):

"Session facilitated other discovery and ultimate resolution."

"It brought settlement discussions to a clear demarcation point so the parties could proceed with a better understanding of the respective positions."

"Imminence of ENE promoted settlement."

"Enabled pro se plaintiff to accept a proposed course of action raised prior to ENE session. The plaintiff only agreed to move forward after the ENE session was completed, and the proposed course of action turned out to be integral to settlement."

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. "Like a Mandatory 'focus group.'"

Yes. "The case would have gone to trial without ENE."

Yes. "As mentioned above, the costs involved of an imminent session likely were a factor in settling."

Yes. "Imminence of ENE promoted settlement."

Yes. "Plaintiff did not want to pay for ENE."

Yes. "Spared parties the time/expense of cross MSJs."

Yes. "We were able to settle the case prior to summary judgment."

No. "Except for avoiding costs of trial."

No. "This is the rare case where ENE was not helpful. In retrospect, I would have chosen a mediator with a different style/approach."

No. "This was bound for summary judgment."

No. "Defense felt good about its chances with a dispositive motion (MSJ; Qualified Immunity)."

No. "If not cost of ENE, cost of expert discovery would have caused settlement discussions."

No. "Issues against my client were purely legal and dismissed."

No. "Increased costs–we thought we had a strong dismissal motion, so we agreed to ENE to encourage [plaintiff] to settle, instead incurred ENE costs [and] extra time."

No. "I am a strong believer in ENE, but here, was not a factor because other factors compelled resolution."

No. "Settled independent of, and before, ENE."