

United States District Court District of Vermont



Early Neutral Evaluation Program

2013 ANNUAL REPORT

January 1, 2013 - December 31, 2013

INTRODUCTION

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

– Abraham Lincoln

The purpose of this report is to present relevant historical and statistical data with regard to this district’s ENE program. The reporting period contained herein is *January 1, 2013* through *December 31, 2013*.

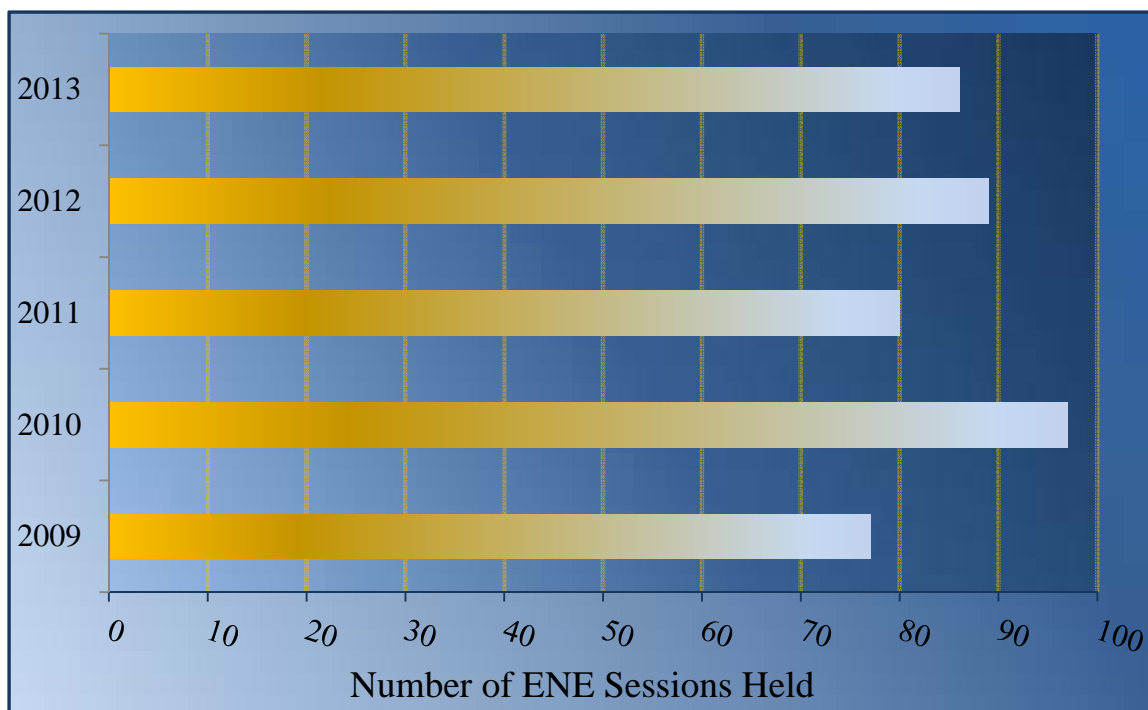
STATISTICAL ANALYSIS

ENE Usage

The aggregate number of cases eligible² for ENE since the program's inception on July 1, 1994 is **3,616**.

1,781 (49%) of eligible cases were either settled or dismissed prior to an ENE session. 40 (1%) of eligible cases successfully opted out of the ENE process altogether.

This graph illustrates the number of ENE sessions held each year for the previous five years.



² Cases filed with nature of suit statistical code categories as specified in L.R. 16.1(b)(1)(A)-(G).

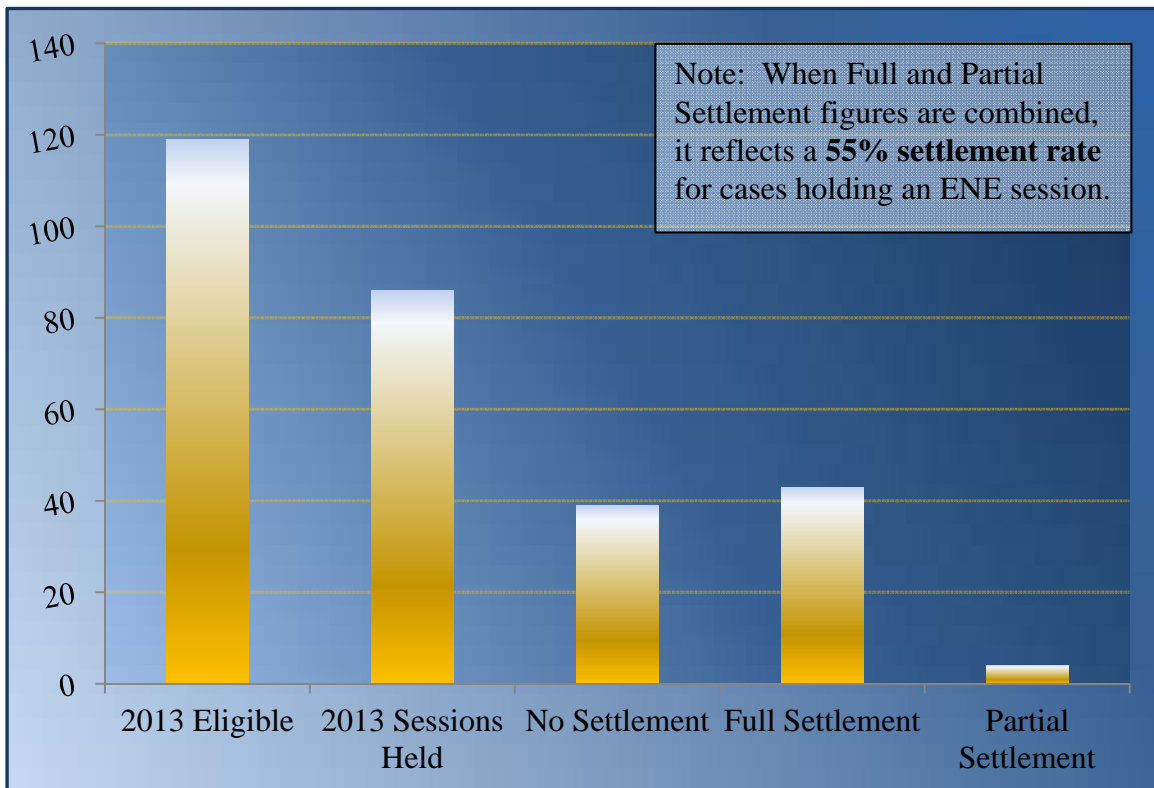
ENE Results

Of the 1,906 sessions held since inception, 1076 (57%) resulted in no settlement; 784 (41%) resulted in full settlement; and 46 (2%) resulted in partial settlement.

2013 Results

As depicted in the graph below, 119 cases were eligible for ENE in the 2013 reporting period. From those 119 cases, 86 sessions occurred. This represents a 3% decrease from the 89 sessions held in 2012.

Of the 86 sessions held, 39 (45%) resulted in no settlement; 43 (50%) resulted in full settlement; and four (5%) resulted in partial settlement.

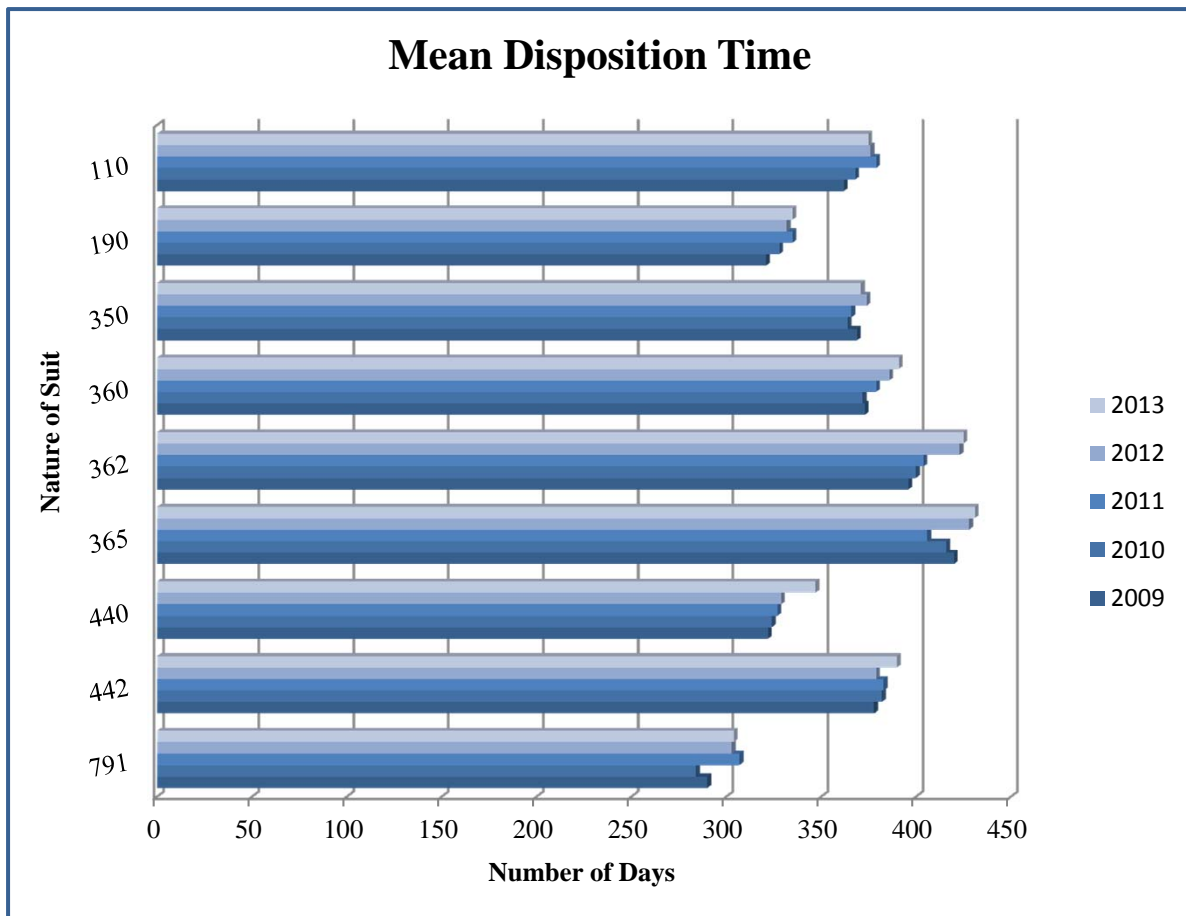


Disposition of ENE-Eligible Cases

This table compares the **point of disposition** for ENE-eligible cases in specific nature of suit (“NOS”) categories for this reporting period. 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	50%	20%	30%	375
190 Contract: Other	58%	17%	25%	335
350 PI: Motor Vehicle	26%	36%	38%	371
360 PI: Other	33%	31%	36%	391
362 PI: Med Malpractice	47%	27%	26%	425
365 PI: Product Liability	48%	22%	30%	431
440 Civil Rights: Other	61%	16%	23%	347
442 Civil Rights: Jobs	31%	32%	37%	390
791 Labor: ERISA	48%	27%	25%	304

Using the same NOS categories as the previous table, the graph below further evaluates the mean disposition time for the past five years. The information illustrates a gradual increase in the number of days to disposition. This is particularly evident in categories 360, 362, and 440.



Overall, of the 57 NOS statistical code categories subject to ENE, the mean disposition time remained consistent in 51% of the categories, increased in 30%, and decreased in 19%.

ATTORNEY FEEDBACK

Case Closing Questionnaires are mailed throughout the reporting period to counsel who participated³ in the ENE process. A summary of responses to the Questionnaires is attached as APPENDIX 1.

Responses to the Questionnaires remain generally quite positive. *“The fact that this case did not resolve at ENE or sooner is neither a reflection on the ENE process, nor the person who conducted the ENE . . .”* *“This was the rare case in which ENE had no impact – defendants settled to avoid discovery.”* However, one respondent felt the ENE session to be a *“[w]aste of time and resources [that] increased costs and expenses.”*

The Questionnaires ask counsel to consider the “intangible effects” of ENE on cases that close *before* an ENE session is held. Of those before-session responses, 92% felt the ENE process as a whole had “no effect” in resolving the matter. Of the responses for cases that closed *after* an ENE session was held, 25% indicated the process as “very helpful,” 40% “somewhat helpful,” 31% “no effect,” and 4% “detrimental” to the resolution.

EVALUATOR FEEDBACK

APPENDIX 2 summarizes the responses to the Court’s Annual Early Neutral Evaluator Questionnaire. Overall, the responses show evaluators continue to believe in the process and its success. *“All cases can benefit from ENE, in my view.”* *“I think the program is working extremely well.”* However, some expressed, *“Sometimes I think ENE occurs too early in the litigation process.”* And *“Enhanced flexibility on timing would help be sure the necessary information is available at the ENE.”*

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.

³ Participation begins with the assignment of an evaluator. Questionnaires were NOT sent to counsel in cases achieving full settlement at session.

UPDATES

Panel Refreshment

Consistent with the Court's roster refresh schedule, Panel Retention Questionnaires were mailed to all evaluators on the Court's current roster. After a review of information provided in the Questionnaires, the Court will refresh the panel as necessary to meet the overall needs of the program.

Training

On October 11th a free seminar was held entitled, ENE & Mediation Advocacy for Attorneys: Prepare for Success! The seminar included interactive panel and participant discussions and demonstrations. It was well received and enjoyed by the full-capacity group that attended. Three hours credit for Continuing Legal Education was awarded for attendance. Attorneys Michael J. Marks, Donald (Tad) Powers, and Adam Powers of MarksPowers LLP developed and conducted the program with wonderful results. The Court would like to recognize and thank these dedicated attorneys for their initiative and willingness to share their techniques and experience for successful alternate dispute resolution.

Evaluator Reports and Supplemental Report Procedure

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

Evaluators are reminded of the procedure developed in 2012 for submission of a Supplemental Evaluator Report within 60 days of the initial ENE session. This procedure allows evaluators to report and receive credit for their continued efforts with the parties when settlement results *after* the initial ENE session. Please see the [Procedure](#) on the Court's website for complete information.

Bankruptcy

Two bankruptcy cases were referred to ENE during this reporting period. One case resolved before the ENE session occurred and the other achieved a full settlement at the session.

CONCLUSION & VISION

2013 proved to be another positive year for the ENE program. Regardless of settlement, it remains an effective litigation tool that opens communication and provides the opportunity for neutral case assessment. Parties are encouraged to fully utilize the process for the many things it can accomplish.

The Court continues to improve the efficiency and effectiveness of the ENE program and looks forward to future developments and success.

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) 951-8113, or to Beth_Cota@vtd.uscourts.gov.

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.

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

- 37% a. Facts/Issues were straightforward so lengthy discovery was not needed
- 5% b. Settlement was at least partly worked out before the case was filed
- 11% c. Client changed mind – case dropped or to be pursued in another venue
- 0% d. ENE process imminent – discovery checklist, case summary, etc. due soon
- 47% e. Other (please explain) _____

If your Case Closed After ENE Session was Held

- 26% 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
- 31% i. Decision on controlling motions by the Court
- 21% j. Trial date set/approaching
- 2% k. Attorney/client schedule only recently permitted full attention on this case
- 20% 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.)

- 21% Very helpful
- 34% Somewhat helpful
- 41% No effect
- 3% 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)

- 34% Active participation of client in the session, i.e., direct communication with other party(ies), hearing strengths and weaknesses of their own case, etc.
- 6% Prompted counsel to exchange information and/or “get moving” on discovery sooner than we otherwise might have
- 2% \$500 fee prompted consideration of settlement before that stage was reached
- 23% Evaluator’s methods of conducting the session and discussing the case
- 8% Prompted all to consider settlement earlier than we otherwise might have
- 6% Combination of all
- 13% Improved pretrial settlement discussion as trial approached, i.e., court pretrial conference
- 8% Other (please explain) _____

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

- 16% Yes
- 66% No
- 19% 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?

- 31% Yes If yes, please explain: _____
- 69% No _____

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

“The parties in this case were able to select their own mediator (who was located in another state). This was helpful since both parties’ counsel had prior dealings with him and felt comfortable. Such flexibility should be extended in future cases.”

“ENE’s too far before trial are not all that helpful.”

“The Court may want to institute a program that assures an Early Neutral Evaluator is actually neutral relative to the case.”

“The specific ENE Mediator was why this particular ENE was detrimental.”

2a. Other (please explain):

“Evaluator made himself available after the session for continued discussions, which facilitated the ultimate settlement.”

“Allowed parties to discuss settlement without one party needing to initiate discussion.”

“Highlighted the importance of the MSJ to all parties so ruling sparked settlement.”

“Insurer forced to focus on the case before trial.”

“Helped inattentive opponent focus on case.”

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: “Delayed discovery and saved expense.”

Yes: “No trial or trial prep.”

Yes: “Early settlement.”

Yes: “The ENE allowed parties to settle one issue, which eliminated that issue from the case.”

Yes: “Assisted in negotiating a non-waiver agreement.”

Yes: “To the extent it caused the case to settle before additional costs were incurred.”

Yes: “Helped to flesh out the issues.”

Yes: “Early settlement always decreases costs of litigation.”

Yes: “Prompted defendant to file for SJ.”

No: “ENE two weeks before trial. Trial expenses were avoided.”

No: “Unfortunately, it had no real impact on this case.”

No: “Co-counsel traveled to Vermont at significant expense. Defendant did not attend ENE. Defendant’s counsel participated by telephone only.”

No: “Settled days before trial.”

No: “Generally, ENE is helpful, but this was an unusual situation.”

No: “Pro se litigant file many pleadings and discovery.”

No: “Increased costs and expenses.”

No: “This was one of the few cases where opposing views far apart, with no give.”

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>84</u>	%	Excellent – thorough preparation and honest efforts toward success
<u>11</u>	%	Good – some efforts made, but appear hesitant and/or skeptical
<u>2</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>*2</u>	%	Other – please explain: *See comments below.

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

<u>23</u>	%	An increase in attorney preparedness and participation
<u>77</u>	%	The same level of attorney preparedness and participation
<u>0</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>80</u>	%	Full active participation
<u>17</u>	%	Some participation
<u>2</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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***1.** “Little or no preparation, but interested in settling the case.”

Comments or suggestions regarding the ENE program:

“Some cases are not yet ready, but that does not relate to the type of case.”

“Some types of subject matter are more difficult to resolve. However, as will all ENE, willingness to put in effort and desire to make the process a success for the client is dispositive.”

“While assigned to several ENEs this year I actually only heard one. That one had out of state attorneys each of whom were thoroughly prepared and clearly used the ENE to settle the case – which they did.”

“I have not, to date, participated as an evaluator in any assigned cases. I currently have 2 cases which have been assigned to me. As a litigant, I continue to believe the program is valuable at focusing litigants on resolution options before trial. Enhanced flexibility on timing would help be sure the necessary information is available at the ENE.”

“Most parties participate but only a few are active as I define the term.”

APPENDIX 3

Current Court Roster (as of 12/31/2013)

Current Court Roster - Bankruptcy (B) (as of 12/31/2013)

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.	23	5		9	5	3
Bergeron, John J.	16	2		8	4	2
Bisson, Leo A.	37	15	3	16	3	
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.	3			1		
Cassidy, Richard T.	94	37		33	16	2
Chadurijian, Mark	3	1			2	
Clapp, Michael	1			1		
Clayton, Gregory S.	6	5		1		
Cleary, David L.	52	20	1	20	6	
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.	77	17		37	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.	34	9		13	10	2
Eaton, Gregory M.	1	1				
Ekman, Christopher D.	1			1		
Ellis, Stephen D.	2			1		1
Emens-Butler, Jennifer (B)	1	1				
Fallon, Ellen M.	22	4		8	6	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	9	2
Garvey, John B.	2	2				
Gebauer, Jr., Gordon C. (B)	6	2		2		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.	38	9		16	8	3
Hemley, Robert B.	48	16	2	16	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	1				1	
Jentes, William	2	1		1		
Joseph, Ben W.	0					
Joslin, Peter B.	78	21	3	34	15	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.	22	5		9	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				2	
Mapes, Stephanie	3				1	1
Marks, Michael J.	162	86	5	29	19	7
Martin, Stephen B.	1	1				
Mazzone, David A.	3				1	
McAndrew, Karen	32	7		15	7	2
McClallen, Robert	3	1		2		
McCormick, Thomas E.	73	17		38	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	6	3
Monahan, Jr., John	1			1		
Morgan, Glenn	1				1	
Mulvey, Jr., William A.	8	4		3		
Murdoch, James W.	32	4	1	23	3	1
Norton, Richard W.	5	2		2	1	
O'Dea, Arthur J.	267	124	1	79	50	10
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	19	4	2	12		
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.	1	1				
Saltonstall, Stephen L.	22	4		10	6	2
Sartore, John T.	4	2		1		
Scholes, Richard A. (B)	2			1	1	
Simons, Richard B.	1			1		
Smith, Jr., Shapleigh	2		1	1		
Spink, James W.	198	67	4	83	29	6
Stewart, Jr., Potter	72	14		28	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.	2	1				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		
	2630	784	46	1076	483	168
Sessions Pending	-56	1906				
Opted out after assignment	-17	2557				
	2557					