

United States District Court  
District of Vermont



Early Neutral Evaluation Program  
2016 ANNUAL REPORT  
January 1– December 31, 2016

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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.

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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, 2016

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“In the middle of every difficulty lies opportunity.”

– Albert Einstein

## STATISTICAL ANALYSIS

### ENE-Eligible Cases<sup>1</sup>

The cumulative number of eligible cases filed since the program was officially launched on July 1, 1994 is 4,030. Of those eligible cases, 1,982 (49%), either settled or were dismissed prior to an evaluation session; 43 (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 |     |
|----------------------|-----|
| 2016                 | 138 |
| 2015                 | 138 |
| 2014                 | 133 |
| 2013                 | 119 |
| 2012                 | 158 |

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<sup>1</sup> 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 timing of disposition for eligible cases in the most active nature of suit (NOS) categories.

|                         |                             |                         |
|-------------------------|-----------------------------|-------------------------|
| 110 Contract: Insurance | 360 PI: Other               | 440 Civil Rights: Other |
| 190 Contract: Other     | 362 PI: Medical Malpractice | 442 Civil Rights: Jobs  |
| 350 PI: Motor Vehicle   | 365 PI: Product Liability   | 791 Labor: ERISA        |

Fig. C

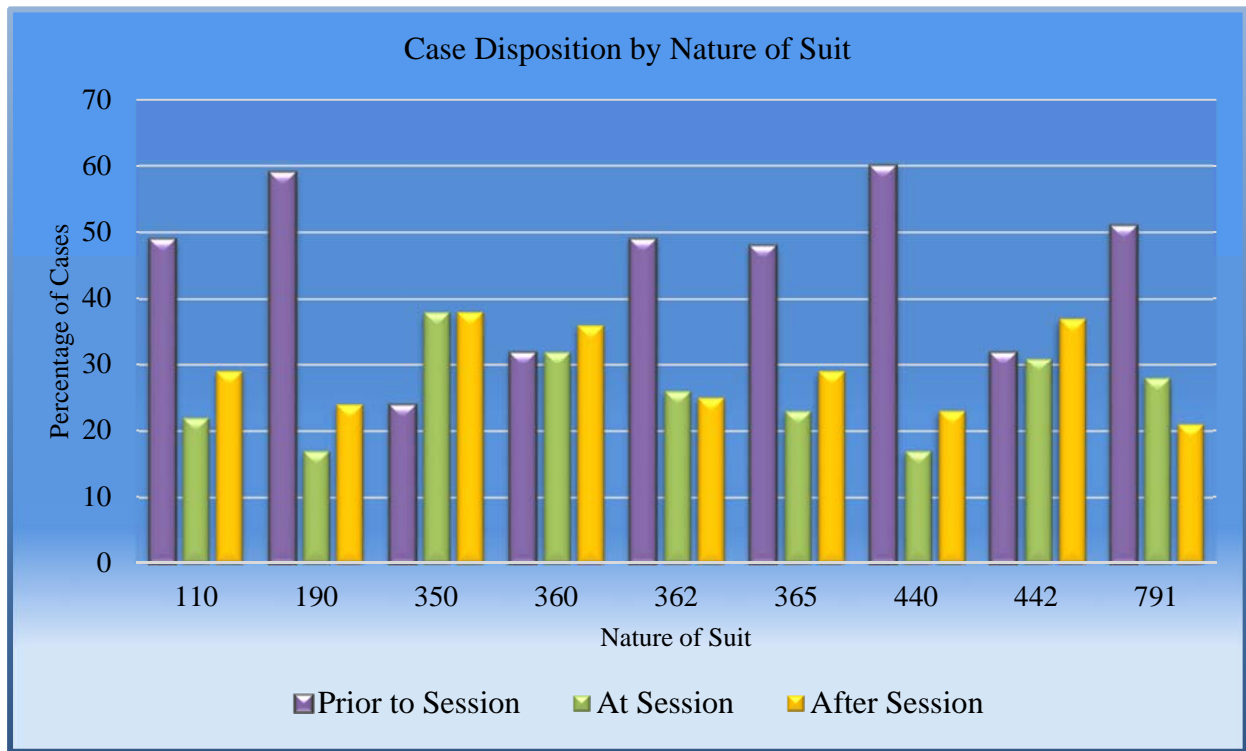
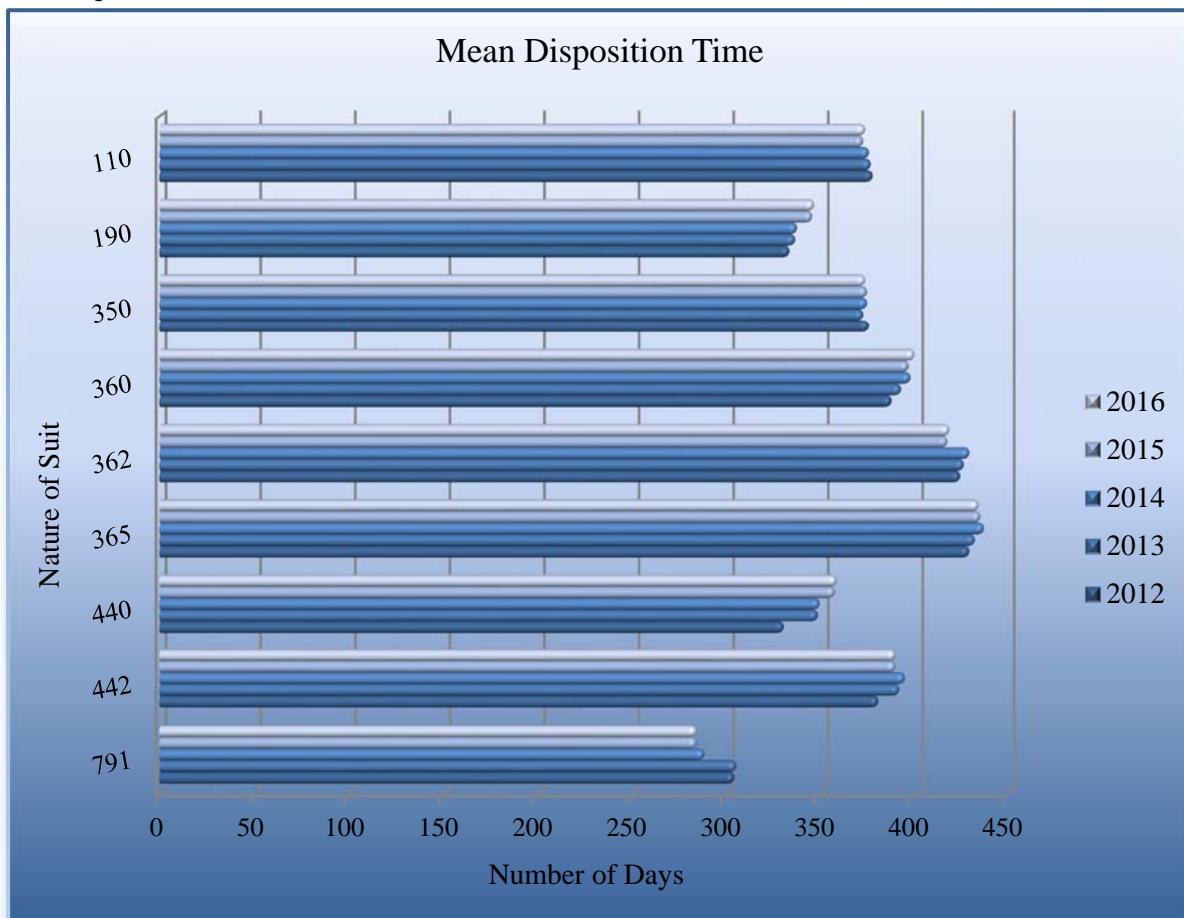


Fig. C seems to suggest that certain case types are more inclined to settle prior to participating in a session.

## Mean Disposition Time of Eligible Cases

Using the same NOS categories as [Fig. C](#), the graph below displays the number of days to case disposition over the previous five years. The information reveals a gradual rise in that number for categories 190, 360, and 440.

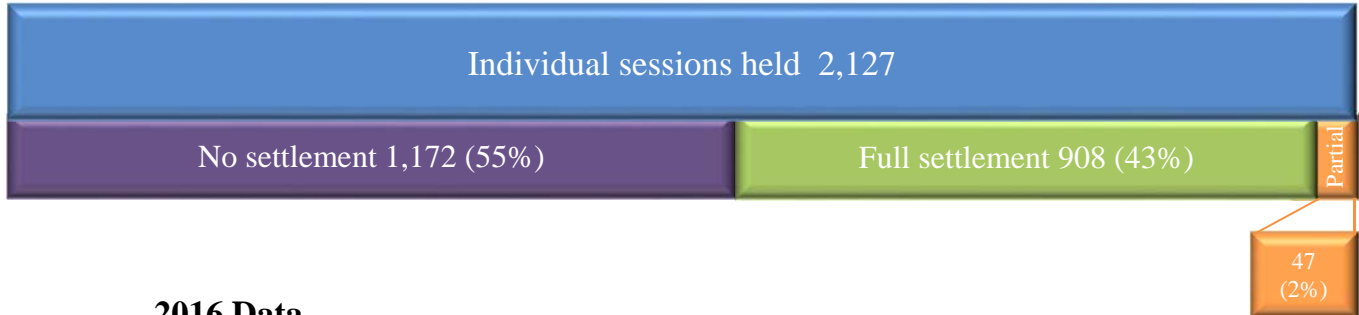
Fig. D



## Individual Evaluation Sessions

A total of 2,127 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

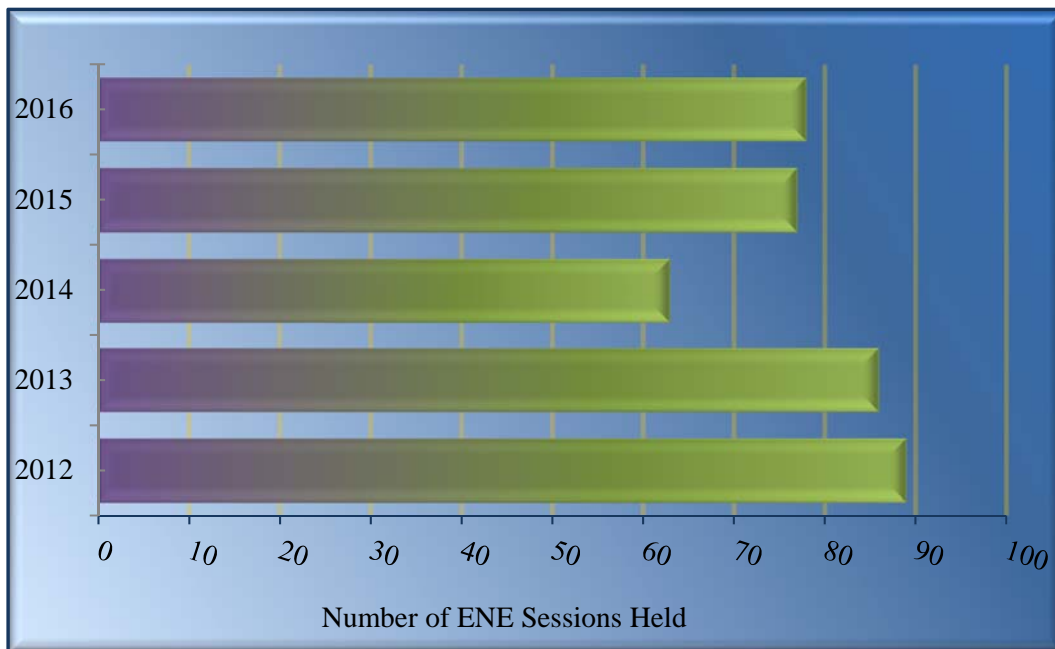


### **2016 Data**

In the 2016 reporting period, 138 eligible cases were filed and 78 sessions were held. Interestingly, these numbers are almost identical to 2015.

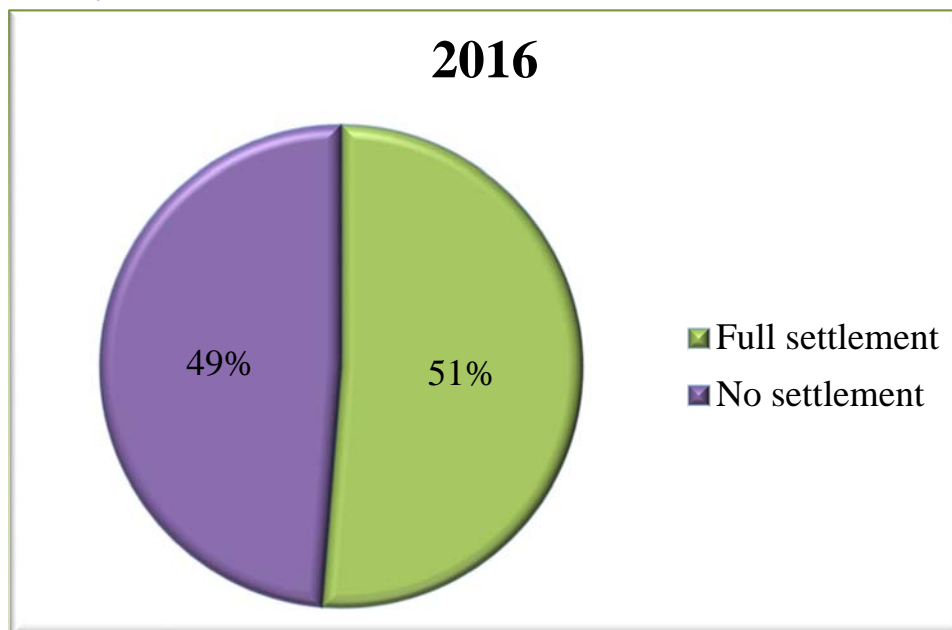
Fig. F compares the number of ENE sessions held during each of the previous five reporting periods.

Fig. F



Of the 78 sessions held during this reporting period, 38 resulted in no settlement and 40 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 Evaluator Questionnaire. The percentages show evaluators have observed a slight decline in *attorneys’* participation in the process, as well as the level of *attorneys’* preparedness and participation. (See APPENDIX 2, [questions 1, 2](#).) Conversely, evaluators reported an increase in *parties’* full, active participation. (See APPENDIX 2, [question 3](#).)



## PARTICIPATING ATTORNEY FEEDBACK

Case Closing Questionnaires are mailed throughout the reporting period to counsel who participated<sup>2</sup> in the ENE process. A summary of responses to the Questionnaire is attached as [APPENDIX 3](#).

## UPDATES

### Panel Refresh/Training

The Panel of Court-appointed evaluators was refreshed as of August 17, 2016 and is available at: <http://www.vtd.uscourts.gov/sites/vtd/files/2016%20Roster%2008172016.pdf>.

With a new Panel in place, training opportunities for 2017 are being explored to ensure the Court maintains a roster of skilled and effective neutral evaluators. Suggestions regarding training are always welcome and may be forwarded to [beth\\_cota@vtd.uscourts.gov](mailto:beth_cota@vtd.uscourts.gov).

### Amendment of Local Rule 16.1

Local Rule 16.1 is slated for amendment effective March 1, 2017. The proposed amendment intends to clarify parties' responsibilities when rescheduling ENE sessions under § (f)(2) and when seeking excusal under § (g)(3). The proposed amendment also includes the addition of § (k) Supplemental Evaluator's Report.

Revised § (f)(2) **Rescheduling** will add a subsection (iii), which will require the parties to notify the ENE Administrator, in writing, of any rescheduled session date when a motion is not required.

Under the revised § (g)(3) **Excusal**, clarification and emphasis will be provided regarding any attendance excusal or substitution as always requiring court approval. Attendance arrangements are not to be made by agreement of the parties.

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<sup>2</sup> Participation begins with the assignment of an evaluator. Questionnaires were NOT sent to counsel in cases achieving full settlement at session.

As cases will often settle after, but as a result of an ENE session and the evaluator's continued efforts, a procedure was developed in 2012 for submission of a Supplemental Evaluator's Report. That procedure has been added as § (k) *Supplemental Evaluator's Report* in the proposed amended L.R. 16.1.

Proposed L.R. 16.1 amendment with changes tracked is attached as [APPENDIX 4](#).

## **Evaluator Reports**

A fillable [Evaluator Report Form](#) is available on the Court's website. Evaluators are once 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).

## **Bankruptcy**

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

## **CONCLUSION & VISION**

2016 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 urged to take full advantage of the process for its many—and often not immediately obvious—benefits.

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

The Court would also like to recognize and thank all 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](mailto:Beth_Cota@vtd.uscourts.gov).

# APPENDIX 1

Current Court Roster (as of 12/31/2016) \* Also serves as Bankruptcy (B) evaluator

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.         | 47             | 19              | 3                  | 18            | 6                        |                                     |
| 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                                   |
| Carleton, Ian P.       | 0              |                 |                    |               |                          |                                     |
| Carlson, Thomas Z.     | 4              | 2               |                    | 1             | 1                        |                                     |
| Carney, Vaughn A.      | 0              |                 |                    |               |                          |                                     |
| Carroll, James F.      | 4              | 1               |                    | 2             |                          |                                     |
| Cassidy, Richard T.    | 107            | 40              |                    | 40            | 18                       | 2                                   |
| Chadurijian, Mark      | 3              | 1               |                    |               | 2                        |                                     |
| Clapp, Michael         | 1              |                 |                    | 1             |                          |                                     |
| Clayton, Gregory S.    | 15             | 10              |                    | 4             |                          |                                     |
| Cleary, David L.       | 70             | 29              | 1                  | 28            | 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.  | 80             | 19              |                    | 38            | 15                       | 8                                   |

| Evaluator                   | Cases Assigned | Full Settlement | Partial Settlement | No Settlement | Settled Prior to Session | Dispositive Motion Prior to Session |
|-----------------------------|----------------|-----------------|--------------------|---------------|--------------------------|-------------------------------------|
| Deitz, Roger M.             | 1              | 1               |                    |               |                          |                                     |
| 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.       | 2              |                 |                    | 1             |                          |                                     |
| Ellis, Stephen D.           | 2              |                 |                    | 1             |                          | 1                                   |
| Emens-Butler, Jennifer (B)  | 2              | 1               |                    |               | 1                        |                                     |
| Fallon, Ellen M.            | 25             | 4               |                    | 10            | 7                        | 3                                   |
| Fead, William A.            | 28             | 8               |                    | 8             | 9                        | 2                                   |
| Feinberg, Kenneth           | 1              |                 |                    | 1             |                          |                                     |
| Fitzhugh, John              | 40             | 5               | 1                  | 23            | 7                        | 3                                   |
| Foote, Richard P.           | 2              |                 | 1                  | 1             |                          |                                     |
| Franklin, Gary L. *         | 1              |                 |                    |               |                          |                                     |
| Furlong, Michael G.         | 1              |                 |                    | 1             |                          |                                     |
| Gallagher, James C.         | 37             | 6               |                    | 17            | 11                       | 2                                   |
| Garvey, John B.             | 3              | 3               |                    |               |                          |                                     |
| Gebauer, Jr., Gordon C. (B) | 10             | 5               |                    | 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.          | 40             | 10              |                    | 17            | 8                        | 4                                   |
| Hemley, Robert B.           | 51             | 17              | 2                  | 18            | 11                       | 3                                   |
| 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             | 5              | 1               |                    | 2             | 1                        |                                     |
| Jentes, William             | 2              | 1               |                    | 1             |                          |                                     |
| Johnson, Eric A.            | 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               |                    |               |                          |                                     |

| Evaluator                  | Cases Assigned | Full Settlement | Partial Settlement | No Settlement | Settled Prior to Session | Dispositive Motion Prior to Session |
|----------------------------|----------------|-----------------|--------------------|---------------|--------------------------|-------------------------------------|
| Kauders, Christopher       | 1              |                 |                    | 1             |                          |                                     |
| 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.       | 5              |                 |                    | 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.        | 5              |                 |                    | 1             | 3                        |                                     |
| Mapes, Stephanie           | 3              |                 |                    |               | 1                        | 1                                   |
| Marks, Michael J.          | 245            | 127             | 6                  | 49            | 30                       | 11                                  |
| 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              |                    | 41            | 12                       | 4                                   |
| McGee, P. Scott            | 10             | 4               |                    | 4             | 2                        |                                     |
| McKearin, Robert R.        | 44             | 9               |                    | 21            | 8                        | 4                                   |
| McNeil, Joseph E.          | 4              |                 |                    | 4             |                          |                                     |
| 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.    | 14             | 6               |                    | 4             | 2                        |                                     |
| Murdoch, James W.          | 34             | 4               | 1                  | 24            | 4                        | 1                                   |
| Norton, Richard W.         | 5              | 2               |                    | 2             | 1                        |                                     |
| O'Dea, Arthur J.           | 280            | 131             | 1                  | 83            | 51                       | 11                                  |
| O'Neill, Jerome F.         | 34             | 12              |                    | 14            | 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 *             | 1              | 1               |                    |               |                          |                                     |
| Pearl, Mitchell               | 2              | 1               |                    | 1             |                          |                                     |
| Pessin, Myron Stuart          | 2              | 1               |                    | 1             |                          |                                     |
| Powers, Donald R.             | 29             | 5               | 2                  | 16            |                          | 2                                   |
| Pyle, Antonio D.              | 0              |                 |                    |               |                          |                                     |
| 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                        |                                     |
| Schraven, John E.             | 1              | 1               |                    |               |                          |                                     |
| Simons, Richard B.            | 1              |                 |                    | 1             |                          |                                     |
| Smith, Jr., Shapleigh         | 2              |                 | 1                  | 1             |                          |                                     |
| Spink, James W.               | 255            | 93              | 4                  | 97            | 40                       | 7                                   |
| Stewart, Jr., Potter          | 80             | 20              |                    | 31            | 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.         | 5              | 1               |                    | 3             |                          | 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             |                          |                                     |
|                               | <b>2908</b>    | <b>908</b>      | <b>47</b>          | <b>1172</b>   | <b>523</b>               | <b>179</b>                          |
| Sessions Pending              | -61            | <b>2127</b>     |                    |               |                          |                                     |
| Opted out after assignment    | -18            | <b>2829</b>     |                    |               |                          |                                     |
|                               | <b>2829</b>    |                 |                    |               |                          |                                     |

# 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.

\*2015 figures in green.

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

|     |           |   |  |
|-----|-----------|---|--|
| 86% | <u>78</u> | % | <b>Excellent</b> – thorough preparation and honest efforts toward success  |
| 12% | <u>22</u> | % | <b>Good</b> – some efforts made, but appear hesitant and/or skeptical      |
| 2%  | <u>0</u>  | % | <b>Indifferent</b> – participate minimally to comply with the Local Rule   |
| 0%  | <u>0</u>  | % | <b>Negative</b> – little or no preparation with no chance given to process |
| 0%  | <u>0</u>  | % | <b>Other</b> – please explain: <u>Nothing provided</u>                     |

---

2. Compared to previous years, do your responses above represent

|     |           |   |  |
|-----|-----------|---|--|
| 25% | <u>17</u> | % | An <b>increase</b> in attorney preparedness and participation    |
| 75% | <u>83</u> | % | The <b>same</b> level of attorney preparedness and participation |
| 0%  | <u>0</u>  | % | A <b>decline</b> in attorney preparedness and participation      |

---

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

|     |           |   |   |
|-----|-----------|---|---|
| 73% | <u>89</u> | % | <b>Full</b> active participation  |
| 20% | <u>11</u> | % | <b>Some</b> participation   |
| 6%  | <u>0</u>  | % | <b>Neutral</b> – present, but not actively participating in the process |
| 1%  | <u>0</u>  | % | <b>Negative</b> participation harming case progress                     |
| 0%  | <u>0</u>  | % | <b>Other</b> – please explain: <u>Nothing provided</u>                  |

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4. In your experience, are there any types of cases that are currently subject to ENE that should not be?  
Nothing provided
- 

### Comments or suggestions regarding the ENE program:

“The program continues to work well.”

“ENEs should be extended upon request of the parties after dispositive motions are filed and determined.”

“The current reporting system does not really address situations where the neutral continues to work to settle the case and is able to do so, but this takes more than 30 days after the session.”

“ENE consistently takes place too early in the process to be successful.”

“The cost places an inordinate burden on plaintiffs who often are low or middle income folks who are suing corporations with unlimited resources.”

# 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.

\*2015 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**

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

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

- |     |            |  |   |
|-----|------------|--|---|
|     |            |  | f. Recent receipt of needed written discovery materials, i.e., interrogatories, requests to admit/produce, expert reports |
| 19% | <b>39%</b> |  |   |
|     |            |  | g. Deposition(s) of experts were completed  |
|     |            |  | h. Deposition(s) of key fact witnesses were completed   |
| 41% | <b>25%</b> |  | i. Decision on controlling motions by the Court   |
| 15% | <b>8%</b>  |  | j. Trial date set/approaching   |
| 0%  | <b>2%</b>  |  | k. Attorney/client schedule only recently permitted full attention on this case   |
| 26% | <b>25%</b> |  | 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.)

- |     |            |                  |
|-----|------------|------------------|
|     |            | Very helpful     |
| 15% | <b>24%</b> |                  |
| 40% | <b>24%</b> | Somewhat helpful |
| 45% | <b>52%</b> | No effect        |
| 0%  | <b>0%</b>  | 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)

- |     |            |   |
|-----|------------|---|
|     |            | Active participation of client in the session, i.e., direct communication with other party(ies), hearing strengths and weaknesses of their own case, etc. |
| 27% | <b>33%</b> |   |
| 11% | <b>9%</b>  | Prompted counsel to exchange information and/or “get moving” on discovery sooner than we otherwise might have   |
| 11% | <b>7%</b>  | \$500 fee prompted consideration of settlement before that stage was reached  |
| 27% | <b>26%</b> | Evaluator’s methods of conducting the session and discussing the case   |
| 8%  | <b>9%</b>  | Prompted all to consider settlement earlier than we otherwise might have  |
| 0%  | <b>2%</b>  | Combination of all  |
| 5%  | <b>5%</b>  | Improved pretrial settlement discussion as trial approached, i.e., court pretrial conference  |
| 11% | <b>9%</b>  | Other (please explain)_____   |

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

- |     |            |                |
|-----|------------|----------------|
|     |            | Yes            |
| 12% | <b>32%</b> |                |
| 50% | <b>48%</b> | No             |
| 38% | <b>20%</b> | 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?

- |     |            |                                   |
|-----|------------|-----------------------------------|
|     |            | Yes If yes, please explain: _____ |
| 26% | <b>39%</b> |                                   |
| 74% | <b>61%</b> | No _____                          |



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

---

“Great program. Not properly utilized here.”

“ENE process generally helpful but in this case parties were too far apart and it was likely too early.”

“The program is great although in some cases it should be held later than the midpoint of discovery.”

“Decision made to defend the case, thus ENE did not impact outcome.”

“Parties now wait for ENE/mediation to discuss settlement; evaluator did a good job. ENE settled the case; took time to get paperwork sorted out.”

“Impending ENE encouraged settlement; if not for ENE, further litigation costs likely would have been incurred.”

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

“Settlement in both parties’ interests.”

“Good outcome achieved.”

“Parties agreed that ENE would not be fruitful until summary judgment was decided.”

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

“Disclosure of plaintiff’s experts.”

“Court granted summary judgment.”

“Case has not settled; parties are negotiating and will refile in state court if settlement is not reached.”

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

“Impending travel & costs encouraged settlement.”

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

“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: “Settlement at ENE saved time and money associated with trial.”

Yes: “Case settled.”

Yes: “It was a help in moving case forward.”

No. “According to my clients the problem was that the case was not properly prepared by predecessor counsel.”

No. “ENE wasn’t successful so plaintiff had to incur expert costs.”

No. “ENE not held.”

No: “Case voluntarily dismissed.”

# APPENDIX 4

## PROPOSED LOCAL RULE 16.1 AMENDMENT

Expected effective date of March 1, 2017

### Rule 16.1. Early Neutral Evaluation (ENE).

(a) **Purpose.** ENE is meant to reduce costs and litigation by providing litigants the opportunity:

- (1) to articulate respective positions;
- (2) to hear, first-hand, opponent's views on disputed matters;
- (3) to hear a neutral assessment of the strengths and weaknesses of each party's case;
- (4) for realistic settlement negotiations; and
- (5) in the absence of settlement, to narrow issues and structure discovery and trial preparation.

(b) **Cases Subject to ENE.**

(1) ***District Court Cases.*** Unless the court exempts them for good cause, civil cases with the following "nature of suit" statistical code categories, as shown by the JS-44 Civil Cover sSheet, are subject to the ENE procedures:

(A) **Contract Cases.** 110 (Insurance), 120 (Marine), 140 (Negotiable Instrument), 150 (Recovery of Overpayment and Enforcement of Judgment), 160 (Stockholders' Suits), 190 (Other Contract), 195 (Contract Product Liability), and 196 (Franchise);

(B) **Real Property Cases.** 230 (Rent, Lease, and Ejectment), 240 (Torts to Land), 245 (Tort Product Liability), and 290 (All Other Real Property);

(C) **Torts Cases.** 310 – 368 (All Personal Injury Cases), 370 (Other Fraud), 371 (Truth in Lending), 380 (Other Personal Property Damage), and 385 (Property Damage Product Liability);

(D) **Civil Rights Cases.** 440 (Other Civil Rights), 442 (Employment), 445 (Americans with Disabilities – Employment), 446 (Americans with Disabilities – Other), and 448 (Education);

(E) **Labor Cases.** 720 (Labor/Management Relations), 740 (Railway Labor Act), 751 (Family and Medical Leave Act), 790 (Other Labor Litigation), and 791 (Employee Retirement Income Security Act);

**(F) Property Rights Cases.** 820 (Copyrights), 830 (Patent), and 840 (Trademark); and

**(G) Cases Arising Under Other Statutes.** 375 (False Claims Act), 410 (Antitrust), 430 (Banks and Banking), 470 (Racketeer Influenced and Corrupt Organizations), 480 (Consumer Credit), 490 (Cable/Satellite TV), 850 (Securities/Commodities/Exchange), 891 (Agricultural Acts), 893 (Environmental Matters), 896 (Arbitration), and 899 (Administrative Procedures Act/Review or Appeal of Agency Decision).

**(2) Bankruptcy Court.** Bankruptcy cases are eligible for ENE as the bankruptcy judge designates.

**(3) Subject to Change.** The court may change the categories of cases subject to this rule by order.

**(c) ENE Administration.** A court staff member shall serve as ENE Administrator to oversee the ENE program and perform the duties specified under this rule.

**(d) Neutral Evaluators.**

**(1) Appointment.** The court maintains a roster of neutral evaluators.

**(2) Eligibility.** To be eligible for the roster, a person must be:

**(A)** an attorney admitted to practice for at least 5 years, who has significant trial experience and substantive expertise that serves the ENE program's objectives; or

**(B)** a non-attorney, or an attorney admitted to practice for less than 5 years, having expertise in a substantive or legal area that serves the ENE program's objectives.

**(3) Compensation.** Neutral evaluators are paid \$500 per case. Parties share the cost equally. This fee assumes an ENE session of approximately one-half day, related preparation, and submission of an evaluator's report. If the ENE session requires significantly more time, if an additional session is required, or if the parties request a formal evaluation, the parties and the evaluator must agree upon any additional compensation.

**(4) ENE by Stipulation.** Parties may stipulate to a neutral evaluator of their choosing for an ~~agreed~~-agreed-upon fee if:

**(A)** the parties file a stipulation with the ENE administrator on or before the date

they are required to report their evaluator selection;

(B) all parties and the evaluator sign the stipulation; and

(C) the stipulation contains the following information:

(i) the neutral evaluator's name and address;

(ii) the fee arrangement, which clearly sets forth each party's share of the fees;

(iii) each party's agreement to participate in the evaluation procedure; and

(iv) the evaluator's agreement to perform the ENE in accordance with these rules.

**(e) Neutral Evaluator Selection.**

**(1) *Choice and Assignment Process.***

(A) The ENE Administrator must send a list of potential evaluators from the court's roster to the parties after the last answer is filed. The number of evaluators on the list must be one more than the number of "sides" in the litigation. For purposes of this rule, all plaintiffs are one side; all defendants are one side; and all third-party defendants are one side.

(B) Each party must report its selection to the ENE Administrator, in writing, within 14 days s from when the list is mailed.

(C) If the parties fail to agree, each "side" may strike one potential evaluator's name, notifying the ENE Administrator, in writing, of the strike within that same 14 days.

(D) The ENE Administrator must assign the selected evaluator or, in the absence of agreement, an evaluator whose name was not stricken, and promptly notify the parties and the evaluator of the designation. The evaluator selection process should be completed quickly to enable the parties to consult with the evaluator in scheduling the ENE session for inclusion in the discovery schedule required by L.R. 26(a)(4)(G).

**(2) *Conflicts of Interest.*** Unless all parties waive objection, no person may serve as a neutral evaluator for a case in which any of the circumstances specified in 28 U.S.C. § 455 exist. An evaluator must promptly disclose disqualifying circumstances to the ENE administrator. A party who believes that a potential or assigned evaluator has a conflict of

interest must notify the ENE Administrator within 7 days of learning of the possible conflict; otherwise the party is deemed to have waived objection.

**(f) Scheduling and Reporting the Session Date.**

(1) *Midpoint of Discovery.* The ENE session should take place near the midpoint of the 8-month discovery period on a date convenient for the parties and evaluator.

(2) *Rescheduling.*

(A) *No Motion Required.* The evaluator parties may reschedule the ENE session without motion if:

- (i) the new date is within 60 days of the original date; and
- (ii) rescheduling is not anticipated to affect the trial-readiness date; and
- (iii) the parties notify the ENE Administrator, in writing, of the new date.

(B) *Motion Required.* A motion to reschedule the ENE session, for good cause, is required if:

- (i) the request is for indefinite postponement; or
- (ii) the new date requires extension of the trial-readiness date.

(C) *Other Situations.* If (A) or (B) do not apply, parties should contact the ENE Administrator.

**(g) Attendance at ENE Session.**

(1) *Persons Required to Attend.* The following persons must attend the ENE session:

(A) *Individuals.* The parties, unless excused pursuant to subsection (g)(1)(D) or (g)(3);

(B) *Corporations.* When a party is a corporation or not a natural person, a person other than outside counsel who possesses settlement authority and the authority to enter into stipulations for the entity;

(C) *United States Government.* When the United States, or an agency or unit thereof, is party to a case, counsel from the United States Attorney's Office who has settlement authority and the authority to enter into stipulations;

(D) *Insurance Companies.* In cases involving insurance companies, an insurance company representative with settlement authority. The insured party need not attend if the representative has exclusive settlement authority; and

(E) **Counsel.** The attorney for each party who has primary responsibility for handling the trial.

(2) **Settlement Authority Defined.** As used in this rule, “settlement authority” means control of the full financial settlement resources involved in the case, including insurance proceeds.

(3) **Excusal.** The court may excuse an attorney or party’s attendance at the ENE session if:

(A) the person shows undue hardship; and

(B) the person ~~submits~~ files with the court a written request to be excused at least 21 calendar days before the session date; and

(C) the person is available by telephone during the session; and/or

(D) the person designates, in the written request, a substitute familiar with the case to attend in his or her place, and describes that substitute’s familiarity with the case; and

(E) the court grants the request and approves the substitute.

**(h) Evaluation Statements.**

(1) **Requirements.** At least 14 days before the ENE session, each party must submit to the evaluator and serve upon each party, a written evaluation statement. The statement must:

(A) not exceed 10 pages in length (excluding exhibits and attachments);

(B) provide a brief statement of facts;

(C) identify the legal and factual issues in dispute and the submitting party’s position relating to those issues;

(D) address whether there are legal or factual issues that, if resolved, would facilitate early settlement or reduce the scope of dispute;

(E) identify the attorney who will represent the party at the ENE session; and

(F) identify the person(s), in addition to counsel, who will attend the ENE session as the party’s representative with decision-making authority.

(2) **Other Matters.** Parties may include other matters in the statement to assist the evaluator.

(3) **Important Documents.** Parties must attach to their statements copies of key documents that gave rise to the action (e.g., contracts) or other materials (e.g., medical

reports, photographs) that will assist the evaluator and advance the ENE session's purposes.

**(4) *Statements Not Filed.*** Parties must not file evaluation statements with the court or provide them to the judge.

**(i) Process and Procedures at the ENE Session.**

**(1) *Structure.*** The evaluator has broad discretion in structuring the ENE session. The session is informal, the rules of evidence do not apply, and there is no formal examination or cross-examination.

**(2) *Preparation.*** Each party must be prepared to fully participate and to discuss realistic estimates of:

(A) case value;

(B) case costs, including, but not limited to, costs of additional discovery, expert witnesses, attorney's fees, other costs associated with trial preparation, and actual trial if settlement efforts are unsuccessful; and

(C) delay that will result if settlement efforts are not successful.

**(3) *Conducting the ENE Session.*** The evaluator must:

(A) permit each party to make an oral presentation of its position;

(B) help the parties to identify areas of agreement and enter a stipulation, where feasible;

(C) assess the strengths and weaknesses of the parties' contentions and evidence and explain the reasons for the assessments;

(D) explore the possibility of settlement using private caucusing and mediation techniques; and

(E) estimate, where feasible, the likelihood of liability and the range of damages.

**(4) *No Settlement.*** If the session does not result in settlement, the evaluator must:

(A) discuss with the parties follow-up measures to facilitate case development or future settlement (e.g. an additional ENE session, formal evaluation, or other ADR procedures); and

(B) help the parties develop an information-sharing or discovery plan to expedite settlement discussions or position the case for efficient disposition by other means.

(5) **Remedy for Noncompliance.** A party who has a substantial belief that another party has not complied in good faith with this rule may file a motion to that effect with the court.

**(j) Evaluator's Report.**

(1) **Items to Include.** Within 21 calendar days after the ENE session, the evaluator must file with the court and send to the parties a report ([fillable form available on the court's website](#)) that includes:

- (A) the date the session took place, including starting and finishing times;
- (B) the names of the persons who attended, noting each person's role in the session and identifying each party's representative with decision-making authority;
- (C) a summary of any [court-approved](#) substitute arrangement regarding attendance;
- (D) the date the evaluator received each party's evaluation statement;
- (E) notations showing whether each party did or did not make an oral presentation of its position; and
- (F) the results of the session, including:
  - (i) whether full or partial settlement was reached;
  - (ii) any stipulation to narrow the scope of the dispute; and
  - (iii) any agreement to limit discovery, facilitate future settlement, or otherwise reduce cost and delay related to trial preparation, including scheduling another ENE session.

(2) **Items to Exclude.** The report must not disclose:

- (A) the evaluator's assessment of any aspect of the case; or
- (B) substantive matters discussed during the session, except as required in (j)(1)(F).

**(k) [Supplemental Evaluator's Report.](#)**

[\(1\) Requirements.](#) An evaluator may file with the court a Supplemental Evaluator's Report [if:](#)

- [\(A\) an initial evaluator's report has been filed with the court; and](#)
  - [\(B\) evaluator diligently continued to work with the parties after the initial session;](#)
- [and](#)



(C) such efforts resulted in partial or full settlement; and

(D) the supplemental report is filed within 60 days from the date of the session.

**(1) Confidentiality.**

**(1) *ENE Process.*** The ENE process is treated as a settlement negotiation under Fed. R. Evid. 408. All written and oral communications made in connection with or during the ENE process are confidential.

**(2) *Exceptions.*** This section does not apply to any stipulation or agreement to narrow the scope of the dispute, facilitate future settlement, or otherwise reduce cost and delay that was approved by all parties.

**(3) *Evaluation of ENE Process.*** Parties, counsel, insurance representatives, and evaluators may respond to inquiries from persons authorized by the court to monitor or evaluate the ENE program. The sources of data and opinions collected for this purpose will be kept confidential.